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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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TORRELL J.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,

Defendant.

Case No. 2:23-cv-01251-BNW

ORDER

10 This case involves review of an administrative action by the Commissioner of Social
11 Security denying Torrell J.'s application for disability benefits under Title II and Title XVI of the
12 Social Security Act. The Court reviewed Plaintiff's Motion for Reversal and/or Remand (ECF
13 No. 8), the Commissioner's Cross-Motion to Affirm and Response (ECF Nos. 10 and 11), and
14 Plaintiff's Reply (ECF No. 12). For the reasons discussed below, the Court grants Plaintiff's
15 Motion and remands for further proceedings.

16 **I. BACKGROUND**

17 On January 25, 2020, Plaintiff filed for disability insurance benefits under Title II of the
18 Social Security Act as well as supplemental security income under Title XVI, alleging an onset
19 date of November 15, 2017. ECF No. 23-1 at 173.² Plaintiff's claim was denied initially and
20 upon reconsideration. *Id.*

21 A telephonic hearing was held before Administrative Law Judge ("ALJ") Cynthia R.
22 Hoover on June 9, 2021. *Id.* On July 9, 2021, ALJ Hoover found that Plaintiff was not disabled.
23 *Id.* at 187. Plaintiff appealed that decision to the Appeals Council, which granted his request and
24 remanded for further proceedings. *Id.* at 23.

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26 ¹ In the interest of privacy, this opinion only uses the first name and last initial of the
nongovernmental party.

27 ² ECF No. 23 refers to the Administrative Record in this matter which, due to COVID-19, was
28 electronically filed. All citations to the Administrative Record will use the CM/ECF page
numbers.

1 ALJ Hoover held a supplemental hearing on January 31, 2023. *Id.* On February 21, 2023,
2 ALJ Hoover found that Plaintiff was disabled from December 29, 2022, but not prior to that date.
3 *Id.* at 38–39. Plaintiff appealed that decision to the Appeals Council, which denied his request for
4 review on June 23, 2023. *Id.* at 7. Plaintiff then commenced this action for judicial review under
5 42 U.S.C. § 405(g) on August 11, 2023. *See* ECF No. 1.

6 **II. STANDARD OF REVIEW**

7 Administrative decisions in Social Security disability-benefits cases are reviewed under
8 42 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g)
9 provides that “[a]ny individual, after any final decision of the Commissioner of Social Security
10 made after a hearing to which [s]he was a party, irrespective of the amount in controversy, may
11 obtain a review of such decision by a civil action. . . brought in the district court of the United
12 States for the judicial district in which the plaintiff resides.” The Court may enter “upon the
13 pleadings and transcripts of the record, a judgment affirming, modifying, or reversing the
14 decision of the Commissioner of Social Security, with or without remanding the cause for a
15 rehearing.” 42 U.S.C. § 405(g).

16 The Commissioner’s findings of fact are conclusive if supported by substantial evidence.
17 *See id.*; *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the Commissioner’s
18 findings may be set aside if they are based on legal error or not supported by substantial
19 evidence. *See Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006); *Thomas*
20 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines substantial evidence as
21 “more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
22 reasonable mind might accept as adequate to support a conclusion.” *Andrews v. Shalala*, 53 F.3d
23 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir.
24 2005). In determining whether the Commissioner’s findings are supported by substantial
25 evidence, the Court “must review the administrative record as a whole, weighing both the
26 evidence that supports and the evidence that detracts from the Commissioner’s conclusion.”
27 *Reddick v. Chater*, 157 F. 3d 715, 720 (9th Cir. 1998); *see also Smolen v. Chater*, 80 F.3d 1273,

1 1279 (9th Cir. 1996).

2 Under the substantial evidence test, findings must be upheld if supported by inferences
3 reasonably drawn from the record. *Batson v. Comm’r*, 359 F.3d 1190, 1193 (9th Cir. 2004).
4 When the evidence supports more than one rational interpretation, the court must defer to the
5 Commissioner’s interpretation. *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten*
6 *v. Sec’y of Health & Human Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Thus, the issue before the
7 Court is not whether the Commissioner could have reasonably reached a different conclusion,
8 but whether the final decision is supported by substantial evidence. *Burch*, 400 F.3d at 679. It is
9 incumbent on the ALJ to make specific findings so that the Court does not speculate as to the
10 basis of the findings when determining if the Commissioner’s decision is supported by
11 substantial evidence. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). Mere cursory
12 findings of fact without explicit statements as to what portions of the evidence were accepted or
13 rejected are not sufficient. *Id.* The ALJ’s findings “should be as comprehensive and analytical as
14 feasible, and where appropriate, should include a statement of subordinate factual foundations on
15 which the ultimate factual conclusions are based.” *Id.*

16 **A. Disability evaluation process and the ALJ decision**

17 The individual seeking disability benefits has the initial burden of proving disability.
18 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the individual must
19 demonstrate the “inability to engage in any substantial gainful activity by reason of any
20 medically determinable physical or mental impairment which can be expected. . . to last for a
21 continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). The individual also
22 must provide “specific medical evidence” in support of her claim for disability. 20 C.F.R.
23 § 404.1514. If the individual establishes an inability to perform other substantial gainful work
24 that exists in the national economy. *Reddick*, 157 F.3d at 721.

25 The ALJ follows a five-step sequential evaluation process in determining whether an
26 individual is disabled. *See* 20 C.F.R. § 404.1520(a); *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987).
27 If at any step the ALJ determines that she can make a finding of disability or non-disability, a

1 determination will be made, and no further evaluation is required. *See* 20 C.F.R.
2 § 404.1520(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003).

3 Step one requires the ALJ to determine whether the individual is engaged in substantial
4 gainful activity (“SGA”). 20 C.F.R. § 404.1520(a)(4)(i). If the individual is engaged in SGA, the
5 ALJ will make a finding of non-disability. If the individual is not engaged in SGA, then the
6 analysis proceeds to step two.

7 Step two addresses whether the individual has a medically determinable impairment that
8 is severe or a combination of impairments that significantly limits her from performing basic
9 work activities. *Id.* § 404.1520(a)(4)(ii). If the individual does not have a severe medically
10 determinable impairment or combination of impairments, then the ALJ makes a finding of non-
11 disability. If the individual has a severe medically determinable impairment or combination of
12 impairments, then the analysis proceeds to step three.

13 Step three requires the ALJ to determine whether the individual’s impairments or
14 combination of impairments meets or medically equals the criteria of an impairment listed in 20
15 C.F.R. Part 404, Subpart P, Appendix 1. *Id.* § 404.1520(a)(4)(iii). If the individual’s impairment
16 or combination of impairments meets or equals the criteria of a listing and the duration
17 requirement, then the ALJ makes a finding of disability. *Id.* § 404.1520(d). Otherwise, the
18 analysis proceeds to step four.

19 However, before moving to step four, the ALJ must first determine the individual’s
20 residual functional capacity (“RFC”), which is a function-by-function assessment of the
21 individual’s ability to do physical and mental work-related activities on a sustained basis despite
22 limitations from impairments. *See* 20 C.F.R. § 404.1560; *see also* SSR 96-8p. In making this
23 finding, the ALJ must consider all the relevant evidence, such as all symptoms and the extent to
24 which the symptoms can reasonably be accepted as consistent with the objective medical
25 evidence and other evidence. 20 C.F.R. § 404.1545. To the extent that statements about the
26 intensity, persistence, or functionally limiting effects of pain or other symptoms are not
27 substantiated by objective medical evidence the ALJ must make a finding on the credibility of

1 the individual's statements based on a consideration of the entire case record.

2 Step four requires the ALJ to determine whether the individual has the RFC to perform
3 her past work ("PRW"). 20 C.F.R. § 404.1520(a)(4)(iv). PRW means work performed either as
4 the individual actually performed it or as it is generally performed in the national economy
5 within the last 15 years. The work also must have lasted long enough for the individual to learn
6 the job and to have performed an SGA. If the individual has the RFC to perform her past work,
7 then the ALJ makes a finding of non-disability. If the individual is unable to perform any PRW
8 or does not have any PRW, then the analysis proceeds to step five.

9 The fifth and final step requires the ALJ to determine whether the individual can do any
10 other work considering her RFC, age, education, and work experience. 20 C.F.R.
11 § 404.1520(a)(4)(v). If she can do other work, then the ALJ makes a finding of non-disability.
12 Although the individual generally continues to have the burden of proving disability at this step,
13 a limited burden of going forward with the evidence shifts to the Commissioner. The
14 Commissioner is responsible for providing evidence demonstrating that other work exists in
15 significant numbers in the economy that the individual can do. *Yuckert*, 482 U.S. at 141–42.

16 *Here*, the ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R.
17 § 404.1520(a).

18 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity
19 since November 15, 2017, the alleged onset date. ECF No. 7-1 at 26.

20 At step two, the ALJ concluded that Plaintiff had the following severe impairments:
21 arthropathy, dysfunction of major joints, degenerative disc disease, hernias, migraine, anxiety,
22 and depression. *Id.*

23 At step three, the ALJ found that Plaintiff did not have an impairment or combination of
24 impairments that met or medically equaled a listed impairment in 20 C.F.R. Part 404, Subpart P,
25 Appendix 1. *Id.* at 27.

26 Before moving to step four, the ALJ concluded that Plaintiff had the RFC to perform
27 sedentary work but with the following limitations:

1 the claimant can only frequently stop, kneel, crouch, crawl, and climb ramps and
2 stairs, never climb ladders, ropes, and scaffolds, can only frequently push and pull
3 with the left upper extremity, can frequently reach overhead, can have only
4 occasional exposure to concentrated exposure to extreme temperatures and
5 hazards such as dangerous moving machines, such as chainsaws and
6 jackhammers, and unprotected heights. The claimant can understand, remember,
7 and carry out simple, routine tasks with the ability to concentrate, persist, and
8 maintain pace for such tasks, and can interact occasionally with the public. The
9 claimant requires the use of a cane for ambulating long distance or on uneven
10 terrain.

11 *Id.* at 29.

12 At step four, the ALJ found that Plaintiff could not perform his past PRW as a building
13 maintenance repairer, home restoration cleaner, or construction worker I. *Id.* at 36.

14 At step five, the ALJ found that prior to December 29, 2022—the date Plaintiff’s age
15 category changed—given Plaintiff’s age, education, work experience, and RFC, there were jobs
16 that existed in significant numbers in the national economy that he could have performed,
17 namely as a table worker, charge account clerk, and lampshade assembler. *Id.* at 37–38. But the
18 ALJ also found that after Plaintiff’s age category changed, there are no jobs that exist in
19 significant numbers in the national economy that he could perform. *Id.* at 38. The ALJ then
20 concluded that Plaintiff was not under a disability prior to December 29, 2022, but he became
21 disabled on that date onward. *Id.*

22 **III. ANALYSIS**

23 **A. The ALJ failed to provide specific, clear, and convincing reasons for discounting 24 Plaintiff’s symptom testimony**

25 The parties dispute whether the ALJ provided specific, clear, and convincing reasons in
26 discounting Plaintiff’s subjective symptom testimony. *Compare* ECF No. 8 at 9–14 *with* ECF
27 Nos. 10 and 11 at 5–13.

28 In determining whether a claimant’s testimony regarding subjective pain or symptoms is
credible, the ALJ engages in a two-step analysis. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th
Cir. 2014). First, the ALJ must determine whether the claimant has presented objective medical

1 evidence of an underlying impairment which could reasonably be expected to produce the pain
2 or other symptoms alleged. *Id.* (internal citation and quotation omitted). The claimant is not
3 required to show that her impairment “could reasonably be expected to cause the severity of the
4 symptom she has alleged; she need only show that it could reasonably have caused some degree
5 of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (quoting *Lingenfelter v.*
6 *Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007)).

7 If the claimant satisfies the first step of the analysis, and there is no evidence of
8 malingering, the ALJ can reject the claimant’s testimony about the severity of their symptoms
9 “only by offering specific, clear, and convincing reasons for doing so.” *Id.* (internal citation and
10 quotation omitted). General findings are insufficient; rather, the ALJ must identify what
11 symptom claims are being discounted and what evidence undermines these claims. *Id.* (citation
12 omitted); *Thomas*, 278 F.3d at 958 (requiring the ALJ to sufficiently explain why they
13 discounted the claimant’s symptom claims). “The clear and convincing [evidence] standard is the
14 most demanding required in Social Security cases.” *Garrison*, 759 F.3d at 1015 (quoting *Moore*
15 *v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)). That said, if the ALJ’s
16 credibility finding is supported by substantial evidence in the record, the Court may not engage
17 in second-guessing. *Thomas*, 278 F.3d at 959.

18 Here, the ALJ found that Plaintiff’s impairments could reasonably be expected to cause
19 the alleged symptoms. ECF No. 7-1 at 34. However, the ALJ found that Plaintiff’s “statements
20 concerning the intensity, persistence, and limiting effects of these symptoms are not fully
21 supported.” *Id.* The ALJ cited daily activities, medical opinion testimony, conservative
22 treatment, and objective medical evidence to discount Plaintiff’s symptom testimony. *Id.* at 29–
23 36. The Court addresses each in turn.

24 ***1. Daily Activities***

25 The ALJ discounted Plaintiff’s symptom testimony, in part, because she found that his
26 “reported activities and abilities were not fully consistent with a finding of disability.” ECF
27 No. 7-1 at 35. Plaintiff argues that the ALJ mischaracterized the extent of his daily activities
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1 because she failed to contextualize the frequency with which he performed them. ECF No. 8 at
2 10–13. He also claims that the ALJ was required to make specific findings as to how his daily
3 activities were transferable to employment but failed to do so. *Id.* at 12–13. The Commissioner
4 responds that Plaintiff’s daily activities constitute a sufficient reason to discredit his testimony
5 because they were inconsistent with other parts of his testimony, and they contradict the claimed
6 extent of Plaintiff’s impairment. ECF No. 10 at 10–11. But Plaintiff counters that because the
7 ALJ did not explain why Plaintiff’s daily activities were inconsistent with his testimony, the
8 Commissioner cannot pull post hoc rationalizations from the record to justify the ALJ’s decision.
9 ECF No. 12 at 5.

10 A plaintiff can be found disabled even if he is able to perform some activities of daily
11 living. *See Garrison*, 759 F.3d at 1016. However, inconsistencies between a claimant’s
12 testimony and the claimant’s reported activities provide a valid reason for discrediting symptom
13 testimony. *Burrell v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014) (citation omitted). In making
14 that determination, “[g]eneral findings are insufficient; rather, the ALJ must identify what
15 testimony is not credible and what evidence undermines the claimant’s complaints.” *Id.* (citation
16 omitted). “To support a lack of credibility finding, the ALJ [is] required to point to *specific facts*
17 in the record.” *Id.* (citation omitted) (emphasis in original).

18 Here, the ALJ did not state that Plaintiff’s daily activities were inconsistent with his
19 testimony, but instead found that his “reported activities and abilities were not fully consistent
20 *with a finding of disability.*” ECF No. 7-1 at 35 (emphasis added). The ALJ also did not identify
21 any particular inconsistencies or how Plaintiff’s reported daily activities undermined his
22 testimony. Instead, the ALJ’s discussion of Plaintiff’s daily activities is akin to the situation in
23 *Burrell*, where the Ninth Circuit explained:

24 But the ALJ did not elaborate on *which* daily activities conflicted with *which* part
25 of Claimant’s testimony. . . . Instead, the government identifies other alleged
26 inconsistencies between Claimant’s hearing testimony and her reported daily
27 activities, such as knitting and lace work. But the ALJ did not identify those
28 inconsistencies. We are constrained to review the reasons the ALJ asserts. Our
decisions make clear that we may not take a general finding—an unspecified
conflict between Claimant’s testimony about daily activities and her reports to

1 doctors—and comb the administrative record to find specific conflicts.
2 775 F.3d at 1138 (internal quotations and citations omitted) (emphasis in original). So although
3 the Commissioner identified supposed inconsistencies in his briefing, because the ALJ did not
4 articulate such inconsistencies, this is not a specific, clear, and convincing reason for discrediting
5 Plaintiff’s testimony. *Id.*

6 However, an ALJ can also discredit a claimant’s testimony when the claimant reports
7 participation in activities that are “inconsistent with the alleged severity of [his] limitations.”
8 *Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022). “Even where those activities suggest some
9 difficulty functioning, they may be grounds for discrediting the claimant’s testimony to the
10 extent that they contradict claims of a totally debilitating impairment.” *Molina v. Astrue*, 674
11 F.3d 1104, 112–13 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. § 404.1502(a)
12 (citations omitted).

13 Here, the Commissioner contends that Plaintiff’s daily activities “are relevant in that they
14 are inconsistent with Plaintiff’s extreme allegations.” ECF No. 10 at 11. In her opinion, the ALJ
15 noted that Plaintiff reported “being able to perform a wide range of daily activities,” including
16 tending to his personal care and hygiene, managing his medications, setting up an appointment
17 calendar and pill organizer, preparing meals, driving, doing laundry, washing dishes, going to
18 church, socializing with family members, going out to dinner and drinks with friends, attending
19 his children’s sporting games and practices, and exercising at the gym. ECF No. 7-1 at 35.

20 But again, “[o]nly if the level of activity were inconsistent with Claimant’s claimed
21 limitations would these activities have any bearing on Claimant’s credibility.” *Reddick*, 157 F.3d
22 at 722. And here, simply listing Plaintiff’s daily activities devoid of context does not substantiate
23 such a finding. *Id.* at 722–23 (“In essence, the ALJ developed his evidentiary basis by not fully
24 accounting for the context of materials or all parts of the testimony and reports.”). Both Plaintiff
25 and his wife reported that he cannot bathe himself and needs help dressing himself. ECF No. 7-1
26 at 496, 505. In the limited circumstances that Plaintiff does prepare a meal—since he typically
27 eats whatever his wife cooks for him—he must sit on a stool while cooking. *Id.* at 65, 95, 506.

1 While he can occasionally do laundry (once a week) and dishes (once every few days), he still
2 needs help completing such chores because doing laundry on his own, for example, takes him
3 almost the entire day. *Id.* at 497, 506. Though Plaintiff used to drive his son to and from school,
4 he no longer does so, and there was no context for how long or how far Plaintiff had to drive
5 when he did. *Id.* at 59. Similarly, there was no context regarding how often, how long, or what
6 Plaintiff had to do to participate in attending church or his son’s practices, which he no longer
7 attends. *Id.* at 502. And when properly contextualized, Plaintiff’s ability to go to “dinner and
8 drinks with friends” is limited to “every now and then” if a family member is in town, but “they
9 understand that [he] has issues so they don’t usually bother [him] too much.” *Id.* at 60, 96.

10 His management of medication and use of an appointment calendar too does not
11 undermine the extent of his claimed limitations. The use of these aids is in direct response to his
12 mental health limitations and his wife put these mechanisms in place because he needed the
13 reminders. *Id.* at 502, 504, 506. And Plaintiff “goes to the gym” as part of his physical therapy
14 treatment, and the “symptoms” that he did not “develop” refer to cardiac symptoms, not his
15 claimed physical or mental limitations. *Id.* at 729, 748. Thus, when properly contextualized,
16 Plaintiff’s daily activities do not contradict the extent of his impairments. *Garrison*, 759 F.3d at
17 1016 (holding that claimant’s daily activities did not undermine her testimony when properly
18 contextualized with their limitations).

19 Finally, the ALJ found that “[s]ome of the physical and mental abilities and social
20 interactions required in order to perform these activities are the same as those necessary for
21 obtaining and maintaining employment.” ECF No. 7-1 at 35. The Ninth Circuit recognized that
22 “many home activities are not easily transferable to what may be the more grueling environment
23 of the workplace, where it might be impossible to periodically rest or take medication.” *Fair v.*
24 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) *superseded on other grounds by* 20 C.F.R.
25 § 404.1502(a). “Yet if a claimant is able to spend a substantial part of his day engaged in pursuits
26 involving the performance of physical functions that are transferable to a work setting, a specific
27 finding as to this fact may be sufficient to discredit an allegation of disabling excess pain.” *Id.*

1 “The ALJ must make specific findings relating to the daily activities and their transferability to
2 conclude that a claimant’s daily activities warrant an adverse credibility determination.” *Orn v.*
3 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (internal quotations and citation omitted).

4 But here, the ALJ did not articulate how Plaintiff’s daily activities would be transferrable
5 to the workplace. And once contextualized with his limitations, it is not apparent that Plaintiff
6 spends a “substantial” part of his day engaging in such activities. This therefore is not a
7 sufficient reason to discount his testimony. *Ghanim v. Colvin*, 763 F.3d 1154, 1165 (9th Cir.
8 2014) (“However, there is no indication here that the limited activities Ghanim engaged in, often
9 with the help of a friend, either comprised a ‘substantial’ portion of Ghanim’s day, or were
10 ‘transferrable’ to a work environment.”).

11 **2. Medical Opinion Evidence**

12 The ALJ also considered, and found persuasive, the opinions of some state agency
13 consultants when evaluating Plaintiff’s symptom testimony. ECF No. 7-1 at 35–36. The
14 Commissioner contends that the consultants’ findings undercut Plaintiff’s testimony because
15 they found that Plaintiff could perform a reduced range of work and thus was not totally
16 disabled. *Id.* at 12–13. But Plaintiff asserts that their findings do not undermine his testimony
17 because while the existence of different medical opinions raises the issue of excess pain, the
18 opinions do not resolve it. ECF No. 12 at 6.

19 In weighing a plaintiff’s credibility, the ALJ may consider different factors, including
20 physician testimony about the nature, severity, and effect of symptoms. *Thomas*, 278 F.3d at
21 958–59. “The ALJ must specifically identify what testimony is credible and what testimony
22 undermines the claimant’s complaints.” *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595,
23 599 (9th Cir. 1999) (citation omitted). A recitation of the medical evidence supporting an ALJ’s
24 RFC determination is not a specific, clear, and convincing reason for rejecting a claimant’s
25 symptom testimony. *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015).

26 Here, the ALJ found state agency medical consultant Dr. Samuel Pak partially persuasive
27 and state agency psychological consultants Drs. F. Mateus and Mark Berkowitzs persuasive.

1 ECF No. 7-1 at 35–36. However, the ALJ did not say that the consultants’ findings undermined
2 Plaintiff’s testimony let alone identify which part of their findings was supposedly inconsistent
3 with his claims. Instead, she noted that Dr. Pak’s finding that Plaintiff can perform some work
4 and Dr. Mateus’s and Dr. Berkowitzs’s findings that Plaintiff had mild to moderate limitations
5 were supported by objective medical evidence. *Id.* But this merely amounts to a summary of the
6 medical evidence supporting her RFC finding. *Brown-Hunter*, 806 F.3d at 494. Because the ALJ
7 did not point to specific evidence in the consultants’ findings and explain how they undermined
8 Plaintiff’s symptom testimony, this is not a sufficient reason to discredit his testimony. *Morgan*,
9 169 F.3d at 599.

10 **3. Conservative Treatment**

11 The ALJ also cited conservative treatment as a reason for discrediting Plaintiff’s
12 symptom testimony. ECF No. 7-1 at 31–33. The Commissioner asserts that this is sufficient to
13 discount Plaintiff’s claims because the ALJ found that his migraines and mental health were
14 conservatively treated, and that Plaintiff was weaning down his pain medication following a knee
15 injury. ECF No. 10 at 11–12. But Plaintiff challenges this notion because he claims that the
16 ALJ’s reference to conservative treatment was simply part of her discussion of objective medical
17 evidence and its purported lack of support for Plaintiff’s contentions. ECF No. 8 at 14 n.4.

18 The effectiveness of treatment is a relevant factor in determining the severity of a
19 claimant’s symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3) (2011); *Warre v. Comm’r of*
20 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). However, courts have found that when
21 there is no indication that a more aggressive treatment would be warranted, an ALJ’s assertion of
22 conservative treatment amounts to a “back door finding” that a plaintiff’s statements are not fully
23 corroborated by objective medical evidence. *See, e.g., Clarke v. Astrue*, No. CV08-604-TUC-
24 DCBBPV, 2010 WL 1540022, at *16 (D. Ariz. Mar. 31, 2010); *Palmer v. Astrue*, No. 11-CV-
25 942 JLS BLM, 2012 WL 3779046, at *5 (S.D. Cal. Aug. 30, 2012).

26 Here, the ALJ noted that after reporting a knee injury in December 2020, Plaintiff began
27 weaning down his pain medication in January 2021 from taking five pills a day, to taking just
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1 one. ECF No. 7-1 at 31. Later, she concluded that his migraines were treated conservatively
2 because there were no records of emergency room visits or the need for “aggressive or invasive”
3 treatment. *Id.* at 34. She also found that Plaintiff’s mental health treatment was conservative
4 because there was no evidence that he “had any severe exacerbations or required
5 hospitalization.” *Id.* at 35.

6 But this is the equivalent of stating that Plaintiff’s symptoms are not fully corroborated
7 by the objective medical evidence. *Clarke*, 2010 WL 1540022, at *16; *Palmer*, 2012 WL
8 3779046, at *5. As discussed further below, the ALJ cannot solely rely on the absence of
9 objective medical evidence to discredit Plaintiff’s subjective symptom testimony. *Burch*, 400
10 F.3d at 680. The ALJ here did not cite any evidence in the record that suggested Plaintiff opted
11 for conservative treatment in lieu of more aggressive treatment, or that indicated a more
12 aggressive option was recommended or even available. *See Clarke*, 2010 WL 1540022, at *15
13 (“There is no indication from any of the treatment records that more aggressive treatment was
14 foregone in favor of conservative treatment”). And the “theoretical existence of a more
15 aggressive treatment option”—such as emergency room visits or hospitalizations—does not
16 support a finding of conservative treatment. *Palmer*, 2012 WL 3779046, at *5. This therefore
17 was not a specific, clear, and convincing reason for the ALJ to discount Plaintiff’s testimony.

18 **4. Objective Medical Evidence**

19 Finally, the ALJ pointed to the objective medical evidence as a reason for not crediting
20 Plaintiff’s testimony. ECF No. 7-1 at 34–35. Plaintiff contends that because the ALJ failed to
21 provide other adequate reasons for discrediting his testimony, the ALJ’s claim that the extent of
22 Plaintiff’s symptoms is not fully corroborated by the objective medical evidence cannot be the
23 sole basis for discounting his testimony. ECF No. 8 at 13–14. The Commissioner responds that
24 this was a proper reason for discrediting his testimony because the objective medical evidence
25 was inconsistent with the testimony. ECF No. 10 at 7–9.

26 Plaintiff is correct that the ALJ “may not reject a claimant’s subjective complaints based
27 solely on a lack of medical evidence to fully corroborate the alleged severity of pain.” *Burch*,

1 400 F.3d at 680. “This means that an ALJ cannot effectively render a claimant’s subjective
2 symptom testimony superfluous by demanding positive objective medical evidence ‘fully
3 corroborat[ing]’ every allegation within the subjective testimony. *Smartt v. Kijakazi*, 53 F.4th
4 489, 495 (9th Cir. 2022). But “[w]hen objective medical evidence in the record is *inconsistent*
5 with the claimant’s subjective testimony, the ALJ may indeed weigh it as undercutting such
6 testimony.” *Id.* at 498 (emphasis in original).

7 Here, the ALJ found that the “objective medical evidence was not fully consistent with
8 the claimant’s reported activities and abilities.” ECF No. 7-1 at 34. However, in explaining such
9 finding, the ALJ on many instances did not point to specific testimony that was undermined or
10 contradicted by the objective medical evidence. Instead, when referring to Plaintiff’s difficulty
11 sitting and his migraines, the ALJ stated that there were “minimal” or “no” exams showing his
12 claimed limitations. *Id.* But this simply means that the ALJ found that the objective medical
13 evidence did not “fully corroborate” his symptoms. *Burch*, 400 F.3d at 680.

14 At other points, the ALJ explained how she accounted for certain limitations in her RFC
15 determination and stated that the objective medical evidence did “not support further limitations”
16 or was “not consistent with a finding the claimant could not perform a reduced range of
17 sedentary work.” ECF No. 7-1 at 34. But this, again, amounts to summary of the medical
18 evidence supporting her RFC determination, which is not a specific, clear, and convincing reason
19 for rejecting Plaintiff’s symptom testimony. *Brown-Hunter*, 806 F.3d at 494.

20 On a few instances, the ALJ appeared to suggest that the objective medical evidence
21 contradicted Plaintiff’s testimony but did not identify the particular testimony nor sufficiently
22 explain how it was contradicted by the objective medical evidence. For example, she found that
23 the “evidence did not support a finding the claimant required continuous use of a cane” because
24 there were some exams in which Plaintiff could walk without a cane. ECF No. 7-1 at 34. But she
25 did not explain what Plaintiff testified and how it was belied by the evidence. This is not akin to
26 the inconsistencies identified in *Smartt*, where the ALJ pointed to specific testimony from the
27 claimant that she had not driven since a certain date and was unable to walk without a walker

1 that were directly contradicted by a report that she routinely drove a car and “multiple specific
2 examples” of her inconsistent use of mobility aids. 53 F.4th at 497. The ALJ here did not even
3 articulate whether Plaintiff represented that he could not walk without a cane and his testimony
4 that he used a cane daily (which, importantly, the ALJ did not reference) is not necessarily
5 inconsistent with the evidence because he did not explicitly state that he was *unable* to walk
6 without a cane. *See* ECF No. 7-1 at 58.

7 The ALJ also found that “[d]espite reporting significant social limitations, there were
8 many exams where the claimant presented as pleasant, friendly, cooperative, exhibited normal
9 behavior, or had a normal mood and affect.” *Id.* at 35. And she later noted that “[d]espite
10 reporting poor memory and concentration, there were many exams where the claimant had
11 normal thoughts, good insight and judgment, was alert and attentive, and intact memory,
12 attention, and concentration.” *Id.* But these contentions suffer the same defect as the above
13 example in that the ALJ did not identify what “significant social limitations” or “poor memory
14 and concentration” Plaintiff testified to and how such testimony was belied by the evidence.

15 Additionally, “treatment records must be viewed in light of the overall diagnostic
16 record.” *Ghanim*, 763 F.3d at 1164 (citation omitted). And the ALJ herself recognized that
17 “exams noted the claimant occasionally had an anxious, depressed, or irritable mood and affect,
18 as well as one evaluation noting impaired attention and concentration.” ECF No. 7-1 at 35. Thus,
19 the ALJ’s cite to the objective medical evidence was not a specific, clear, and convincing reason
20 to discount Plaintiff’s testimony. *Ghanim*, 763 at 1164 (holding that treatment notes indicating
21 that claimant was “upbeat,” “smiling,” and had “focused attention” did not contradict claimant’s
22 reported symptoms of depression and social anxiety).

23 * * *

24 Because the ALJ only made a general credibility finding and never identified *which*
25 particular testimony she found not credible and never explained how the evidence contradicted
26 that testimony, this error was not harmless as the ALJ did not provide enough reasoning for the
27 Court to meaningfully review. *Brown-Hunter*, 806 F.3d at 494. Moreover, another ALJ crediting

1 Plaintiff's symptom testimony could have reached a different disability determination, likewise
2 rendering the error not harmless. *Stout*, 454 F.3d at 1055–56.

3 **B. Remand for further proceedings is the appropriate remedy**

4 Plaintiff asks the Court to reverse and remand for a direct award of benefits because he
5 contends that he meets the three requirements of the “credit-as-true” test. ECF No. 8 at 15–16.
6 The Commissioner, however, requests that the Court remand the case for further proceedings
7 because there is “serious doubt” that Plaintiff is disabled given inconsistencies in the record.
8 ECF No. 10 at 13–14.

9 When an ALJ improperly rejects a claimant’s symptom testimony without providing
10 legally sufficient reasons, the court may grant a direct award of benefits when certain conditions
11 are met. *Garrison*, 759 F.3d at 1019. The three-part analysis of such conditions is known as the
12 “credit-as-true” test. *Id.* The credit-as-true test first asks (1) whether the ALJ failed to provide
13 legally sufficient reasons for rejecting the claimant’s testimony, and (2) whether there are
14 outstanding issues that must be resolved and whether further administrative proceedings would
15 be useful. *Id.* at 1020; *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir.
16 2014). When the first two conditions are satisfied, the court then credits the discredited testimony
17 as true for the purpose of determining whether, on the record taken as a whole, there is no doubt
18 as to disability. *Treichler*, 775 F.3d at 1101. But even after reaching the third step and crediting
19 the claimant’s testimony as true, it is within the court’s discretion either to make a direct award
20 of benefits or to remand for further proceedings. *Id.* at 1101–02.

21 As explained above, the Court finds that at the first step, the ALJ failed to provide legally
22 sufficient reasons for rejecting Plaintiff’s symptom testimony. At step two, the Court considers
23 whether the record as a whole is free from conflicts, ambiguities, or gaps, and whether all factual
24 issues have been resolved. *Moisa v. Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004). And in
25 considering the record, the Court finds that further administrative proceedings would be useful.

26 Plaintiff contends that because the ALJ posed a hypothetical to the vocational expert
27 regarding missing two days of work a month or being off-task 15 percent of time, and the VE

1 testified that such an individual could not work, the record is complete. However, it is unclear
2 which limitations the ALJ was accounting for in posing that hypothetical and Plaintiff too does
3 not explain which limitations the question considers. As discussed above, the ALJ discredited
4 Plaintiff's testimony, in part, because the record did not fully corroborate the extent of Plaintiff's
5 migraines and his inability to remain seated. The ALJ also did not sufficiently explain which
6 testimony regarding Plaintiff's mental health limitations was undermined by the objective
7 medical evidence and how.

8 But questions remain as to these limitations. While the ALJ posed hypotheticals to the
9 VE for a person who always required the use of a cane, she did not pose any hypotheticals
10 regarding Plaintiff's ability or inability to sit for certain periods of time nor whether an
11 individual with a certain frequency of migraines could work. And Plaintiff's potential mental
12 health limitations likewise were not provided to the VE. This case therefore does not fit in with
13 the category of cases in which the credit-as-true test was satisfied. *See, e.g., Trevizo v. Berryhill*,
14 871 F.3d 664, 683 (9th Cir. 2017) (vocational expert "specifically opined" about potential
15 limitations); *Garrison*, 759 F.3d at 1022 (same); *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th
16 Cir. 2004) (vocational expert testimony "clearly established" claimant could not perform any
17 substantial gainful work).

18 Because further administrative proceedings are necessary, the Court need not reach the
19 third step of the analysis. *Treichler*, 775 F.3d at 1107. But even if Plaintiff's testimony was
20 credited, it is not clear that the ALJ would be required to find Plaintiff disabled given the gaps in
21 the hypotheticals posed to the VE. *Leon v. Berryhill*, 880 F.3d 1041, 1048 (9th Cir. 2017).
22 Because Plaintiff fails to satisfy the credit-as-true test, the Court remands the case for further
23 proceedings.

24 **IV. CONCLUSION**

25 **IT IS THEREFORE ORDERED** that Plaintiff's Motion for Reversal and/or Remand
26 (ECF No. 8) is GRANTED consistent with this Order.

27 **IT IS FURTHER ORDERED** that the Commissioner's Cross-Motion to Affirm (ECF
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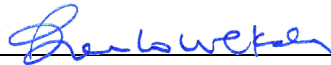
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No. 10) is DENIED.

IT IS FURTHER ORDERED that on remand, the ALJ consider the qualifications and limitations of Plaintiff’s daily activities, Plaintiff’s subjective symptom testimony, and any other part of the decision as necessary considering the updated record on remand, including Plaintiff’s RFC and any hypotheticals given to the vocational expert.

IT IS FURTHER ORDERED that the Clerk of Court is directed to enter judgment in favor of Plaintiff and close this case.

DATED this 27th day of August 2024.



BRENDA WEKSLER
UNITED STATES MAGISTRATE JUDGE