



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

JAMES HALL,  
 Plaintiff,  
 v.  
 NANCY A. BERRYHILL, Acting  
 Commissioner of Social Security,  
 Defendant.

Case No.: 3:17-cv-02258-LAB (RNB)  
**REPORT AND  
 RECOMMENDATION REGARDING  
 CROSS-MOTIONS FOR SUMMARY  
 JUDGMENT**  
 (ECF Nos. 19, 21)

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

On November 6, 2017, plaintiff James Hall 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 application for a period of disability and disability insurance benefits. (ECF No. 1.)

Now pending before the Court and ready for decision are the parties' cross-motions for summary judgment. For the reasons set forth herein, the Court **RECOMMENDS** that plaintiff's motion for summary judgment be **DENIED**, that the Commissioner's cross-

1 motion for summary judgment be **GRANTED**, and that Judgment be entered affirming the  
2 decision of the Commissioner and dismissing this action with prejudice.

### 4 **PROCEDURAL BACKGROUND**

5 On February 19, 2014, plaintiff protectively filed an application for a period of  
6 disability and disability insurance benefits under Title II of the Social Security Act, alleging  
7 disability beginning September 4, 2013. (Certified Administrative Record ["AR"] 17, 242-  
8 43, 335.) After his claim was denied initially and upon reconsideration (AR 110-14, 116-  
9 21), plaintiff requested an administrative hearing before an administrative law judge  
10 ("ALJ"). (AR 123-24.) An administrative hearing was held on October 30, 2015. Plaintiff  
11 appeared at the hearing with counsel, and testimony was taken from him and a vocational  
12 expert ("VE"). (AR 61-88.)

13 On March 1, 2016, a supplemental administrative hearing was held. Plaintiff  
14 appeared at this hearing with the same counsel, and testimony was taken from him and a  
15 different VE. (AR 50-60.)

16 On June 6, 2016, another supplemental administrative hearing was held. Plaintiff  
17 appeared at this hearing with different counsel, and testimony was taken from him and  
18 telephonically from a medical expert. (AR 36-49.)

19 As reflected in his June 24, 2016 hearing decision, the ALJ found that plaintiff had  
20 not been under a disability, as defined in the Social Security Act, from September 4, 2013,  
21 through the date of the decision. (AR 17-29.) The ALJ's decision became the final  
22 decision of the Commissioner on September 8, 2017, when the Appeals Council denied  
23 plaintiff's request for review. (AR 1-3.) This timely civil action followed.

### 25 **SUMMARY OF THE ALJ'S FINDINGS**

26 In rendering his decision, the ALJ followed the Commissioner's five-step sequential  
27 evaluation process. *See* 20 C.F.R. § 404.1520. At step one, the ALJ found that plaintiff  
28 had not engaged in substantial gainful activity since September 4, 2013, the alleged onset

1 date. (AR 19.)

2 At step two, the ALJ found that plaintiff had the following severe impairments: right  
3 ankle injury with multiple surgeries, osteochondral lesion, and chronic pain; obesity;  
4 history of thoracic fractures; obstructive sleep apnea; degenerative disc/joint  
5 disease/spondylosis; and metatarsalgia. (AR 20.)

6 At step three, the ALJ found that plaintiff did not have an impairment or combination  
7 of impairments that met or medically equaled the severity of one of the impairments listed  
8 in the Commissioner's Listing of Impairments. (AR 20.)

9 Next, the ALJ determined that plaintiff had the residual functional capacity ("RFC")  
10 to perform sedentary work as defined in 20 C.F.R. § 404.1567(a), with certain limitations.  
11 Specifically, the ALJ found that plaintiff could occasionally perform postural activities;  
12 could not climb ladders, ropes, and scaffolds; could not be exposed to hazards, extreme  
13 cold, or vibrations; and could not operate foot controls with the right lower extremity, but  
14 could frequently operate foot controls with the left lower extremity. The ALJ also found  
15 that plaintiff could frequently reach, handle, finger, push, and pull. (AR 21.)

16 For purposes of his step four determination, the ALJ found that plaintiff's past work  
17 as an electrician and carpenter met the criteria of past relevant work, as defined in 20 C.F.R.  
18 § 404.1560. The ALJ proceeded to find, based on the testimony of the VE at the March 1,  
19 2016 supplemental hearing, that the demands of plaintiff's past relevant work exceeded his  
20 RFC. (AR 27.)

21 The ALJ then proceeded to step five of the sequential evaluation process. Based on  
22 the testimony of the VE at the March 1, 2016 supplemental hearing that a hypothetical  
23 person with plaintiff's vocational profile and RFC could perform the requirements of  
24 occupations that existed in significant numbers in the national economy (*i.e.*, office helper,  
25 assembler, and information clerk), the ALJ found that plaintiff was not disabled. (AR 28-  
26 29.)

27 //

28 //

1 **PLAINTIFF'S CLAIM OF ERROR**

2 As reflected in plaintiff's summary judgment motion, plaintiff claims that, in  
3 determining plaintiff's RFC, the ALJ erred when he implicitly rejected the opinions of two  
4 medical experts that plaintiff could only sit for one hour at a time. (See ECF No. 19-1 at  
5 4-8.)

6  
7 **STANDARD OF REVIEW**

8 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to  
9 determine whether the Commissioner's findings are supported by substantial evidence and  
10 whether the proper legal standards were applied. *DeLorme v. Sullivan*, 924 F.2d 841, 846  
11 (9th Cir. 1991). Substantial evidence means "more than a mere scintilla" but less than a  
12 preponderance. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Desrosiers v. Sec'y of*  
13 *Health & Human Servs.*, 846 F.2d 573, 575-76 (9th Cir. 1988). Substantial evidence is  
14 "such relevant evidence as a reasonable mind might accept as adequate to support a  
15 conclusion." *Richardson*, 402 U.S. at 401. This Court must review the record as a whole  
16 and consider adverse as well as supporting evidence. *Green v. Heckler*, 803 F.2d 528, 529-  
17 30 (9th Cir. 1986). Where evidence is susceptible of more than one rational interpretation,  
18 the Commissioner's decision must be upheld. *Gallant v. Heckler*, 753 F.2d 1450, 1452  
19 (9th Cir. 1984).

20  
21 **DISCUSSION**

22 **A. The ALJ erred when he implicitly rejected the opinions of the two**  
23 **medical experts that plaintiff could only sit for one hour at a time.**

24 On December 10, 2015, Anthony Francis, M.D. completed a Medical Source  
25 Statement and responded to medical interrogatories at the behest of the ALJ. (AR 839-49.)  
26 Dr. Francis opined in the Medical Source Statement that plaintiff could lift and carry 10  
27 pounds occasionally and frequently; sit for *one hour at a time* (uninterrupted); stand for  
28 one hour at a time and walk for one hour at a time; and stand and walk two hours

1 cumulatively and sit for six hours in an eight hour workday. (AR 840.) Dr. Francis further  
2 opined that plaintiff could frequently reach, handle, finger, feel, push/pull, and operate foot  
3 controls bilaterally. (AR 841.) Dr. Francis also opined that plaintiff could occasionally  
4 climb stairs and ramps, balance, stoop, kneel, crouch, and crawl, but never climb ladders  
5 or scaffolds. (AR 842.) Finally, Dr. Francis opined that plaintiff should never be exposed  
6 to unprotected heights, extreme cold, and vibrations. (AR 843.)

7 At the June 6, 2016 supplemental hearing, the ALJ called upon the services of a  
8 medical expert. (A.R. 36-49.) Dr. Thompson stated that he “feel[s] that the RFC of 17F,  
9 dated 12/10/2015 [Dr. Francis’s Medical Source Statement and interrogatory responses],  
10 appears appropriate with one change.” Dr. Thompson believed that plaintiff was capable  
11 of lifting and carrying 11-20 pounds occasionally, as opposed to 10 pounds. (AR 41.)

12 Thus, both medical experts agreed that plaintiff only was capable of sitting for one  
13 hour at a time. In his decision, the ALJ stated that he was giving “great weight to the  
14 opinions of Dr. Francis and Dr. Thompson, as they are generally consistent with the  
15 evidence.” (AR 25.) Plaintiff contends that, by not including the limitation to sitting for  
16 one hour at a time in his RFC assessment, the ALJ implicitly rejected the opinions of the  
17 two medical experts because sedentary work contemplates breaks every two hours and thus  
18 the ability to sit uninterrupted for that length of time. Plaintiff further contends that it was  
19 error for the ALJ to reject the medical experts’ opinions without articulating any basis for  
20 doing so. (*See* ECF No. 19-1 at 5-8.)

21 The Commissioner does not dispute that, in determining that plaintiff had the RFC  
22 for sedentary work with postural, environmental, and manipulative restrictions and limits  
23 on operating foot controls, the ALJ implicitly rejected the opinions of Dr. Francis and Dr.  
24 Thompson that plaintiff was limited to sitting for one hour at a time because sedentary  
25 work contemplates breaks every two hours. However, the Commissioner contends that the  
26 ALJ did not err because his RFC assessment was supported by substantial evidence. (*See*

27 //

28 //

1 ECF No. 21-1 at 8.)<sup>1</sup> In support of this contention, the Commissioner cites the opinions of  
2 the State agency physicians that plaintiff could sit for six hours in an eight-hour workday  
3 with normal breaks (*see id.* at 11, citing AR 93-94 and 103-05) and the March 11, 2016  
4 opinion of Dr. Schmitter that plaintiff could sit for four hours at a time (*see id.* at 12, citing  
5 AR 957-61).

6 The fallacy of the Commissioner's contention is that, as noted above, the standard  
7 of review is whether the Commissioner's findings are supported by substantial evidence  
8 **and whether the proper legal standards were applied.** Because the ALJ stated that he  
9 was giving "great weight" to the opinions of Dr. Francis and Dr. Thompson, he was  
10 required either (1) to include the limitation to sitting for one hour at a time in plaintiff's  
11 RFC, or (2) to explain why he did not. *See Flores v. Berryhill*, 2018 WL 2439579, at \*1  
12 (9th Cir. 2018); *see also* Social Security Ruling<sup>2</sup> ("SSR") 96-8p, at \*7 ("The RFC  
13 assessment must always consider and address medical source opinions. If the RFC  
14 assessment conflicts with an opinion from a medical source, the adjudicator must explain  
15 why the opinion was not adopted.").

---

17  
18 <sup>1</sup> The Commissioner also contends that the ALJ "reasonably discounted Plaintiff's  
19 subjective complaints about his symptoms and limitations, including testimony that  
20 Plaintiff had problems sitting due to his back impairments." However, plaintiff is not  
21 contesting the ALJ's adverse credibility determination, just his implicit rejection of the two  
22 medical experts' opinions regarding the one-hour sitting limitation. Moreover, in making  
23 an adverse credibility determination, it is incumbent on the ALJ to specify which  
24 statements by plaintiff concerning his or her symptoms and functional limitations were not  
25 credible and/or in what respect(s) plaintiff's statements were not credible. *See Reddick v.*  
26 *Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.  
27 1996). Here, the Court notes that in his summary of plaintiff's administrative hearing  
28 testimony, the ALJ did not specifically mention plaintiff's testimony regarding his limited  
ability to sit (*see* AR 21-22), which the ALJ seemingly interpreted at the hearing as  
requiring a sit/stand option at will (*see* AR 84). The Court therefore disagrees with the  
Commissioner that the ALJ "reasonably discounted" plaintiff's testimony regarding his  
limited ability to sit due to his back impairments.

<sup>2</sup> Social Security Rulings are binding on ALJs. *See Terry v. Sullivan*, 903 F.2d 1273,  
1275 n.1 (9th Cir. 1990).

1 The Court therefore finds that the ALJ did not follow the proper legal standards when  
2 he implicitly rejected the opinions of Dr. Francis and Dr. Thompson that plaintiff was  
3 limited to sitting for one hour at a time.

4  
5 **B. The ALJ's error was harmless.**

6 The Commissioner contends that even if the ALJ erred, the error was harmless. (*See*  
7 ECF No. 21-1 at 14-17.) Harmless error analysis does apply in this context. *See, e.g.,*  
8 *Marsh v. Colvin*, 792 F.3d 1170, 1172-73 (9th Cir. 2015); *Garrison v. Colvin*, 759 F.3d  
9 995, 1012 (9th Cir. 2014). An error is harmless if it is “inconsequential to the ultimate  
10 nondisability determination.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56  
11 (9th Cir. 2006). In reviewing the ALJ’s non-disability determination for harmless error,  
12 the Court considers the evidence in the record as a whole. *See Molina v. Astrue*, 674 F.3d  
13 1104, 1115 (9th Cir. 2012).

14 Here, the record reflects that, based on plaintiff’s testimony about needing to shift  
15 positions while seated, the ALJ asked the VE at the October 30, 2015 supplemental hearing  
16 whether jobs would be available for an individual who needed to sit/stand at will and had  
17 other limitations generally consistent with plaintiff’s RFC. The VE testified that such a  
18 person could perform *inter alia* assembler work, Dictionary of Occupational Titles (DOT)  
19 713.687-026, a sedentary occupation that did not require overhead reaching or operation  
20 of foot controls and could be performed sitting or standing. (*See* AR 83-85.)

21 At the March 1, 2016 supplemental hearing, the ALJ posited a hypothetical question  
22 with the limitations in plaintiff’s RFC to another VE, although this hypothetical did not  
23 include a sit/stand option. The VE testified that such a person could perform *inter alia*  
24 assembler work, DOT 713.687-026—the same job that the VE had identified at the October  
25 30, 2015 hearing. (*See* AR 57-58.)

26 Therefore, while the Court is unable to find that ALJ’s step five determination that  
27 plaintiff could perform the occupations of office helper and information clerk was  
28 supported by substantial evidence, the Court is able to find that the ALJ’s error with respect

1 to the medical experts' opinions was harmless because the ALJ's determination that  
2 plaintiff could perform the occupation of assembler was supported by substantial evidence.  
3 *See Lara v. Astrue*, 305 F. App'x 324, 326 (9th Cir. 2008) ("To the extent the VE was  
4 overly broad and included jobs that [plaintiff] could both perform and not perform, any  
5 error is harmless so long as the jobs that could be done are enough to support the ALJ's  
6 decision."). Moreover, based on the VE's testimony that there were 50,000 assembler jobs  
7 available nationally (*see* AR 57-58), the Court finds that the Commissioner has satisfied  
8 her burden at step five of demonstrating that work exists in significant numbers in the  
9 national economy that plaintiff could do despite his limitations. *See, e.g., Gutierrez v.*  
10 *Comm'r of Soc. Sec.*, 740 F.3d 519, 527-29 (9th Cir. 2014) (25,000 jobs nationally meets  
11 the statutory standard of "work which exists in significant numbers either in the region  
12 where such individual lives or in several regions of the country"); *Peck v. Colvin*, 2013 WL  
13 3121280, at \*5 (C.D. Cal. June 19, 2013) (14,000 jobs nationally significant); *Yepiz v.*  
14 *Colvin*, 2013 WL 1339450, at \*9 (C.D. Cal. Mar. 28, 2013) (15,000 jobs nationally  
15 significant); *Haase v. Astrue*, 2012 WL 3670639, at \*8 (C.D. Cal. Aug. 27, 2012) (13,000  
16 jobs nationally significant).

## 17 18 RECOMMENDATION

19 The Court therefore **RECOMMENDS** that plaintiff's motion for summary  
20 judgment be **DENIED**, that the Commissioner's cross-motion for summary judgment be  
21 **GRANTED**, and that Judgment be entered affirming the decision of the Commissioner  
22 and dismissing this action with prejudice.

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

27 //

28 //



1 to the other party's objections within 14 days after being served with a copy of the  
2 objections. *See id.*

3 IT IS SO ORDERED.

4  
5 Dated: November 13, 2018



6 ROBERT N. BLOCK  
7 United States Magistrate Judge

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28