

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Feb 01, 2019

SEAN F. McAVOY, CLERK

RICKY M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:18-CV-3044-JTR

ORDER GRANTING, IN PART,  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT AND  
REMANDING FOR ADDITIONAL  
PROCEEDINGS

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 14, 18. Attorney D. James Tree represents Ricky M. (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS, IN PART**, Plaintiff’s Motion for Summary Judgment; **DENIES** Defendant’s Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

On March 11, 2014, Plaintiff filed an application for Supplemental Security Income benefits. Tr. 18, 154-157. Plaintiff alleged a disability onset date of January 1, 2014, Tr. 18, 154, 168, due to Herniated Discs in Back, Perforated Gastric Ulcer, Ventral Hernia, Arthritis, High Blood Pressure, and Sciatic Nerve Left Leg. Tr. 172. Plaintiff’s applications were denied initially and upon reconsideration.

1 Administrative Law Judge (ALJ) Mary Gallagher Dilley held a hearing on  
2 April 5, 2016, Tr. 18, 34-67, and issued an unfavorable decision on November 28,  
3 2016. Tr. 18-28. The Appeals Council denied review on January 26, 2018. Tr. 1-  
4 3. The ALJ's November 28, 2016, decision thus became the final decision of the  
5 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
6 405(g). Plaintiff filed this action for judicial review on March 28, 2018. ECF No.  
7 1, 4.

### 8 STATEMENT OF FACTS

9 The facts of the case are set forth in the administrative hearing transcript, the  
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
11 here.

12 Plaintiff was born on July 11, 1964 and was 49 years old on the date the  
13 application was filed, March 11, 2014. Tr. 40, 154. He obtained his GED and  
14 completed a Job Corps program in welding. Tr. 42. Plaintiff testified at the  
15 administrative hearing on April 5, 2016, that he last worked as a mechanic. Tr. 44.  
16 Plaintiff's disability report indicates that he stopped working because of his  
17 conditions on December 31, 1993. Tr. 172.

18 Plaintiff testified that the main issue keeping him from being able to work is  
19 lower back pain that also affects his left leg. Tr. 46-49. He stated that at least  
20 three times a week he has a shooting pain from his back down to his left leg, and  
21 then has a constant ache from his hip to his ankle. Tr. 46. He testified that this  
22 pain usually lasts a day or two, but sometimes lasts for a week. Tr. 46-47.  
23 Plaintiff stated that when he is not experiencing the shooting pain down his left leg,  
24 the pain remains in his lower back. Tr. 46-47. Plaintiff testified that he can be up  
25 on his feet, walking and standing, for "maybe a half hour at the most" before his  
26 lower back begins to hurt. Tr. 47-48. He testified that he can probably sit in a  
27 chair for an hour. Tr. 48. He also testified that it would probably alleviate his  
28 back pain if he was able to switch positions between standing and sitting

1 throughout the day. Tr. 48-49. Plaintiff testified that he does not have any pain  
2 medication for his back pain, although he stated that he has an upcoming  
3 appointment with his treating physician, Jeremiah Crank, M.D. Tr. 49. Plaintiff  
4 testified that he was getting ready to have back surgery but then his doctors  
5 discovered he had atrial fibrillation. Tr. 55, 57. He noted that no date had been  
6 scheduled for back surgery, and he had not seen a surgeon for his back. Tr. 57. He  
7 testified that he tried physical therapy, but he could not recall if it helped or not.  
8 Tr. 57. He noted that he did not go to physical therapy very often because he had  
9 to walk to the appointments and “that was pretty hard to do.” Tr. 57.

10 Plaintiff testified that he has “a little bit [of pain] here and there” from his  
11 swollen testicle, but he does not have to lie down, and it is not something that  
12 makes him stop what he is doing. Tr. 54. Plaintiff also testified that although the  
13 doctors determined that he has atrial fibrillation, he does not feel it. Tr. 55. He  
14 stated that he is taking medication for his heart, and there had been discussions  
15 about putting in a pacemaker. Tr. 55.

#### 16 **STANDARD OF REVIEW**

17 The ALJ is responsible for determining credibility, resolving conflicts in  
18 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
19 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed de novo, with  
20 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
21 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
22 only if it is not supported by substantial evidence or if it is based on legal error.  
23 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
24 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
25 1098. Put another way, substantial evidence is such relevant evidence as a  
26 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
27 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
28 rational interpretation, the Court may not substitute its judgment for that of the

1 ALJ. Tackett, 180 F.3d at 1097; Morgan v. Commissioner of Soc. Sec. Admin., 169  
2 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative  
3 findings, or if conflicting evidence supports a finding of either disability or non-  
4 disability, the ALJ's determination is conclusive. Sprague v. Bowen, 812 F.2d  
5 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by  
6 substantial evidence will be set aside if the proper legal standards were not applied  
7 in weighing the evidence and making the decision. Brawner v. Secretary of Health  
8 and Human Services, 839 F.2d 432, 433 (9th Cir. 1988).

### 9 SEQUENTIAL EVALUATION PROCESS

10 The Commissioner has established a five-step sequential evaluation process  
11 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
12 416.920(a); Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987). In steps one through  
13 four, the burden of proof rests upon the claimant to establish a prima facie case of  
14 entitlement to disability benefits. Tackett, 180 F.3d at 1098-1099. This burden is  
15 met once a claimant establishes that a physical or mental impairment prevents the  
16 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),  
17 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds  
18 to step five, and the burden shifts to the Commissioner to show that the claimant  
19 can perform other jobs present in significant numbers in the national economy.  
20 Batson v. Commissioner of Soc. Sec. Admin., 359 F.3d 1190, 1193-1194 (2004). If  
21 a claimant cannot make an adjustment to other work in the national economy, a  
22 finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 23 ADMINISTRATIVE DECISION

24 On November 28, 2016, the ALJ issued a decision finding Plaintiff was not  
25 disabled as defined in the Social Security Act.

26 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
27 activity since the application date, March 11, 2014. Tr. 20.  
28

1 At step two, the ALJ determined Plaintiff had the following severe  
2 impairments: lumbar degenerative disc disease, cervical degenerative disc disease,  
3 thoracic degenerative disc disease, testicular hydrocele, and atrial fibrillation. Tr.  
4 20.

5 At step three, the ALJ found Plaintiff did not have an impairment or  
6 combination of impairments that meets or medically equals the severity of one of  
7 the listed impairments. Tr. 21.

8 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and  
9 determined that he could perform light exertion level work with the following  
10 limitations: he could occasionally lift and carry 20 pounds and frequently lift and  
11 carry 10 pounds; could stand and/or walk about six hours in an eight-hour  
12 workday; could sit for six hours in an eight-hour workday; could occasionally  
13 climb ramps, stairs, ladders, ropes, and scaffolds; could frequently balance; could  
14 occasionally stoop, kneel, crouch, and crawl; could frequently perform overhead  
15 reaching; must avoid concentrated exposure to vibration; and must be able to  
16 alternate sitting and standing briefly every hour. Tr. 21.

17 At step four, the ALJ determined Plaintiff had no past relevant work. Tr. 26.

18 At step five, the ALJ determined that, considering Plaintiff's age, education,  
19 work experience and RFC, and based on the testimony of the vocational expert  
20 (VE), Plaintiff could perform other jobs present in significant numbers in the  
21 national economy, including the light exertion level jobs of cashier II, storage  
22 facility rental clerk, and furniture rental consultant. Tr. 26-27. The ALJ presented  
23 the VE with a hypothetical that required an individual to alternate sitting and  
24 standing briefly every hour. Tr. 63. In her decision, the ALJ stated that, although  
25 the Dictionary of Occupational Titles (DOT) does not address the sit/stand option  
26 assigned to Plaintiff, the VE based her testimony regarding such limitation on her  
27 education and experience in the field. Tr. 27.

1 **ISSUES**

2 The question presented is whether substantial evidence supports the ALJ’s  
3 decision denying benefits and, if so, whether that decision is based on proper legal  
4 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the  
5 medical opinion evidence; and (2) failing to provide specific, clear, and convincing  
6 reasons for discrediting Plaintiff’s symptom testimony. ECF No. 14 at 2.

7 **DISCUSSION<sup>1</sup>**

8 **A. Medical Source Opinions**

9 Plaintiff argues the ALJ erred by failing to properly consider the medical  
10 opinion evidence of record. ECF No. 14 at 5-14. Plaintiff specifically asserts the  
11 ALJ erred by according “less weight” to the opinion of treating physician Dr.  
12 Crank, and instead relying on the opinion of nonexamining state agency medical  
13 consultant, Christy Ulleland, M.D. Id. Further, Plaintiff argues the ALJ  
14 inaccurately determined that the RFC assessment was consistent with the  
15 conclusion of nonexamining medical expert Vivian Omeozulu, M.D. Id.

16 In weighing medical source opinions in a disability proceeding, the courts  
17 distinguish among the opinions of three types of acceptable medical sources: (i)  
18 treating physicians, who actually treat the claimant; (ii) examining physicians, who  
19 examine but do not treat the claimant; and (iii) nonexamining physicians, who  
20 neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.

21 \_\_\_\_\_  
22 <sup>1</sup>In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held  
23 that ALJs of the Securities and Exchange Commission are “Officers of the United  
24 States” and thus subject to the Appointments Clause. To the extent *Lucia* applies  
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in  
26 their briefing. *See Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161  
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not  
28 specifically addressed in an appellant’s opening brief).

1 1996). A treating physician’s opinion carries more weight than an examining  
2 physician’s opinion, and an examining physician’s opinion is given more weight  
3 than that of a nonexamining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592  
4 (9th Cir. 2004); *Lester*, 81 F.3d at 830. The Ninth Circuit has held that “[t]he  
5 opinion of a nonexamining physician cannot by itself constitute substantial  
6 evidence that justifies the rejection of either an examining or a treating physician.”  
7 *Lester*, 81 F.3d at 830; *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990)  
8 (finding a nonexamining doctor’s opinion “with nothing more” does not constitute  
9 substantial evidence).

10 In making findings regarding the medical opinion evidence of record, the  
11 ALJ must set forth specific, legitimate reasons that are based on substantial  
12 evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).  
13 The ALJ is required to set forth the reasoning behind his or her decisions in a way  
14 that allows for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492  
15 (9th Cir. 2015) (finding a clear statement of the agency’s reasoning is necessary  
16 because the Court can affirm the ALJ’s decision to deny benefits only on the  
17 grounds invoked by the ALJ). “Although the ALJ’s analysis need not be  
18 extensive, the ALJ must provide some reasoning in order for us to meaningfully  
19 determine whether the ALJ’s conclusions were supported by substantial evidence.”  
20 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014).

21 **1. Dr. Crank**

22 On March 1, 2013, prior to the alleged disability onset date of January 1,  
23 2014, treating physician Dr. Crank submitted a physical functional evaluation of  
24 Plaintiff to the Department of Social and Health Services (DSHS). Tr. 25, 273-  
25 275. Dr. Crank opined that Plaintiff was unable to meet the demands of sedentary  
26 work, and he estimated the limitation on Plaintiff’s work activities to persist for  
27 twelve months with available medical treatment. Tr. 275. He noted that Plaintiff’s  
28 chief complaints and symptoms were side back pain and radiation down his left leg

1 with weakness and numbness of his left leg. Tr. 273. He also reported that  
2 Plaintiff had a ventral painful hernia and was seeing double once a month. Tr. 273.  
3 Dr. Crank noted that the reported onset of Plaintiff's symptoms was fifteen years  
4 prior to his evaluation. Tr. 273.

5 In reaching her RFC determination, the ALJ accorded "less weight" to Dr.  
6 Crank's opinion because (1) it was remote in that it was rendered prior to the  
7 correction of Plaintiff's hernia and before the protective filing date; and (2) he did  
8 not have the opportunity to review subsequent office treatment records which  
9 indicated a "lesser degree of severity alleged." Tr. 25.

10 **a. Remoteness**

11 Citing the remoteness of Dr. Crank's opinion, the ALJ noted it was  
12 significant that the opinion was made prior to the correction of Plaintiff's hernia.  
13 Tr. 25. The Court agrees with Plaintiff that the correction of his hernia is not  
14 significant with respect to Dr. Crank's opinion as to the limiting effects of his  
15 degenerative disc disease. ECF No. 14 at 11. Dr. Crank noted that Plaintiff's  
16 lower back pain and left leg radiculopathy was severe, and his ventral hernia pain  
17 was moderate. Tr. 274. He also determined that Plaintiff's lower back pain and  
18 left leg radiculopathy affected the following basic work activities: sitting, standing,  
19 walking, lifting, carrying, handling, pushing, pulling, reaching, stooping, and  
20 crouching. Tr. 274. Dr. Crank listed the ventral hernia pain as only affecting  
21 Plaintiff's ability to lift. Tr. 274. Thus, that the opinion was provided prior to the  
22 correction of Plaintiff's hernia was not a specific and legitimate reason to discount  
23 Dr. Crank's opinion.

24 Once again citing the remoteness of Dr. Crank's opinion, the ALJ noted that  
25 the opinion predated the protective filing date in this action. Tr. 25. Dr. Crank's  
26 opinion was rendered ten months prior to the alleged disability onset date and  
27 slightly more than one year before the application date. While medical opinions  
28 that predate the alleged onset of disability are of limited relevance, see Fair v.



1 Bowen, 885 F.2d 597, 600 (9th Cir. 1989), the Carmickle case specifies “[t]his is  
2 especially true in cases...where disability is allegedly caused by a discrete event.”  
3 Carmickle, 533 F.3d at 1165. Here, Plaintiff’s back pain was not caused by a  
4 discrete event. Plaintiff’s back impairment is a degenerative condition and the  
5 record contains several references to Plaintiff’s many years of continued back pain.  
6 Tr. 45 (Plaintiff responding to ALJ’s question about what prompted his benefits  
7 application, “I probably should have done it a lot, lot of years earlier, but my  
8 back’s the reason I did it); Tr. 86 (Dr. Ulleland reported the medical record showed  
9 many years of back pain/sciatica symptoms with multilevel degenerative changes);  
10 Tr. 273 (Dr. Crank noted the reported onset of Plaintiff’s primary impairment was  
11 fifteen years prior to his March 2013 evaluation); Tr. 352 (Dr. Drenguis reported,  
12 “[Plaintiff] has had lumbar back pain for over ten years. It was gradual in onset  
13 and has been increasing in severity and frequency”); Tr. 803 (hospital notes from a  
14 January 28, 2015 visit due to back pain state, “[history] of back spasm”).

15         Additionally, Dr. Crank estimated that the limitation on Plaintiff’s work  
16 activities would persist with available medical treatment for twelve months, which  
17 continued beyond the alleged disability onset date. Tr. 275. Consistent with that  
18 opinion, the record shows that Plaintiff presented with consistent back pain  
19 symptoms in subsequent office visits to Dr. Crank. Tr. 337-344. During office  
20 visits on April 1, 2013 and February 26, 2014, Plaintiff presented with severe left  
21 sided back pain with pain radiating down his left leg. Tr. 337, 341. At the April 1,  
22 2013 visit, Dr. Crank observed that “[t]he problem is worsening. It occurs  
23 persistently.” Tr. 341. At the February 26, 2014 visit, which occurred after the  
24 alleged disability onset date and less than one month before the application date,  
25 Dr. Crank noted that Plaintiff’s back pain was “similar to prior symptoms.” Tr.  
26 338. After a review of the entire record, the Court finds that the remoteness  
27 determination regarding Dr. Crank’s opinion was not a specific and legitimate  
28 reason to discredit his opinion.

1           **b. Subsequent Office Treatment Records**

2           Finally, the ALJ reasoned that Dr. Crank’s opinion was discredited because  
3 subsequent office treatment records indicated a “lesser degree of severity alleged.”  
4 Tr. 25. The ALJ simply stated her conclusion, and without further explanation,  
5 cited to Exhibits 10F (Tr. 664-831), 11F (Tr. 832-857), and 12F (Tr. 858-868). See  
6 *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) (“The ALJ must do more  
7 than state conclusions. [She] must set forth [her] own interpretations and explain  
8 why they, rather than the doctors’, are correct”) (internal citations omitted).

9           Defendant contends that “the basis of this finding by the ALJ was  
10 sufficiently explained given that the ALJ’s decision contained the ALJ’s citation  
11 and discussion of medical records contained in Exhibits 10F and 11F (Tr. 23, 702,  
12 714, 739, 742, 842-844; Tr. 24, 703, 709, 714-717, 742, 725, 727, 804; Tr. 26, 730,  
13 753, 828-830, 852).” ECF No. 3-4 n.1. Exhibit 12F does not support the ALJ’s  
14 assertion, as it is the ALJ’s request for Dr. Omeozulu to complete a medical  
15 interrogatory. Tr. 858-868. It is not clear from a review of Exhibits 10F and 11F  
16 which records the ALJ refers to as support for her assertion. Tr. 25. All but four  
17 of the records cited by Defendant above relate to Plaintiff’s atrial fibrillation and  
18 testicular hydrocele symptoms. Three of the citations relate to pain radiating down  
19 Plaintiff’s back and left testicle, Tr. 725, 727, 804, and one citation involves Dr.  
20 Drenguis’ findings about Plaintiff’s back pain, Tr. 828-830. As discussed above,  
21 Dr. Crank noted that Plaintiff’s chief complaints and symptoms were side back  
22 pain and radiation down his left leg with weakness and numbness of his left leg.  
23 Tr. 273. The basis of this assertion by the ALJ was not sufficiently explained, and  
24 thus, was not a specific and legitimate reason to discredit Dr. Crank’s opinion.

25           The Court finds the ALJ erred by failing to provide specific and legitimate  
26 reasons to give “less weight” to Dr. Crank’s opinion. Accordingly, a remand is  
27 necessary for reconsideration of Dr. Crank’s opinion. The ALJ shall be instructed  
28 to clarify her determination that Dr. Crank’s opinion is entitled to less weight due

1 to remoteness and because subsequent office treatment records indicated a “lesser  
2 degree of severity alleged.” Tr. 25.

3 **2. Dr. Omeozulu**

4 On July 2, 2016, nonexamining physician Dr. Omeozulu completed a  
5 medical interrogatory about Plaintiff. Tr. 870-878. Dr. Omeozulu opined that  
6 Plaintiff could sit for thirty minutes at one time without interruption, stand for  
7 twenty minutes at one time without interruption, and walk for twenty minutes at  
8 one time without interruption. Tr. 874. She reported that Plaintiff could sit for a  
9 total of five hours, stand for a total of four hours, and walk for a total of four hours  
10 in an eight-hour workday. Tr. 874. Dr. Omeozulu noted there was no evidence of  
11 nerve root compression, Plaintiff’s range of motion was normal, there was no  
12 motor, sensory, or reflex loss, and Plaintiff’s straight leg raising test was negative.  
13 Tr. 871.

14 The ALJ accorded “some weight” to the opinion of Dr. Omeozulu, finding  
15 that the option to change positions every hour as set forth in the RFC  
16 accommodated Dr. Omeozulu’s opinion as to how long Plaintiff could sit, stand,  
17 and walk at one time. Tr. 25. Although her form report provides little support for  
18 the opinions rendered, see *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996)  
19 (stating that the ALJ’s rejection of a check-off report that did not contain an  
20 explanation of the bases for the conclusions made was permissible), the ALJ  
21 specifically stated she found that the option to change positions every hour, as  
22 included in the RFC, accommodated Dr. Omeozulu’s opinion that Plaintiff could  
23 sit for thirty minutes at one time, stand for twenty minutes at one time, and walk  
24 for twenty minutes at one time. Tr. 25, 874. In making this determination, the  
25 ALJ failed to describe how the RFC’s limitation to change positions every hour  
26 was consistent with Dr. Omeozulu’s limitation to change positions every twenty to  
27 thirty minutes. The ALJ did not provide citations to supporting physical  
28 examination records or identify specific objective clinical findings to support her

1 conclusion, nor did she identify specific evidence that contradicted Dr.  
2 Omeozulu’s opinion as to these limitations. See *Brown-Hunter*, 806 F.3d at 492  
3 (finding the agency must set forth reasoning behind its decisions in a way that  
4 allows for meaningful review). If the ALJ fails to specify his or her rationale, a  
5 reviewing court will be unable to review those reasons meaningfully without  
6 improperly “substitut[ing] our conclusions for the ALJ’s, or speculat[ing] as to the  
7 grounds for the ALJ’s conclusions.” *Id.*, quoting *Treichler*, 775 F.3d at 1103.  
8 Because the ALJ failed to identify what specific evidence contradicted the  
9 limitations set forth by Dr. Omeozulu, the Court finds the ALJ’s rationale for  
10 stating that Dr. Omeozulu’s sit, stand, and walk limitations were in accordance  
11 with the RFC is not properly supported.

12 Because this matter must be remanded for additional proceedings to remedy  
13 the above noted defects with Dr. Crank’s opinion, the ALJ shall also be instructed  
14 to clarify her determination that Dr. Omeozulu’s time limits for sitting, standing,  
15 and walking are incorporated in the RFC.

### 16 **3. Dr. Ulleland**

17 On September 11, 2014, state agency medical consultant Dr. Ulleland  
18 completed a physical residual functional capacity assessment of Plaintiff. Tr. 79-  
19 89. Dr. Ulleland opined that Plaintiff could perform light work. Tr. 87-88. She  
20 determined that Plaintiff could stand and/or walk with normal breaks for a total of  
21 about six hours in an eight-hour workday, and he could sit with normal breaks for a  
22 total of about six hours in an eight-hour workday. Tr. 84 at 6. Dr. Ulleland  
23 reported the medical record showed many years of back pain/sciatica symptoms  
24 with multilevel degenerative changes, but with fairly modest clinical examination  
25 serial findings and no sustained neuromotor deficit or muscle atrophy. Tr. 86.

26 The ALJ accorded “great weight” to the opinion of Dr. Ulleland because her  
27 opinion was “based on a thorough review of the available medical records and a  
28 comprehensive understanding of agency rules and regulations.” Tr. 24. The ALJ

1 also noted that Dr. Ulleland’s opinion was well supported by a reasonable  
2 explanation and the available evidence. Tr. 24. As discussed above, the ALJ’s  
3 basis for discounting the opinion of Plaintiff’s treating physician, was unsupported.  
4 “The opinion of a nonexamining physician cannot by itself constitute substantial  
5 evidence that justifies the rejection of the opinion of either an examining physician  
6 or a treating physician.” Lester, 81 F. 3d at 831. Therefore, the ALJ’s assessment  
7 of Plaintiff’s overall functioning is not supported by substantial evidence.

8 Plaintiff’s RFC is an administrative finding, dispositive of the case, which is  
9 reserved to the Commissioner, and, by delegation of authority, to the ALJ. SSR  
10 96-5p. It is thus the responsibility of the ALJ, not this Court, to make an RFC  
11 determination. Accordingly, Plaintiff’s RFC must be redetermined, on remand,  
12 taking into consideration the opinions of the medical professionals noted above, as  
13 well as any additional or supplemental evidence relevant to Plaintiff’s claim for  
14 disability benefits.

15 **B. Plaintiff’s Symptom Testimony**

16 Plaintiff also contends the ALJ erred by improperly rejecting his subjective  
17 complaints. ECF No. 14 at 14-21.

18 It is the province of the ALJ to make credibility determinations. Andrews,  
19 53 F.3d at 1043. However, the ALJ’s findings must be supported by specific  
20 cogent reasons. Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). Once  
21 the claimant produces medical evidence of an underlying medical impairment, the  
22 ALJ may not discredit testimony as to the severity of an impairment because it is  
23 unsupported by medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir.  
24 1998). Absent affirmative evidence of malingering, the ALJ’s reasons for rejecting  
25 the claimant’s testimony must be “specific, clear and convincing.” Smolen v.  
26 Chater, 80 F.3d 1273, 1281; Lester, 81 F.3d at 834. “General findings are  
27 insufficient: rather, the ALJ must identify what testimony is not credible and what  
28

1 evidence undermines the claimant's complaints." Lester, 81 F.3d at 834; *Dodrill v.*  
2 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

3 The ALJ concluded Plaintiff's medically determinable impairments could  
4 reasonably be expected to cause his alleged symptoms; however, Plaintiff's  
5 statements concerning the intensity, persistence and limiting effects of those  
6 symptoms were not entirely consistent with the medical and other evidence of  
7 record. Tr. 26. The ALJ listed the following reasons for finding Plaintiff's  
8 subjective complaints not persuasive in this case: (1) Plaintiff's allegations of  
9 disabling limitations were inconsistent with the conservative nature of treatment;  
10 (2) the objective medical evidence did not support the level of impairment claimed;  
11 and (3) Plaintiff's variable control of his physical conditions was largely due to his  
12 noncompliance with treatment recommendations. Tr. 23-24, 26.

13 While some of the reasons provided by the ALJ for discounting Plaintiff's  
14 testimony may be supported by the evidence of record, this matter must be  
15 remanded for additional proceedings to remedy defects in light of the ALJ's  
16 erroneous determination regarding the medical opinion evidence of record. See  
17 *supra*. Accordingly, on remand, the ALJ shall also reconsider Plaintiff's  
18 statements and testimony and reassess what statements, if any, are not credible and,  
19 if deemed not credible, what specific evidence undermines those statements.

### 20 CONCLUSION

21 Plaintiff argues the ALJ's decision should be reversed and remanded for the  
22 payment of benefits. The Court has the discretion to remand the case for additional  
23 evidence and findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court  
24 may award benefits if the record is fully developed and further administrative  
25 proceedings would serve no useful purpose. *Id.* Remand is appropriate when  
26 additional administrative proceedings could remedy defects. *Rodriguez v. Bowen*,  
27 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court finds that further  
28 development is necessary for a proper determination to be made.

1 The ALJ's RFC determination is not supported by substantial evidence in  
2 this case and must be reevaluated. On remand, the ALJ shall reassess the opinions  
3 of Drs. Crank, Omeozulu, and Ulleland, and all other medical evidence of record  
4 relevant to Plaintiff's claim for disability benefits. The ALJ shall reevaluate  
5 Plaintiff's subjective complaints, formulate a new RFC determination, obtain  
6 supplemental testimony from a vocational expert, if necessary, and take into  
7 consideration any other evidence or testimony relevant to Plaintiff's disability  
8 claim.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is  
11 **GRANTED IN PART.**

12 2. **Defendant's Motion for Summary Judgment, ECF No. 18, is**  
13 **DENIED.**

14 3. The matter is **REMANDED** to the Commissioner for additional  
15 proceedings consistent with this Order.

16 4. An application for attorney fees may be filed by separate motion.

17 The District Court Executive is directed to file this Order and provide a copy  
18 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and  
19 the file shall be **CLOSED.**

20 **IT IS SO ORDERED.**

21 DATED February 1, 2019.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

---

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE