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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

NATHAN PANTAGES GOMEZ,  
Plaintiff,  
v.  
NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,<sup>1</sup>  
Defendant.

Case No.: 17-cv-01582-MMA (RNB)

**REPORT AND  
RECOMMENDATION REGARDING  
CROSS-MOTIONS FOR SUMMARY  
JUDGMENT**

**(ECF Nos. 10, 11)**

This Report and Recommendation is submitted to the Honorable Michael M. Anello, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Civil Local Rule 72.1(c) of the United States District Court for the Southern District of California.

On October 20, 2016, plaintiff Nathan Pantages Gomez filed a Complaint pursuant to 42 U.S.C. § 405(g) seeking judicial review of a decision by the Commissioner of Social Security denying his applications for a period of disability and disability insurance benefits and for Supplemental Security Income (“SSI”). (ECF No. 1.)

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<sup>1</sup> Plaintiff did not name a specific Commissioner in his Complaint. Accordingly, Nancy A. Berryhill is hereby substituted as the defendant in this case per Fed. R. Civ. P. 25(d).

1 Now pending before the Court and ready for decision are the parties' cross-motions  
2 for summary judgment. (ECF Nos. 10, 11.) For the reasons set forth herein, the Court  
3 **RECOMMENDS** that plaintiff's motion for summary judgment be **GRANTED**, that the  
4 Commissioner's cross-motion for summary judgment be **DENIED**, and that Judgment be  
5 entered reversing the decision of the Commissioner and remanding this matter for further  
6 administrative proceedings.

7  
8 **PROCEDURAL BACKGROUND**

9 On December 19, 2013, plaintiff filed an application for a period of disability and  
10 disability insurance benefits. (Certified Administrative Record ["AR"]) 203-06.) On  
11 February 6, 2014, Plaintiff also protectively filed for SSI. (AR 207-12.) In both  
12 applications, plaintiff alleged onset of disability on October 1, 2012. (AR 203-12.)  
13 Plaintiff stated that he was unable to work due to migraines, five brain surgeries, a herniated  
14 disc, a stroke, anxiety, depression, sciatica, a pinched nerve, a blood clot in right lung, and  
15 high blood pressure. (AR 153, 161.) The applications were denied initially and upon  
16 reconsideration. (AR 15, 152-58, 161-67.)

17 On July 10, 2014, plaintiff requested an administrative hearing. (AR 168-69.) A  
18 hearing was held before an administrative law judge ("ALJ") on September 14, 2015. (AR  
19 35-88.) Plaintiff testified at the hearing, along with a Vocational Expert ("VE"), Connie  
20 Guillory, and a medical expert, John W. Pollard, M.D. (AR 24, 35-88.) Plaintiff was not  
21 represented at the administrative hearing. (AR 36-38.) The ALJ issued a decision on  
22 March 25, 2016, finding that plaintiff was not disabled. (AR 35-37.) Thereafter, plaintiff  
23 requested a review of the decision by the Appeals Council. (AR 199-202.) The ALJ's  
24 decision became the final decision of the Commissioner on July 13, 2017, when the  
25 Appeals Council denied plaintiff's request for review. (AR 1-6.) This timely civil action  
26 followed.

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1 **SUMMARY OF THE ALJ’S FINDINGS**

2 In rendering his decision, the ALJ followed the Commissioner’s five-step sequential  
3 evaluation process. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ found that  
4 plaintiff had engaged in substantial gainful activity from September 8, 2014 through May  
5 2015. (AR 17-18.) Specifically, plaintiff worked part-time from September 8, 2014 to  
6 May 2015 as a night auditor at a hotel, earning approximately \$1,382.63 per month, which  
7 is above substantial gainful activity levels for 2014 and 2015. (AR 17-18.)

8 At step two, the ALJ found that plaintiff had the following severe impairments:  
9 pulmonary embolism, headaches, migraines, obesity, affective disorder, and anxiety  
10 disorder. (AR 18.)

11 At step three, the ALJ found that plaintiff did not have an impairment or combination  
12 of impairments that met or medically equaled the severity of one of the impairments listed  
13 in the Commissioner’s Listing of Impairments. (AR 19.)

14 Next, the ALJ determined that plaintiff had the residual functional capacity (“RFC”)  
15 to perform light work, except plaintiff: (1) must avoid hazards such as moving machinery  
16 and unprotected heights; (2) must avoid climbing ladders, ropes, or scaffolds; (3) is limited  
17 to understanding, remembering, and carrying out simple, routine, repetitive tasks with  
18 standard industry breaks every two hours; (4) is limited to no interaction with the general  
19 public; and (5) is limited to occasional work-related, non-personal, non-social interaction  
20 with co-workers and supervisors involving no more than a brief exchange of information  
21 or hand-off of product. (AR 21-27.)

22 At step four, the ALJ determined that plaintiff was unable to perform any past  
23 relevant work as a customer service representative, warehouse worker, or night auditor.  
24 (AR 27-28.)

25 The ALJ then proceeded to step five of the sequential evaluation process. Based on  
26 the VE’s testimony that a hypothetical person with plaintiff’s vocational profile could  
27 perform the requirements of occupations that existed in significant numbers in the national  
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1 economy (*i.e.*, hand packer, document preparer), the ALJ found that plaintiff was not  
2 disabled from October 1, 2012 through March 25, 2016. (AR 28-29.)

3  
4 **DISPUTED ISSUES**

5 As reflected in plaintiff’s motion for summary judgment, the disputed issues that  
6 plaintiff is raising as the grounds for reversal or remand are as follows:

7 1. Whether the ALJ erred when he failed to reference one of the medical  
8 opinions of record. (ECF No. 10-1 at 17-19.)

9 2. Whether the ALJ made a proper adverse credibility determination with respect  
10 to plaintiff’s subjective symptom testimony. (ECF No. 10-1 at 13-17.)

11  
12 **STANDARD OF REVIEW**

13 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to  
14 determine whether the Commissioner’s findings are supported by substantial evidence and  
15 whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d 841, 846  
16 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but less than a  
17 preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Desrosiers v. Sec’y of*  
18 *Health & Human Servs.*, 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is  
19 “such relevant evidence as a reasonable mind might accept as adequate to support a  
20 conclusion.” *Richardson*, 402 U.S. at 401. This Court must review the record as a whole  
21 and consider adverse as well as supporting evidence. *Green v. Heckler*, 803 F.2d 528, 529-  
22 30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation,  
23 the Commissioner’s decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452  
24 (9th Cir. 1984).

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1 **DISCUSSION**

2 As discussed hereafter, the Court concurs with the Commissioner that reversal is not  
3 warranted based on the ALJ’s alleged failure to reference one of the medical opinions of  
4 record. However, the Court concurs with plaintiff that the ALJ failed to provide legally  
5 sufficient reasons on which he could properly rely in order to reject plaintiff’s subjective  
6 symptom testimony.

7  
8 **A. Reversal is not warranted based on the ALJ’s failure to reference one of**  
9 **the medical opinions of record.**

10 The law is well established in this Circuit that a treating physician’s opinions are  
11 entitled to special weight because a treating physician is employed to cure and has a greater  
12 opportunity to know and observe the patient as an individual. *See McAllister v. Sullivan*,  
13 888 F.2d 599, 602 (9th Cir. 1989). “The treating physician’s opinion is not, however,  
14 necessarily conclusive as to either a physical condition or the ultimate issue of disability.”  
15 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The weight given a treating  
16 physician’s opinion depends on whether it is supported by sufficient medical data and is  
17 consistent with other evidence in the record. *See* 20 C.F.R. §§ 404.1527(d)(2),  
18 416.927(d)(2). If the treating physician’s opinion is uncontroverted by another doctor, it  
19 may be rejected only for “clear and convincing” reasons. *See Lester v. Chater*, 81 F.3d  
20 821, 830 (9th Cir. 1995); *Baxter v. Sullivan*, 923 F.3d 1391, 1396 (9th Cir. 1991). Where  
21 a treating physician’s opinion is controverted, it may be rejected only if the ALJ makes  
22 findings setting forth specific and legitimate reasons that are based on the substantial  
23 evidence of record. *See, e.g., Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (“A  
24 treating physician’s opinion on disability, even if controverted, can be rejected only with  
25 specific and legitimate reasons supported by substantial evidence in the record.”);  
26 *Magallanes*, 881 F.2d at 751; *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987).

27 Plaintiff contends that the ALJ erred when he failed to “even reference the [treating  
28 physician’s] opinion contained in the Mental Impairment Questionnaire at TR 675-679.”

1 (ECF No. 10-1 at 18.) As such, he asserts that “the ALJ did not even attempt to meet his  
2 burden” in rejecting the opinion. (*Id.* at 19.) In fact, as the Commissioner points out, the  
3 ALJ did consider and address this opinion, giving it little weight. (*See* AR 26; ECF No.  
4 11-1 at 23-24.) The Court deems plaintiff’s failure to address the Commissioner’s response  
5 in his reply as a concession that this disputed issue has no merit. (*See* ECF Nos. 13, 14.)  
6

7 **B. The Court is unable to affirm the ALJ’s adverse credibility**  
8 **determination.**

9 In deciding whether to accept a claimant’s subjective symptom testimony, an ALJ  
10 must perform two stages of analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).  
11 First, the claimant must produce objective medical evidence of an impairment or  
12 impairments and show that the impairment or combination of impairments could  
13 reasonably be expected to produce some degree of the symptoms described. *Id.* (citing  
14 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). Second, if the claimant has  
15 presented such evidence and there is no evidence of malingering, the ALJ can reject the  
16 claimant’s testimony about the severity of her symptoms only by offering specific, clear  
17 and convincing reasons for doing so. *Vasquez*, 572 F.3d at 591 (citing *Lingenfelter*, 504  
18 F.3d at 1036)); *see also Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (“[O]nce  
19 the claimant produces objective medical evidence of an underlying impairment, an  
20 adjudicator may not reject a claimant’s subjective complaints based solely on a lack of  
21 objective medical evidence to fully corroborate the alleged severity of pain.”). The ALJ  
22 must state specifically which symptom testimony is not credible and what facts in the  
23 record support that conclusion. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

24 Here, since the ALJ did not cite evidence of malingering and the Commissioner has  
25 not argued that there was evidence of malingering,<sup>2</sup> the Court will apply the “clear and  
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28 <sup>2</sup> (*See* ECF No. 10-1 at 15; ECF No. 11-1 at 8-19.)

1 convincing” standard to the ALJ’s adverse credibility determination. *See Burrell v. Colvin*,  
2 775 F.3d 1133, 1136 (9th Cir. 2014) (applying “clear and convincing” standard where the  
3 government did not argue that a lesser standard should apply based on evidence of  
4 malingering); *see also Ghanim v. Colvin*, 763 F.3d 1154, 1163 n.9 (9th Cir. 2014) (same).

5 Plaintiff alleged that he could not work because of migraines, five brain surgeries, a  
6 herniated disc, a stroke, anxiety, depression, sciatica, a pinched nerve, a blood clot in right  
7 lung, and high blood pressure. (AR 153, 161.) During the administrative hearing, plaintiff  
8 testified that he could not work because of headaches, dizziness, cognitive problems, and  
9 problems concentrating. (AR 67.) Plaintiff had a brain tumor removed in 1991, which did  
10 not recur. (AR 54.) He also had a shunt put in his head in 1992 to prevent hydrocephalus.  
11 (AR 54, 68.)

12 Plaintiff testified that he experienced “really bad” headaches, which reached a 9 on  
13 a pain scale of 1-10, for at least a year prior to the hearing. (AR 49, 68-71.) He further  
14 testified that despite medication, they had become “unmanageable.” (AR 49, 68-69.) He  
15 testified that his doctors had determined that he had calcification and scar tissue related to  
16 his shunt which was causing the headaches. (AR 49.) He testified that his doctors were  
17 trying to manage the headaches, but were unable to do so, and in the four to six weeks prior  
18 to the hearing, plaintiff stopped being able to drive, and had maybe two good days out of a  
19 seven-day period where he was not in bed in pain. (AR 49, 61-62.) Plaintiff further  
20 testified that his surgeon had previously removed scar tissue from his neck (in  
21 approximately 2008), and had informed him that in three to five years, he was going to  
22 need surgery again because of calcification related to the shunt. (AR 67.)

23 Plaintiff testified that when he would have a headache, he could not go anywhere  
24 (*e.g.*, the store). (AR 68.) He testified that he was in bed all day with ice packs and heat  
25 packs. (AR 68.) The pain was located in the back of his neck and radiated up towards his  
26 occipital nerve and then to his frontal lobe. (AR 68.) Plaintiff also testified that he would  
27 get dizzy when he stood up, and that he had to wait until the room stopped spinning before  
28 he could try walking. (AR 76.)

1 Plaintiff testified that he was fired from his part-time job as a night auditor at the  
2 Legoland Hotel in May 2015 because he missed too much work due to his headaches.<sup>3</sup>  
3 (AR 62-64, 69.) Plaintiff further testified that he was fired from his job as a customer  
4 service representative at Sempra Energy in October 2012 because he had too many  
5 absences related to his own health problems, and his wife’s health problems. (AR 64-65.)

6 Plaintiff testified that in the summer of 2014 he had to un-enroll in a master’s  
7 program for education at the University of Phoenix, because he was in bed in so much pain.  
8 (AR 71, 73.) Prior to that, he had been in the program for almost a full year, on a full-time  
9 basis, taking exclusively online classes. (AR 71-72.) Plaintiff testified that he spent 30-  
10 40 hours a week on the program, and “also had to go to schools and do in-house observing.”  
11 (AR 72.) However, he also testified that he was only able to observe about four hours  
12 before he had to un-enroll. (AR 73.) Plaintiff planned on taking some time off and going  
13 back, but he was not able to do so because he did not have the stamina to sit at a computer  
14 to read and answer questions. (AR 74.)

15 Plaintiff testified that after he stopped working in May 2015, he “pretty much” spent  
16 his days in bed. (AR 74.) He testified that it took too much out of him to go to the gym  
17 for some cardio, and that he had gained approximately fourteen pounds in the prior year.  
18 (AR 74.) Plaintiff testified that he did not really do any chores around the house or partake  
19 in any kind of leisure activities. (AR 75.) Plaintiff’s wife took care of him and did  
20 whatever chores needed to be done. (AR 75.)

21 Plaintiff further testified that when he got ready to take his California teaching tests,  
22 that was when he figured out that his cognitive skills, despite being an A/B student, were  
23 “just horrible” and that he was not retaining anything. (AR 72.) He testified that he worked  
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25 <sup>3</sup> Plaintiff testified that he was terminated while in the hospital because he was  
26 missing too much work. (AR 64.) He further testified that after he provided human  
27 resources with documentation of his doctor visits and ambulance rides, he was offered to  
28 stay in the position, but because he was so sick, he felt like the issue would continue and  
turned down the offer. (AR 64.)



1 on his cognitive skills, but he was constantly losing stuff. (AR 76.) He testified that he  
2 had a handicap placard because otherwise he would spend hours looking for his car. (AR  
3 76.)

4 Plaintiff also testified that he received numerous treatments for his headaches,  
5 including: (1) Botox injections (four); (2) epidural injections (eight or nine); (3) H-wave  
6 stimulation treatment; (4) IV with fluids and Dilaudid; and (5) Oxy. (AR 69, 77-79.)  
7 Plaintiff further testified that he had an MRI yearly. (AR 79.)

8 Dr. Pollard, who appeared by telephone, testified that plaintiff was very convincing  
9 in his testimony, and that he did not see any inconsistencies between plaintiff's testimony  
10 and his medical records. (AR 81-82.) At the time of the hearing, however, Dr. Pollard did  
11 not have, and therefore had not reviewed, plaintiff's more recent medical records from  
12 Kaiser and Palomar Medical Center. (AR 34, 48-53.) The most recent records he reviewed  
13 from Kaiser were from June 2014, and the most recent records he reviewed from Palomar  
14 Medical Center were from February 2014. (AR 40-41.)

15 The ALJ determined that although plaintiff's medically determinable impairments  
16 could reasonably be expected to cause the alleged symptoms, plaintiff's statements  
17 concerning the intensity, persistence, and limiting effects of these symptoms were not  
18 entirely credible to the extent they were inconsistent with the ALJ's RFC determination for  
19 light work. (*See* AR 21-27.) In support of this adverse credibility determination, the ALJ  
20 proffered the following reasons: (1) "despite [plaintiff's] allegations of constant headaches  
21 and neck pain, [plaintiff] worked and engaged in substantial gainful activity from  
22 September 2014 to May 2015"; (2) plaintiff "received unemployment insurance benefits  
23 during the relevant period at issue" which required him to "certify that he was willing and  
24 able to engage in work activity, which is inconsistent with a claim for disability"; (3)  
25 plaintiff's "symptoms were relatively controlled under the prescribed treatment regimen";  
26 (4) plaintiff demonstrated an ability to focus and concentrate at the hearing, where he "was  
27 articulate and provided specific information regarding his work history, medical history,  
28 and personal history"; and (5) "some of [plaintiff's] statements regarding the limiting

1 effects of his physical impairments were inconsistent with activities of daily living,”  
2 including: (a) exercising 30 minutes a day, six days a week, at a moderate or strenuous  
3 level in July 2014; (b) being enrolled in a full time master’s degree program from summer  
4 2013 to July 2014, on which he spent 30-40 hours per week, including classroom  
5 observations, and received mostly A’s and B’s; and (c) engaging in heavy lifting in  
6 November 2014. (AR 22.)

7 The ALJ further found that the medical evidence in the record did not support the  
8 degree of limitations alleged by plaintiff. (AR 23.) The ALJ’s opinion contains a lengthy  
9 discussion of plaintiff’s medical records. (See AR 23-27.) In his discussion, the ALJ noted  
10 that that “[i]t does not appear that [plaintiff] has had any emergency treatment or  
11 hospitalizations for his headaches since April 2015,” and his outpatient records indicated  
12 “unremarkable findings” in July 2015. (AR 24.) The ALJ added that there was no evidence  
13 of shunt infection or malfunctioning, and that plaintiff’s medical records indicated his  
14 symptoms were “relatively controlled under the prescribed treatment regimen.” (AR 23-  
15 24.) The ALJ further noted that although plaintiff’s medical records indicated emergency  
16 treatment for headaches (as well as chest pain and/or shortness of breath, depression and  
17 anxiety) prior to May 2015, plaintiff was either attending graduate school and/or engaging  
18 in substantial gainful activity during that period. (AR 23-25.)

19 In his motion, plaintiff contends that the ALJ failed to make adequate specific  
20 findings stating clear and convincing reasons for rejecting plaintiff’s testimony regarding  
21 the severity of his symptoms, because he primarily relied on plaintiff’s statements  
22 regarding physical activity over a year prior to the hearing, which took place on September  
23 14, 2015. (ECF No. 10-1 at 16-17.) Plaintiff notes that he un-enrolled in his master’s  
24 program in July 2014, and the last progress notes regarding his exercise regimen were also  
25 in July 2014. (See *id.* at 17, n.4.) Plaintiff claims that this “rationale cannot be held to be  
26 substantial evidence given its age.” (See *id.* at 17.) Plaintiff further contends that his  
27 testimony regarding his master’s program and physician-ordered exercise regimen did not  
28 demonstrate that he had engaged in daily activities that were easily transferrable to a work

1 environment, where it might be impossible to rest periodically or take medication. (*See id.*  
2 at 14.) In his reply, plaintiff also contends that the ALJ did not adequately address his  
3 testimony that his daily activities had been modified significantly over the course of the  
4 prior year, particularly due to his headaches, and that he was spending five days a week in  
5 bed in pain and was dizzy when he stood up. (ECF No. 14 at 3.)

6 As set forth below, the Court finds that none of the reasons proffered by the ALJ in  
7 support of his adverse credibility finding constituted a legally sufficient reason.

8  
9 1. Plaintiff engaged in substantial gainful activity from September 2014  
10 to May 2015

11 One of the reasons proffered by the ALJ for rejecting plaintiff’s subjective symptom  
12 testimony was that “despite [plaintiff’s] allegations of constant headaches and neck pain,  
13 [plaintiff] worked and engaged in substantial gainful activity from September 2014 to May  
14 2015.” (AR 22.)

15 Plaintiff filed applications on December 19, 2013 and February 6, 2014 for a period  
16 of disability and disability insurance benefits and SSI benefits, alleging onset of disability  
17 on October 1, 2012. (AR 203-12.) After the alleged onset of disability date, as noted by  
18 the ALJ, plaintiff worked “part-time from September 8, 2014 to May 2015, as a night  
19 auditor at a hotel.” (AR 17.) The ALJ further noted that plaintiff “earned \$14.00 per hour  
20 and worked 16-20 hours a week.” (AR 17.) Plaintiff testified that he started working again  
21 because he “needed to bring some money in somehow.” (AR 66.) Plaintiff further testified  
22 that he was fired from the hotel in May 2015 because he missed too much work due to his  
23 headaches. (AR 62-64, 69.)

24 An ALJ is permitted to consider a claimant’s attempts to work or substantial gainful  
25 activity in determining his credibility. *See, e.g., Lingenfelter*, 504 F.3d at 1036. However,  
26 this “reason in and of itself . . . is not a sufficient basis for the ALJ’s adverse credibility  
27 finding.” *Id.* at 1033 (finding the reason insufficient where the claimant worked for nine  
28 weeks after filing an application for disability insurance benefits and SSI benefits). Where,

1 as here, the claimant, “after the relevant time period during which he claimed to be disabled  
2 and facing difficult economic circumstances, tried to work . . . and, because of his  
3 impairments, failed,” it “is not a clear and convincing reason for concluding that his  
4 symptoms could not have precluded him from maintaining employment during the relevant  
5 time period.” *Id.* at 1036-37, 38-39 (noting the Ninth Circuit has “suggested that similar  
6 evidence that a claimant tried to work and failed actually *supported* his allegations of  
7 disabling pain” and that the “Social Security Administration permits recipients of disability  
8 benefits to work on a trial basis without the trial work period adversely affecting their  
9 disability status”).

10 Accordingly, the Court finds that plaintiff’s period of part-time work after the  
11 alleged onset of disability did not constitute a legally sufficient reason on which the ALJ  
12 could properly rely in support of his adverse credibility determination.

13  
14 2. Plaintiff received unemployment benefits

15 Another reason proffered by the ALJ was that plaintiff “received unemployment  
16 insurance benefits during the relevant period at issue” which required him to “certify that  
17 he was willing and able to engage in work activity, which is inconsistent with a claim for  
18 disability.” (AR 22.) The ALJ specifically noted that the record “indicates [plaintiff]  
19 received such benefits in the second quarter of 2013, third quarter of 2013, fourth quarter  
20 of 2013, and third quarter of 2015. (AR 22.)

21 A claimant’s receipt of unemployment benefits could be a legally sufficient reason  
22 to find a claimant not credible if it evidenced that the claimant considered himself capable  
23 of work and held himself out as available for work. *See Copeland v. Bowen*, 861 F.2d 536,  
24 542 (9th Cir. 1988). However, a claimant’s receipt of unemployment benefits does not  
25 preclude receipt of Social Security benefits: for example, a person capable of only part-  
26 time work may receive benefits under both programs. Compare Cal. Unemp. Ins. Code §  
27 1253.8 (an individual shall not be disqualified from unemployment benefits solely on the  
28 basis that he is only available for part-time work); with 20 C.F.R. § 404.1545(b) (claimant

1 under the Social Security Act is assessed for his capacity to work “on a regular and  
2 continuing basis”); and Social Security Ruling (“SSR”) 96–8p, 1996 WL 374184, at \*2  
3 (defining “a regular and continuing basis” as “8 hours a day, for 5 days a week, or an  
4 equivalent work schedule”). Accordingly, a claimant’s receipt of unemployment benefits  
5 does not necessarily constitute a legally sufficient reason for an adverse credibility  
6 determination when the record “does not establish whether [the claimant] held himself out  
7 as available for full-time or part-time work.” *See Carmickle v. Comm’r, Soc. Sec. Admin.*,  
8 533 F.3d 1155, 1161-62 (9th Cir. 2008); *see also Giuliano v. Colvin*, 577 F. App’x. 859,  
9 865 (10th Cir. 2014) (noting that claimant who was receiving unemployment benefits was  
10 also looking for part-time work, which may not have been inconsistent with allegations of  
11 total disability under the Social Security Act); *Mulanax v. Comm’r of Soc. Sec.*, 293 F.  
12 App’x. 522, 523 (9th Cir. 2008) (receipt of unemployment benefits that were payable to  
13 applicants available for temporary or part-time jobs was not necessarily inconsistent with  
14 a claim of disability under the Social Security Act).

15 Here, although the record does contain evidence that plaintiff received  
16 unemployment benefits for three quarters in 2013 and one quarter in 2015, the record does  
17 not provide any context for that evidence. (*See* AR 22, Exhibits 6D, 8D.) The record does  
18 not contain plaintiff’s unemployment benefits application, does not specify whether  
19 plaintiff claimed he was available for full-time or part-time work, and does not otherwise  
20 specify the basis for any application for unemployment benefits. Moreover, as noted  
21 above, after the alleged onset of disability date, plaintiff’s only employment was part-time.

22 Accordingly, the Court finds that the evidence in the record that plaintiff received  
23 unemployment benefits did not give rise to a legally sufficient reason on which the ALJ  
24 could properly rely in support of his adverse credibility determination. *See, e.g., Plummer*  
25 *v. Colvin*, No. CV-13-08282-PCT-BSB, 2014 WL 7150682, at \*16 (D. Az. Dec. 16, 2014)  
26 (claimant’s receipt of unemployment benefits was not clear and convincing reason for  
27 ALJ’s adverse credibility determination where the record did not contain the  
28 unemployment benefits application nor establish the manner in which claimant held herself

1 out as available for work in completing any such application); *Wood v. Colvin*, No. 2:13-  
2 CV-00190-JTR, 2014 WL 4407719, at \*9 (E.D. Wash. Sept. 8, 2014) (same where record  
3 contained no certification by claimant that he was physically and mentally able to work  
4 full-time); *Miller v. Colvin*, No. CV 13-1259-E, 2014 WL 1873276, at \*4 (C.D. Cal. May  
5 9, 2014) (same where there was no indication whether claimant based her claim for  
6 unemployment benefits on full-time or part-time work); *Ellis v. Astrue*, No. CV-10-6253-  
7 HZ, 2011 WL 5025839, at \*5-6 (D. Or. Oct. 20, 2011) (same where record did not contain  
8 claimant’s unemployment benefits application).

9  
10 3. Plaintiff’s symptoms were relatively controlled under the prescribed  
11 treatment regimen

12 Another reason proffered by the ALJ was that plaintiff’s “symptoms were relatively  
13 controlled under the prescribed treatment regimen.” (AR 22.) With regard to plaintiff’s  
14 headaches, the ALJ relied on the fact that although plaintiff received emergency treatment  
15 for his headaches and neck pain in 2013, 2014, and 2015, including a hospitalization in  
16 April 2015, as well as epidural injections, Botox injections, and used an H-wave unit, he  
17 “was attending school or working at the time of these visits and hospitalization.” (AR 23-  
18 24.) The ALJ also noted that a review of systems from July 2015 revealed “unremarkable  
19 findings” and that it did not appear that plaintiff had received any emergency treatment or  
20 hospitalizations for his headaches since April 2015. (AR 24.) Thus, the ALJ concluded  
21 that “[d]espite some emergency treatment and receiving various injections, [plaintiff’s]  
22 symptoms have been relatively controlled under the treatment regimen.” (AR 24.) The  
23 ALJ added that it was “telling[.]” that plaintiff was able to work and attend school despite  
24 his treatment, and “notabl[e]” that plaintiff only missed six days of work at the hotel during  
25 this period. (AR 24.)

26 Evidence that treatment can effectively control an impairment may be a clear and  
27 convincing reason to find a claimant less credible. *See* 20 C.F.R. §§ 404.1529(c)(3)(iv),  
28 416.929(c)(3)(iv); *Warre v. Comm’r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.

1 2006) (stating that “[i]mpairments that can be controlled effectively with medication are  
2 not disabling for purposes of determining eligibility for SSI benefits.”).

3 Here, however, substantial evidence in the record does not support the ALJ’s  
4 conclusion. Plaintiff’s treatment records reflect that plaintiff consistently complained of  
5 chronic severe headaches that were unmanageable and often described as disabling. *See*  
6 *Lankford v. Astrue*, No. 1:12-cv-01517-NJV, 2013 WL 416221, at \*5 (N.D. Cal. Jan. 31,  
7 2013) (concluding that the ALJ’s finding that a claimant’s pain was controlled did not  
8 support his credibility assessment because the ALJ failed to recognize that the medication  
9 did not resolve the problem and claimant continued to complain of chronic pain); *see also*  
10 AR 18 (ALJ noting that the “claimant complained of headaches throughout the relevant  
11 period.”).

12 At the ALJ hearing, Dr. Pollard testified that plaintiff was very convincing in his  
13 testimony, and that he did not see any inconsistencies between plaintiff’s testimony and his  
14 medical records. (AR 81-82.) In summarizing the record, Dr. Pollard testified that  
15 plaintiff’s primary symptoms were a headache and neck pain, cognitive changes,  
16 depression, anxiety, and panic attacks. (AR 53.) He further testified that “[m]ultiple  
17 treatments have not been helpful.” (AR 54.)

18 At the time of the hearing, however, Dr. Pollard did not have, and therefore had not  
19 reviewed, plaintiff’s more recent medical records from Kaiser and Palomar Medical  
20 Center. (AR 34, 48-53.) The most recent records he reviewed from Kaiser were from June  
21 2014, and the most recent records he reviewed from Palomar Medical Center were from  
22 February 2014. (AR 40-41.) He had not reviewed plaintiff’s exhibits 11F through 13F.  
23 (*See* AR 52.) The ALJ purported to consider the subsequent records in his decision. (*See*  
24 AR 22-27.)

25 The late-obtained treatment notes not reviewed by Dr. Pollard indicate that plaintiff  
26 continued to have chronic severe headaches throughout 2014 and into at least August 2015.  
27 (*See* AR 779, 798-802, 804-06, 810-11, 836, 872, 892, 909-11.) According to plaintiff’s  
28

1 evaluations, the immediate cause of the headaches was not clear, but he continued to  
2 receive treatment for them. (*See, e.g.*, AR 846-52, 911.)

3 In January 2015, plaintiff went to the emergency room because he was experiencing  
4 daily headaches, which were not responding to treatment, but that morning he woke up  
5 with a more severe headache than normal, along with dizziness. (AR 909, 922.) Treatment  
6 notes beginning in February 2015 also indicated plaintiff was receiving epidural cortisone  
7 injections to the C4-C5 area. (AR 832-34, 841-42.) Plaintiff reported having “much  
8 success” with the injections, but also reported that all injections were “helpful for short  
9 term none for long term.” (AR 832-34, 841-42.) At the same time he sought treatment in  
10 February 2015, he reported his pain to be a 7/8 out of 10, with his worst pain level in the  
11 last two weeks reaching a 10/10. (AR 832, 836.)

12 In April 2015, when plaintiff discussed a cervical epidural steroid injection with his  
13 physician at Kaiser, the physician noted that given the “absence of cervical radiculitis and  
14 minimal findings on mri,” the “expectation of benefit of epidural injection is low when  
15 current etiology of pain sx unclear.” (AR 847.) The physician further noted that at the C4-  
16 5 area plaintiff had “no significant disk bulge,” “no canal stenosis,” “unremarkable” facet  
17 joints, and “no neural foraminal stenosis.” (AR 846.) However, plaintiff thereafter  
18 received a cervical epidural steroid injection for his neck pain on April 20, 2015. (AR  
19 850.) There was a “reduction” of neck pain after the procedure. (AR 852.)

20 The following day, however, plaintiff went to the emergency room with a different  
21 type of headache and neck pain in the region of his shunt, and numbness in his left upper  
22 extremity. (AR 856-58.) Plaintiff’s CT and shunt series appeared normal, but he was  
23 admitted for pain control. (AR 863-69.) During a neurosurgery consult the next day, a  
24 physician noted that plaintiff’s shunt was “non-functional” and had been so for at least the  
25 past year. (AR 871.) A different physician noted that the new “head ache and neck pain  
26 exacerbation” were of undetermined origin, and there was “[n]o evidence of shunt infection  
27 or malfunction; in fact the shunt may be chronically non-functioning based on its CT  
28 appearance.” (AR 874.) The following day, plaintiff’s headache was overall better, but he



1 still needed an IV, and a physician stated that plaintiff required inpatient care to be safely  
2 and appropriately treated. (AR 879.)

3 In June 2015, plaintiff reported to his physicians that he was not functional about  
4 four days a week because of headaches, and was hoping to see chronic pain management  
5 for possible acupuncture. (AR 892.) Plaintiff's physician thought acupuncture would be  
6 a good option, but it was not covered by plaintiff's insurance. (AR 901.) In July 2015,  
7 plaintiff reported getting disabling headaches three to four days per week, and sought a re-  
8 referral back to chronic pain management. (AR 896.) In August 2015, plaintiff reported  
9 that he was "struggling with a wean off of his pain medications," and was having to spend  
10 more time in bed. (AR 899.) Plaintiff was attempting to decrease his reliance on Percocet,  
11 one of his pain medications. (See AR 901.)

12 As of July 2015, the final patient record, there was no indication plaintiff's chronic  
13 severe headaches had subsided or were being controlled by medication and/or treatment.  
14 As of July 28, 2015, plaintiff was noted to be taking the following medication: Lioresal for  
15 pain, Percocet for pain, Xanax, Prinzide/Zestoretic for blood pressure, Keppra, Flexeril for  
16 muscle spasms, Naprosyn for pain, Buspar, Cymbalta, and Desyrel. (See AR 901-02.)

17 Based on the foregoing, the Court finds that the ALJ's determination that plaintiff's  
18 symptoms were relatively controlled under the prescribed treatment regimen was not  
19 supported by the medical record as a whole. *See generally Ghanim*, 763 F.3d at 1161-62  
20 (an ALJ's consideration of the medical evidence must include the "context of the overall  
21 diagnostic picture" or the medical record on the whole). Therefore, the Court finds that  
22 this also was not a legally sufficient reason on which the ALJ could properly rely in support  
23 of his adverse credibility determination.

24  
25 4. Plaintiff demonstrated an ability to focus and concentrate at the hearing

26 Another reason proffered by the ALJ was that plaintiff demonstrated an ability to  
27 focus and concentrate at the hearing, where he "was articulate and provided specific  
28 information regarding his work history, medical history, and personal history." (AR 22.)

1 An ALJ may “consider his or her own recorded observations of the individual as part  
2 of the overall evaluation of the credibility of the individual’s statements.” SSR 96-7p, 1996  
3 WL 374186, at \*5; *but see Orn v. Astrue*, 495 F.3d 625, 639-40 (9th Cir. 2007) (“The ALJ’s  
4 observations of a claimant’s functioning may not form the sole basis for discrediting a  
5 person’s testimony.”). However, while this observation relates, at least tangentially, to  
6 plaintiff’s complaints of cognitive problems (*e.g.*, lack of retention, misplacing items, and  
7 forgetting where he parked his car) and problems concentrating, it does not relate to  
8 plaintiff’s testimony regarding his chronic severe headaches. Accordingly, the Court finds  
9 that this “reason” did not constitute a legally sufficient reason on which the ALJ could  
10 properly rely to reject plaintiff’s subjective symptom testimony regarding the pain severity  
11 of his headaches.

12  
13 5. Inconsistent with activities of daily living

14 An additional reason proffered by the ALJ was that “some of [plaintiff’s] statements  
15 regarding the limiting effects of his physical impairments were inconsistent with activities  
16 of daily living,” including: (a) exercising 30 minutes a day, six days a week, at a moderate  
17 or strenuous level in July 2014; (b) being enrolled in a full time master’s degree program  
18 from summer 2013 to July 2014, on which he spent 30-40 hours per week, including  
19 classroom observations, and received mostly A’s and B’s; and (c) engaging in heavy lifting  
20 in November 2014. (AR 22.)

21 Engaging in daily activities that are incompatible with the severity of symptoms  
22 alleged can support an adverse credibility determination. *See Orn*, 495 F.3d at 639; *Batson*  
23 *v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004). Daily activities may  
24 also be “grounds for an adverse credibility finding ‘if a claimant is able to spend a  
25 substantial part of his day engaged in pursuits involving the performance of physical  
26 functions that are transferable to a work setting.’” *Orn*, 495 F.3d at 639 (quoting *Fair v.*  
27 *Bowen*, 885 F.2d 597, 603 (9th Cir.1989)); *see also Smolen v. Chater*, 80 F.3d 1273, 1284  
28

1 n. 7 (9th Cir. 1996) (recognizing that “many home activities may not be easily transferrable  
2 to a work environment”).

3  
4 a. *Exercise*

5 In finding that plaintiff’s statements regarding the limiting effect of his physical  
6 impairments were inconsistent with his activities of daily living, the ALJ cited progress  
7 notes from July 2014 indicating that plaintiff exercised 30 minutes a day, six days per week  
8 at moderate or strenuous level. (AR 22.)

9 In December 2014, plaintiff’s treatment notes indicate plaintiff had been exercising  
10 on his physician’s orders, but stopped with low back pain. (See AR 824, 827, 832, 836,  
11 884, 892, 894.) They also indicate plaintiff reported that his neck and head pain was worse  
12 with light activity. (See AR 842, 899.) There is no indication in the notes that he started  
13 exercising again. (See AR 824, 827, 832, 836, 884, 892, 894.) During the hearing, plaintiff  
14 testified that he had been experiencing “really bad” headaches for at least a year prior to  
15 the hearing, and since he stopped working in May 2015, he “pretty much” spent his days  
16 in bed. (AR 49, 68-71, 74.) He further testified that he had been unable to go to the gym  
17 and had gained approximately fourteen pounds in the past year as a result. (AR 74.)

18 Based on the foregoing, it appears that plaintiff’s daily exercising for a brief period  
19 of time more than a year prior to the hearing is not inconsistent with his pain testimony  
20 concerning his chronic severe headaches. Therefore, the Court finds that this was not a  
21 legally sufficient reason on which the ALJ could properly rely in support of his adverse  
22 credibility determination.

23  
24 b. *Engaged in heavy lifting in November 2014*

25 The ALJ also cited the fact that plaintiff engaged in heavy lifting in November 2014  
26 as a reason to find plaintiff’s statements regarding the limiting effect of his physical  
27 impairments to be inconsistent with his activities of daily living. (AR 22.) The ALJ cited  
28 a medical progress note that stated plaintiff complained of sharp chest pains after “recent

1 heavy lifting after moving.” (AR 820-21.) Although this activity may be inconsistent with  
2 certain physical ailments plaintiff did not testify about, the Court finds that this was not a  
3 legally sufficient reason on which the ALJ could properly rely in support of his adverse  
4 credibility determination.

5  
6 c. *Enrolled in full-time degree program*

7 The ALJ further cited the fact that plaintiff was enrolled in a full-time master’s  
8 degree program from summer 2013 until July 2014, and received mostly A’s and B’s, as a  
9 reason for finding plaintiff’s statements regarding the limiting effect of his physical  
10 impairments to be inconsistent with his daily activities. (AR 22.) The ALJ added that “[i]n  
11 this program, [plaintiff] was also spending 30-40 hours per week on education-related  
12 activities, including classroom observations.” (AR 22.)

13 The Court finds that, based on the record before it, plaintiff’s participation in his  
14 master’s degree program does not appear to be inconsistent with his subjective pain  
15 testimony. As the ALJ noted, plaintiff’s master’s degree program was exclusively online,  
16 and plaintiff does not claim that he was unable to function 24/7 from summer 2013 until  
17 July 2014. Moreover, plaintiff testified that he was only able to observe about four hours  
18 before he had to un-enroll from his program in July 2014, because his headaches were  
19 getting progressively worse. (AR 72-73.) He stated that it got to the point where he  
20 “couldn’t do the work, the schoolwork, the hours that were needed to be in observing and  
21 I couldn’t do any of that because I was, again, in bed in pain.” (AR 73.) Plaintiff further  
22 testified that in the period leading up to the hearing, he was bedridden most of the week.  
23 (AR 49, 61-62.) Plaintiff was also never able to return to school. (AR 74.)

24 Based on the foregoing, the Court finds that plaintiff’s participation in his master’s  
25 degree program did not give rise to a legally sufficient reason on which the ALJ could  
26 properly rely to reject plaintiff’s subjective symptom testimony regarding the pain severity  
27 of his headaches.

28 ///

1           6.     Unsupported by objective medical evidence

2           The sole remaining reason proffered by the ALJ was that plaintiff’s subjective  
3 symptom complaints were unsupported by the objective medical evidence, citing the same  
4 reasons set forth above: (1) it does not appear that plaintiff has had any emergency  
5 treatment or hospitalizations for his headaches since April 2015; and (2) plaintiff’s  
6 symptoms have been relatively controlled under the prescribed treatment regimen, noting  
7 that plaintiff was able to work and attend school. (See AR 23-24.) However, since the  
8 ALJ’s other reasons were legally insufficient to support his adverse credibility  
9 determination, this remaining reason cannot be legally sufficient by itself. See *Robbins v.*  
10 *Soc. Sec. Admin.*, 466 F.3d 880, 884 (9th Cir. 2006) (where ALJ’s initial reason for adverse  
11 credibility determination was legally insufficient, his sole remaining reason premised on  
12 lack of medical support for claimant’s testimony was legally insufficient); *Light v. Soc.*  
13 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997) (“[A] finding that the claimant lacks  
14 credibility cannot be premised wholly on a lack of medical support for the severity of his  
15 pain.”).

16  
17           7.     Harmless Error

18           The Commissioner argues that plaintiff has not shown how any alleged error was  
19 harmful because, although the ALJ discounted plaintiff’s symptom allegations, he  
20 nonetheless included limitations in plaintiff’s RFC<sup>4</sup> that accommodated his subjective  
21 complaints. (ECF No. 11-1 at 20.) The Court is mindful that harmless error principles  
22 apply in social security cases. See *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
23 (“We have long recognized that harmless error principles apply in the Social Security Act  
24 context.”). However, plaintiff testified, *inter alia*, that his condition had deteriorated in the  
25 year prior to the hearing and that he had maybe two good days out of a seven-day period  
26

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27           <sup>4</sup>     A claimant’s RFC is what a claimant can still do despite his limitations. See  
28 *Smolen*, 80 F.3d at 1291.

1 where he was not bedridden in pain. (AR 49, 61-62.) The ALJ did not accommodate this  
2 subjective symptom testimony in his RFC determination. The Court therefore finds that  
3 the ALJ's failure to make a proper adverse credibility determination was not harmless  
4 error.

5  
6 **CONCLUSION AND RECOMMENDATION**

7 For the foregoing reasons, this Court **RECOMMENDS** that plaintiff's motion for  
8 summary judgment be **GRANTED**, that the Commissioner's cross-motion for summary  
9 judgment be **DENIED**, and that Judgment be entered reversing the decision of the  
10 Commissioner and remanding this matter for further administrative proceedings.

11 Any party having objections to the Court's proposed findings and recommendations  
12 shall serve and file specific written objections within 14 days after being served with a  
13 copy of this Report and Recommendation. *See* Fed. R. Civ. P. 72(b)(2). The objections  
14 should be captioned "Objections to Report and Recommendation." A party may respond  
15 to the other party's objections within 14 days after being served with a copy of the  
16 objections. *See id.*

17 IT IS SO ORDERED.

18 Dated: June 18, 2018



19 \_\_\_\_\_  
20 ROBERT N. BLOCK  
21 UNITED STATES MAGISTRATE JUDGE  
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