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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MICHAEL HAYES,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, ACTING
15 COMMISSIONER OF SOCIAL
16 SECURITY,

16 Defendant.
17

Case No.: 16-CV-140 JLS (MDD)

**ORDER (1) ADOPTING REPORT
AND RECOMMENDATION AND (2)
REMANDING CASE**

(ECF Nos. 11, 12, 15)

18 Presently before the Court are Plaintiff Michael Hayes's Motion for Summary
19 Judgment ("Pl.'s MSJ," ECF No. 11), Defendant's Cross-Motion for Summary Judgment
20 and Opposition to Plaintiff's MSJ ("Def.'s Cross-MSJ & Opp'n," ECF No. 12), and
21 Plaintiff's Reply Brief and Opposition to Defendant's Cross-MSJ ("Pl.'s Reply," ECF No.
22 14). On December 19, 2016, Magistrate Judge Mitchell D. Dembin issued his Report and
23 Recommendation on both parties' MSJs. ("R&R," ECF No. 15.) Defendant filed timely
24 objections to Judge Dembin's R&R on January 3, 2017. ("R&R Obj.," ECF No. 16.)
25 Plaintiff filed a timely response in opposition to Defendant's objections on January 10,
26 2017. ("R&R Obj. Opp'n," ECF No. 17.) After considering the parties' arguments and the
27 law, the Court **OVERRULES** Defendant's objections and **ADOPTS** Judge Dembin's
28 R&R in its entirety.

1 **BACKGROUND**

2 The R&R adequately details the administrative record in this case. (*See* R&R 2–13,
3 ECF No. 15; *see also* ECF No. 9 (Administrative Record).) The Court will not repeat it
4 here, but notes relevant facts were necessary in assessing Defendant’s objections.

5 **LEGAL STANDARD**

6 **I. Objections to a Report and Recommendation**

7 A district judge “may accept, reject, or modify the recommended disposition” of a
8 magistrate judge on a dispositive matter. Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C.
9 § 636(b)(1). “[T]he district judge must determine de novo any part of the [report and
10 recommendation] that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). However,
11 “[t]he statute makes it clear that the district judge must review the magistrate judge’s
12 findings and recommendations de novo *if objection is made*, but not otherwise.” *United*
13 *States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (emphasis in
14 original); *see also* *Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005). “Neither the
15 Constitution nor the statute requires a district judge to review, de novo, findings and
16 recommendations that the parties themselves accept as correct.” *Reyna-Tapia*, 328 F.3d at
17 1121.

18 **II. Judicial Review of Agency Action**

19 The Social Security Act provides for judicial review of a final agency decision
20 denying a claim for disability benefits. 42 U.S.C. § 405(g). A reviewing court must affirm
21 the denial of benefits if the agency’s decision is supported by substantial evidence and
22 applies the correct legal standards. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190,
23 1193 (9th Cir. 2004). Substantial evidence is a term of art that means “such relevant
24 evidence as a reasonable mind might accept as adequate to support a conclusion.”
25 *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001) (quoting *Morgan v. Comm’r of*
26 *Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)). Put another way, it is “more than a
27 scintilla but less than a preponderance.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
28 2002) (quoting *Jamerson v. Chater*, 112 F.3d 1064, 1066 (9th Cir. 1997)). If the evidence

1 is susceptible to more than one reasonable interpretation, the agency’s decision must be
2 upheld. *Id.*; *Batson*, 359 F.3d at 1193.

3 DISCUSSION

4 Defendant solely objects to Judge Dembin’s recommendation that the Court remand
5 the case for further proceedings because the administrative law judge (“ALJ”) did not
6 adequately address Plaintiff’s claim of right knee disability.¹ (*See generally* R&R Obj.,
7 ECF No. 16.) Judge Dembin concluded that the ALJ’s finding on Plaintiff’s residual
8 functional capacity (“RFC”) based on Plaintiff’s alleged right knee disability is not
9 supported by substantial evidence. (R&R 19, ECF No. 15.) Specifically, Judge Dembin
10 found that “[n]o physician has opined and no medical evidence is present in the record that
11 supports the ALJ’s RFC finding of what Plaintiff can do physically.” (*Id.*) To be sure, the
12 medical records contain several diagnoses regarding Plaintiff’s right knee. (*See id.* at 13–
13 20.) But Judge Dembin found that “notably absent in these records is any evidence about
14 how Plaintiff’s right knee impairment *affects Plaintiff’s current ability to function.*” (*Id.* at
15 17 (emphasis added).) Thus, Judge Dembin concluded that “the ALJ’s RFC assessment
16 regarding Plaintiff’s knee impairment was not based on substantial evidence because the
17 ALJ failed to develop the record about how Plaintiff’s knee impairment affects his ability
18 to function.” (*Id.*)

19 Defendant argues that Judge Dembin erred because the RFC assessment is not a
20 medical issue and thus no doctor’s opinion or testimony is conclusive on the issue; rather,
21 the RFC assessment is based on the evidence as a whole. (R&R Obj. 2, ECF No. 16.) Thus,
22 Defendant argues that the ALJ properly determined Plaintiff’s RFC after reviewing all the
23 evidence in the record. (*Id.* at 3.)

24 As an initial matter, the Court agrees with Defendant that no doctor’s opinion or
25 testimony is conclusive on the issue, since where “the record contains conflicting medical
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27 ¹ Defendant “does not object to the portion of the R&R affirming the ALJ’s credibility assessment”
28 (R&R Obj. 2 n.1, ECF No. 16.) Plaintiff likewise does not object to this portion of the R&R. (*See generally*
R&R Obj. Opp’n, ECF No. 17.)

1 evidence, the ALJ is charged with determining credibility and resolving conflict.” *Benton*
2 *v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003); *Batson v. Comm’r of the Soc. Sec.*
3 *Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). The problem in this case, as Judge Dembin
4 notes, is that there is no medical evidence *at all* regarding the effect of Plaintiff’s right knee
5 issues on his residual functional capacity. The ALJ solely relied on general diagnoses of
6 Plaintiff’s right knee condition in assessing Plaintiff’s residual functional capacity. (*See*
7 *R&R 15–17* (collecting evidence relied upon by the ALJ, including diagnoses such as
8 osteoarthritis of the right knee, a torn meniscus, and post-surgical pain from a previously
9 inserted surgical screw).) This is insufficient. As Judge Dembin correctly noted, “the ALJ’s
10 RFC determination or finding must be supported by medical evidence, particularly the
11 opinion of a treating or an examining physician.” *Banks v. Barnhart*, 434 F. Supp. 2d 800,
12 805 (C.D. Cal. 2006); *see also de Lopez v. Astrue*, 643 F. Supp. 2d 1178, 1184 (C.D. Cal.
13 2009) (“When ‘the administrative record does not contain any opinion by a treating or
14 examining physician regarding plaintiff’s RFC,’ the ALJ has a duty to obtain ‘such an
15 opinion. Thus, the ALJ also did not fully and fairly develop the record in this regard.’ Here,
16 the ALJ also failed to develop the record, and this is an additional reason to remand this
17 matter, as discussed below.” (internal citation omitted)); *Mendoza v. Barnhart*, 436 F.
18 Supp. 2d 1110, 1116 (C.D. Cal. 2006) (“Moreover, the administrative record does not
19 contain any opinion by a treating or examining physician regarding plaintiff’s RFC, and
20 the ALJ failed to get such an opinion. Thus, the ALJ also did not fully and fairly develop
21 the record in this regard.”). And Defendant fails to provide a single case upholding an
22 ALJ’s RFC on substantial evidence grounds where the RFC was similarly devoid of any
23 support from a medical opinion or other medical evidence specifically regarding a
24 claimant’s physical ability to function in the workplace.² Without more, the Court declines
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26 ² Defendant also argues that “the residual functional capacity is not a medical issue.” (*R&R Obj. 2*, ECF
27 No. 16 (citing statutory and regulatory authority).) But, again, Defendant does not explain how these
28 authorities—or any others—demonstrate that an ALJ’s RFC assessment can be based on substantial
evidence without a medical opinion or other medical evidence regarding a claimant’s ability to function
in the workplace.

1 to overrule Judge Dembin’s conclusion that “the ALJ incorrectly determined the record
2 was sufficiently complete to allow him to reach a conclusion on this issue.” (R&R 19, ECF
3 No. 15 (citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001).)

4 Finally, Defendant argues that Judge Dembin improperly relied on out-of-circuit
5 cases stating that ALJs may not draw inferences in assessing the evidence, which,
6 according to Defendant, is contrary to Ninth Circuit authority stating that ALJs are entitled
7 to draw inferences logically flowing from the evidence. (R&R Obj. 3, ECF No. 16 (citing
8 *Sample v. Schweiker*, 694 F.2d 639, 632 (9th Cir. 1982).) The Court disagrees. Judge
9 Dembin did not err by relying on Eighth Circuit cases as persuasive authority, especially
10 because those cases speak directly to the issue at hand. (*See, e.g.*, R&R 17, ECF No. 15
11 (citing *Lauer v. Apfel*, 245 F.3d 700, 704 (8th Cir. 2001) (“Because a claimant’s RFC is a
12 medical question, an ALJ’s assessment of it must be supported by some medical evidence
13 *of the claimant’s ability to function in the workplace.*” (internal citations omitted)
14 (emphasis added))).) Defendant is right that in the Ninth Circuit an ALJ “is entitled to draw
15 inferences logically flowing from the evidence.” *Sample v. Schweiker*, 694 F.2d 639, 642
16 (9th Cir. 1982) (citing *Beane v. Richardson*, 457 F.2d 758 (9th Cir. 1972)). The problem,
17 of course, is the predicate issue that here the ALJ was lacking substantial evidence from
18 which to properly draw an inference.³ Accordingly, the Court **OVERRULES** Defendant’s
19 objections.

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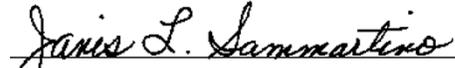
27 ³ In addition, Defendant’s reliance on *Sample* is misplaced, since the *Sample* Court confronted a situation
28 where the “ALJ considered each alleged medical infirmity *in light of the expert opinions available.*” 694
F.2d at 642 (emphasis added).

1 **CONCLUSION**

2 After conducting a de novo review, the Court is satisfied that Judge Dembin’s R&R
3 is analytically sound. Accordingly, the Court **VERRULES** Defendant’s objections,
4 **ADOPTS** Judge Dembin’s R&R in its entirety (ECF No. 15), and **REMANDS** the matter
5 to the Social Security Administration for further review consistent with this Opinion.

6 **IT IS SO ORDERED.**

7 Dated: March 1, 2017

8 
9 Hon. Janis L. Sammartino
United States District Judge

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