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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Dec 28, 2018

SEAN F. McAVOY, CLERK

CHRISTOPHER M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-CV-00364-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 16, 20. Attorney Dana Chris Madsen represents Christopher M. (Plaintiff); Special Assistant United States Attorney Jeffrey R. McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 13. After reviewing the administrative record and briefs filed by the parties, the Court **DENIES** Defendant's Motion for Summary Judgment; **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c).

JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits (DIB) and

1 Supplemental Security Income (SSI) on October 22, 2013 and August 7, 2014,
2 respectively. Tr. 80, 143. Plaintiff alleged disability since October 14, 2013, Tr.
3 140, 142, due to type 1 diabetes and head trauma. Tr. 169. The DIB application
4 was denied initially and upon reconsideration. Tr. 99-101, 103-104. The SSI
5 application was expedited to the hearing level following filing. Tr. 242, 244.
6 Administrative Law Judge (ALJ) R.J. Payne held a hearing on March 9, 2016 and
7 heard testimony from Plaintiff, medical expert Irvin Belzer, M.D., and vocational
8 expert, Thomas Polsin. Tr. 36-79. The ALJ issued an unfavorable decision on
9 March 30, 2016. Tr. 21-30. The Appeals Council denied review on August 30,
10 2017. Tr. 1-6. The ALJ's March 30, 2016 decision became the final decision of
11 the Commissioner, which is appealable to the district court pursuant to 42 U.S.C.
12 §§ 405(g), 1383(c). Plaintiff filed this action for judicial review on October 27,
13 2017. ECF Nos. 1, 4 .

14 **STATEMENT OF FACTS**

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

18 Plaintiff was 41 years old at the alleged date of onset. Tr. 140. He has a
19 high school education. Tr. 170 His reported work history includes the jobs of
20 assistant manager in sales and maintenance in sales. Tr. 170, 198. Plaintiff
21 reported that he stopped working on October 14, 2013 due to his conditions. Tr.
22 169.

23 **STANDARD OF REVIEW**

24 The ALJ is responsible for determining credibility, resolving conflicts in
25 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
26 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
27 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
28 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is

1 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
2 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
3 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
4 another way, substantial evidence is such relevant evidence as a reasonable mind
5 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
6 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
7 interpretation, the court may not substitute its judgment for that of the ALJ.
8 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
9 findings, or if conflicting evidence supports a finding of either disability or non-
10 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
11 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
12 evidence will be set aside if the proper legal standards were not applied in
13 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
14 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

15 **SEQUENTIAL EVALUATION PROCESS**

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
18 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
19 through four, the burden of proof rests upon the claimant to establish a prima facie
20 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
21 burden is met once the claimant establishes that physical or mental impairments
22 prevent him from engaging in his previous occupations. 20 C.F.R. §§
23 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
24 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
25 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
26 which the claimant can perform exist in the national economy. *Batson v. Comm'r*
27 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant
28 cannot make an adjustment to other work in the national economy, a finding of

1 “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

2 **ADMINISTRATIVE DECISION**

3 On March 30, 2016, the ALJ issued a decision finding Plaintiff was not
4 disabled as defined in the Social Security Act.

5 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
6 activity since October 14, 2013, the alleged date of onset. Tr. 23.

7 At step two, the ALJ determined Plaintiff had the following severe
8 impairments: diabetes type I with some neuropathy and a thyroid nodule. Tr. 23.

9 At step three, the ALJ found Plaintiff did not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of
11 the listed impairments. Tr. 24.

12 At step four, the ALJ assessed Plaintiff’s residual function capacity and
13 determined he could perform a full range of medium work, stating that Plaintiff
14 “can frequently lift and/or carry twenty-five pounds. The claimant can lift 50
15 pounds occasionally and lift 25 pounds frequently; would have no limitations in
16 sitting, standing and walking; and would have no non-exertional physical
17 limitations.” Tr. 24. The ALJ identified Plaintiff’s past relevant work as store
18 laborer and storage facility rental clerk and concluded that Plaintiff was able to
19 perform this past relevant work. Tr. 28.

20 As an alternative to denying the claim at step four, the ALJ determined at
21 step five that, considering Plaintiff’s age, education, work experience and residual
22 functional capacity that a finding of “not disabled” would be directed by Medical-
23 Vocational Rule 203.28. Tr. 29. He additionally found that, based on the
24 testimony of the vocational expert, there were other jobs that exist in significant
25 numbers in the national economy Plaintiff could perform, including the jobs of
26 small parts assembler, hand packager, and final assembler. Tr. 29. The ALJ
27 concluded Plaintiff was not under a disability within the meaning of the Social
28 Security Act at any time from October 14, 2013, through the date of the ALJ’s

1 decision. Tr. 30.

2 **ISSUES**

3 The question presented is whether substantial evidence supports the ALJ’s
4 decision denying benefits and, if so, whether that decision is based on proper legal
5 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
6 medical source opinions and (2) failing to properly address Plaintiff’s symptom
7 statements. Additionally, the Plaintiff argues that these errors are harmful and a
8 remand for an immediate award of benefits is warranted. ECF No. 16.

9 **DISCUSSION¹**

10 **1. Medical Opinions**

11 Plaintiff argues the ALJ failed to properly consider and weigh the medical
12 opinions expressed by treating physician Adam Lyko, M.D. ECF No. 16 at 11-14.

13 On May 22, 2014, Dr. Lyko stated that Plaintiff had “type 1 diabetes
14 mellitus with brittle control which has resulted in his inability to work. He has had
15 a difficult time maintaining normal sugar levels and is prone to low and high sugar
16 swings which affects his ability to work. I support his current disability
17 application.” Tr. 381, 387, 472.

18 On April 28, 2015, Dr. Lyko completed a form regarding the forgiveness of
19 the Plaintiff’s federal student loans. Tr. 485. He stated that Plaintiff had the
20 following:

21 _____
22 ¹In *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 a medically determinable physical or mental impairment that (a)
2 prevents the applicant from engaging in any substantial gainful activity,
3 in any field of work, and (b) can be expected to result in death, or has
4 lasted for a continuous period of not less than 60 months, or can be
5 expected to last for a continuous period of not less than 60 months.

6 Id. He stated that Plaintiff's diagnosis was diabetes mellitus type 1 and described
7 it as "brittle diabetes, uncontrolled sugars, history of hypoglycemia." Id.

8 On January 26, 2016, Dr. Lyko stated "[m]y impression is that he is disabled
9 because of the brittle nature of his type 1 diabetes. My impression is that his
10 ability to be able to work is limited by his diabetic condition." Tr. 544.

11 The ALJ assigned partial weight to Dr. Lyko's assessments, for five
12 reasons: (1) the opinions were unsupported by treatment records showing that
13 Plaintiff's blood sugar levels remained under good control without severe lows; (2)
14 Plaintiff had declined an insulin pump; (3) the opinions were inconsistent with the
15 medical expert's testimony; (4) the April 2015 assessment was performed for the
16 purpose of student debt discharge and not Social Security Benefits; and (5) no
17 other doctor had indicated that Plaintiff could not perform work at the sedentary,
18 light, or medium levels. Tr. 27.

19 In weighing medical source opinions, the ALJ should distinguish between
20 three different types of physicians: (1) treating physicians, who actually treat the
21 claimant; (2) examining physicians, who examine but do not treat the claimant;
22 and, (3) nonexamining physicians who neither treat nor examine the claimant.
23 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
24 weight to the opinion of a treating physician than to the opinion of an examining
25 physician. Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
26 should give more weight to the opinion of an examining physician than to the
27 opinion of a nonexamining physician. Id.

28 When a treating physician's opinion is not contradicted by another
physician, the ALJ may reject the opinion only for "clear and convincing" reasons.

1 Baxter v. Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
2 physician's opinion is contradicted by another physician, the ALJ is only required
3 to provide "specific and legitimate reasons" for rejecting the opinion. Murray v.
4 Heckler, 722 F.2d 499, 502 (9th Cir. 1983). The specific and legitimate standard
5 can be met by the ALJ setting out a detailed and thorough summary of the facts
6 and conflicting clinical evidence, stating his interpretation thereof, and making
7 findings. Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
8 required to do more than offer his conclusions, he "must set forth his
9 interpretations and explain why they, rather than the doctors', are correct."
10 Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988).

11 Plaintiff fails to assert which standard applies to the ALJ's reasons for
12 rejecting the opinions. ECF No. 16 at 11-14. Defendant asserts that Dr. Lyko's
13 opinions are contradicted by the medical expert, Dr. Belzer's opinion, and the ALJ
14 is only required to provide specific and legitimate reasons for not adopting the
15 opinions. ECF No. 20 at 3-4. The Court concludes that the ALJ erred in his
16 treatment of the opinions. The reasons the ALJ provided were not supported by
17 substantial evidence and did not meet the lessor standard of specific and legitimate.

18 The ALJ's first reason for not adopting Dr. Lyko's opinions, that the
19 opinions were unsupported by treatment records, is not supported by substantial
20 evidence. Inconsistency with the objective evidence is a specific and legitimate
21 reason for rejecting physician's opinions. Batson, 359 F.3d at 1195. The ALJ
22 stated that "treatment records as of April 2014 stated the claimant's blood sugar
23 levels remained under good control without any severe lows," and that "[a]
24 treatment record from Dr. Lyko, from May 22, 2014, the same dates as one of the
25 letters, stated the claimant's diabetes symptoms had improved somewhat. He did
26 not alter his doses but instead discussed better ways of preventing lows." Tr. 27.
27 The April 24, 2014 visit cited by the ALJ includes a glucose log showing his levels
28 from April 19 to April 24 ranging from 83 to 291. Tr. 375. However, under the

1 Impressions and Recommendations Dr. Lyko wrote “[s]ugar control has worsened.
2 My impression is he had a honeymoon period last year which has ended and he has
3 become more brittle. He has not been able to work because of his diabetes. He
4 needs more insulin. . .” Tr. 378. This conclusion by the treating physician fails to
5 support the ALJ’s conclusion that “sugar levels remained under good control.” Tr.
6 27. Likewise, the May 22, 2014 treatment record cited by the ALJ includes a
7 glucose log from May 12 to May 22 showing a range of 54 to 344. Tr. 423. The
8 Impression and Recommendation states “[s]ugar control remains labile but is
9 slightly better on average than previously. I will not change his doses but
10 discussed ways of preventing lows. He has labile type 1 diabetes and is not able to
11 work.” Tr. 426. The Patient Instructions section states “[y]our diabetes has
12 improved but remains not optimally controlled. You have a brittle form of
13 diabetes and are very sensitive to insulin and carbohydrate intake.” Id. Here, the
14 citations to the record the ALJ relied upon to support his conclusion do not actually
15 support it. The ALJ appears to be interpreting the medical evidence instead of
16 relying on the physician’s interpretation of the evidence, which is unacceptable.
17 See *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) (the ALJ “must be
18 careful not to succumb to the temptation to play doctor”). Therefore, the ALJ’s
19 assertion is not supported by substantial evidence.

20 The ALJ’s second reason for not adopting Dr. Lyko’s opinions, that Plaintiff
21 had declined an insulin pump, is not specific and legitimate. Plaintiff asserts that
22 there is no evidence in the record that the insulin pump would better manage
23 Plaintiff’s condition. ECF No. 16 at 12. Defendant argues that “[w]ere Plaintiff’s
24 symptoms as severe as Dr. Lyko believed, it is reasonable to presume Plaintiff
25 would have explored all treatment options available to him.” ECF No. 20 at 5.
26 “Impairments that can be controlled effectively with medication are not disabling
27 for the purpose of determining eligibility for SSI benefits.” *Warre v. Comm’r of*
28 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). However, the treatment

1 must be prescribed by the treating physician and the treatment must be clearly
2 expected to restore the capacity to engage in any substantial gainful activity.

3 S.S.R. 82-59.²

4 On July 28, 2015, Dr. Lyko stated “I discussed management options
5 including insulin pump therapy which [he] is not interested in at the moment.” Tr.
6 523. Under Patient Instructions, Dr. Lyko wrote, “[a]n insulin pump would likely
7 help improve the control.” Id. Again, on January 26, 2016, Dr. Lyko wrote that
8 “[p]atient is not interested in insulin pump at this time.” Tr. 541. Nowhere in the
9 record does Dr. Lyko, or any other treating provider, prescribe the use of an insulin
10 pump. The only evidence that an insulin pump would improve Plaintiff’s
11 symptoms is the instructions to Plaintiff stating that one “would likely help
12 improve the control.” Tr. 523. This does not show that a pump was prescribed or
13 that the pump was clearly expected to return Plaintiff to an ability to perform
14 substantial gainful activity. An improvement in control of symptoms does not
15 necessary equate to an improvement in functional ability to the point a claimant
16 can return to and succeed in competitive employment. As such, the ALJ’s reliance
17 on Plaintiff’s refusal to use an insulin pump is not legally sufficient to reject Dr.
18 Lyko’s opinions.

19 The ALJ’s third reason for assigning only partial weight to Dr. Lyko’s
20 opinions, that they were inconsistent with the medical expert’s testimony, is not
21 specific and legitimate. “The opinion of a nonexamining physician cannot by itself
22 constitute substantial evidence that justifies the rejection of the opinion of either an

23 _____
24 ²S.S.R. 82-59 was rescinded on October 29, 2018 and replaced with S.S.R.
25 18-3p. At the time of the decision, the S.S.R. 82-59 was in effect. Additionally,
26 S.S.R. 18-3p echoes the need for an expectation that treatment be prescribed and
27 that the treatment would restore the claimant’s ability to engage in substantial
28 gainful activity.

1 examining physician or a treating physician.” Lester, 81 F.3d at 831. At the
2 hearing, Dr. Belzer stated that Plaintiff’s primary diagnosis was type I diabetes, Tr.
3 40-41, with an isoecho nodule in his right thyroid that did not meet the criteria for
4 aspiration, Tr. 43. He found that Plaintiff’s impairments did not meet or equal a
5 listing, Tr. 44, and opined that Plaintiff retained the residual functional capacity to
6 maintain medium work with no nonexertional limitations, Tr. 45. Considering
7 none of the other reasons the ALJ provided for assigning only partial weight to Dr.
8 Lyko’s opinion meet the specific and legitimate standard, this reason alone is
9 insufficient under Lester to support the ALJ’s determination.³

10 The ALJ’s fourth reason for assigning only partial weight to the April 2015
11 opinion, that it was performed for the purpose of student debt discharge, is not
12 specific and legitimate. The ALJ stated that “the April 2015 assessment was
13 performed for the purposes of student loan discharge, which is not necessarily
14 consistent with Social Security Administration disability standards.” Tr. 27. The
15 Ninth Circuit has found that “in the absence of other evidence to undermine the
16 credibility of a medical report, the purpose for which the report was obtained does
17 not provide a legitimate basis for rejecting it.” Reddick v. Chater, 157 F.3d 715,
18 726 (9th Cir. 1998).

19 Defendant argues that the decisions of other governmental organizations
20 regarding a claimant’s disability does not necessarily equate with disability under
21 Social Security’s rules. ECF No. 20 at 6 (citing 20 C.F.R. §§ 404.1504, 416.904).
22 However, Dr. Lyko’s opinion represented on the form is not the decision of a
23 governmental organization, but an opinion from a treating physician regarding

24
25 ³The Court notes that Plaintiff submitted his blood sugar readings and these
26 were exhibited in the “E” section. Tr. 267-79. It is unclear if Dr. Lyko reviewed
27 records from the “E” section in forming his opinion. Tr. 40 (confirming that he
28 received an electronic record “with exhibits through 11-F”).

1 Plaintiff's functional abilities. Tr. 485. The regulations require every medical
2 opinion to be evaluated, regardless of its source. 20 C.F.R. §§ 404.1527(c),
3 416.927(c). Therefore, this reason is not specific and legitimate.

4 The ALJ's fifth reason for assigning only partial weight to Dr. Lyko's
5 opinions, that no other doctor had indicated that Plaintiff could not perform work
6 at the sedentary, light, or medium levels, is not specific and legitimate. Dr. Lyko is
7 one of just a few providers who examined Plaintiff after his alleged onset date.
8 Besides Dr. Lyko, Plaintiff was seen one time by Dr. Woolf, Tr. 478-80, one time
9 by E. David Hurlley, M.D., Tr. 480-82, and three times by the nurse practitioner in
10 Dr. Lyko's office, Jennifer Jones, ARNP, Tr. 593-96, 504-12. Additionally,
11 Plaintiff saw an eye doctor and a registered dietitian for diabetes education. Tr.
12 497-500, 527-31. None of these providers prepared any functional opinion. The
13 Court refuses to accept the ALJ's insinuation that the lack of a medical opinion
14 equates to a lack of limitations.

15 The only other opinions in the evidence come from nonexamining sources:
16 Dr. Belzer at the hearing, Tr. 39-48, and Howard Platter, M.D., at the
17 reconsideration level, Tr. 93-95. As discussed above, the opinions of
18 nonexamining providers alone are not substantial evidence to support the rejection
19 of a treating physician. Lester, 81 F.3d at 831. Therefore, without more than a
20 reference to the opinions from the nonexertional sources in the record, the ALJ's
21 reason falls short of the specific and legitimate standard.

22 This case is to be remanded for the ALJ to properly address the opinions of
23 Dr. Lyko.

24 **2. Plaintiff's Symptom Statements**

25 Plaintiff contests the ALJ's determination that his symptom statements were
26 not entirely consistent with the evidence. ECF No. 16 at 15-17.

27 It is generally the province of the ALJ to make credibility determinations
28 regarding a claimant's symptom statements, Andrews, 53 F.3d at 1039, but the

1 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
2 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
3 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
4 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81
5 F.3d at 834. "General findings are insufficient: rather the ALJ must identify what
6 testimony is not credible and what evidence undermines the claimant's
7 complaints." *Lester*, 81 F.3d at 834.

8 The ALJ found Plaintiff's medically determinable impairments could
9 reasonably be expected to cause his alleged symptoms, but that his statements
10 concerning the intensity, persistence, and limiting effects of the symptoms were
11 not entirely consistent with the evidence. Tr. 25. The ALJ provided four reasons
12 for his determination: (1) Plaintiff's statements were not supported by the
13 objective medical evidence; (2) Plaintiff's symptoms were inconsistent with his
14 reported activities; (3) Plaintiff did not know why he was fired from his prior job;
15 and (4) Plaintiff applied for and received unemployment benefits. Tr. 25-27.

16 The ALJ's first reason for rejecting Plaintiff's symptom statements, that they
17 were inconsistent with the objective medical evidence, is not specific, clear and
18 convincing. Objective medical evidence is a "relevant factor in determining the
19 severity of the claimant's pain and its disabling effects," but it cannot serve as the
20 only reason for rejecting a claimant's credibility. *Rollins v. Massanari*, 261 F.3d
21 853, 857 (9th Cir. 2001). The ALJ found that the record demonstrated that
22 Plaintiff's symptoms were controlled and improving. Tr. 25-26. However, the
23 ALJ failed to state with specificity how the evidence of improvement was
24 inconsistent with Plaintiff's reported symptoms. *Id.* Therefore, this fails to meet
25 the specific, clear and convincing standard.

26 The ALJ's second reason for rejecting Plaintiff's symptom statements, that
27 they were inconsistent with his reported activities, is not specific, clear and
28 convincing. A claimant's daily activities may support an adverse credibility

1 finding if (1) the claimant’s activities contradict his other testimony, or (2) “the
2 claimant is able to spend a substantial part of his day engaged in pursuits involving
3 performance of physical functions that are transferable to a work setting.” Orn,
4 495 F.3d 625, 639 (9th Cir. 2007) (citing Fair v. Bowen, 885 F.2d 597, 603 (9th
5 Cir. 1989)). A claimant need not be “utterly incapacitated” to be eligible for
6 benefits. Fair, 885 F.2d at 603. The ALJ found that Plaintiff’s activities of
7 checking his blood sugar levels, preparing meals, housework, going outside daily,
8 and shopping in stores as inconsistent with Plaintiff’s reported symptoms. Tr. 26.
9 First, the ALJ failed to state how these activities were inconsistent with his
10 reported symptoms. Id. Second, that Ninth Circuit has “repeatedly warned that
11 ALJs must be especially cautious in concluding that daily activities are inconsistent
12 with testimony about pain, because impairments that would unquestionably
13 preclude work and all the pressures of a workplace environment will often be
14 consistent with doing more than merely resting in bed all day.” Garrison v.
15 Colvin, 759 F.3d 995, 1016 (9th Cir. 2014). As such, this reason is not specific,
16 clear and convincing.

17 The ALJ’s third reason for rejecting Plaintiff’s symptom statements, that he
18 did not know why he was fired from his last job, is specific, clear and convincing.
19 An ALJ may rely on the fact that claimant left his job because he was laid off,
20 rather than because he was injured, in finding the claimant’s statements not entirely
21 credible. Bruton v. Massanari, 268 F.3d 824, 828 (9th Cir. 2001). The ALJ found
22 that Plaintiff’s testimony regarding why he left his prior employment was
23 unsupported in the record. Tr. 26-27. At his hearing, Plaintiff testified that he
24 thought he was let go from his prior employment, ending October 14, 2013, due to
25 the need to use the restroom frequently, but he had no proof. Tr. 53. The ALJ
26 found this inconsistent with Plaintiff denying frequent urination on exams on July
27 24, 2014, April 28, 2015, July 28, 2015, October 27, 2015, and January 26, 2016.
28 Tr. 27. While it is questionable for the ALJ to rely on evidence of Plaintiff’s

1 symptoms from 2014 and forward when he last worked in 2013, a review of the
2 evidence from 2013 supports the ALJ's overall conclusion that Plaintiff failed to
3 report excessive urination as a symptom to his providers. Tr. 339, 348, 360. The
4 complaint of frequent urination first appears in the record on April 24, 2014 when
5 he reports to Dr. Lyko that he was fired in October of 2013 for needing to urinate
6 frequently. Tr. 375. However, on May 22, 2014, Plaintiff again denied excessive
7 urination. Tr. 424. As such, this reason meets the specific, clear and convincing
8 standard. However, considering this case has been remanded for the ALJ to
9 properly address Dr. Lyko's opinions, he will also make a new credibility
10 determination.

11 The ALJ's fourth reason for rejecting Plaintiff's symptom statements, that he
12 applied for and received unemployment benefits, is not specific, clear and
13 convincing. The receipt of unemployment benefits can support an ALJ's adverse
14 determination regarding his symptom statements; however, there must be evidence
15 to support that the claimant held himself out as ready, willing, and able to work
16 full-time. Carmickle, 533 F.3d at 1161-62. Here, Plaintiff received unemployment
17 benefits in the first two quarters of 2014. Tr. 160. However, the ALJ has pointed
18 to no evidence that Plaintiff held himself out as ready, willing, and able to work
19 full-time in his receipt of these benefits. Tr. 27. Therefore, this reason is not
20 specific, clear and convincing.

21 The evaluation of a claimant's symptom statements and their resulting
22 limitations relies, in part, on the assessment of the medical evidence. See 20
23 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, since the case is
24 being remanded for the ALJ to properly address Dr. Lyko's opinions, a new
25 assessment of Plaintiff's subjective symptom statements is necessary.

26 **REMEDY**

27 Plaintiff argues that the ALJ's errors were harmful and the appropriate
28 remedy is a remand for an immediate award of benefits. ECF No. 16 at 17-18.

1 The Court agrees that the ALJ's treatment of Dr. Lyko's opinion was a harmful
2 error. However, the Court finds that the appropriate remedy is to remand for
3 additional proceedings.

4 The decision whether to remand for further proceedings or reverse and
5 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
6 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
7 where "no useful purpose would be served by further administrative proceedings,
8 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
9 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
10 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
11 (9th Cir. 1990); see also *Garrison*, 759 F.3d at 1021 (noting that a district court
12 may abuse its discretion not to remand for benefits when all of these conditions are
13 met). This policy is based on the "need to expedite disability claims." *Varney*,
14 859 F.2d at 1401. But where there are outstanding issues that must be resolved
15 before a determination can be made, and it is not clear from the record that the ALJ
16 would be required to find a claimant disabled if all the evidence were properly
17 evaluated, remand is appropriate. See *Benecke v. Barnhart*, 379 F.3d 587, 595-96
18 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

19 In this case, it is not clear from the record that the ALJ would be required to
20 find Plaintiff disabled if all the evidence were properly evaluated. While Dr.
21 Lyko's opinions are clear in that he considered Plaintiff's impairments to preclude
22 work, the opinions are not clear as to how Plaintiff's symptoms result in functional
23 limitations that can be reflected in a residual functional capacity that was presented
24 to the vocational expert at the hearing. Further proceedings are necessary for the
25 ALJ to properly address Dr. Lyko's opinions and to properly address Plaintiff's
26 symptom statements. Additionally, the ALJ will supplement the record with any
27 outstanding medical evidence, including Plaintiff's glucose monitor readings, if
28 available. At remand proceedings the ALJ will call a medical expert to review the

1 medical evidence, including Plaintiff's glucose monitor readings, and testify at the
2 hearing. Likewise, the ALJ will call a vocational expert to testify at the hearing.

3 **CONCLUSION**

4 Accordingly, **IT IS ORDERED:**

5 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is
6 **DENIED.**

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
8 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
9 additional proceedings consistent with this Order.

10 3. Application for attorney fees may be filed by separate motion.

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

14 DATED December 28, 2018.



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

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16 JOHN T. RODGERS
17 UNITED STATES MAGISTRATE JUDGE
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