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4 **UNITED STATES DISTRICT COURT**
5 **SOUTHERN DISTRICT OF CALIFORNIA**
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7 TAM PHAN NGUYEN,
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Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No.: 17cv1406-MMA (NLS)
**ORDER ADOPTING REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE;**
[Doc. No. 18]
**OVERRULING DEFENDANT’S
OBJECTIONS TO THE
MAGISTRATE JUDGE’S REPORT
AND RECOMMENDATION;**
[Doc. No. 19]
**GRANTING IN PART PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT;**
[Doc. No. 13]
**DENYING DEFENDANT’S CROSS-
MOTION FOR SUMMARY
JUDGMENT; AND**
[Doc. No. 14]
**REMANDING FOR FURTHER
PROCEEDINGS**

23 On July 12, 2017, Plaintiff Mr. Nguyen filed this social security appeal challenging
24 the denial of his application for disability insurance benefits and Supplemental Security
25 Income (“SSI”). Doc. No. 1. The Court referred all matters arising in this appeal to the
26 Honorable Nita L. Stormes, United States Magistrate Judge, for report and
27 recommendation pursuant to section 636(b)(1)(B) of title 28 of the United States Code
28 and Civil Local Rule 72.1. *See* Doc. No. 7.

1 The parties have filed motions for summary judgment. Doc. Nos. 13, 14. On
2 August 3, 2018, Judge Stormes issued a thorough and well-reasoned Report
3 recommending that the Court grant in part Plaintiff’s motion, deny Defendant’s cross-
4 motion, and remand the case for further proceedings. Doc. No. 18 at 39-40. Defendant
5 has filed objections to the Report and Recommendation [Doc. No. 19], and Plaintiff filed
6 a reply brief [Doc. No. 20].

7 LEGAL STANDARD

8 The duties of the district court in connection with a Magistrate Judge’s report and
9 recommendation are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and
10 28 U.S.C. § 636(b)(1). Where the parties file objections, “[a] judge of the [district] court
11 shall make a de novo determination of those portions of the [report and recommendation]
12 to which objection is made.” 28 U.S.C. § 636(b)(1); *see Thomas v. Arn*, 474 U.S. 140,
13 149–50 (1985). A district judge may “accept, reject, or modify, in whole or in part, the
14 findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1);
15 *Wilkins v. Ramirez*, 455 F. Supp. 2d 1080, 1088 (S.D. Cal. 2006).

16 DISCUSSION

17 Defendant objects to the Magistrate Judge’s findings that the Administrative Law
18 Judge (“ALJ”): (1) improperly rejected the opinions of three treating physicians; (2)
19 improperly found a nonexamining physician’s opinion preferable to the opinions of
20 treating physicians; and (3) improperly discredited Plaintiff and his family members.
21 Doc. No. 19.

22 **1. Evaluating Opinions of Treating Physicians**

23 Defendant first objects to the Magistrate Judge’s finding that the ALJ failed to
24 provide specific and legitimate reasons for rejecting the testimony of Doctors Diana L.
25 Marquardt, M.D., Harry C. Henderson, III, M.D., and Milton Lessner, Ph.D. *Id.* at 2-9.

26 Where the treating physician’s opinion is contradicted by another doctor, the ALJ
27 may not reject the opinion without providing “specific and legitimate reasons” supported
28 by substantial evidence in the record for so doing. *Murray v. Heckler*, 722 F.2d 499, 502

1 (9th Cir. 1983). If a treating physician’s opinion is “well-supported by medically
2 acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the
3 substantial evidence in [the] case record, [it will be given] controlling weight.” 20 C.F.R.
4 § 404.1527(c)(2). If a treating physician’s opinion is not given “controlling weight”
5 because it is not “well-supported” or because it is inconsistent with other substantial
6 evidence in the record, the ALJ considers specified factors in determining the weight it
7 will be given: (1) “[l]ength of the treatment relationship and frequency of examination”
8 by the treating physician; (2) the “nature and extent of the treatment relationship”
9 between the treating physician and the plaintiff; (3) the amount of relevant evidence that
10 supports the opinion and quality of the explanation provided; (4) the consistency of the
11 medical opinion with the record as a whole; (5) the specialty of the physician providing
12 the opinion; and (6) other factors, such as the degree of understanding a physician has of
13 the Social Security Administration’s “disability programs and their evidentiary
14 requirements,” and the degree of his or her familiarity with other information in the case
15 record. *Id.* § 404.1527(C)(2)-(6).

16 **A. Doctor Lessner**

17 In rejecting Dr. Lessner’s opinion, the ALJ explained that “[m]uch of [his] analysis
18 appears based on subjective statement[s] from [Plaintiff] including that he felt he could
19 not make decisions anymore, he felt restless and agitated, and his energy was low,” and
20 he did not “list any specific functional limitations/restrictions.” AR at 109. The ALJ also
21 concluded that Dr. Lessner’s assessment is “inconsistent with [Plaintiff’s] reports that he
22 provides care to both of his disabled parents.” *Id.*

23 Although the ALJ asserts that Dr. Lessner’s analysis relies heavily upon Plaintiff’s
24 subjective statements, this is not apparent from the record. *See* AR at 109. Dr. Lessner
25 relied upon objective clinical evidence, including his general observations, a review of
26 Dr. Henderson’s records and prescriptions, a review of a psychological evaluation by Dr.
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1 Miller, and test results from five objective tests.¹ See AR at 479-89. Thus, the ALJ's
2 finding that Dr. Lessner's opinion rested largely on Plaintiff's subjective complaints is
3 not supported by substantial evidence. See *Tommasetti v. Astrue*, 533 F.3d 1035, 1041
4 (9th Cir. 2008) (An ALJ may reject a treating physician's opinion where it relies on the
5 plaintiff's discredited self-report and objective clinical evidence does not support the
6 opinion).

7 The ALJ's determination that Dr. Lessner's assessment is inconsistent with
8 Plaintiff's reported activities is not a specific and legitimate reason supported by
9 substantial evidence. While inconsistency between a treating physician's opinion and a
10 plaintiff's daily activities may be a specific and legitimate reason for rejecting the
11 opinion, Plaintiff's reported activities are not inconsistent with Dr. Lessner's opined
12 limitations. See *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005); *Rollins v.*
13 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Brandl v. Astrue*, No. CV 11-7719-SP,
14 2012 WL 3887097, at *5 (C.D. Cal. Sept. 7, 2012); AR at 481. Here, the ALJ noted that
15 Plaintiff could clean, straighten up around the house, and watch over his father by feeding
16 him, assisting him to the bathroom, and walking him around the house. AR at 102. Dr.
17 Lessner concluded that Plaintiff would have difficulty with concentration and short term
18 memory. AR at 483. None of the daily activities cited by the ALJ exceed Dr. Lessner's
19 opined limitations. See *Brandl*, 2012 WL 3887097, at *4-5 ("The mere ability to perform
20 activities of daily living . . . is not a specific and legitimate reason."); *Fair v. Bowen*, 885
21 F.2d 597, 603 (9th Cir. 1989) ("The Social Security Act does not require that claimants
22 be utterly incapacitated to be eligible for benefits.").

23 The ALJ also rejected Dr. Lessner's opinions because he failed to identify any
24 specific functional limitations or restrictions. AR at 109. However, Dr. Lessner
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27 ¹ Specifically, Dr. Lessner based his diagnostic impression on results from the following tests: (1) The
28 Minnesota Multiphasic Personality Inventory-2; (2) Rotter Incomplete Sentence Blank; (3) Bender
Gestalt; (4) The Mooney Problem Check List; and (5) The Beck Depression Inventory. AR at 484-88.

1 concluded that Plaintiff would not be able to work due to concentration problems, short
2 term memory, and suspected brain damage. AR at 483. While Dr. Lessner’s statement is
3 brief, it does in fact state specific limitations. *See id.* Accordingly, it was inaccurate for
4 the ALJ to conclude that Dr. Lessner’s report did not detail any specific limitations. *See*
5 *Vossough v. Colvin*, No. ED CV 13-02207-VBK, 2014 WL 3055866, at *6 (C.D. Cal.
6 July 2, 2014) (finding the ALJ erred in concluding a treating physician’s letter did not
7 contain specific limitations where he briefly stated that the plaintiff’s symptoms interfere
8 with concentration and focus).

9 Based on the foregoing, the Court **OVERRULES** Defendant’s objection to the
10 Magistrate Judge’s finding that the ALJ improperly rejected Dr. Lessner’s opinion.

11 **B. Dr. Marquardt**

12 The ALJ accorded no weight to Dr. Marquardt’s opinion because she “based her
13 assessments of [Plaintiff’s] mental impairments on ‘eConsults’ and subjective statements,
14 noting almost no objective findings of her own to support her conclusion that mental
15 impairments would prevent work activity.” AR at 110. The ALJ also noted that Dr.
16 Marquardt is “not a specialist in this area.” *Id.*

17 The ALJ’s determination that Dr. Marquardt’s opinion is based on very little to no
18 objective findings of her own is not supported by substantial evidence. For example, Dr.
19 Marquardt consistently assessed Plaintiff as “oriented x3.”² *See* AR at 374, 381, 387,
20 389, 391, 393, 395, 397, 399, 401, 412, 414, 431 433, 435, 440, 447, 449, 451, 453, 455.
21 At times, Dr. Marquardt noted Plaintiff’s odd affect or that he was “not very socially
22 appropriate.” AR at 412, 414, 431, 433. Moreover, in reviewing Dr. Marquardt’s consult
23 with a mental health specialist, it appears that Dr. Marquardt made her own objective

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26 ² “Oriented x3” means that a person is oriented to person, place, and time, but is not aware of the
27 situation. *See Metro. Life Ins. Co. v. Yeary*, No. 3:94 CV 7534, 1998 U.S. Dist. LEXIS 22835, at *11
28 (N.D. Ohio Feb. 6, 1998) (“The category oriented ‘x3’ means whether an individual is oriented to
person, place and time.”); *see also Fernandez v. Comm’r of Soc. Sec.*, No. 8:14-cv-1272-T-30CM, 2015
U.S. Dist. LEXIS 108133, at *15 (M.D. Fla. July 31, 2015) (stating that oriented x4 indicates that a
person is “oriented to person, place, time and situation”).

1 findings with respect to Plaintiff’s bipolar disorder diagnosis. *See* AR at 474-75 (stating
2 that the specialist indicated the diagnosis could be either a primary psychotic disorder or
3 a mood disorder with psychotic features). Dr. Marquardt’s assessments with respect to
4 diagnosing Plaintiff and his level of orientation were based on observed abnormalities
5 rather than Plaintiff’s subjective statements. *See Popick v. Comm’r of Soc. Sec.*, 32 F.
6 Supp. 3d 157, 168 (N.D.N.Y. 2012) (stating that a diagnosis is likely based upon
7 “observed abnormalities of behavior, rather than any subjective statement by Plaintiff”);
8 *see also* 20 C.F.R. § 404.1502(g) (“Psychiatric signs are medically demonstrable
9 phenomena that indicate specific abnormalities, e.g., abnormalities of behavior, mood,
10 thought, memory, orientation, development, or perception, and must also be shown by
11 observable facts that can be medically described or evaluated.”).

12 Additionally, the Magistrate Judge correctly concluded that a treating primary care
13 physician’s opinion as to Plaintiff’s mental functioning may not be disregarded because
14 the physician is not a mental health specialist. *See Lester v. Chater*, 81 F.3d 821, 833
15 (9th Cir. 1995). Dr. Marquardt is “qualified to give a medical opinion as to [Plaintiff’s]
16 mental state . . . even though [Dr. Marquardt] is not a psychiatrist.” *See Sprague v.*
17 *Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Like the treating physicians in *Sprague* and
18 *Lester*, Dr. Marquardt provided treatment for Plaintiff’s psychiatric impairment,
19 including the prescription of psychotropic medication. *See* AR at 107; *see also Sprague*,
20 812 F.2d at 1232; *Lester*, 81 F.3d at 833. Thus, Dr. Marquardt’s “opinion constitutes
21 ‘competent psychiatric evidence’ and may not be discredited on the ground that [she] is
22 not a board certified psychiatrist.” *Lester*, 81 F.3d at 833 (quoting *Sprague*, 812 F.2d at
23 1232). Moreover, “[a]n integral part of the treating physician’s role is to take into
24 account all the available information regarding all of [her] patient’s impairments—
25 including the findings and opinions of other experts.” *Id.*

26 In any event, the ALJ failed to consider the factors set forth in 20 C.F.R. §
27 404.1527(C)(2)-(6). Accordingly, the Court **OVERRULES** Defendant’s objection to the
28 Magistrate Judge’s finding that the ALJ “did not adequately detail his reasoning in

1 accordance with the ‘specific and legitimate’ standard” and did not weigh the relevant
2 factors in giving less than controlling weight to Dr. Marquardt. Doc. No. 18 at 34.

3 **C. Dr. Henderson**

4 The ALJ found that “Dr. Henderson’s opinion is unsupported by any clinical
5 notations and appears to accept uncritically as true the subjective statements of either
6 [Plaintiff] or his family members” and that his opinion is “inconsistent with [Plaintiff’s]
7 reported activities including cleaning, preparing meals, and caring for his disabled
8 parents.” AR at 111. As such, the ALJ found his opinion unreliable. *Id.*

9 A review of the record reveals that Dr. Henderson’s opinion is based upon his
10 psychotherapy and medication management with Plaintiff for over a year. *See Popick*, 32
11 F. Supp. 3d at 160-61 (stating that a diagnosis is likely based upon “observed
12 abnormalities in Plaintiff’s behavior, not merely Plaintiff’s self-reports”). It is also clear
13 that Dr. Henderson does not “accept uncritically as true the subjective statements” of
14 Plaintiff or his family. *See* AR at 111. For example, Dr. Henderson reported that
15 Plaintiff “is in severe delusion thinking that he is caring for his ill father” and specifically
16 explained that Plaintiff does not do any household activities. AR at 690, 692.

17 Further, the ALJ did not weigh the factors set forth in 20 C.F.R. § 404.1527(C) to
18 accord less than controlling weight to Dr. Henderson. 20 C.F.R. § 404.1527(C)(2)-(6).
19 Based on the foregoing, the ALJ did not adequately provide specific and legitimate
20 reasons for rejecting Dr. Henderson’s opinion, and the Court **OVERRULES** Defendant’s
21 objection on this ground.

22 **2. Evaluating the Opinion of Nonexamining Physician Dr. Koretsky**

23 According to Defendant, the ALJ properly gave partial weight to Dr. Koretsky’s
24 opinion because he found that it “addressed Plaintiff’s reported symptoms and the many
25 normal findings from the mental status examinations.” Doc. No. 19 at 9. When a
26 nonexamining physician’s opinion contradicts an examining or treating physician’s
27 opinion and the ALJ gives greater weight to the nonexamining physician’s opinion, the
28 ALJ must articulate his reasons for doing so. *See Morgan v. Comm’r of Soc. Sec. Admin.*,

1 169 F.3d 595, 600-01 (9th Cir. 1999). “A nonexamining physician’s opinion can
2 constitute substantial evidence if it is supported by other evidence in the record.” *Ste*
3 *Claire v. Astrue*, 752 F. Supp. 2d 1146, 1155 (D. Or. 2010) (citation omitted).

4 Here, the ALJ did not adequately articulate his reasons for providing Dr. Koretsky
5 more weight than the treating physicians, and did not articulate how his opinion is
6 supported by other evidence in the record. *See* AR at 110-11. While the ALJ did find
7 that Dr. Koretsky’s opinion is supported by Plaintiff’s “reported symptoms and findings
8 from multiple mental status exams and psychological testing,” the ALJ did not identify
9 which examinations and tests support Dr. Koretsky’s opinion. *See id.* This does not
10 sufficiently explain how the record as a whole supports Dr. Koretsky’s opinion,
11 particularly where Plaintiff’s treating physicians opined that Plaintiff is suffering severe,
12 disabling mental impairments. Accordingly, the Court agrees with the Magistrate
13 Judge’s finding that “the ALJ must provide additional information and reasoning to reject
14 or discount the opinions of the treating physicians and offer an explanation as to why [Dr.
15 Koretsky’s] conclusion is correct.” *See* Doc. No. 18 at 36. The Court, therefore,
16 **OVERRULES** Defendant’s objection on this ground.

17 **3. Credibility Determinations**

18 Defendant objects to the Magistrate Judge’s finding that the ALJ improperly
19 partially rejected Plaintiff’s and third party testimony. Doc. No. 19 at 10. The ALJ
20 discredited Plaintiff, his mother, and his brother because Plaintiff’s “regular activities are
21 inconsistent with earlier reports,” which suggest that Plaintiff is more capable than
22 alleged. *Id.* The ALJ also found that the objective medical evidence is inconsistent with
23 allegations of disabling symptoms and limitations. AR at 105. The ALJ also gave
24 Plaintiff’s mother and brother “little weight” because of their “inherent bias/subjectivity”
25 and noted “internal inconsistencies” within Plaintiff’s brother’s Third Party Function
26 Report. *Id.*

27 First, the ALJ found that Plaintiff’s reported activities are inconsistent with earlier
28 reports. AR at 104. “[D]aily activities may be grounds for an adverse credibility finding

1 if a [plaintiff] is able to spend a substantial part of his day engaged in pursuits involving
2 performance of physical functions that are transferrable to a work setting.” *Orn v.*
3 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (internal quotation marks omitted). A plaintiff
4 need not be “utterly incapacitated” to be eligible for benefits. *Fair*, 885 F.2d at 603. In
5 this case, Plaintiff testified that he cleans and straightens up around the house and
6 watches over his father, including feeding him, assisting him to the bathroom, and
7 walking with him. AR at 104. While there is conflicting evidence regarding the extent of
8 Plaintiff’s ability to perform these activities,³ they relate to Plaintiff’s physical
9 capabilities. “The fact that Plaintiff is physically able to perform certain tasks, however,
10 has little bearing on [his] reporting of mental impairments. Therefore, Plaintiff’s
11 credibility concerning [his] mental impairments should not be diminished because of
12 [his] ability to carry out some activities of daily living.” *Mackey v. Colvin*, No. 1:14-CV-
13 3075-WF, 2015 WL 853791, at *9 (E.D. Wash. Feb. 26, 2015). Moreover, the ALJ did
14 not articulate whether Plaintiff spends a substantial part of his day engaged in these
15 pursuits, nor did he explain how these functions are transferrable to a work setting. *See*
16 *Orn*, 495 F.3d at 639. As a result, Plaintiff’s and his family members’ credibility
17 regarding Plaintiff’s mental impairments should not be diminished because of his ability
18 to carry out some activities of daily living. *See id.*; *see also Mackey*, 2015 WL 853791,
19 at *9.

20 Second, the ALJ found that the objective medical evidence fails to provide “strong
21 support” for Plaintiff’s and his family members’ allegations of disabling symptoms and
22 limitations. AR at 105. As discussed herein, the Court finds that the ALJ did not provide
23 adequate reasons for rejecting the opinions of Drs. Lessner, Marquardt, and Henderson,
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26 ³ For example, Plaintiff’s mother and brother both stated that Plaintiff does not complete any household
27 chores or cook, and Dr. Henderson opined that Plaintiff was completely delusional in stating that he
28 completes these tasks. AR at 104-05, 690, 692. Additionally, Plaintiff alleged in his disability report
that he needs help undressing and bathing, and that he cannot cook or do household chores due to his
hand tremors. AR at 104, 285.

1 and failed to adequately explain how Dr. Koretsky's opinion is entitled to greater weight.
2 The opinions of Drs. Lessner, Marquardt, and Henderson suggest that the severity of
3 Plaintiff's mental impairments are generally consistent with his and his family's
4 allegations. As such, inconsistency with medical evidence is not an adequate reason for
5 discrediting Plaintiff or his family members. *See Mackey*, 2015 WL 853791, at *9.

6 Based on the foregoing, the Court **OVERRULES** Defendant's objections with
7 respect to the ALJ's credibility determinations.

8 **CONCLUSION**

9 After reviewing the Report and Recommendation in its entirety, the Court finds
10 Judge Stormes' conclusions are thorough, well-reasoned, and supported by applicable
11 law. Accordingly, the Court **ORDERS** as follows:

12 1. The Report and Recommendation [Doc. No. 18] is **ADOPTED** in its
13 entirety;

14 2. Defendant's Objections to the Report and Recommendation [Doc. No. 19]
15 are **OVERRULED**;

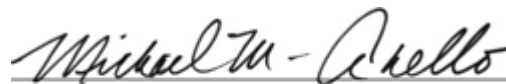
16 3. Plaintiff's Motion for Summary Judgment [Doc. No. 13] is **GRANTED IN**
17 **PART**;

18 4. Defendant's Cross-Motion for Summary Judgment [Doc. No. 14] is
19 **DENIED**; and

20 5. The Court **REMANDS** this matter for further proceedings.

21 **IT IS SO ORDERED.**

22 Dated: September 5, 2018



23 Hon. Michael M. Anello
24 United States District Judge