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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HUGO G.,

Plaintiff,

v.

ANDREW SAUL, Commissioner of
Social Security,

Defendant.

Case No.: 20cv153-MDD

**ORDER DENYING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT’S CROSS MOTION
FOR SUMMARY JUDGMENT**

[ECF Nos. 15, 16]

Hugo G. (“Plaintiff”) filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final administrative decision of the Commissioner of the Social Security Administration (“Commissioner”) denying Plaintiff’s application for a period of disability and disability insurance benefits under Title II of the Social Security Act (“Act”) and for supplemental security income under Title XVI of the Act. (AR at 15).¹ For the reasons expressed herein, the Court **DENIES** Plaintiff’s motion for summary judgment [ECF No. 15] and **GRANTS** the Commissioner’s cross motion for summary

¹ “AR” refers to the Certified Administrative Record filed on November 19, 2020. (ECF No. 11).

1 judgment [ECF No. 16].

2 **I. BACKGROUND**

3 Plaintiff was born October 5, 1977. (AR at 25). On the alleged
4 disability onset date, Plaintiff was 34 years old, which defined him as a
5 younger individual. (*Id.*).

6 **A. Procedural History**

7 On October 15, 2015, Plaintiff protectively filed an application for a
8 period of disability and disability insurance benefits under Title II of the Act
9 and supplemental security income under Title XVI of the Act, alleging a
10 disability beginning on November 20, 2011. (AR at 15). After his application
11 was denied initially and upon reconsideration, Plaintiff requested a hearing
12 before an administrative law judge (“ALJ”). (*Id.*). An administrative hearing
13 was held on February 8, 2019. (AR at 32-54). Plaintiff appeared and was
14 represented by his attorney, Steven Rosales. (*See id.*). Testimony was taken
15 from Plaintiff, Gloria Lassaw, an impartial vocational expert (“VE”), and Dr.
16 Gaeta, a medical expert. (*Id.*). On February 21, 2019, the ALJ issued a
17 decision denying Plaintiff’s claim for a period of disability and disability
18 insurance benefits and for supplemental security income. (AR at 15-26).

19 Plaintiff sought review with the Appeals Council. (*See* AR at 5). On
20 November 26, 2019, the Appeals Council denied Plaintiff’s request for review
21 and declared the ALJ’s decision to be the final decision of the Commissioner
22 in Plaintiff’s case. (AR at 1). This timely civil action followed.

23 **II. DISCUSSION**

24 **A. Legal Standard**

25 Sections 405(g) and 1383(c)(3) of the Social Security Act allow
26 unsuccessful applicants to seek judicial review of a final agency decision of
27 the Commissioner. 42 U.S.C. §§ 405(g), 1383(c)(3). The scope of judicial

1 review is limited in that a denial of benefits will not be disturbed if it is
2 supported by substantial evidence and contains no legal error. *Id.*; *see also*
3 *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1993 (9th Cir. 2004).

4 Substantial evidence “is a ‘term of art’ used throughout administrative
5 law to describe how courts are to review agency factfinding.” *Biestek v.*
6 *Berryhill*, 139 S. Ct. 1148, 1154 (2019). Courts look “to an existing
7 administrative record and ask[] whether it contains ‘sufficien[t] evidence’ to
8 support the agency’s factual determinations.” *Id.* “[T]he threshold for such
9 evidentiary sufficiency is not high. Substantial evidence, [the Supreme
10 Court] has said, is ‘more than a mere scintilla.’ It means—and only means—
11 ‘such relevant evidence as a reasonable mind might accept as adequate to
12 support a conclusion.” *Id.* The Ninth Circuit explains that substantial
13 evidence is “more than a mere scintilla but may be less than a
14 preponderance.” *Molina v. Astrue*, 674 F.3d 1104, 1110-11 (9th Cir. 2012)
15 (quotation marks and citations omitted), *superseded by regulation on other*
16 *grounds*.

17 An ALJ’s decision is reversed only if it “was not supported by
18 substantial evidence in the record as a whole or if the ALJ applied the wrong
19 legal standard.” *Id.* “To determine whether substantial evidence supports
20 the ALJ’s determination, [the Court] must assess the entire record, weighing
21 the evidence both supporting and detracting from the agency’s conclusion.”
22 *Ahearn v. Saul*, 988 F.3d 1111, 1115 (9th Cir. 2021) (citing *Mayer v.*
23 *Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The Court “may not reweigh
24 the evidence or substitute [it’s] judgment for that of the ALJ.” *Id.* “The ALJ
25 is responsible for determining credibility, resolving conflicts in medical
26 testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035,
27 1039 (9th Cir. 1995). “When the evidence can rationally be interpreted in

1 more than one way, the court must uphold the [ALJ's] decision.” *Mayes*, 276
2 F.3d at 459.

3 Section 405(g) permits a court to enter a judgment affirming, modifying
4 or reversing the Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing
5 court may also remand the matter to the Social Security Administration for
6 further proceedings. *Id.*

7 **B. Summary of the ALJ’s Findings**

8 In rendering his decision, the ALJ followed the Commissioner’s five-step
9 sequential evaluation process. *See* C.F.R. § 404.1520. At step one, the ALJ
10 found that Plaintiff did not engage in substantial gainful activity during the
11 period from his amended alleged onset date of November 20, 2011. (AR at
12 17).

13 At step two, the ALJ found that Plaintiff had the following severe
14 impairments: post gunshot wound with humerus fracture with history of
15 nonunion and chronic pain. (*Id.*).

16 At step three, the ALJ found that Plaintiff did not have an impairment
17 or combination of impairments that met or medically equaled one of the
18 impairments listed in the Commissioner’s Listing of Impairments. (AR at 21)
19 (citing 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d),
20 404.1525 and 404.1526)).

21 Next, after considering the entire record, the ALJ determined that
22 Plaintiff had the residual functional capacity (“RFC”) to perform light work
23 with the following limitations:

24 [T]he claimant can lift and/or carry 20 pounds occasionally and 10
25 pounds frequently; the claimant can sit for 6 hours in an 8-hour
26 workday; the claimant can stand and/or walk for 6 hours in an 8-
27 hour workday; The claimant can frequently climb ramps, stairs,
ropes, ladders and scaffolds; the claimant can frequently balance,

1 stoop, kneel, crouch and crawl; the claimant can frequently be
2 exposed to environmental factors but claimant cannot be exposed
3 to concentrated temperature extremes; the claimant cannot reach,
4 handle, finger, push or pull with the left upper extremity, but the
5 left upper extremity may assist the right upper extremity with
6 lifting and/or carrying within the aforementioned limitations.

7 (AR at 19-20).

8 The ALJ said that his RFC assessment was based on all the evidence
9 and the extent to which Plaintiff's symptoms can reasonably be accepted as
10 consistent with the objective medical evidence and other evidence. (AR at
11 20). The ALJ also stated that he considered the opinion evidence in
12 accordance with the requirements of 20 C.F.R. 404.1527 and 416.927. (*Id.*).

13 The ALJ then proceeded to step four of the sequential evaluation
14 process. He found Plaintiff was unable to perform his past relevant work.
15 (AR at 24).

16 For the purposes of his step five determination, the ALJ accepted the
17 testimony of VE Gloria Lassaw. The ALJ determined that Plaintiff could
18 perform jobs identified by the VE which exist in significant numbers in the
19 national economy. For example, cashier (DOT 211.462-010), usher (DOT
20 344.677-014), and advertising material distributor (DOT 230.687-010).

21 **C. Issues in Dispute**

22 The issues in dispute in this case are: (1) whether the ALJ properly
23 considered Plaintiff's subjective symptom testimony; and (2) whether the ALJ
24 properly considered the lay witness testimonial evidence.

25 **1. Plaintiff's Subjective Symptom Testimony**

26 Plaintiff testified that he cannot lift more than ten to fifteen pounds
27 and that he has "real bad nerve damage." (AR at 37). He further testified
that hot and cold temperatures bother him. (*Id.*). In terms of pain, Plaintiff

1 explained that he has a constant, throbbing pain, that he is always tense, and
2 that his nerves feel “knotted up.” (AR at 40). He testified that medication
3 helps “a bit,” but “not really to be honest.” (*Id.*). Plaintiff conceded that he
4 would likely be able to do a job where he primarily used his non-injured arm,
5 like a greeter or an usher. (AR at 38-39).

6 “[W]here, as here, the ALJ ‘determines that a claimant for Social
7 Security benefits is not malingering and has provided objective medical
8 evidence of an underlying impairment which might reasonably produce the
9 pain or other symptoms [he] alleges, the ALJ must reject the claimant’s
10 testimony about the severity of those symptoms only by providing specific,
11 clear, and convincing reasons for doing so.’” *Lambert v. Saul*, 980 F.3d 1266,
12 1277 (9th Cir. 2020) (quoting *Brown-Hunter v. Colvin*, 806 F.3d 487, 488-89
13 (9th Cir. 2015)). “This requires the ALJ to ‘specifically identify the testimony
14 [from a claimant] she or he finds not to be credible and . . . explain what
15 evidence undermines that testimony.’” *Id.* (quoting *Treichler v. Comm’r of*
16 *Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir. 2014)).

17 In this case, the ALJ generically found that “the claimant’s
18 statements concerning the intensity, persistence and limiting effects of these
19 symptoms are not entirely consistent with the medical evidence and other
20 evidence in the record for the reasons explained in this decision.” (AR at 20).
21 The Ninth Circuit has repeatedly found this language to be insufficient and
22 “boilerplate.” *See id.* at 1277; *Treichler*, 775 F.3d at 1103; *see also Brown-*
23 *Hunter*, 806 F.3d at 493 (finding the statement to be “conclusory” and that it
24 “failed to identify specifically which of Brown-Hunter’s statements she found
25 not credible and why”). Like *Lambert*, *Brown-Hunter*, and *Treichler*, the
26 ALJ’s decision in this case does not “identify what parts of the claimant’s
27 testimony were not credible and why.” *Treichler*, 775 F.3d at 1103.

1 This Court “cannot review whether the ALJ provided specific, clear,
2 and convincing reasons for rejecting [Plaintiff’s] . . . testimony where, as here,
3 the ALJ never identified *which* testimony [he] found not credible, and never
4 explained *which* evidence contradicted that testimony.” *Lambert*, 980 F.3d
5 at 1277 (quoting *Brown-Hunter*, 806 F.3d at 494). The ALJ was required to
6 do more than offer “non-specific conclusions” that Plaintiff’s testimony was
7 inconsistent with his medical record. *Id.* (quoting *Burrell v. Colvin*, 775 F.3d
8 1133, 1138 (9th Cir. 2014) (explaining that we may not “take a general
9 finding—an unspecified conflict between [c]laimant’s testimony . . . and her
10 reports to doctors—and comb the administrative record to find specific
11 conflicts”)). The ALJ provided a detailed overview of Plaintiff’s medical
12 history, but “providing a summary of medical evidence . . . is not the same as
13 providing clear and convincing *reasons* for finding the claimant’s symptom
14 testimony not credible.” *Brown-Hunter*, 806 F.3d at 494. As such, the ALJ
15 erred in assessing Plaintiff’s subjective symptom testimony.

16 The Court must next consider whether the error was harmless. “An
17 error is harmless only if it is inconsequential to the ultimate nondisability
18 determination, or if despite the legal error, the agency’s path may reasonably
19 be discerned.” *Id.* (citations and internal quotation marks omitted).

20 *Lambert*, *Brown-Hunter*, and *Treichler* found errors based on this
21 boilerplate language not harmless. *See Lambert*, 980 F.3d at 1269; *Brown-*
22 *Hunter*, 806 F.3d at 489-91; *Treichler*, 775 F.3d at 1095-97 n.2. However, the
23 plaintiffs’ testimonies and RFCs in those cases were contradictory. For
24 example, in *Lambert*, the plaintiff testified that it is difficult for her to walk,
25 that her pain is “debilitating,” and that she “spends most of her time in her
26 bedroom ‘because it’s unbearable to move.’” *Lambert*, 980 F.3d at 1269.
27 Nonetheless, the ALJ found that Plaintiff “could perform modified ‘light

1 work,’ which includes lifting up to twenty pounds, a ‘good deal of walking and
2 standing,’ and ‘pushing and pulling of arm or leg controls.’” *Id.* In *Brown-*
3 *Hunter*, the plaintiff was assessed with an RFC “to perform light work”
4 despite the plaintiff’s testimony that she could only sit for about an hour and
5 stand for about forty-five minutes. *Brown-Hunter*, 806 F.3d at 489-91. In
6 *Treichler*, the plaintiff testified that he was “not very mobile,” and has to sit
7 down after five to ten minutes of standing due to pain. *Treichler*, 775 F.3d at
8 1095 (internal quotation marks omitted). The ALJ found that the plaintiff
9 could perform light work, except that he “must change positions every 15
10 minutes. . . .” *Id.* at 1097 n.2 (internal quotation marks omitted).

11 This case is distinguishable because Plaintiff’s testimony supports
12 the RFC determination. (See AR at 24) (indicating that the RFC “assessment
13 is supported by the testimony of [Plaintiff]”). For example, the RFC and
14 Plaintiff’s testimony both indicate that Plaintiff can lift ten pounds
15 frequently and twenty pounds occasionally if his left upper extremity assists
16 the right upper extremity, that Plaintiff cannot be exposed to concentrated
17 temperature extremes, and that Plaintiff cannot reach, handle, finger, push
18 or pull with the upper left extremity. (See AR at 19-20, 37-40, 283-91).
19 Further, Plaintiff does not challenge the RFC assessment and does not
20 specify portions of his testimony that require a more restrictive RFC. (ECF
21 No. 15-1). Accordingly, the Court finds that the ALJ’s error was harmless.

22 2. Lay Witness Testimony

23 The Commissioner’s regulations require that, in determining
24 whether a claimant is disabled, the ALJ consider statements provided by
25 nonmedical sources such as family members about the severity of the
26 claimant’s impairments and how the impairments and any related symptoms
27 affect the claimant’s ability to work. See 20 C.F.R. §§ 404.1513(b)(4),

1 404.1529(a). Lay witness testimony as to how a claimant's symptoms affect
2 the claimant's ability to work is competent evidence and cannot be
3 disregarded without providing specific reasons germane to the testimony
4 rejected. *See Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).

5 Plaintiff's sister completed a third-party function report. (AR at 273-
6 80). She visits with Plaintiff three to four days a week and explained that
7 Plaintiff is constantly in pain. (AR at 273). According to Plaintiff's sister,
8 Plaintiff does not do much because his doctor put limitations on his arm. (AR
9 at 277). He does not do any household chores, care for anyone else, and does
10 not cook for himself. (AR at 273-75). She also explains that Plaintiff stutters
11 and gets nervous when he speaks. (AR at 278).

12 The ALJ assigned Plaintiff's sister's opinion "partial weight" because
13 it "is not supported by the clinical or diagnostic medical evidence," including
14 opinion evidence from acceptable medical sources that indicate Plaintiff is
15 more functional than his sister opined. (AR at 21). For example, she opined
16 that Plaintiff was constantly in pain and could not move his arm much, but
17 the medical record shows that Plaintiff's pain "is somewhat abated on his
18 medication, that he had regained range of motion in his shoulder, and that
19 his last surgery was successful." (*Id.*). The medical record does show that
20 Plaintiff had functional range of motion at least as of June 10, 2016. (AR at
21 647). Plaintiff regained full range of motion on July 7, 2016. (AR at 617).
22 Moreover, Drs. J. Hartman, B. Harris, and Gaeta opined that Plaintiff could
23 perform light work activity. (AR at 46-48, 63-64, 75-77, 88-91, 99-101). An
24 ALJ can reject lay witness testimony to the extent that it conflicts with other
25 testimony and the medical evidence. *Bayliss v. Barnhart*, 427 F.3d 1211,
26 1218 (9th Cir. 2005); *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).
27 Accordingly, the ALJ did not err in evaluating Plaintiff's sister's testimony.

1 **III. CONCLUSION**

2 Based on the foregoing, the Court **DENIES** Plaintiff's motion for
3 summary judgment and **GRANTS** the Commissioner's cross-motion for
4 summary judgment. The Clerk of Court is instructed to enter judgment
5 accordingly.

6 **IT IS SO ORDERED.**

7 Dated: June 23, 2021



8 Hon. Mitchell D. Dembin
9 United States Magistrate Judge

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