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5 UNITED STATES DISTRICT COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
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8 Aaron Spayd,

9 Plaintiff,

10 v.

11 Nancy A. Berryhill, Acting Commissioner
12 of Social Security,

13 Defendant.

Case No.: 16-cv-01353-JLS-JLB

Report and Recommendation

[ECF Nos. 16, 18]

14
15 This matter is before the Court on cross-motions for summary judgment. (ECF Nos.
16 16, 18.) Plaintiff Aaron Spayd moves under 42 U.S.C. § 405(g)¹ for judicial review of the
17 Commissioner of Social Security’s² (“Commissioner”) final decision denying his
18 applications for a period of disability and disability insurance benefits and supplemental
19 security income under Titles II and XVI of the Social Security Act.

20 This Report and Recommendation is submitted to United States District Judge Janis
21 L. Sammartino pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(c) of the United
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24 ¹ “Any individual, after any final decision of the Commissioner of Social Security made after a hearing to
25 which he was a party . . . may obtain a review of such decision by a civil action . . . brought in the district
26 court of the United States The court shall have the power to enter, upon the pleadings and transcripts
27 of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social
28 Security, with or without remanding the cause for a rehearing. The findings of the Commissioner . . . as
to any fact, if supported by substantial evidence, shall be conclusive” 42 U.S.C. § 405(g) (2015).

² When Plaintiff initiated this action, Carolyn W. Colvin was the Acting Commissioner of the Social Security Administration. Nancy A. Berryhill is now the Acting Commissioner. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is automatically substituted as a party.

1 States District Court for the Southern District of California. After careful review of the
2 moving and opposing papers, the administrative record, the facts, and the applicable law,
3 the Court hereby RECOMMENDS that Plaintiff’s motion for summary judgment (ECF
4 No. 16) be DENIED IN PART AND GRANTED IN PART. The Court further
5 RECOMMENDS that the Commissioner’s cross-motion for summary judgment affirming
6 the Administrative Law Judge’s (“ALJ”) decision (ECF No. 18) be DENIED.

7 **I. BACKGROUND**

8 Plaintiff filed applications for a period of disability and disability insurance benefits
9 and supplemental security benefits on April 19, 2012.³ In both applications, Plaintiff
10 initially alleged disability commencing February 27, 2010.⁴ (ECF No. 13-5 at 2, 4.) On
11 April 9, 2014, Plaintiff requested that the alleged onset date of disability be amended from
12 February 27, 2010 to October 8, 2010. (ECF Nos. 13-2 at 57; 13-5 at 16.) The
13 Commissioner denied the applications by initial determination on August 29, 2012. (ECF
14 No. 13-3 at 18-19; ECF No. 13-4 at 2.) Plaintiff requested reconsideration of the initial
15 determination on October 29, 2012. (ECF 13-4 at 7-8.) The Commissioner denied
16 reconsideration on March 1, 2013. (*Id.* at 9-14; ECF No. 13-3 at 50-51.) Plaintiff requested
17 a de novo hearing before an ALJ on March 7, 2013. (ECF No. 13-4 at 15-16.) The
18 Commissioner granted this request and appointed an ALJ. (*Id.* at 17-19, 69-73, 75-79.)
19 On April 9, 2014, Plaintiff, his attorney, a psychological expert, and a vocational expert
20 appeared before the ALJ, James Carletti. (ECF No. 13-2 at 30.) In a decision dated August
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24 ³ See 42 U.S.C. § 423 (Disability insurance benefit payments); *see also id.* at §§ 416(i) (defining “period
25 of disability”), 423(d)(1) (defining “disability” for purposes of entitlement to a period of disability or to
26 disability insurance benefits).

27 ⁴ Plaintiff also filed prior applications with an alleged onset date of February 14, 2008. (ECF No. 13-2 at
28 99.) These applications are not at issue in this appeal. Plaintiff’s previous applications resulted in a final
unfavorable decision written by Administrative Law Judge Larry B. Parker and dated October 7, 2010.
(ECF Nos. 13-2 at 32; 13-3 at 2-13.) Plaintiff’s unfavorable October 2010 decision created a presumption
of continuing nondisability that could be rebutted only if Plaintiff showed a “changed circumstance”
affecting disability. Acquiescence Social Security Ruling 97–4(9), 1997 WL 742758, at *3 (Dec. 3, 1997).

1 29, 2014, the ALJ issued an unfavorable decision and found Plaintiff was not disabled from
2 October 8, 2010, through the date of his decision. (*Id.* at 46.)

3 Thereafter, the Social Security Administration Appeals Council denied Plaintiff's
4 request for review of the ALJ's unfavorable decision, making the ALJ's decision the final
5 decision of the Commissioner. (*Id.* at 2.) Plaintiff then commenced this instant action for
6 judicial review pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

7 **II. STANDARD OF REVIEW**

8 The Social Security Act allows for unsuccessful applicants to seek judicial review
9 of the Commissioner's final agency decision.⁵ The scope of judicial review, however, is
10 limited. The Commissioner's final decision should not be disturbed unless: (1) The ALJ's
11 findings are based on legal error; or (2) the ALJ's determinations are not supported by
12 substantial evidence in the record as a whole.⁶ Substantial evidence is "more than a mere
13 scintilla, but may be less than a preponderance."⁷ Substantial evidence is "relevant
14 evidence that, considering the entire record, a reasonable person might accept as adequate
15 to support a conclusion."⁸

16 In making this determination, the Court must consider the record as a whole,
17 weighing both the evidence that supports and the evidence that detracts from the ALJ's
18 conclusion.⁹ Where the evidence can reasonably be construed to support more than one
19 rational interpretation, the Court must uphold the ALJ's decision.¹⁰ This includes deferring
20 to the ALJ's credibility determinations and resolutions of evidentiary conflicts.¹¹

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24 ⁵ See 42 U.S.C. §§ 405(g), 1383(c)(3)

25 ⁶ See *Schneider v. Comm'r of Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000).

26 ⁷ *Lewis v. Apfel*, 236 F.3d 503, 509 (9th Cir. 2001).

27 ⁸ *Id.*; *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1011 (9th Cir. 2003).

28 ⁹ See *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001); *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988).

¹⁰ See *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004).

¹¹ See *Lewis*, 236 F.3d at 509.

1 **III. THE ALJ’S DECISION**

2 Utilizing the five-step disability evaluation process,¹² the ALJ first found that
3 Plaintiff’s last date insured was September 30, 2011 and that Plaintiff had not engaged in
4 substantial gainful activity since October 8, 2010, the alleged onset date. (ECF No. 13-2
5 at 33.)

6 Before proceeding to step two, the ALJ addressed whether Plaintiff was subject to
7 res judicata in light of Plaintiff’s final unfavorable decision of nondisability issued by
8 Administrative Law Judge Parker on October 7, 2010. (*Id.*) The ALJ explained that, absent
9 a showing of changed circumstances since that final unfavorable decision, Plaintiff was
10 subject to presumptions of nondisability and of continuing applicability of residual
11 functional capacity as determined by Judge Parker. (*Id.*) The ALJ concluded that the
12 evidence showed changed circumstances, and provided the following analysis:

13 Judge Parker found the claimant only had asthma. The evidence
14 now before the undersigned shows asthma, schizophrenia,
15 affective disorders and Polly-substance abuse. While the
16 claimant’s physical limitations are unchanged, he now has
17 mental limitations. Accordingly, there are changed
18 circumstances, and the Chavez presumptions do not apply.^[13]

18 (*Id.*)

19 The ALJ then proceeded to step two and found that Plaintiff had the following severe
20 impairments: asthma; schizophrenia; affective disorders; and polysubstance abuse.¹⁴ (*Id.*)
21 In making this determination, the ALJ explained that Plaintiff also had the following
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25 ¹² 20 C.F.R. § 404.1520.

26 ¹³ See *Chavez v. Bowen*, 844 F.2d 691, 693 (9th Cir. 1988) (“The principles of res judicata apply to
27 administrative decisions, although the doctrine is applied less rigidly to administrative proceedings than
28 to judicial proceedings. . . . The claimant, in order to overcome the presumption of continuing
nondisability arising from the first administrative law judge’s findings of nondisability, must prove
‘changed circumstances’ indicating a greater disability.”).

¹⁴ 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 conditions that do not meet the criteria for severe impairments: right hand infection; right
2 hand pain; and right hand skin disease. (*Id.*)

3 At step three, the ALJ found that Plaintiff does not have an impairment or a
4 combination of impairments that meet the severity required to stop analysis at step three
5 and award benefits. (*Id.*) Before considering step four, the ALJ found that Plaintiff has
6 the residual functional capacity to perform sedentary work except has environmental
7 limitations to no exposure to extreme cold and heat; can perform simple repetitive tasks,
8 with no public contact; and minimum interactions with co-workers and supervisors. (*Id.*
9 at 35.) In arriving at this residual functional capacity determination, the ALJ looked at the
10 entire record, including Plaintiff's medical history to determine the limitations of his
11 asthma, low back pain, affective disorder, and polysubstance abuse. (*Id.* at 34-44.)

12 At step four, the ALJ compared the residual functional capacity assessed to the
13 demands of Plaintiff's past relevant work as a cook/cashier, security guard, and shipping
14 and receiving clerk. (*Id.* at 45.) In doing so, the ALJ relied on the testimony of the
15 vocational expert to determine that Plaintiff is unable to perform any past relevant work.
16 (*Id.*) At step five, the ALJ determined that, considering the Plaintiff's age, education, work
17 experience, and residual functional capacity, there were jobs in significant numbers in the
18 national economy that Plaintiff could perform. (*Id.*) The ALJ relied on the testimony of
19 the vocational expert to determine that Plaintiff could work as an assembler or a production
20 examiner. (*Id.* at 46.) The ALJ then concluded that Plaintiff "has not been under a
21 disability, as defined in the Social Security Act, from October 8, 2010, through the date of
22 this decision." (*Id.*)

23 **IV. DISCUSSION**

24 Plaintiff challenges the ALJ's residual functional capacity determination. Plaintiff
25 argues that it was not supported by substantial evidence and was the product of harmful
26 legal error for two reasons. The first harmful legal error argued by Plaintiff is that the ALJ
27 failed to provide "specific and legitimate reasons" for discounting two treating physicians'
28 opinions. (ECF No. 16-1 at 18-26.) More specifically, Plaintiff argues that the ALJ failed

1 to properly discount the following specific opinions of Dr. Francisco Recalde and Dr.
2 Jonathan Kistler, which would change the outcome at the final step of determining
3 disability: (1) Dr. Recalde’s opinion that limited Plaintiff to “occasional” handling and
4 fingering; (2) Dr. Kistler’s opinion that found marked limitation in “sustaining an ordinary
5 routine without special supervision;” and (3) both Dr. Recalde and Dr. Kistler opinions that
6 Plaintiff would miss more than four days per month due to his mental and physical
7 limitations.¹⁵ (*Id.* at 20-21.)

8 The second harmful legal error argued by Plaintiff is that the ALJ failed to provide
9 “clear and convincing” reasons for discrediting Plaintiff’s testimony regarding functional
10 limitations with respect to the use of his hands. (*Id.* at 26-28; ECF No. 20 at 10-11.)

11 The Commissioner opposes Plaintiff’s motion and cross-moves for summary
12 judgment, arguing: (1) the ALJ properly considered the medical evidence in the record
13 when determining the appropriate weight to assign to Dr. Recalde’s and Dr. Kistler’s
14 opinions (EFC No. 18-1 at 3-7); and (2) the ALJ properly assessed Plaintiff’s credibility,
15 which is supported by the substantial evidence of the record (*id.* at 7-10).

16 For the reasons explained below, the Court concludes that the ALJ articulated
17 specific and legitimate reasons supported by substantial evidence in the record to discount
18 Dr. Reclade’s opinions, but failed to articulate specific and legitimate reasons to discount
19 Dr. Kistler’s opinions. Further, the ALJ failed to articulate clear and convincing reasons
20 to discredit Plaintiff’s statements concerning the limiting effects on the use of his hands as
21 a result of his symptoms.

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25 ¹⁵ According to Plaintiff, the ALJ erred in discrediting these opinions and these opinions warrant a
26 favorable finding of disability. The vocational expert testified that if a hypothetical individual with
27 Plaintiff’s residual functional capacity and past relevant work history was limited in his handling and
28 fingering to occasionally; had marked difficulties sustaining ordinary routine without special supervision;
or would be absent at least four or more times on a regular and recurring basis, that would eliminate all
work for that individual. (ECF No. 13-2 at 91-92.)

1 **A. Treating Source Opinions**

2 Here, it is undisputed that both Drs. Recalde’s and Kistler’s opinions constitute
3 opinions of a treating source.

4 “As a general rule, more weight should be given to the opinion of a treating source
5 than to the opinion of doctors who do not treat the claimant. At least where the treating
6 doctor’s opinion is not contradicted by another doctor, it may be rejected only for ‘clear
7 and convincing’ reasons.”¹⁶ In addition, “‘clear and convincing reasons’ are required to
8 reject the treating doctor’s ultimate conclusions. Even if the treating doctor’s opinion is
9 contradicted by another doctor, the Commissioner may not reject this opinion without
10 providing ‘specific and legitimate reasons’ supported by substantial evidence in the record
11 for doing so.”¹⁷ An ALJ may “discredit treating physicians’ opinions that are conclusory,
12 brief, and unsupported by the record as a whole, or by objective medical findings.”¹⁸

13 **1. Dr. Recalde**

14 On November 18, 2013, Dr. Recalde provided a medical record to the Social
15 Security Administration reflecting his opinion that Plaintiff met the requirements for listed
16 impairment 3.03 due to his asthma. (ECF No. 13-8 at 89-91.) The medical record was a
17 checklist on which Dr. Recalde checked off boxes describing 3.03 asthma criteria that he
18 believed applied to Plaintiff. In completing this checklist, Dr. Recalde said that Plaintiff
19 had chronic asthmatic bronchitis with FEV₁ equal to or less than the value specified
20 corresponding to the person’s height without shoes. (*Id.* at 90.) He also said that over the
21 course of a 12 or more consecutive month evaluation period, Plaintiff experienced asthma
22 attacks, in spite of prescribed treatment and requiring physician intervention, occurring at
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26 ¹⁶ *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995) (internal citations omitted).

27 ¹⁷ *Id.*

28 ¹⁸ *Batson*, 359 F.3d at 1195; *Meanel v. Apfel*, 172 F.3d 1111, 1113–14 (9th Cir. 1999) (affirming rejection of a treating physician’s “meager opinion” as conclusory, unsubstantiated by relevant medical documentation, and providing no basis for finding the claimant disabled).

1 least once every 2 months or at least six times a year and hospitalized for longer than 24
2 hours. (*Id.*)

3 The ALJ found, and Plaintiff’s medical records rationally support the conclusion,
4 that Plaintiff did not suffer from asthma attacks requiring physician intervention at least
5 every two months or at least six times a year. (ECF No. 13-2 at 36.) As a result, the ALJ
6 gave Dr. Recalde’s asthma opinion less weight. (*Id.*) Plaintiff does not challenge this
7 determination.

8 Plaintiff does, however, challenge whether the ALJ’s decision to give “no weight”
9 to the Residual Functional Capacity Questionnaire completed by Dr. Recalde on October
10 31, 2013 (the same date Dr. Recalde signed the 3.03 asthma opinion discussed above) is
11 supported by specific and legitimate reasons for doing so.¹⁹ (ECF No. 16-1 at 20-24.) In
12 the Questionnaire, Dr. Recalde essentially concluded that Plaintiff’s physical condition was
13 severe enough to render him disabled under the Social Security Administration regulations,
14 concluding that Plaintiff was not capable of working an 8-hour day, 5 days a week on a
15 sustained basis. (ECF No. 13-8 at 94-95.) As part of the Questionnaire, Dr. Recalde
16 diagnosed Plaintiff as having three impairments: (1) central extrusion L₅-S₁; (2)
17 degenerative disc disease; and (3) asthma. (*Id.* at 94.) When asked to “[i]dentify *all* of
18 your patient’s symptoms,” Dr. Recalde said the following constituted all of Plaintiff’s
19 symptoms: pain, exertional dyspnea, and shortness of breath. (*Id.* (emphasis added).)

20 Also within the Questionnaire, Dr. Recalde provided an “estimate” of his “patient’s
21 functional limitations if your patient were placed in a competitive work situation on an
22 ongoing basis.” (*Id.*) Dr. Recalde estimated that Plaintiff would not be able to walk more
23 than 2-2½ city blocks without rest or significant pain; would be able to sit for only 45
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26 ¹⁹ Because Dr. Recalde’s opinions are contradicted by another doctor, the “specific and legitimate reasons”
27 standard of review applies. The parties do not argue that the higher “clear and convincing reasons”
28 standard of review should apply. The Court notes that even if the “clear and convincing reasons” standard
would not change.

1 minutes at a time and only for 3-hours in an 8-hour workday; would be able to stand/walk
2 for 45 minutes at a time and only for 3-hours in an 8-hour workday; would need to shift
3 positions from sitting, standing, or walking; and would take 5-6 unscheduled 10-15 minute
4 breaks throughout the day. (*Id.*) With respect to Plaintiff’s ability to “lift and carry in a
5 competitive work situation,” Dr. Recalde estimated that Plaintiff could only lift anything
6 weighing 20 pounds or less occasionally (less than 1/3 of the 8-hour workday) and anything
7 over 50 pounds never. (*Id.* at 95.) Dr. Recalde also checked a box indicating that Plaintiff
8 has “limitations in doing repetitive reaching, handling or fingering,” and provided the
9 following estimates of these limitations during an 8-hour workday: Plaintiff could use his
10 right hand to grasp, turn, or twist objects only 30% of the workday; could use his right
11 fingers for fine manipulation only 50% of the workday; could use his right arm for reaching
12 only 10% of the workday; could use his left hand to grasp, turn, or twist objects only 80%
13 of the workday; could use his left fingers for fine manipulation only 80% of the workday;
14 and could use his left arm for reaching only 25% of the workday. (*Id.*) Also within the
15 Questionnaire, Dr. Recalde provided the following estimate of how often Plaintiff is likely
16 to be absent from work as a result of his impairments or treatments: more than four times
17 a month. (*Id.*)

18 Plaintiff specifically challenges whether the ALJ articulated a sufficient basis to
19 assign “no weight” to Dr. Recalde’s opinions and focuses his argument on the portions of
20 Dr. Recalde’s opinion that show Plaintiff is only capable of “occasional” handling and
21 fingering in a competitive work situation. (ECF No. 16-1 at 20-21.) Defendant responds
22 generally that “[t]he ALJ properly considered the medical evidence of record” and the ALJ
23 properly discounted Dr. Recalde’s opinions because the record showed he had “less insight
24 into [Plaintiff’s] condition” than the hypothetical treating physician contemplated by the
25 Social Security Regulations, which outline the general rule that more weight should be
26 given to the opinion of a treating source. (ECF No. 18-1 at 3-6.) More specifically,
27 Defendant argues that the ALJ reasonably concluded that Dr. Recalde was not familiar with
28 information in Plaintiff’s records and explained that this conclusion was supported by the

1 fact that Plaintiff's appointments were always with Dr. Recalde's physician's assistant,
2 Bernard Casillan, and Dr. Recalde relied on patently inaccurate information about the
3 severity of Plaintiff's asthma in issuing his 3.03 asthma opinion. (*Id.* at 5-6.)²⁰

4 The Court concludes that the ALJ articulated specific and legitimate reasons
5 supported by substantial evidence for rejecting and offering no weight to Dr. Recalde's
6 opinions. For example, the ALJ explained that Dr. Recalde issued an opinion about
7 Plaintiff's asthma that was contradicted by the record – by both Plaintiff's reports and the
8 objective evidence in the record of hospitalizations and emergency visits. (ECF No. 13-2
9 at 36.) The ALJ also criticized Dr. Recalde for failing to provide any test results to support
10 his asthma opinion. (*Id.*) Dr. Recalde provided his asthma opinion on the same date
11 (October 31, 2013) as the Questionnaire form containing the opinions at issue. On both
12 forms, asthma is a diagnosis. (ECF No. 13-8 at 90-95.) The contradictions between Dr.
13 Recalde's opinions and the record show that Dr. Recalde was not sufficiently familiar with
14 information in Plaintiff's records and constitute specific and legitimate reasons for
15 rejecting Dr. Recalde's opinions.

16 Besides asthma, the only other diagnoses listed by Dr. Recalde on the Questionnaire
17 were central extrusion L₅-S₁ and degenerative disc disease. The ALJ addressed Dr.
18 Recalde's opinions concerning Plaintiff's functional limitations arising from these
19 diagnoses under the heading Low Back Pain. (ECF No. 13-2 at 37-38.) The ALJ rejected
20 Dr. Recalde's opinions, explaining: (1) Dr. Recalde's Questionnaire answers were
21 unreliable as evidenced by the fact that he failed to give Plaintiff environmental limitations
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24 ²⁰ In response to Plaintiff's motion, Defendant also carelessly argues that Plaintiff's primary care physician
25 was "Dr. Bernard Castillo" [*sic*]. (*Id.* at 4.) While Plaintiff did not appear to appreciate the distinction
26 when testifying before the ALJ (*see* ECF No. 13-2 at 59), the record is clear that Bernard Casillan was a
27 treating physician's assistant, not a doctor (*see, e.g.*, ECF No. 13-6 at 25, 114; ECF No. 13-8 at 54; ECF
28 No. 13-9 at 102). Thus, as Bernard Casillan was not a doctor and as Defendant does not argue that a
physician's assistant would have been considered acceptable medical source at the time of the ALJ's
decision for purposes of establishing the existence of an impairment, Defendant's criticism of Plaintiff for
failing to put forth opinion evidence from Bernard Casillan is not well taken. *See* 20 C.F.R. §§
404.1513(a) (1-5), 416. 913(a)(1-5); Social Security Rule 06-03p (rescinded).

1 in light of his severe asthma; (2) Dr. Recalde’s Questionnaire answers were unreliable
2 because Dr. Recalde had not seen Plaintiff in months; (3) Dr. Recalde’s Questionnaire
3 answers were inconsistent with the “generally unremarkable physical examination found
4 by consultative examiner Dr. Dao”; and (4) Plaintiff “does not have objective physical
5 findings of a severe orthopedic condition that would justify” Dr. Recalde’s more restrictive
6 assessment. (*Id.* at 38.) The ALJ provided specific and legitimate reasons supported by
7 substantial evidence for rejecting Dr. Recalde’s opinions.

8 Plaintiff attacks the ALJ’s reasons for rejecting Dr. Recalde’s Questionnaire
9 answers. First, Plaintiff argues that there are “two simple explanations” for why Dr.
10 Recalde did not include an environmental limitation in the Questionnaire: (1) because he
11 separately found (on the other form completed on October 31, 2013) that Plaintiff’s asthma
12 met the requirements for Listing 3.03; and (2) the Questionnaire “did not inquire about
13 environmental limitations and focused more specifically upon physical limitations.” (ECF
14 No. 16-1 at 22.) Plaintiff misses the point. “When the evidence before the ALJ is subject
15 to more than one rational interpretation, [courts] must defer to the ALJ’s conclusion.”²¹
16 This Court concludes that the ALJ rationally determined Dr. Recalde’s failure to include
17 Plaintiff’s environmental limitations on the Questionnaire when he was of the opinion that
18 Plaintiff met the 3.03 asthma criteria showed that Dr. Recalde’s Questionnaire answers
19 were unreliable, especially to the extent they stemmed from his asthma diagnosis in
20 assessing Plaintiff’s present condition.²²

21 Second, Plaintiff argues that the ALJ erred in rejecting Dr. Recalde’s October 31,
22 2013 opinions on the basis that Dr. Recalde had not seen Plaintiff “in months.” (*Id.* at 22-
23 23.) Plaintiff argues that this reasoning shows that “[t]he ALJ chose not to examine any of
24 the factors for assessing opinion evidence (20 C.F.R. §§ 404.1527(c), 416.927(c)),
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27 ²¹ *Batson*, 359 F.3d at 1198.

28 ²² Whether Dr. Recalde was sufficiently familiar with the information in the case record is a relevant factor
when determining the weight an opinion receives. 20 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6).

1 particularly the frequency of Dr. Recalde’s examinations, which appeared to have occurred
2 monthly.” (*Id.*) In support, Plaintiff points to treatment notes bearing Dr. Recalde’s
3 signature for the April 29, 2010 through April 30, 2012 time period and other evidence,
4 which Plaintiff argues show Dr. Recalde examined Plaintiff on a monthly basis. (*Id.* at 23.)
5 In response, Defendant generally argues that the ALJ properly considered the infrequency
6 with which Dr. Recalde actually saw Plaintiff, including that Dr. Recalde had not seen
7 Plaintiff in months.²³ (ECF No. 18-1 at 6.)

8 The Court finds that substantial evidence in the record supports the ALJ’s conclusion
9 that Dr. Recalde’s Questionnaire answers were not reliable for purposes of assessing
10 Plaintiff’s present physical limitations. Given Dr. Recalde had not seen Plaintiff in months,
11 it was rational for the ALJ to conclude that Dr. Recalde was not sufficiently familiar with
12 Plaintiff’s present physical limitations. The ALJ reasoned that, “Dr. Recalde had not seen
13 the claimant in months, which makes it a little more difficult for him to make a functional
14 determination.” (ECF No. 13-2 at 38.) This was a specific and legitimate reason supported
15 by substantial evidence to reject and offer no weight to Dr. Recalde’s opinion regarding
16 Plaintiff’s present physical limitations.

17 According to the administrative record, the last time Dr. Recalde’s office saw
18 Plaintiff was March 4, 2013 – more than 7 months prior to Dr. Recalde’s Questionnaire
19 answers. (ECF No. 13-8 at 48, 95.) And it is unclear which treatment records, if any, Dr.
20 Recalde believed supported the functional limitations reflected in the Questionnaire. Dr.
21 Recalde was given the opportunity to, but did not, “attach all relevant treatment notes,
22 laboratory and test results” to the Questionnaire. (*See Id.* at 94.)

23 Plaintiff argues that the ALJ should have assigned weight to Dr. Recalde’s
24 Questionnaire answers that suggested Plaintiff was only capable of “occasional” handling
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27 ²³ Further, according to Plaintiff, Dr. Recalde may have never himself examined Plaintiff because Plaintiff
28 “always” or “[f]or the most part” sees the physician’s assistant, Bernard Casillan. (ECF No. 13-2 at 73-
74.)

1 and fingering in a competitive work situation because they were supported by treatment
2 records concerning Plaintiff's eczema. (ECF No. 16-1 at 23.) The problem with this
3 argument is that Dr. Recalde did not identify eczema or any other condition affecting the
4 use of Plaintiff's hands as forming the basis for his Questionnaire answers that suggested
5 Plaintiff was only capable of "occasional" handling and fingering. Rather, Dr. Recalde
6 diagnosed Plaintiff as having three impairments: (1) central extrusion L₅-S₁;
7 (2) degenerative disc disease; and (3) asthma. (ECF No. 13-8 at 94.) Based on Dr.
8 Recalde's Questionnaire answers, it was rational for the ALJ to conclude that Dr. Recalde's
9 opinions did not rely on the records to which Plaintiff now points for purposes of summary
10 judgment. Thus, it defies logic to argue that the ALJ was required to consider treatment
11 records outside the scope of Dr. Recalde's diagnoses to support the functional limitations
12 that Dr. Recalde said flowed from his diagnoses.²⁴ In the end, the ALJ properly discredited
13 Dr. Recalde's functional limitation opinions reflected in the Questionnaire – they were
14 conclusory, brief, and/or contradicted or unsupported by the relevant record.²⁵

15 Third, Plaintiff argues that the ALJ erred in relying upon the opinion of Dr. Dao
16 when rejecting Dr. Recalde's October 31, 2013 opinions. (ECF No. 16-1 at 24.) In support,
17 Plaintiff argues that the ALJ improperly engaged in selective reliance because he both
18 rejected Dr. Dao's opinion that Plaintiff could perform light work and relied on Dr. Dao's
19 opinion to reject Dr. Recalde. (*Id.*) Plaintiff also argues that it was improper to rely on Dr.
20 Dao's opinion because he lacked the necessary background information about Plaintiff's
21 condition. (*Id.*)

22 Plaintiff's argument that the ALJ improperly engaged in selective reliance ignores
23 the procedural posture of this case. The ALJ explained that principles of *res judicata*
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25 ²⁴ The Court notes that Plaintiff himself did not indicate that using his hands was a problem when he filled
26 out his function report. (ECF No. 13-6 at 31.) And during the hearing, Plaintiff indicated that his biggest
27 problems were his asthma and mental illness. (ECF No. 13-2 at 60.)

28 ²⁵ See *Batson*, 359 F.3d at 1195; *Meanel*, 172 F.3d at 1113–14 (affirming rejection of a treating physician's
"meager opinion" as conclusory, unsubstantiated by relevant medical documentation, and providing no
basis for finding the claimant disabled).

1 applied to this case as a result of ALJ Parker’s prior final unfavorable decision. (ECF No.
2 13-2 at 33, 37.) In 2010, ALJ Parker found that Plaintiff’s residual functional capacity
3 limited Plaintiff to sedentary work. (*Id.* at 35.) Here, the ALJ adopted ALJ Parker’s prior
4 sedentary residual functional capacity determination (*id.* at 38), and Plaintiff does not argue
5 that this was error. Thus, the issue before the ALJ in *this* separate and subsequent appeal
6 was whether Plaintiff had met his burden to show a more *restrictive* residual functional
7 capacity determination was appropriate.²⁶ (*Id.*) Hence, the ALJ did not engage in selective
8 reliance, but rather adopted the residual functional capacity determined by ALJ Parker,
9 who issued a more restrictive residual functional capacity than Dr. Dao.

10 Plaintiff’s argument that Dr. Dao lacked the necessary background information
11 about Plaintiff’s condition is unpersuasive.²⁷ (*See* ECF No. 16-1 at 24.) In support of this
12 argument, Plaintiff cites *Pruitt v. Astrue*, No. 08cv1107, 2010 WL 1330164, at *4–5 (C.D.
13 Cal. Mar. 31, 2010), which seems to support Plaintiff’s position that consulting physicians
14 must be provided with all of a claimant’s medical records before they can be relied upon.
15 But this nonbinding case law is inconsistent with the language of the relevant Social
16 Security regulations, which do not extend so far. They require that a consulting physician
17 be provided with “any necessary background information about [a claimant’s] condition.”²⁸
18 This language does not amount to a requirement that every consulting physician be
19 provided with all of a claimant’s medical records. And Plaintiff fails to identify what
20 additional, “necessary” records Dr. Dao should have been provided to assess Plaintiff’s
21 physical limitations.²⁹

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24 ²⁶ *See also Chavez*, 844 F.2d at 694.

25 ²⁷ Dr. Dao notes in the review of medical records section: medical note from June 2012 and May 2012 for
26 asthma exacerbation and an unremarkable x-ray from November 2011. (ECF No. 13-7 at 108.)

27 ²⁸ 20 C.F.R. § 416.917; *see also* 20 C.F.R. § 404.1517.

28 ²⁹ Dr. Dao’s physical examination of Plaintiff was preceded by his review of three treatment notes, two
for asthma exacerbation and one unremarkable chest x-ray from two years earlier. This review included
Plaintiff’s two most recent visits to the hospital for asthma exacerbation in May and June 2012 prior to
the examination in July 2012. (ECF No. 13-7 at 108.)

1 Moreover, Dr. Dao’s physical examination is consistent with the record. For
2 example, the State agency consultants who reviewed all the available medical evidence
3 made findings consistent with Dr. Dao’s findings that suggested Plaintiff was *not* limited
4 to “occasional” handling and fingering. (*See* ECF No. 13-2 at 38; ECF No. 13-3 at 35-49
5 and 52-83.) As the ALJ found, Plaintiff “does not have objective physical findings of a
6 severe orthopedic condition that would justify a more restrictive [residual functional
7 capacity] assessment.” (ECF No. 13-2 at 38.) Thus, the Court is not persuaded that the
8 ALJ erred in rejecting Dr. Recalde’s Questionnaire answers in part because they were
9 inconsistent with the generally unremarkable physical examination found by consultative
10 examiner Dr. Dao.

11 The final reason articulated by the ALJ for rejecting Dr. Recalde’s October 31, 2013
12 opinions was that Plaintiff “does not have objective physical findings of a severe
13 orthopedic condition that would justify a more restrictive assessment” of Plaintiff’s
14 residual functional capacity. (*Id.* at 38.) As the parties do not address this rationale in their
15 papers, the Court declines to analyze whether this reasoning standing alone constitutes a
16 specific and legitimate reason supported by substantial evidence to reject Dr. Recalde’s
17 October 31, 2013 opinions. However, as stated above, the Court concludes that the ALJ
18 articulated other specific and legitimate reasons supported by substantial evidence in the
19 record for rejecting Dr. Recalde’s October 31, 2013 opinions.

20 Plaintiff’s request for summary judgment relating to Dr. Recalde’s opinions should
21 be denied.

22 **2. Dr. Kistler**

23 Dr. Kistler offered an assessment of Plaintiff’s mental limitations. The ALJ assigned
24 little weight to Dr. Kistler’s assessment, explaining:

25 On March 18, 2014, Jonathan Kistler, M.D., completed a Mental
26 Capacity Assessment and reported the claimant had marked and
27 extreme limitations in sustained concentration and persistence,
28 marked and extreme limitations in social interaction, and marked
and extreme limitations in adaptation. The undersigned gives Dr.

1 Kistler’s medical opinion little weight because while the
2 psychotic symptoms are present, they appear to be under good
3 control when the claimant consistently takes his medications.
4 However, since the claimant did have some demonstrated
5 difficulties with concentration on the examination, the
undersigned limited the claimant to simple work.

6 (*Id.* at 41.) Plaintiff argues that this articulated rationale both does not meet the “specific
7 and legitimate” standard for discounting a treating source’s opinion and is unsupported by
8 the record.³⁰ (ECF No. 16-1 at 25.) This Court concludes that Plaintiff has met his burden
9 to show summary judgment in Plaintiff’s favor is appropriate on this issue because the
10 ALJ’s articulated rationale with respect to Dr. Kistler’s opinion fails to meet the “specific
11 and legitimate reasons” standard.

12 Defendant’s response in opposition is unavailing. Defendant argues that the ALJ
13 properly discounted the medical source statement of Dr. Kistler for the following reasons:
14 (1) it constituted a check box opinion; (2) it relied on “self-reports”; (3) it was inconsistent
15 with the ALJ’s finding that Plaintiff’s psychiatric impairments were under “good control”
16 when Plaintiff “took his medication”; and (4) the ALJ rationally interpreted ambiguities in
17 the medical evidence as being inconsistent with Dr. Kistler’s opinions. (ECF No. 18-1 at
18 6-7.) A key flaw of this response is that reasons (1), (2), and (4) were not articulated by
19 the ALJ.³¹ The Court must decline Defendant’s invitation to affirm the ALJ with respect
20 to Dr. Kistler based on *post hoc* rationalizations.³²

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23 ³⁰ Because Dr. Kistler’s opinion is contradicted by another doctor, the “specific and legitimate reasons”
24 standard of review applies. The parties do not argue that the higher “clear and convincing reasons”
25 standard of review should apply. The Court notes that even if the “clear and convincing reasons” standard
were to apply, the Court’s recommendation regarding the instant cross-motions for summary judgment
would not change.

26 ³¹ It is particularly unfortunate that Defendant asserted in its opposition that “the ALJ *noted* that doctor
[sic] completed a check-box report” (ECF No. 18-1 at 6) (emphasis added)), a claim that is patently
incorrect.

27 ³² See, e.g., *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003) (reviewing courts are “constrained to
28 review the reasons the ALJ asserts” and may not engage in post hoc reasoning to justify an ALJ’s
decision).

1 Only reason (3) above appears in the ALJ’s decision weighing Dr. Kistler’s opinion.
2 The ALJ said that he discounted Dr. Kistler’s medical opinion because Plaintiff’s psychotic
3 symptoms appeared to be “under good control when the claimant consistently takes his
4 medications.” (ECF No. 13-2 at 41.) The ALJ fails to point to any medical evidence in
5 support of this conclusion. Plaintiff, on the other hand, points to substantial medical
6 evidence in the record that contradicts this conclusion. (ECF Nos. 16-1 at 25-26; 20 at 7.)
7 The Court is left to speculate as to what medical evidence the ALJ may have interpreted to
8 support his conclusory assertion that Plaintiff’s psychiatric symptoms were under “good
9 control” when medicated. Therefore, the ALJ erred when he assigned little weight to Dr.
10 Kistler’s opinion because the ALJ’s articulated rationale fails to meet the “specific and
11 legitimate reasons” standard.³³ Courts may only review the ALJ’s articulated rationale,
12 and “[i]f the [ALJ’s] decision on its face does not adequately explain how a conclusion was
13 reached, that alone is grounds for remand.”³⁴

14 Finally, Plaintiff persuasively argues that crediting Dr. Kistler’s opinion may change
15 the outcome at the final step of determining disability.³⁵ (ECF No. 16-1 at 20-21.) Thus,
16 because Plaintiff’s disability status may change depending on the ALJ’s analysis of Dr.
17 Kistler’s opinion, the ALJ committed legal error that is not harmless, and thus, warrants
18 remedy.

19 **B. Credibility of Plaintiff’s Testimony Regarding the Use of His Hands**

20 Plaintiff argues that the ALJ erred because in making his adverse credibility
21 determination the ALJ failed to provide clear and convincing reasons for discounting
22 Plaintiff’s testimony regarding the use of his hands and failed to consider corroborating
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25 ³³ See *Garrison v. Colvin*, 759 F.3d 995, 1012–13 (9th Cir. 2014).

26 ³⁴ *Barbato v. Comm’r of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1276 n.2 (C.D. Cal. 1996) (quoting *Williams*
v. Bowen, 664 F. Supp. 1200, 1207 (N.D. Ill. 1987)).

27 ³⁵ As argued by Plaintiff, the vocational expert testified that if a hypothetical individual with Plaintiff’s
28 residual functional capacity and past relevant work history had marked difficulties sustaining ordinary
routine without special supervision; and/or would be absent at least four or more times on a regular and
recurring basis, that would eliminate all work for that individual. (ECF No. 13-2 at 91-92.)

1 evidence relating to the use of Plaintiff’s hands. (*Id.* at 26-28; ECF No. 20 at 10-11.) In
2 response, Defendant argues that the ALJ’s credibility analysis is sufficient, but Defendant
3 does not address the issue of whether the ALJ properly discounted Plaintiff’s testimony
4 about the use of his hands. (*See* ECF No. 18-1 at 8-10.) Plaintiff makes clear in his reply
5 brief that Plaintiff’s credibility argument is limited to the issue of Plaintiff’s use of his
6 hands. (ECF No. 20 at 10-11.)

7 The Ninth Circuit employs a “clear and convincing reasons” standard when
8 reviewing an ALJ’s decision to discredit a claimant’s allegations.³⁶ “[A]n ALJ does not
9 provide specific, clear, and convincing reasons for rejecting a claimant’s testimony by
10 simply reciting the medical evidence in support of his or her residual functional capacity
11 determination. To ensure that [appellate] review of the ALJ’s credibility determination is
12 meaningful, and that the claimant’s testimony is not rejected arbitrarily, we require the ALJ
13 to specify which testimony she finds not credible, and then provide clear and convincing
14 reasons, supported by evidence in the record, to support that credibility determination.”³⁷

15 Here, the ALJ summarized Plaintiff’s testimony relating to the use of his hands as
16 follows: Plaintiff “testified he has blisters on his hands, which causes his hands to bleed all
17 the time. He testified that although he uses lotion, which helps, his skin continues to break
18 out.” (ECF No. 13-2 at 42.) The ALJ then goes on to conclude, “After careful
19 consideration of the evidence, the undersigned finds that the claimant’s medically
20 determinable impairments could reasonably be expected to cause the alleged symptoms;
21 however, the claimant’s statements concerning the intensity, persistence and limiting
22 effects of these symptoms are not entirely credible for the reasons explained in this
23 decision.” (*Id.*) The ALJ says nothing further about whether and why he discounted
24 Plaintiff’s testimony regarding the use of his hands. As the ALJ provided no analysis about
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27 ³⁶ *See, e.g., Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014); *Chaudhry v. Astrue*, 688 F.3d 661,
28 670-71 (9th Cir. 2012).

³⁷ *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir. 2015).

1 whether and why he discounted Plaintiff’s testimony regarding the use of his hands, the
2 Court concludes that the ALJ’s credibility analysis relating to Plaintiff’s use of his hands
3 fails to meet the Ninth Circuit’s “clear and convincing reasons” standard for discounting a
4 claimant’s testimony.

5 Furthermore, in light of the vocational expert’s opinion that adding the limitation of
6 “occasional” handling and fingering to Plaintiff’s residual functional capacity
7 determination would preclude all work, Plaintiff has met his burden to show that the weight
8 afforded to testimony about Plaintiff’s use of his hands is material to the ALJ’s disability
9 determination. (*See* ECF Nos. 16-1 at 17; 13-2 at 91.) Thus, the ALJ committed legal
10 error that was not harmless.

11 In sum, the ALJ erred in failing to articulate clear and convincing reasons for
12 discounting Plaintiff’s statements concerning the intensity, persistence and limiting effects
13 of his symptoms related to the use of his hands. Because Plaintiff’s disability status may
14 change depending on this credibility analysis, the ALJ committed legal error that is not
15 harmless, and thus, warrants remedy.

16 **C. Remand is Appropriate**

17 When an ALJ commits error that is not harmless, “[t]he decision whether to remand
18 for further proceedings or simply to award benefits is within the discretion of [the] court.”³⁸
19 “Remand for further administrative proceedings is appropriate if enhancement of the record
20 would be useful.”³⁹ Furthermore, “[i]f additional proceedings can remedy defects in the
21 original administrative proceeding, a social security case should be remanded.”⁴⁰ On the
22 other hand, “where the record has been fully developed such that further administrative
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26 ³⁸ *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989) (citing *Winans v. Bowen*, 853 F.2d 643, 647
27 (9th Cir. 1987)).

28 ³⁹ *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004).

⁴⁰ *Lewin v. Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981).

1 proceedings would serve no useful purpose, the district court should remand for an
2 immediate award of benefits.”⁴¹

3 Here, the ALJ committed legal error that was not harmless, but this is not a case
4 where further administrative proceedings would lack purpose. Therefore, remand for
5 further proceedings is the appropriate remedy.

6 **V. CONCLUSION**

7 For the reasons stated above, the Court **RECOMMENDS** the following:

8 (1) Plaintiff’s motion for summary judgment (ECF No. 16) be **GRANTED IN**
9 **PART AND DENIED IN PART** and that this case be **REMANDED** for further
10 proceedings consistent with this Report and Recommendation;

11 (2) The Commissioner’s cross-motion for summary judgment (ECF No. 18) be
12 **DENIED**.

13 **IT IS HEREBY ORDERED** that any written objections to this Report and
14 Recommendation must be filed with the Court and served on all parties **no later than**
15 **August 10, 2017**. The document should be captioned “Objections to Report and
16 Recommendation.”

17 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the
18 Court and served on all parties no later than **August 17, 2017**. The parties are advised that

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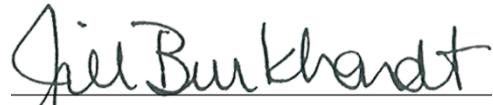
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24 ⁴¹ *Benecke*, 379 F.3d at 593. Before remanding a case to the ALJ with instructions to award benefits, three
25 requirements must be met:

- 26 (1) the record has been fully developed and further administrative proceedings
27 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient
28 reasons for rejecting evidence, whether claimant testimony or medical opinion; and
(3) if the improperly discredited evidence were credited as true, the ALJ would be
required to find the claimant disabled on remand.

Garrison, 759 F.3d at 1020.

1 failure to file objections within the specified time may waive the right to raise those
2 objections on appeal of the Court's order.⁴²

3 Dated: July 27, 2017

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5 Hon. Jill L. Burkhardt
6 United States Magistrate Judge
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27 _____
28 ⁴² *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991).