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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GREGG ANTHONY HAWLEY,)
)
 Plaintiff(s),)
)
 vs.)
)
 NANCY A. BERRYHILL, ACTING)
 COMMISSIONER OF SOCIAL SECURITY,)
)
 Defendant(s).)
 _____)

Case No. 2:16-cv-01049-RFB-NJK
ORDER

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits pursuant to Title II of the Social Security Act. Currently before the Court is Plaintiff’s Motion for Reversal and/or Remand. Docket No. 9. The Commissioner filed a response in opposition and a Cross-Motion to Affirm. Docket No. 10. Plaintiff filed a reply. Docket No. 11. The parties filed supplemental briefs. Docket No. 15, 16. The Court hereby **SETS** a hearing in this matter for 3:00 p.m. on June 1, 2017, in Courtroom 3A. The Court will hear argument on the motions generally, but counsel shall be prepared in particular to address the following.¹

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¹ To ensure counsel can properly prepare, the Court is providing more detail than typical in setting a hearing. Nonetheless, the Court herein expresses no opinion as to the ultimate resolution of the motions or as to any particular issue therein.

1 **I. OPINION OF DR. EDWARD TSAI**

- 2 1. The Commissioner appears to be relying in part on reasons not articulated by the ALJ for
3 discounting Dr. Tsai’s opinion, such as Plaintiff’s daily activities and the conservative
4 nature of the treatment received. *Compare* Docket No. 10 at 8, 10 *with* A.R. 24, 26 (not
5 expressly articulating either reason as the basis for ALJ’s discounting of portions of Dr.
6 Tsai’s opinion). The parties shall be prepared to argue whether any such reason is
7 pertinent to the Court’s analysis. *Cf. Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d
8 1219, 1225-26 (9th Cir. 2009) (reviewing courts consider only those reasons articulated
9 by the ALJ).
- 10 2. Plaintiff anticipates in the opening brief the argument that the ALJ properly discounted
11 portions of Dr. Tsai’s opinion as a conclusory form that is insufficiently explained and
12 insufficiently supported by the medical record. Docket No. 9 at 17-18. The parties shall
13 be prepared to argue whether the Commissioner waived the ability to rely on the
14 conclusory nature of Dr. Tsai’s opinion by not including in her opposition brief any
15 discussion on this issue. *See, e.g., Newdow v. Congress of the United States of America*,
16 435 F. Supp. 2d 1066, 1070 n.5 (E.D. Cal. 2006) (silence on an issue in an opposition
17 brief can be construed as acquiescence on that issue).
- 18 3. Assuming such an argument has not been waived, the parties shall be prepared to argue
19 whether the ALJ properly discounted portions of Dr. Tsai’s opinion as conclusory.
- 20 4. Assuming such an argument has not been waived, the parties shall be prepared to argue
21 whether there is a basis in law for Plaintiff’s contention that the ALJ erred by giving
22 significant weight to part of Dr. Tsai’s opinion but discounting other parts. *Cf.*
23 *Magallanes v. Bowen*, 881 F.2d 747, 753-54 (9th Cir. 1989) (affirming ALJ’s adoption
24 of part of a physician’s opinion).

25 **II. LISTING 5.06B**

- 26 1. Dr. Tsai may have opined in the check-box questionnaire that the requirements had been
27 met for Listing 5.06B by noting “5.06 B 3+4.” A.R. 431. The parties shall be prepared
28 to argue whether the ALJ properly rejected any such finding as a conclusory opinion

1 offered without sufficient explanation or support in the medical record, as discussed
2 above.

3 2. While Dr. Tsai included the notation regarding Listing 5.06B in his questionnaire
4 completed on September 6, 2013, A.R. 431-34, there is no similar notation on his later
5 questionnaire completed on October 13, 2014, A.R. 463-66. The parties shall be prepared
6 to argue whether such an omission impacts the Court’s analysis.

7 3. Plaintiff admits that his “physical exams did not appear to note a ‘tender mass palpable
8 on physical examination,’ as required by Listing 5.06B(3).” Docket No. 9 at 20.² The
9 parties shall be prepared to argue whether such an absence itself renders Listing 5.06B(3)
10 unmet since it requires that this condition be “clinically documented.”

11 4. Plaintiff argues that Dr. Tsai “interpret[ed]” Plaintiff’s abdominal pain and diarrhea as
12 meaning that an abdominal mass exists. Docket No. 9 at 21. The parties shall be
13 prepared to argue whether such interpretation would be sufficient to meet Listing
14 5.06B(3) since it requires a mass that is capable of being discerned by touch. *Compare*
15 Listing 5.06B(3) with Merriam-Webster Dictionary (defining “palpable” a “capable of
16 being touched or felt”).

17 5. The parties shall be prepared to argue whether Plaintiff has waived the ability to raise any
18 argument regarding Listing 5.06B(5) by addressing it for the first time in reply. *Cf.*
19 *Bazuaye v. I.N.S.*, 79 F.3d 118, 120 (9th Cir. 1996).

20 6. Assuming such an argument has not been waived, the parties shall be prepared to argue
21 whether the ALJ erred in finding no unintentional weight loss sufficient to meet Listing
22 5.06(B)(5). *Cf. Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) (ALJs are
23 responsible for resolving ambiguities).

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26 ² Neither party acknowledges the medical record that appears to affirmatively negate the existence
27 of any palpable abdominal mass. *See* A.R. 385 (“no masses palpable” in abdomen); A.R. 470 (“no masses
28 palpable” in abdomen); A.R. 473 (“no masses palpable” in abdomen); A.R. 476 (“no masses palpable” in
abdomen); A.R. 479 (“no masses palpable” in abdomen).

