UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

JOSEPH L. LEONARD,

Plaintiff,

v.

NANCY A. BERRYHILL,

Defendant.

Case No. 16-cv-03988-BLF

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND REMANDING TO THE AGENCY

[Re: ECF 16, 20]

Plaintiff Joseph L. Leonard appeals a final decision of Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, denying his application for a period of disability and disability benefits under Title II of the Social Security Act. Before the Court are the parties' cross-motions for summary judgment, which have been fully briefed. *See* Pl.'s Mot., ECF 16; Def.'s Mot., ECF 20. Upon consideration of the briefing and for the reasons set forth below, the Court GRANTS IN PART and DENIES IN PART Plaintiff's motion and GRANTS IN PART and DENIES IN PART Defendant's cross motion, and REMANDS the case to the Agency for further proceedings.

I. BACKGROUND

Leonard, a United States citizen, was born on July 6, 1977. Admin R. ("AR") 34. He graduated from high school and attended some junior college. *Id.* at 35. Most recently, Leonard worked as a regional facilities manager for a law firm in Mountain View, California. *Id.* at 35. In this role, he was responsible for budgeting for the facilities needs of the firm's five offices, ran the day-to-day operations for cleanliness, ensured mechanical systems functioned properly, assisted with ergonomic issues, reconfigured and built furniture, oversaw security, and oversaw the security programing. *Id.* at 36. On September 25, 2012, Leonard filed an application for a period of disability and disability insurance benefits, alleging disability beginning September 23, 2011.

Id. at 124–25. Leonard claims disability resulting from headaches, numbness in his hands, depression, and poor memory. *Id.* at 68. Leonard was 34 years old on his alleged onset date. *Id.* at 124.

Leonard was denied benefits initially and upon reconsideration. *Id.* at 68–72, 76–80. He requested and received a hearing before an administrative law judge ("ALJ") on September 30, 2014. During that hearing, Leonard advised the ALJ that he was seeking benefits only for a closed period from September 23, 2011, through March 7, 2014. *Id.* at 33. At the hearing, ALJ Betty Roberts Barbeito heard testimony from Leonard himself; Dr. Keith Holan, an impartial medical expert; and Victoria Rei, an impartial vocational expert ("VE"). *Id.* at 11, 28–65 (transcript). On January 16, 2015, ALJ Barbeito issued a written decision finding Leonard not disabled and thus not entitled to benefits. *Id.* at 11–23. The ALJ's decision was affirmed by the Appeals Council on May 13, 2016, making the ALJ's decision the final decision of the Commissioner of Social Security. *Id.* at 1–6. Leonard now seeks judicial review of the denial of benefits.

II. LEGAL STANDARD

A. Standard of Review

District courts "have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." 42 USC § 405(g). However, "a federal court's review of Social Security determinations is quite limited." *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015). Federal courts "'leave it to the ALJ to determine credibility, resolve conflicts in the testimony, and resolve ambiguities in the record.'" *Id.* (quoting *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014)).

A court "will disturb the Commissioner's decision to deny benefits only if it is not supported by substantial evidence or is based on legal error." *Brown-Hunter*, 806 F.3d at 492 (internal quotation marks and citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and must be more than a mere scintilla, but may be less than a preponderance." *Rounds v. Comm'r of Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015) (internal quotation marks and citations omitted). A court

"must consider the evidence as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." *Id.* (internal quotation marks and citation omitted). If the evidence is susceptible to more than one rational interpretation, the ALJ's findings must be upheld if supported by reasonable inferences drawn from the record. *Id.*

Finally, even when the ALJ commits legal error, the ALJ's decision will be upheld so long as the error is harmless. *Brown-Hunter*, 806 F.3d at 492. However, "[a] reviewing court may not make independent findings based on the evidence before the ALJ to conclude that the ALJ's error was harmless." *Id.* The court is "constrained to review the reasons the ALJ asserts." *Id.*

B. Standard for Determining Disability

Disability benefits are available under Title II of the Social Security Act when an eligible claimant is unable "to engage in any substantial gainful activity by reason of any 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 12 months." 42 U.S.C. § 423(d)(1)(A).

"To determine whether a claimant is disabled, an ALJ is required to employ a five-step sequential analysis, determining: (1) whether the claimant is doing substantial gainful activity; (2) whether the claimant has a severe medically determinable physical or mental impairment or combination of impairments that has lasted for more than 12 months; (3) whether the impairment meets or equals one of the listings in the regulations; (4) whether, given the claimant's residual functional capacity, the claimant can still do his or her past relevant work; and (5) whether the claimant can make an adjustment to other work." *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014) (internal quotation marks and citations omitted). The residual functional capacity ("RFC") referenced at step four is what a claimant can still do despite his or her limitations. *Id.* at 1160 n.5. "The burden of proof is on the claimant at steps one through four, but shifts to the Commissioner at step five." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir. 2009).

III. DISCUSSION

The ALJ determined that Leonard had acquired sufficient quarters of coverage to remain

insured through December 31, 2016. AR 11. At step one, the ALJ determined that Leonard had not engaged in substantial gainful activity since his alleged onset date of September 23, 2011. *Id.* at 13. At step two, the ALJ found that Leonard had the following severe impairments: degenerative disc disease of the cervical spine, obstructive sleep apnea, and bilateral carpal tunnel syndrome. *Id.* However, the ALJ found that Leonard's obesity and his medically determinable mental impairment of depression were not severe impairments. *Id.* at 14.

At step three, the ALJ concluded that Leonard did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R., Part 404, Subpart P, Appendix 1 (20 C.F.R. 404.1520(d), 404.1525, and 404.1526). *Id.* at 16. Between steps three and four, the ALJ found that Leonard had the RFC to perform light work as defined in 20 C.F.R. 404.1567(b), except that Leonard "can lift and/or carry 20 pounds occasionally and 10 pounds frequently; he can stand and/or walk for six hours out of an eight-hour workday with regular breaks; he can sit for six hours out of an eight-hour workday with regular breaks; he can repetitively push and pull with the upper extremities; he can never climb ropes or scaffolds; he is limited to occasional overhead reaching; he has no visual or communicative limitations; and he must avoid hazardous machinery, extreme cold, wetness, and vibrations." *Id.* at 16–17. At step four, the ALJ found that Leonard was unable to perform any past relevant work ("PRW"). *Id.* at 21. At step five, the ALJ determined that Leonard could perform other work existing in significant numbers in the national economy. *Id.* at 22. Thus, the ALJ concluded that Leonard had not been under a disability, as defined in the Social Security Act, from September 23, 2011, through the date of the decision. *Id.* at 23.

Leonard challenges the ALJ's step five determination, asserting that substantial evidence does not support the ALJ's decision. Leonard further argues that the ALJ failed to properly evaluate Leonard's activities of daily living; failed to appropriately consider Leonard's hearing testimony in assessing Leonard's mental abilities; erroneously evaluated the opinions of Drs. David Cahn and Keith Holan.

A. The ALJ Erred in Her Step Five Determination

Leonard first argues that the ALJ erred at step five because her transferable-skills finding

rests on her misstatement or misunderstanding of the vocational expert's testimony, and as such, substantial evidence does not support the ALJ's transferable-skills finding. Pl.'s Mot. 9–10. In light of this purported error, Leonard asks this Court to remand the case and order the ALJ to base any transferable skills step-five decision on transferable skills as defined by SSR 82-41. Reply 5. Leonard also asks the Court to permit him to cross-examine the ALJ about any vocational knowledge and expertise she might have if she intends to rely on that knowledge and/or expertise to render a decision at step five. *Id.* The Commissioner disagrees, and contends that substantial evidence supports the ALJ's determination because she properly identified Leonard's transferable skills and the specific occupations to which the skills were transferable and relied on VE testimony to find that those jobs existed in significant numbers in the national economy. Def.'s Mot. 3.

At step five, the Commissioner bears the burden "to show that the claimant can perform some other work that exists in 'significant numbers' in the national economy, taking into consideration the claimant's [RFC], age, education, and work experience." *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999) (quoting 20 C.F.R. § 404.1560(b)(3)). A claimant must be able to perform the full range of jobs within a given category of work (e.g., light work, medium work), and exertional and non-exertional impairments must be considered. *Id.* at 1102. The Commissioner can meet his burden in two ways: "(1) by the testimony of a vocational expert, or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2." *Id.* at 1099.

Here, the VE classified Plaintiff's PRW as (1) maintenance supervisor, Dictionary of Occupational Titles ("DOT") 891.137-010, which is skilled light work with a specific vocational preparation ("SVP") of 7; and (2) data entry clerk, DOT 203.582-054, which is semi-skilled sedentary work with an SVP of 4. AR 60. The VE testified that a person with Leonard's RFC, age, education, and work experience could not perform his PRW, but had skills that were transferable to other work, including (1) customer order clerk, which is sedentary work with an SVP of 4, with 1,500,000 jobs in the United States and 23,200 jobs in California; (2) information clerk, which is sedentary work with an SVP of 4, with 1,600,000 jobs in the United States and

16,600 in California; and (3) telemarketing, which is sedentary work with an SVP of 3, with 2,600,000 jobs in the United States and 18,400 jobs in California. AR 62–63.

In her decision, the ALJ found that Leonard could not perform his PRW but had acquired transferable skills, including telephone, computer, and communication skills. AR 22. Leonard contends, and the Commissioner concedes, that in so finding, the ALJ mistakenly stated that the VE found that Leonard's PRW included customer order clerk, information clerk, and telemarketing. Def.'s Mot. 4; Pl.'s Mot. 9–10. Instead, those were other jobs that the VE testified Leonard could perform and not his PRW, as reflected later in the ALJ's decision and in the hearing transcript. AR 22–23, 62–63. Leonard argues that because the ALJ's transferable-skills finding rests on this misstatement or misunderstanding of the VE's testimony, it cannot be supported by substantial evidence. Pl.'s Mot. 9.

Because the Commissioner has conceded error, the Court must next determine whether the mistake was harmless. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005) ("A decision of the ALJ will not be reversed for errors that are harmless."). While the ALJ's error could be as insignificant as a typographical error, it could be as serious as a mistaken assumption on which the ALJ based her decision. Attorney argument alone is not sufficient to cure the record or to demonstrate harmless error. Thus, without more, the Court cannot find that the ALJ's mistake was harmless. Accordingly, remand is required for the ALJ to reconsider the VE's testimony and base her step five decision on substantial evidence. However, this Court does not approve the request to cross-examine the ALJ.

B. Substantial Evidence Does Not Support the ALJ's Evaluation of Leonard's Activities of Daily Living

Second, Leonard argues that the ALJ unreasonably relied on his "admitted" activities of daily living as direct evidence that he could perform full-time work. Pl.'s Mot. 12–14. Leonard takes issue with the ALJ's reliance in four respects: First, the ALJ mischaracterized his activities. *Id.* at 13. Second, the ALJ relied on "obviously false assumptions." *Id.* Third, the ALJ erroneously ruled that Leonard's daily activities were "[s]ome of the physical and mental abilities and social interactions as those necessary for maintaining employment." *Id.* (citing and quoting

AR 18). Fourth, Leonard asserts that such reliance was contrary to Ninth Circuit precedent. *Id.* As a result, Leonard contends that the ALJ's reliance on Leonard's activities of daily living as direct evidence of his ability to perform full-time semi-skilled work is not supported by substantial evidence. *Id.* at 14. The Commissioner disputes Leonard's assertion, and asserts that there is no merit to Leonard's contention because the ALJ properly considered Leonard's activities of daily living and found them inconsistent with his allegations of disability. Def.'s Mot. 8.

Here, the ALJ found that "despite his impairments," Leonard "has engaged in a somewhat normal level of daily activity and interaction." AR 18. From this, the ALJ concluded that Leonard's ability to participate in these activities diminished his credibility with respect to his functional limitations. *Id.* On the one hand, the ALJ could reasonably conclude that Leonard's admitted activities of daily living—caring for his son, caring for his personal hygiene, preparing simple meals, completing basic household chores, driving short distances, occasionally socializing with friends and family, watching television, riding his bike, and reading—involved the same physical and mental abilities and social interactions required for obtaining and maintaining employment. *Id.* at 52–55, 203–11, 224–32; *see Molina v. Astrue*, 674 F.3d 1104, 1112–13 (9th Cir. 2012) ("[T]he ALJ may discredit a claimant's testimony when the claimant reports participation in everyday activities indicating capacities that are transferable to a work setting."); *id.* at 1113 (affirming ALJ's decision without requiring her specify which ability was demonstrated by claimant's participation in everyday activities). On the other hand, however, the ALJ appears to have completely ignored Leonard's claims that he slept all day. *See, e.g.*, AR 203–11, 224–25. Indeed, in his Function Report, Leonard wrote that after he took his son to school, he went back to sleep for approximately five or six hours. *Id.* at 225. Without providing an adequate explanation, the ALJ may not "cherry-pick" the evidence. *Scott v. Astrue*, 647 F.3d 734, 739–40 (7th Cir.2011) ("The ALJ [is] not permitted to 'cherry-pick' from [ ] mixed results to support a denial of benefits." (citation omitted)) (cited with approval in *Garrison v. Colvin*, 759 F.3d 995, 1018 (9th Cir. 2014).

Nevertheless, the Court does not agree that the ALJ's consideration of Leonard's daily activities ignores Ninth Circuit precedent. *See* Pl.'s Mot. 13–14. Indeed, contrary to Leonard's

assertion, consideration of a claimant's activities of daily living is not prohibited by Ninth Circuit precedent—the ALJ is tasked with considering all of the evidence and making a determination as to whether the evidence supports the claimant's allegations of disability. That Leonard does not agree with the conclusion does not make it contrary to Ninth Circuit precedent.

Thus, while the Court concludes that consideration of Leonard's activities of daily living was not inconsistent with Ninth Circuit precedent, it finds unsupported by substantial evidence the ultimate conclusion that Leonard could perform work consistent with the ALJ's residual functional capacity assessment. Accordingly, remand is required for the ALJ to consider the entirety of the record and set forth legally sufficient reasons for rejecting portions of it.

C. The ALJ Properly Considered Leonard's Hearing Testimony in Assessing His Mental Abilities

Third, Leonard contends that the ALJ unreasonably relied on her observations of him at the hearing even though he did not allege that he was disabled at that time. Pl.'s Mot. 14–15. The Commissioner disagrees, and maintains that the ALJ properly found that Leonard's ability to testify about the treatment, testing, and examinations he underwent between 2011 and 2013 belied his contention that he had disabling memory and concentration problems prior to March 2014. Def.'s Mot. 11.

In her decision, the ALJ noted that although Leonard alleged that he had difficulty concentrating during the closed period, at the hearing, Leonard "did not demonstrate or manifest any difficulty concentrating." AR 18. The ALJ recognized that Leonard was not claiming disability as of the time of the hearing, but nonetheless observed that Leonard "was able to recall activities and tests performed during the consultative examination in September 2013[.]" *Id.* at 18–19. From this, the ALJ extrapolated that Leonard's "memory and concentration were intact during that examination," which took place during the period for which Leonard seeks disability. *Id.* at 19.

Again, contrary to Leonard's contentions, the ALJ properly relied on Leonard's demeanor and recollection as a basis for discounting his testimony regarding the severity of his symptoms and their limiting effects. *See, e.g.*, *Cotton v. Astrue*, 374 Fed. Appx. 769, 771 (9th Cir. 2010)

(holding that the ALJ's own observations indicating that "the claimant exaggerated the extent of her hearing loss" were a specific, convincing reason for discrediting the claimant's testimony); *Fanale v. Astrue*, 322 Fed. Appx. 566, 567 (9th Cir. 2009) (claimant's demeanor at hearing amounted to clear and convincing reason for discrediting her subjective complaints); *Matney on Behalf of Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992) (holding that district court properly affirmed the ALJ where ALJ's credibility finding was based on claimant's daily activities, "his demeanor and appearance at the hearing" as well as his well-documented motivation to obtain social security benefits").

D. The ALJ Erred in Her Evaluation of the Opinion of Dr. David Cahn

Fourth, Leonard argues that the ALJ erroneously evaluated treating internist Dr. Cahn's opinions for several reasons. Pl.'s Mot. 16–18. The crux of Leonard's position is that the ALJ inappropriately considered Leonard's credibility when determining the weight to give Dr. Cahn's opinions and did not afford Dr. Cahn's opinions the deference they were owed. The Commissioner, however, asserts that the ALJ properly evaluated Dr. Cahn's opinion and rejected his assessment of extreme functional limitation. Def.'s Mot. 11–15. Specifically, the Commissioner states that the ALJ provided several valid bases for affording little weight to Dr. Cahn's opinion. *Id.* at 13–15.

"Generally, the opinion of a treating physician must be given more weight than the opinion of an examining physician, and the opinion of an examining physician must be afforded more weight than the opinion of a reviewing physician." *Ghanim*, 763 F.3d at 1160. "If a treating physician's opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case record, it will be given controlling weight." *Id.* (internal quotation marks, citation, and brackets omitted). However, the Ninth Circuit has held that an ALJ may discount the opinions of treating and examining physicians if the ALJ offers "specific and legitimate reasons" for doing so that are supported by substantial evidence. *Cain v. Barnhart*, 74 Fed. Appx. 755, 757–58 (9th Cir. 2003); *see also Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), *as amended* (Apr. 9, 1996) (describing the standards for evaluating treating, examining, and non-examining physicians). In evaluating

whether the ALJ provided "specific and legitimate" reasons supported by substantial evidence for discounting or partially discounting these opinions, the Court's role is not to make a *de novo* determination whether Leonard is entitled to benefits. Instead, "if evidence exists to support more than one rational interpretation, [the Court] must defer to the Commissioner's decision." *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004).

Dr. Cahn, an internist, served as Leonard's primary care physician from July 2011 onward. AR 321. Dr. Cahn treated Leonard approximately every two to three months. *Id.* at 367. At his first appointment with Leonard, Dr. Cahn noted that Leonard experienced depression and anxiety and had a family history of bipolar disease. *Id.* His condition appears to have remained stable until September 2011, when Dr. Cahn noted that Leonard was also experiencing hypogonadism restriction by deficiency and a vitamin D deficiency. *Id.* In November 2011, Dr. Cahn reported that Leonard was suffering from sleep apnea and hypertension. *Id.* In July 2012, Dr. Cahn opined that Leonard had been disabled since July 2011. *Id.* at 321.

One year later, on July 2, 2013, Dr. Cahn noted that Leonard suffered from Chronic Fatigue Syndrome and was experiencing the following symptoms: self-reported impairment in short-term memory or concentration, tender cervical or axillary lymph nodes, muscle pain, multiple joint pain without joint swelling or redness, unrefreshing sleep, post-exertional malaise lasting more than 24 hours, persistent reproducible muscle tenderness, depression, and comprehension problems, among other symptoms. *See id.* at 367–69. In his report, Dr. Cahn stated that these symptoms were "constantly" severe enough to interfere with the attention and concentration needed to perform simple work tasks. *Id.* at 369. Dr. Cahn also reported that Leonard could only sit or stand for 15 minutes at one time and requires a job that permits shifting positions from sitting, standing, or walking. *Id.* at 370. Finally, Dr. Cahn noted that Leonard could occasionally lift less than 10 pounds, could rarely lift 10 pounds, and could never lift anything greater than 20 pounds, and could occasionally twist, stoop, crouch/squat, and climb stairs, but could never climb ladders. *Id.* at 370–71. In September 2014, Dr. Cahn stated that as of March 7, 2014, all of the restrictions he set forth earlier were "lifted," because Leonard felt better once his medication was adjusted. *Id.* at 426.

The ALJ found that Dr. Cahn's opinion was entitled to little weight because "it is brief, conclusory, and inadequately supported by clinical findings." *Id.* at 21. After reviewing the medical records, the ALJ found that "Dr. Cahn primarily summarized in the treatment notes [Leonard's] subjective complaints, diagnoses, and treatment, but he did not provide medically acceptable clinical or diagnostic findings to support the functional assessment." *Id.* The ALJ also noted that Dr. Cahn's opinions were inconsistent with: (1) the objective medical evidence, which showed, among other things, minimal treatment and no tests supporting Leonard's alleged levels of cognitive deficits; (2) Dr. Cahn's "own treatment records that document routine and conservative treatment"; and (3) Leonard's admitted activities of daily living (discussed above). *Id.* Finally, the ALJ found that the nature of Leonard's impairments are outside the area of Dr. Cahn's specialty. *Id.*

The Court finds that the ALJ failed to provide specific and legitimate reasons for rejecting Dr. Cahn's assessment that are supported by the entire record. First, the ALJ improperly discounted Dr. Cahn's assessment after finding that it was essentially a summary of Leonard's "subjective complaints," which the ALJ determined were not credible. While "[a]n ALJ may reject a treating physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible," *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citation omitted), as discussed above, the ALJ's opinion does not make clear that she properly considered all of the evidence before discounting Leonard's claims. *See supra* at III.B.

Second, the ALJ's finding that Dr. Cahn's assessment of Leonard was not supported by the objective medical evidence is inconsistent with her own findings. For example, the ALJ stated that "the objective medical evidence . . . shows mild physical findings, diagnostic evidence of mild bilateral carpal tunnel syndrome and mild cervical disc disease, minimal treatment, and no tests supporting the claimant's alleged level of cognitive deficits." AR 21, 280 (noting that Leonard's brain MRI scan was mostly normal and that Leonard appeared to be "cognitively intact" during an October 2012 appointment), 384 (mental health evaluator found that Leonard was a "fair historian" in September 2013). The ALJ also noted that "[t]he lack of more aggressive treatment, such as surgical intervention or the prescription of a CPAP machine, suggest the claimant's

symptoms and limitations were not as severe as he alleged." *Id.* at 18; *see also* AR 354, 358 (although Leonard requested a referral for a sleep study, he did not make an appointment). Despite this, the ALJ found these impairments severe in her step three determination. AR 13. Given this inconsistency, the Court cannot conclude that the ALJ's determination with respect to this aspect of Dr. Cahn's opinion was based on substantial evidence.

Finally, although it is proper for the ALJ to consider a doctor's area of specialization in determining that his opinion merits little weight, *see* 20 C.F.R. § 404.1527(c)(5) (ALJ considers physician's specialization in evaluating medical opinions); *Kennelly v. Astrue*, 313 Fed. Appx. 977, 978 (9th Cir. 2009), the ALJ did not explain what aspect of Dr. Cahn's area of specialization made him ill equipped to provide any portion of his opinion. Thus, without more, the Court cannot say that the ALJ's determination to give Dr. Cahn's opinion minimal weight was warranted.

E. The ALJ Erred in Her Evaluation of Dr. Keith Holan's Opinion

Finally, Leonard contends that the ALJ erred by incorrectly rejecting Dr. Holan's finding that he could perform occasional fingering and feeling. In particular, he argues that the ALJ did not give legally sufficient reasons for rejecting Dr. Holan's finding. Pl.'s Mot. 18–20. The Commissioner disagrees, and asserts that the ALJ provided valid reasons for discounting Dr. Holan's opinion on this issue. Def.'s Mot. 16. In particular, the Commissioner states that the ALJ properly found that Leonard's treatment records and the objective medical evidence did not support limitations on fingering and feeling as Dr. Holan opined. *Id* (citing AR 20–21).

Dr. Holan is board certified in internal medicine. AR 37. Dr. Holan reviewed the record in this case and testified via telephone during the hearing as an impartial medical expert. Dr. Holan testified that Leonard had the following medically determinable impairments: disorders of the spine with no evidence of nerve root compression, sleep-related breathing disorders without evidence of pulmonary artery or organic mental disorders, and bilateral carpel tunnel syndrome, as evidenced by an EMG study. AR 39. He opined that the impairments neither singly nor in combination met or equaled a medical listing. *Id.* at 39–40. Based on his review of the medical record, he indicated that Leonard "would be able to occasionally lift and carry 20 pounds,

frequently lift and carry 10 pounds, stand or walk for a total of six hours in an eight-hour day; sit for six hours in an eight-hour day; and frequent or repetitive pushing and pulling would be limited with the upper extremities." *Id.* Dr. Holan also detailed various postural and environmental limitations. *Id.* at 40.

The ALJ gave significant weight, but not full weight, to Dr. Holan's opinions. *Id.* at 20. She noted that she did not adopt Dr. Holan's opinion that Leonard should be limited to occasional fingering and feeling, as the "limitations were not supported by the record as a whole." *Id.* at 21. The ALJ based her conclusion on the fact that Leonard's carpal tunnel syndrome, which would have contributed to the purported limitations, was "mild" and rarely mentioned throughout the record. *Id.* As with the ALJ's consideration of Dr. Cahn's opinions, the ALJ's decision to give this aspect of Dr. Holan's opinion minimal weight is suspect because despite this assertion, the ALJ found that Leonard's bilateral carpal tunnel syndrome was a severe impairment at step three of the sequential analysis. AR 13. This inconsistency suggests that perhaps the ALJ was making medical diagnoses without having substantial evidence in the record. Accordingly, remand is required for the ALJ to set forth legally sufficient reasons for rejecting this aspect of Dr. Holan's opinions.

F. Remand is Warranted

The decision whether to remand for further proceedings or order an immediate award of benefits is within the district court's discretion. Harman v. Apfel, 211 F.3d 1172, 1175–78 (9th Cir. 2000). Where no useful purpose would be served by further administrative proceedings, or where the record has been fully developed, it is appropriate to exercise this discretion to direct an immediate award of benefits. Id. at 1179 ("[T]he decision of whether to remand for further proceedings turns upon the likely utility of such proceedings."). However, where, as here, the circumstances of the case suggest that further administrative review could remedy the Commissioner's errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011).

Since the ALJ erred in her step five determination and failed to identify substantial evidence to support her findings with respect to Leonard's activities of daily living and her

evaluation of the opinions of Drs. Cahn and Holan, remand is appropriate. Because outstanding issues must be resolved before a determination of disability can be made, and "when the record as a whole creates serious doubt as to whether the [Plaintiff] is, in fact, disabled within the meaning of Social Security Act," further administrative proceedings would serve a useful purpose and remedy defects. Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir. 2014) (citations omitted). Accordingly, the Court will remand this action to the agency for further consideration.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiff Joseph Leonard's motion for summary judgment on issues 1, 2, 4, and 5 as set forth in his statement of issues, Pl. Mot. 2, and GRANTS Defendant Berryhill's motion for summary judgment on issue 3. Def. Mot. 10. The Court DENIES the cross motions on all remaining issues presented.

V. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the decision of the Commissioner is reversed, and the matter is remanded for further proceedings consistent with this Order. The Court notes that it makes no determination on whether the ALJ's ultimate conclusion with respect to a finding of nondisability was correct. Moreover, through this Order, the Court is not intending to approve or allow the cross examination of the ALJ by Leonard, his counsel, or any other representatives.

Dated: July 24, 2017

BETH LABSON FREEMAN
United States District Judge