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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 JASON BLOUNT,

12 Plaintiff,

13 v.

14 KILOLO KIJAKAZI, Acting Commissioner of
15 Social Security,

16 Defendant.

Case No.: 21cv679-BLM

**ORDER GRANTING PLAINTIFF'S
MERITS BRIEF**

[ECF NO. 36]

17 Plaintiff, who is proceeding pro se, brought this action for judicial review of the Social
18 Security Commissioner's ("Defendant") "erroneous ruling affecting his monthly entitlement to
19 Supplemental Security Insurance Disability Benefits pursuant to 42 USC 1383(c)." ECF No. 14.
20 Before the Court are Plaintiff's Merits Brief [ECF No. 36] and Defendant's Response in Opposition
21 to Plaintiff's Merits Brief [ECF No. 38]. Plaintiff did not file a Reply. See Docket. After careful
22 consideration of the pleadings and supporting documents, the Court **GRANTS** Plaintiff's Merits
23 Brief and **REMANDS** for further proceedings consistent with this order.

24 **PROCEDURAL BACKGROUND**

25 On August 26, 2019, Plaintiff filed a Title II application for a period of disability and
26 disability insurance benefits alleging disability beginning on August 3, 2018. Administrative
27 Record ("AR") at 151-160. The claims were initially denied on September 26, 2019, and upon
28 reconsideration on January 9, 2020. Id. at 80-84, 89-83. Plaintiff requested an administrative

1 hearing on February 10, 2020. Id. at 94-97.

2 On July 13, 2020, a telephonic hearing was held before Administrative Law Judge (“ALJ”) William K. Mueller. Id. 31-57. Plaintiff and an impartial vocational expert (“VE”), Nelly K. Katsell, 3 testified at the hearing. Id. at 32. In a written decision dated July 22, 2020, ALJ Mueller 4 determined that Plaintiff was not disabled under the Social Security Act. Id. at 26. On 5 September 1, 2020, Plaintiff requested review by the Appeals Council. Id. at 148-150. The 6 Appeals Council denied review of the ALJ’s ruling, and on January 12, 2021, the ALJ decision 7 became the final decision of the Defendant. Id. at 1-2.

8 On April 16, 2021, Plaintiff filed the instant action seeking judicial review of the denial of 9 his application for Social Security Disability Insurance Benefits for lack of disability. ECF No. 1. 10 The Court dismissed Plaintiff’s complaint with leave to amend on April 21, 2021. ECF No. 5. On 11 December 14, 2021, Plaintiff filed his first amended complaint. ECF No. 7. The Court dismissed 12 Plaintiff’s first amended complaint with leave to amend on December 22, 2021. ECF No. 8. 13 Plaintiff filed a second amended complaint on January 28, 2022 [ECF No. 9], which the Court 14 dismissed with leave to amend on February 2, 2022. ECF No. 12. On March 7, 2022, Plaintiff 15 filed his third amended complaint [ECF No. 14], which the Court determined survived *sua sponte* 16 screening and directed the United States Marshal to effectuate service. ECF No. 16.

17 **ALJ’S DECISION**

18 At step one of the sequential review, the ALJ determined that Plaintiff had not engaged 19 in substantial gainful activity during the relevant time period. AR at 21. At step two, he 20 determined that Plaintiff “ha[d] the following severe impairments: carpal tunnel syndrome, 21 major joint dysfunction, and peripheral neuropathy (20 CFR 416.920(c)).” Id. At step three, 22 the ALJ found that Plaintiff’s medically determinable impairments or combination of impairments 23 did not meet or medically equal the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 24 1 (20 C.F.R. 416.920(d), 416.925, and 416.926). Id. at 23. At step four, the ALJ considered 25 Plaintiff’s severe impairments and determined that his residual functional capacity (“RFC”) 26 permitted him 27

28 to perform medium work as defined in 20 CFR 416.967(c)[.] Specifically, the

1 [plaintiff] is able to lift and carry up to 50 pounds occasionally, and 25 pounds
2 frequently. The [plaintiff] is able to sit up to 6 hours in an 8-hour workday. The
3 [plaintiff] is able to stand or walk up to 6 hours in an 8-hour workday. Regarding
4 positional tasks the [plaintiff] is able to climb ropes, ladders or scaffolds frequently
but not continuously. Moreover, with his left upper extremity he is able to reach,
handle and finger frequently but not continuously.

5 Id. The ALJ found that while Plaintiff's "medically determinable impairments could reasonably
6 be expected to cause the alleged symptoms; . . . [Plaintiff's] statements concerning the intensity,
7 persistence and limiting effects of these symptoms are not entirely consistent with the medical
8 evidence and other evidence in the record." AR at 24. The ALJ concluded that Plaintiff was
9 not disabled as he could perform his past relevant work (other than Stocker) and other work
10 that exists in significant numbers in the national economy given his age, education, work
11 experience, and RFC. Id. at 25, 26.

12 **STANDARD OF REVIEW**

13 Section 405(g) of the Social Security Act permits unsuccessful applicants to seek judicial
14 review of the Commissioner's final decision. 42 U.S.C. § 405(g). The scope of judicial review is
15 limited in that a denial of benefits will not be disturbed if it is supported by substantial evidence
16 and contains no legal error. Id.; see also Miner v. Berryhill, 722 Fed.Appx. 632, 633 (9th Cir.
17 2018) (We review the district court's decision de novo, disturbing the denial of benefit only if
18 the decision "contains legal error or is not support by substantial evidence." (quoting Tommasetti
19 v. Astrue, 522 F.3d 1035, 1038 (9th Cir. 2008)). Substantial evidence is "more than a mere
20 scintilla but may be less than a preponderance." Ahearn v. Saul, 988 F.3d 1111, 1115 (9th Cir.
21 2011) (quoting Molina v. Astrue, 674 F.3d 1104, 1110–11 (9th Cir. 2012) (quotation marks and
22 citation omitted), *superseded by regulation on other grounds*). It is relevant evidence that a
23 reasonable person might accept as adequate to support a conclusion after considering the entire
24 record. Ahearn, 988 F.3d at 1115; see also Biestek v. Berryhill, 139 S.Ct. 1148, 1154 (2019);
25 Mar for Mar v. Saul, 838 Fed.Appx. 290, 291 (9th Cir. 2021) (holding that substantial evidence
26 means "such relevant evidence as a reasonable mind might accept as adequate to support a
27 conclusion." (citation omitted)). "In determining whether the Commissioner's findings are
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1 supported by substantial evidence, [the court] must review the administrative record as a whole,
2 weighing both the evidence that supports and the evidence that detracts from the [ALJ's]
3 conclusion." Laursen v. Barnhard, 127 Fed.Appx. 311, 312 (9th Cir. 2005) (quoting Reddick v.
4 Chater, 157 F.3d 715, 720 (9th Cir. 1998)). Where the evidence can reasonably be construed
5 to support more than one rational interpretation, the court must uphold the ALJ's decision. See
6 Ahearn, 988 F.3d at 1115–16 (citing Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001)).
7 This includes deferring to the ALJ's credibility determination and resolution of evidentiary
8 conflicts. See Ahearn, 988 F.3d at 1115 ("[t]he ALJ is responsible for determining credibility
9 resolving conflicts in medical testimony, and for resolving ambiguities," and "we reverse only if
10 the ALJ's decision was not supported by substantial evidence in the record as a whole") (quoting
11 Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)).

12 Even if the reviewing court finds that substantial evidence supports the ALJ's conclusions,
13 the court must set aside the decision if the ALJ failed to apply the proper legal standard in
14 weighing the evidence and reaching his or her decision. See Miner, 722 Fed.Appx. at 633.
15 Section 405(g) permits a court to enter judgment affirming, modifying, or reversing the
16 Commissioner's decision. 42 U.S.C. § 405(g). The reviewing court also may remand the matter
17 to the Social Security Administration for further proceedings. Id.

18 **DISCUSSION**

19 A. Plaintiff's Subjective Complaints

20 Plaintiff's first argument is that the ALJ failed to provide clear and convincing reasons to
21 discount his subjective pain and symptom testimony. ECF No. 36 at 6. Plaintiff argues that
22 there is no evidence that his babysitting or can collecting activities include skills that are
23 transferable to the work setting. Id. at 7-8. Plaintiff further argues that there is insufficient
24 evidence in the record regarding the scope and extent of his daily activities, including his
25 babysitting and can collecting, to support the ALJ's adverse credibility determination. Id.

26 Defendant contends that the ALJ properly discounted Plaintiff's subjective complaints
27 because they were inconsistent with his activity level. ECF No. 38 at 1. In addition, Defendant
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1 asserts that the ALJ adequately rejected Plaintiff's testimony because it was inconsistent with
2 the objective medical evidence. Id. at 3.

3 1. Plaintiff's Testimony

4 At the July 13, 2020 hearing, Plaintiff, who appeared without counsel, testified that he
5 had been collecting cans for approximately five months and collected cans two to three hours a
6 week. AR at 43. Plaintiff explained that he asks family and friends to save their recyclables and
7 he collects them when he can, either by driving to retrieve the cans or having his niece drop
8 them at his home. Id. Plaintiff testified that he babysits his five-year-old daughter when her
9 mother is at work but provided no further explanation. Id. at 44. Plaintiff also testified that he
10 attended college but dropped out in 2016, after he was in a car accident that injured his left
11 arm. Id. Plaintiff stated that he has nerve damage that started on August 3, 2018 but does not
12 provide details regarding that damage. Id. at 45. Plaintiff stated that he experiences daily arm
13 pain and random back pain. Id. Plaintiff further stated that he lost most of the strength in his
14 left arm and experiences constant numbness and tingling but can still move his fingers. Id. at
15 45-46. Plaintiff also testified that the pain and numbness prevent him from "really us[ing] his
16 left arm as [he] used to be able to[.]" Id. at 46. When the ALJ asked Plaintiff whether he has
17 "any use of [his left arm] at all[.]" Plaintiff testified:

18 [W]hen I pick stuff up with my right arm, I can still tuck my arm . . . with my
19 elbow into my side. I'm still not able to carry stuff [] just kind of put all the weight
20 mostly on my right arm. If I get like, too much usage it makes it hurt worse and,
21 like, all days it's hot or cold, hot or cold. And so, the more I use it [] the worse it
22 gets and the pain . . . medication that [the doctors] prescribe, it just doesn't work.

21 Id. at 46.

22 Plaintiff also indicated that he was unable to return to driving a forklift because he could
23 not control the forklift due to the vibration. Id. at 47. Plaintiff stated that he knows how to
24 write computer code, but the limited use of, and pain in, his left arm prevents him from being
25 employed. Id. at 48. When asked if he was right-handed, Plaintiff responded that he "use[s]
26 my right hand" and when asked if he writes with his right hand, replied "I write with my left
27 hand and my right hand now." Id. at 49.

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1 2. Relevant Law

2 The Ninth Circuit has established a two-part test for evaluating a claimant’s subjective
3 symptom testimony. See Zuniga v. Saul, 801 Fed.Appx. 465, 466 (9th Cir. 2019) (citing Vasquez
4 v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009)). First, the ALJ “must determine whether the
5 claimant has presented objective medical evidence of an underlying impairment which could
6 reasonably be expected to produce the pain or other symptoms alleged.” Id. (quoting
7 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)). The claimant need not prove that
8 the impairment reasonably could be expected to produce the alleged degree of pain or other
9 symptoms; the claimant need only prove that the impairment reasonably could be expected to
10 produce some degree of pain or other symptom. See Garrison v. Colvin, 759 F.3d 995, 1014
11 (9th Cir. 2014) (quoting Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996)). If the claimant
12 satisfies the first element “and there is no evidence of malingering, the ALJ can only reject the
13 claimant’s testimony about the severity of her symptoms if she gives ‘specific, clear and
14 convincing reasons’ for the rejection.” Zuniga, 801 Fed.Appx. at 466 (quoting Lingenfelter, 504
15 F.3d at 1036). “General findings are insufficient, rather, the ALJ must identify what testimony is
16 not credible and what evidence undermines the claimant’s complaints.” Roberts v. Saul, 829
17 Fed.Appx. 757, 760 (9th Cir. 2020) (quoting Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995)
18 *superseded by regulation on other grounds*). The ALJ’s findings must be “sufficiently specific to
19 permit the court to conclude that the ALJ did not arbitrarily discredit [Plaintiff’s] testimony.”
20 Werlein v. Berryhill, 725 Fed.Appx. 534, 535 (9th Cir. 2018) (quoting Tommasetti, 533 F.3d at
21 1039 (quoting Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002))).

22 When weighing the claimant’s testimony, “an ALJ may consider . . . reputation for
23 truthfulness, inconsistencies in testimony or between testimony and conduct, daily activities,
24 and unexplained, or inadequately explained, failure to seek treatment or follow a prescribed
25 course of treatment.” Orn v. Astrue, 495 F.3d 625, 636 (9th Cir. 2007) (internal quotation marks
26 and citation omitted). An ALJ also may consider the claimant’s work record and testimony from
27 doctors and third parties regarding the “nature, severity, and effect of the symptoms” of which
28 the claimant complains. Lenhart v. Astrue, 252 Fed.Appx. 787, 788 (9th Cir. 2007) (quoting Light

1 v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir. 1997)); see also 20 C.F.R. § 404.1529(c). If
2 the ALJ's finding is supported by substantial evidence, the court may not second-guess his or
3 her decision. See Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1162-63 (9th Cir.
4 2008) (where the ALJ's credibility assessment is supported by substantial evidence, it will not
5 be disturbed even where some of the reasons for discrediting a claimant's testimony were
6 improper).

7 As an initial matter, neither party contests the ALJ's determination that Plaintiff has the
8 following severe impairments: "carpal tunnel syndrome, major joint dysfunction, and peripheral
9 neuropathy (20 CFR 416.920(c))." AR at 21. Because the ALJ determined that Plaintiff's
10 "medically determinable impairments could reasonably be expected to cause the alleged
11 symptoms"—a finding that is not contested by either party—the first prong of the ALJ's inquiry
12 regarding the Plaintiff's subjective symptoms is satisfied. Id. at 24; see Lingenfelter, 504 F.3d
13 at 1036; ECF Nos. 36 & 38. Furthermore, neither party alleges that the ALJ found that Plaintiff
14 was malingering. See ECF Nos. 36 & 38. As a result, the Court must determine whether the ALJ
15 provided clear and convincing reasons for discounting Plaintiff's subjective claims regarding his
16 symptoms. See Lingenfelter, 504 F.3d at 1036.

17 The ALJ identified two reasons for discounting Plaintiff's subjective complaints: (1)
18 Plaintiff's claims were inconsistent with the objective medical evidence, and (2) Plaintiff's claims
19 were inconsistent with Plaintiff's activities of daily living, including collecting cans for money and
20 taking care of his five-year-old daughter. AR at 24. The Court will consider each reason
21 individually.

22 3. Objective Medical Evidence

23 Plaintiff argues that the objective medical evidence was not sufficient to discredit his
24 testimony regarding the "intensity, duration, and aggravation with activity." ECF No. 36 at 8
25 n1.

26 Defendant asserts that the ALJ's reference to numerous normal exam findings in the
27 medical record supports his conclusion that Plaintiff's pain testimony was not as severe as
28 alleged. ECF No. 38 at 2.

1 Plaintiff testified that he is unable to use his left arm due to daily pain, lack of strength,
2 and constant numbness and tingling. AR at 45-46. Plaintiff also testified that he experienced
3 intermittent back pain and that the pain medicine doesn't help. Id. at 46. The ALJ stated that
4 "[Plaintiff's] statements concerning the intensity, persistence and limiting effects of [his]
5 symptoms were not entirely consistent with the medical evidence and other evidence in the
6 record explained in this decision." Id. at 24. To support his conclusion, the ALJ identified several
7 medical records that undermined Plaintiff's claims regarding his pain and limitations. For
8 example, the ALJ highlighted Plaintiff's EMG/NCV testing with Dr. Amirhassan Bhreman, which
9 revealed "mild bilateral median neuropathy at the wrists (carpal tunnel syndrome and mild
10 bilateral sensory slowing suggestive of probable underlying neuropathy[.])" and that Plaintiff's
11 remaining nerves were within normal limits and the examined muscles showed no electrical
12 instability. Id. at 21-22 (citing Exhibit 2F at 2). The ALJ also noted that Plaintiff was only
13 recommended topical cream, which constitutes conservative treatment for carpal tunnel
14 syndrome. Id. (citing Exhibit 2F at 2). The ALJ also referenced Plaintiff's El Cajon Family Health
15 Center record which provided an assessment of "idiopathic peripheral neuropathy with a finding
16 of 'numbness.'" Id. (citing Exhibit 4F at 4). The ALJ pointed to that fact that Plaintiff had intact
17 left forearm and hand movement, as well as 5/5 left grip strength and "intact crude touch
18 sensation of the left arm and hand." Id. (citing Exhibit 4F at 4). While the ALJ does not clearly
19 identify which of Plaintiff's claims the objective medical evidence undermines and there is
20 evidence both supporting and contradicting the ALJ's conclusion, for purposes of this analysis,
21 the Court finds that the ALJ's conclusion regarding the inconsistency between the objective
22 medical evidence and Plaintiff's pain and limitation testimony is not unreasonable and is
23 supported by substantial evidence. See Batson v. Comm'r, Soc. Sec. Admin., 359 F.3d 1190,
24 1198 (9th Cir. 2004) (quoting Andrews, 53 F.3d at 1041) ("When the evidence before the ALJ
25 is subject to more than one rational interpretation, [the Court] must defer to the ALJ's
26 conclusion.")

27 However, inconsistencies with the objective medical evidence cannot be the sole reason
28 provided by an ALJ for rejecting or discounting a plaintiff's credibility. Ragudo v. Saul, 411

1 F.Supp.3d 1125, 1136 (S.D. Cal. Sep. 30, 2019) (citing Burch v. Barnhart, 400 F.3d 676, 680
2 (9th Cir. 2005) and Light, 119 F.3d at 782). “[T]he Ninth Circuit has repeatedly emphasized
3 that, ‘in evaluating the credibility of ... testimony after a claimant produces objective medical
4 evidence of an underlying impairment, an ALJ may not reject a claimant's subjective complaints
5 based solely on a lack of medical evidence to fully corroborate the alleged severity of [the
6 impairment].’” Ondracek v. Comm'r of Soc. Sec., 2017 WL 714374, at *8 (E.D. Cal. Feb. 22,
7 2017) (quoting Burch, 400 F.3d at 680); see also Rollins v. Massanari, 261 F.3d 853, 857 (9th
8 Cir. 2001) (a claimant's testimony “cannot be rejected on the sole ground that it is not fully
9 corroborated by objective medical evidence”); Burch, 400 F.3d at 680 (“an ALJ may not reject
10 a claimant's subjective complaints based solely on a lack of medical evidence to fully corroborate
11 the alleged severity of pain”); Light, 119 F.3d at 792 (“[A] finding that the claimant lacks
12 credibility cannot be premised wholly on a lack of medical support for the severity of his pain”);
13 Social Security Ruling (“SSR”) 16–3p (S.S.A. Oct. 25, 2017) (stating that SSA adjudicators should
14 “not disregard an individual's statements about the intensity, persistence, and limiting effects of
15 symptoms solely because the objective medical evidence does not substantiate the degree of
16 impairment-related symptoms alleged by the individual”). However, “when coupled with other
17 permissible reasons, inconsistencies between a claimant's allegations and objective medical
18 evidence may be used to discount a claimant's testimony.” Cambria R. v. Comm’r Soc. Sec.
19 Admin, 2022 WL 4329416, at *4 (D. Or., Sept. 19, 2022)) (citing Adaline S.G. v. Comm'r Soc.
20 Sec. Admin., 2021 WL 5316987, at *3 (D. Or. Nov. 15, 2021); Tatyana K. v. Berryhill, 2019 WL
21 464965, at *4 (D. Or. Feb. 6, 2019) (citing Batson, 359 F.3d at 1197-98 (9th Cir. 2004)); see
22 also Kittridge v. Kijakazi, 2022 WL 2965961, at *1 (9th Cir., July 27, 2022) (“[w]hile subjective
23 pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective
24 medical evidence, the medical evidence is still a relevant factor in determining the severity of
25 the claimant's pain and its disabling effects.”) (quoting Rollins, 261 F.3d at 857). Accordingly,
26 the ALJ needed to provide another clear and convincing reason to discount Plaintiff’s subjective
27 pain and limitation testimony.

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2 4. Activities of Daily Living

3 The second reason the ALJ provided for discounting Plaintiff's subjective symptom
4 testimony was his ability "to collect cans, do activities of daily living and take care of his now 5-
5 year-old daughter. Moreover, he testified that he is right handed [sic] and his injury is on the
6 left." AR at 24.

7 Plaintiff argues that the record lacks details regarding his actual daily activities and that
8 the "limited daily activities" in which he engages "do not support a negative credibility
9 determination." ECF No. 36 at 7-8. Plaintiff further argues that there is no evidence to
10 demonstrate how his activities translate to transferable work.¹ Id. at 8.

11 Defendant contends that the ALJ properly discounted Plaintiff's subjective complaints
12 based upon Plaintiff's babysitting and can collecting activities. ECF No. 38 at 2-3. Defendant
13 relies on Rollins, 261 F.3d at 859, to support his argument. ECF No. 38 at 2-3.

14 In evaluating a plaintiff's credibility, an ALJ may consider whether a plaintiff's daily
15 activities are consistent with the asserted symptoms. See Thomas, 278 F.3d at 958-59 (quoting
16 Light, 119 F.3d at 792). While the fact that a plaintiff can participate in various daily activities
17 does not necessarily detract from the plaintiff's credibility as to her specific limitations or overall
18 disability, "a negative inference is permissible where the activities contradict the other testimony
19 of the claimant, or where the activities are of a nature and extent to reflect transferable work
20 skills." Elizondo, 2010 WL 3432261, at *5. Evidence of daily activities can be used to contradict
21 the claimant's testimony or to establish transferable work skills. Steele v. Berryhill, 2018 WL
22 2718033, at *3 (S.D. Cal., June 6, 2018); Orn, 495 F.3d at 639.

23 Here, The ALJ is using Plaintiff's daily activities to contradict his symptom testimony. See
24 AR at 24 (explaining that Plaintiff's statements are inconsistent with his activities of daily living).
25 "Engaging in daily activities that are incompatible with the severity of symptoms alleged can
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27 ¹ As discussed elsewhere, the ALJ did not base his non-disability determination or the adverse
28 credibility determination on the ground that Plaintiff's daily activities met the threshold for
transferable work.

1 support an adverse credibility determination.” Stephanie M. v. Saul, 2022 WL 1037112, at *19
2 (S.D. Cal. Apr. 6, 2022), report and recommendation adopted sub nom. Stephanie M v. Kijakazi,
3 2022 WL 1214708 (S.D. Cal. Apr. 25, 2022) (citing Ghanim v. Colvin, 763 F.3d 1154, 1165 (9th
4 Cir. 2014)). “Daily activities support an adverse credibility finding if a claimant is able to spend
5 a substantial part of her day engaged in pursuits involving the performance of physical functions
6 or skills that are transferable to a work setting.” Elizondo, 2010 WL 3432261, at *5 (citing Orn,
7 495 F.3d at 639; Morgan v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir.1999);
8 Thomas, 278 F.3d at 959). “A claimant’s performance of chores such as preparing meals,
9 cleaning house, doing laundry, shopping, occasional childcare, and interacting with others has
10 been considered sufficient to support an adverse credibility finding when performed for a
11 substantial portion of the day.” Id. at *5 (citing Stubbs-Danielson v. Astrue, 539 F.3d 1169,
12 1175 (9th Cir. 2008); Burch, 400 F.3d at 680–81; Thomas, 278 F.3d at 959; Morgan, 169 F.3d
13 at 600; Curry v. Sullivan, 925 F.2d 1127, 1130 (9th Cir. 1990)).

14 Here, the ALJ stated that Plaintiff’s “statements about intensity, persistence, and limiting
15 effects of his symptoms [] are inconsistent because he is able to collect cans, do activities of
16 daily living and take care of his five-year-old daughter.” AR at 24. The ALJ did not provide any
17 explanation or analysis; he just set forth this conclusory statement. Id. The ALJ did not identify
18 the specific subjective symptom testimony that these activities undermine nor explain how the
19 ability to perform the activities contradict the specific testimony. This constitutes legal error.
20 See Roberts, 829 Fed.Appx. at 760 (finding that the ALJ must “identify what testimony is not
21 credible and what evidence undermines the claimant’s complaints”); see also Stephanie M. v.
22 Saul, 2022 WL 1037112 at *12 (“The ALJ is ‘required to point to specific facts in the record’”)
23 (quoting Burrell v. Colvin, 775 F.3d 1133, 1138 (9th Cir. 2014)).

24 The record also does not provide substantial evidence supporting the ALJ’s conclusion.
25 While Plaintiff testified that he babysits his daughter while her mother is at work [AR at 44], the
26 record is silent as to how long or how often the mother works and what activities Plaintiff
27 performs while babysitting. For example, the record does not state whether Plaintiff watches
28 the child every day, one day per week, or one day per month. It also does not state whether

1 Plaintiff's babysitting activities involve cooking, cleaning, taking the child to the park, driving her
2 to activities, etc. or merely sitting with the child watching television. Similarly, Plaintiff testified
3 that he collects cans 2-3 hours per week and that his can collecting activities merely involve him
4 driving to his friends' and family's homes to pick up the cans they saved for him or waiting at
5 his home for his niece to drop off the cans she had picked up from others. AR at 43. The ALJ
6 does not address the specific facts of these activities or explain which part of these infrequent
7 activities undermine Plaintiff's subjective symptom testimony. AR at 24.

8 Defendant's reliance on Rollins is misplaced. In Rollins, the Ninth Circuit found that the
9 ALJ provided "sufficient specific reasons for not fully crediting [plaintiff's] pain testimony"
10 because plaintiff's testimony undermined her subjective complaints. 261 F.3d at 857. There,
11 the plaintiff testified that she tended to the needs of her children, cooked, cleaned, did laundry,
12 shopped, and attended therapy. Id. In addition, the plaintiff's daily activities questionnaire
13 noted that she performed these tasks from early morning until 10:00 p.m. Id. The Ninth Circuit
14 determined that that the ALJ's interpretation of the plaintiff's testimony was reasonable and
15 supported by substantial evidence despite the plaintiff's testimony being "somewhat equivocal
16 about how regularly she able to keep all of these activities[.]" Id. In contrast, here, Plaintiff did
17 not complete a daily activities questionnaire, the record is silent as to the scope of Plaintiff's
18 duties when he babysits his daughter, and the record does not fully support the ALJ's statement
19 regarding Plaintiff's can collecting activity since he only performs this activity two to three hours
20 per week. As a result, the Court finds that there is not substantial evidence supporting the ALJ's
21 statements regarding Plaintiff's daily activities and his conclusion that the activities undermine
22 Plaintiff's subjective symptom testimony.

23 The ALJ's remaining statements regarding Plaintiff's daily activities was that Plaintiff
24 "testified that he is right handed [sic] and his injury is on the left. He also testified that he went
25 to college to learn how to write code." AR at 24. The first statement is not accurate and not
26 supported by substantial evidence as Plaintiff actually testified in response to the ALJ's question
27 as to whether he is right-handed, "Yes, I use my right hand." When the ALJ rephrased the
28 question and asked if he writes with his right hand, Plaintiff responded, "I write with my left

1 hand and my right hand now, yes, sir.” AR at 49. The ALJ did not ask any follow up questions
2 and did not address the discrepancy or explain how the testimony undercut Plaintiff’s other
3 statements or subjective symptom testimony. AR at 24. Similarly, the ALJ failed to identify
4 which claim the second sentence undercut and explain why it negatively impacted Plaintiff’s
5 credibility. Id.

6 In summary, there is insufficient evidence in the record to establish the scope of Plaintiff’s
7 daily activities, the ALJ failed to identify which activities undercut which subjective symptom
8 testimony, and there is not substantial evidence supporting the ALJ’s conclusion. As such, the
9 Court finds that the ALJ erred in his analysis and that there is not substantial evidence in the
10 record to support his conclusion. Because the Court finds that the ALJ’s reliance on activities of
11 daily living was legally insufficient to support the adverse credibility finding and the finding
12 cannot be based solely on inconsistency with the objective medical evidence, the Court finds
13 that the ALJ has not set forth clear and convincing reasons to reject or discount Plaintiff’s
14 subjective testimony.

15 5. Harmless Error

16 Having found that the ALJ committed legal error, the Court must determine whether the
17 error was harmless. Harmless error occurs if the error is inconsequential to the ultimate
18 nondisability determination. See Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006);
19 see also Stout v. Comm’r, Soc. Sec. Admin., 454 F.3d 1050, 1055-56 (9th Cir. 2006). Errors that
20 do not affect the ultimate result are harmless. See Parra v. Astrue, 481 F.3d 742, 747 (9th Cir.
21 2007). An ALJ’s error may be deemed harmless if, in light of the other reasons supporting the
22 overall finding, it can be concluded that the error did not “affect[] the ALJ’s conclusion.” Batson,
23 359 F.3d at 1197. In a recent case involving the failure of an ALJ to identify the specific
24 statements she discredited, the Ninth Circuit found the error was not harmless. Brown-Hunter
25 v. Colvin, 806 F.3d 487, 489 (9th Cir. 2015). The Ninth Circuit explained that an ALJ does not
26 provide specific, clear, and convincing reasons for rejecting a claimant’s testimony by simply
27 reciting the medical evidence in support of his or her residual functional capacity determination.
28 To ensure that our review of the ALJ’s credibility determination is meaningful, and that the

1 claimant's testimony is not rejected arbitrarily, we require the ALJ to specify which testimony
2 she finds not credible, and then provide clear and convincing reasons, supported by evidence in
3 the record, to support that credibility determination. Id. The court determined that the ALJ
4 committed legal error by finding the plaintiff's testimony not credible while failing to identify
5 which testimony she found not credible and why. Id. The court concluded that the error "was
6 not harmless because it preclude[d] [the court] from conducting a meaningful review of the
7 ALJ's reasoning." Id. The Court makes the same finding in this case. Because the ALJ failed to
8 adequately identify the testimony he found not credible as well as the specific evidence that
9 undermines each statement, the Court cannot conduct a meaningful review of the ALJ's
10 reasoning and, therefore, the error is not harmless. See Brown-Hunter, 806 F.3d at 494 ("We
11 conclude, therefore, that the ALJ committed legal error. This error was not harmless because it
12 precludes us from conducting a meaningful review of the ALJ's reasoning"); see also Holcomb
13 v. Saul, 832 Fed.Appx. 505, 506 (9th Cir. 2020) (noting that the ALJ failed to mention plaintiff's
14 symptom testimony while discussing the medical evidence and finding that "[t]he ALJ's failure
15 to specify the reasons for discrediting Holcomb's symptom testimony was reversible error.").

16 B. Duty to Develop the Record

17 In a related argument, Plaintiff asserts that the ALJ violated his duty to develop the record
18 when he failed to obtain information regarding Plaintiff's daily activities. ECF No. 36 at 6.
19 Plaintiff explains that the ALJ did not obtain information regarding how his babysitting and can
20 collecting activities actually are performed and did not obtain any information regarding
21 Plaintiff's other daily activities such as where he lives and whether he performs household
22 chores. Id. at 6-8.

23 Defendant contends that the ALJ did not have a duty to develop the record further
24 because the record reflects Plaintiff's daily activities and "the activities speak for themselves."
25 ECF No. 38 at 4-5. In addition, Defendant asserts that "Plaintiff had the opportunity to explain
26 the scope of his daily activities to the ALJ at the hearing." Id. Defendant fails to provide any
27 law regarding the duty to develop the record or to provide any law supporting Defendant's legal
28 argument. Id.

1 the "credit-as-true" rule is mandatory or discretionary. See Vasquez, 572 F.3d at 593
2 (acknowledging that there is a split of authority in the Circuit, but declining to resolve the
3 conflict); Luna v. Astrue, 623 F.3d 1032, 1035 (9th Cir. 2010) (finding rule is not mandatory
4 where "there are 'outstanding issues that must be resolved before a proper disability
5 determination can be made'" (internal citation omitted)); Shilts v. Astrue, 400 Fed.Appx. 183,
6 184-85 (9th Cir. 2010) (explaining that "evidence should be credited as true and an action
7 remanded for an immediate award of benefits only if [the Benecke requirements are satisfied]"
8 (internal citation omitted)). "Even if all three requirements are met, the Court retains flexibility
9 to remand for further proceedings 'when the record as a whole creates serious doubt as to
10 whether the claimant is, in fact, disabled within the meaning of the Social Security Act.'" Nichols
11 v. Saul, 2019 WL 6252934, at *10 (S.D. Cal., Nov. 22, 2019) (quoting Brown-Hunter, 806 F.3d
12 at 495). A remand for an immediate award of benefits is appropriate only in rare circumstances.
13 Id.

14 Here, based on the record before it, the Court concludes that the rare circumstances that
15 may result in a direct award of benefits are not present. See Leon v. Berryhill, 880 F.3d 1041,
16 1044 (9th Cir. 2017) ("[a]n automatic award of benefits in a disability benefits case is a rare and
17 prophylactic exception to the well-established ordinary remand rule"); see also Howland v. Saul,
18 804 Fed.Appx. 467, 471 (9th Cir. 2020) (same). Instead, the Court finds further administrative
19 proceedings will serve a meaningful purpose by allowing the ALJ to obtain additional relevant
20 information regarding the Plaintiff's daily activities, including his babysitting and can collecting
21 activities, and to consider how that information impacts the Plaintiff's credibility, RFC, and
22 alleged disability.

23 Therefore, this Court **REVERSES** the ALJ's decision and **REMANDS** for further
24 proceedings to address the errors noted in this order.

25 **IT IS SO ORDERED.**

26 Dated: 7/27/2023

27 
28 Hon. Barbara L. Major
United States Magistrate Judge