

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

May 11, 2021

SEAN F. McAVOY, CLERK

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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON
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11 SCOTT S.,

12 Plaintiff,

13 v.
14

15 ANDREW M. SAUL,
16 COMMISSIONER OF SOCIAL
17 SECURITY,

18 Defendant.
19

No. 2:20-CV-00236-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR
ADDITIONAL PROCEEDINGS

20 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
21 No. 13, 14. Attorney Timothy Anderson represents Scott S. (Plaintiff); Special
22 Assistant United States Attorney Jordan Goddard represents the Commissioner of
23 Social Security (Defendant). The parties have consented to proceed before a
24 magistrate judge. ECF No. 4. After reviewing the administrative record and the
25 briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary
26 Judgment; **DENIES** Defendant's Motion for Summary Judgment; and
27 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
28 42 U.S.C. § 405(g).

ORDER GRANTING PLAINTIFF'S MOTION . . . - 1

1 **JURISDICTION**

2 Plaintiff filed applications for Disability Insurance Benefits and
3 Supplemental Security Income on February 21, 2018, alleging disability since
4 January 1, 2014,¹ due to chronic lower back pain, sciatica in both legs, inability to
5 stand for prolonged periods of time, L4-L5 bulging discs, chronic back stiffness,
6 left leg pain, low hearing in both ears, and high blood pressure. Tr. 58-59. The
7 applications were denied initially and upon reconsideration. Tr. 111-19, 122-35.
8 Administrative Law Judge (ALJ) Jesse Shumway held a hearing on May 31, 2019,
9 Tr. 31-57, and issued an unfavorable decision on July 3, 2019. Tr. 15-25. Plaintiff
10 requested review of the ALJ’s decision by the Appeals Council and the Appeals
11 Council denied the request for review on April 24, 2020. Tr. 1-5. The ALJ’s July
12 2019 decision is the final decision of the Commissioner, which is appealable to the
13 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
14 review on June 26, 2020. ECF No. 1.

15 **STATEMENT OF FACTS**

16 Plaintiff was born in 1968 and was 45 years old as of his alleged onset date.
17 Tr. 23. He has a high school education and has worked in construction, logging,
18 and the lumber industry. Tr. 23, 230-31. He was initially injured in an on-the-job
19 incident where he was hit by a front-end loader. Tr. 297.

20 **STANDARD OF REVIEW**

21 The ALJ is responsible for determining the reliability of a claimant’s
22 allegations, resolving conflicts in medical testimony, and resolving ambiguities.
23 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ’s determinations
24 of law are reviewed *de novo*, with deference to a reasonable interpretation of the
25 applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The

26 _____
27 ¹ At the hearing Plaintiff amended his alleged onset date to March 1, 2017.
28 Tr. 34.

1 decision of the ALJ may be reversed only if it is not supported by substantial
2 evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th
3 Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but
4 less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is
5 such relevant evidence as a reasonable mind might accept as adequate to support a
6 conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is
7 susceptible to more than one rational interpretation, the Court may not substitute its
8 judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*
9 *of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence
10 supports the administrative findings, or if conflicting evidence supports a finding
11 of either disability or non-disability, the ALJ's determination is conclusive.
12 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a
13 decision supported by substantial evidence will be set aside if the proper legal
14 standards were not applied in weighing the evidence and making the decision.
15 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
16 1988).

17 SEQUENTIAL EVALUATION PROCESS

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *Bowen v.*
20 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant has
21 the burden of establishing a prima facie case of entitlement to disability benefits.
22 *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that
23 a physical or mental impairment prevents the claimant from engaging in past
24 relevant work. 20 C.F.R. § 404.1520(a)(4). If a claimant cannot perform past
25 relevant work, the ALJ proceeds to step five, and the burden shifts to the
26 Commissioner to show (1) the claimant can make an adjustment to other work; and
27 (2) the claimant can perform specific jobs that exist in the national economy.
28 *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004).

1 If a claimant cannot make an adjustment to other work in the national economy,
2 the claimant will be found disabled. 20 C.F.R. § 404.1520(a)(4)(v).

3 ADMINISTRATIVE FINDINGS

4 On July 3, 2019, the ALJ issued a decision finding Plaintiff was not disabled
5 as defined in the Social Security Act. Tr. 15-25.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since January 1, 2014. Tr. 17.²

8 At step two, the ALJ determined Plaintiff had the following severe
9 impairments: lumbar degenerative disc disease and mild obesity. *Id.*

10 At step three, the ALJ found Plaintiff did not have an impairment or
11 combination of impairments that met or medically equaled the severity of one of
12 the listed impairments. Tr. 18.

13 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
14 he could perform a range of light work, with the following limitations:

15 He can stand and/or walk for thirty minutes at a time for up to four
16 hours total in combination in an eight-hour workday; he can only
17 occasionally perform all postural activities; and he cannot have
18 concentrated exposure to vibration or hazards, such as working at
19 unprotected heights and/or moving mechanical parts.

20 Tr. 18-19.

21 At step four, the ALJ found Plaintiff was unable to perform his past relevant
22 work as a construction worker, all around logger, or lumber straightener. Tr. 23.

23 At step five the ALJ found that, considering Plaintiff's age, education, work
24 experience and residual functional capacity, there were jobs that existed in
25 significant numbers in the national economy that Plaintiff could perform,

26
27 ² The ALJ did not acknowledge that Plaintiff amended his alleged onset date
28 at the hearing.

1 specifically identifying the representative occupations of cashier II, production
2 assembler, and outside deliverer. Tr. 23-24.

3 The ALJ thus concluded Plaintiff was not under a disability within the
4 meaning of the Social Security Act at any time from the original alleged onset date
5 through the date of the decision. Tr. 24-25.

6 ISSUES

7 The question presented is whether substantial evidence supports the ALJ's
8 decision denying benefits and, if so, whether that decision is based on proper legal
9 standards.

10 Plaintiff contends the Commissioner erred by (1) not properly assessing
11 Plaintiff's testimony; and (2) giving legally insufficient reasons for rejecting the
12 opinion of the medical expert, Robert Smiley, M.D.

13 DISCUSSION

14 1. Plaintiff's subjective statements

15 Plaintiff contends the ALJ erred by improperly rejecting his subjective
16 complaints. ECF No. 13 at 17-21.

17 It is the province of the ALJ to make determinations regarding a claimant's
18 allegations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the
19 ALJ's findings must be supported by specific, cogent reasons. *Rashad v. Sullivan*,
20 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence
21 of an underlying medical impairment, the ALJ may not discredit testimony as to
22 the severity of an impairment merely because it is unsupported by medical
23 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative
24 evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony
25 must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281
26 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General
27 findings are insufficient: rather the ALJ must identify what testimony is not

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1 credible and what evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d
2 at 834; *Dodrill v. 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 some of the alleged symptoms; however,
5 Plaintiff’s statements concerning the intensity, persistence and limiting effects of
6 those symptoms were not entirely consistent with the medical evidence and other
7 evidence in the record. Tr. 19. The ALJ found Plaintiff’s allegations were not
8 consistent with the objective medical findings, varied from prior statements to his
9 physicians and Social Security, conflicted with his activities of daily living, and
10 were inconsistent with his course of treatment. Tr. 20-21.

11 Plaintiff argues the ALJ’s reasoning does not reach the clear and convincing
12 standard, as facts were considered out of context and the ALJ selectively read the
13 record. ECF No. 13 at 4-16. Defendant argues the ALJ reasonably considered and
14 interpreted the record and legitimately found Plaintiff’s allegations to be
15 unsupported by his treatment, his inconsistent statements, and his activities. ECF
16 No. 14 at 4-9. The Court finds the ALJ did not offer clear and convincing reasons
17 for discounting Plaintiff’s subjective testimony.

18 *a. Varying prior statements*

19 The ALJ found Plaintiff made prior statements to his physicians and to the
20 Social Security Administration that varied from his testimony at hearing. Tr. 20.
21 The ALJ specifically pointed to Plaintiff’s changing reports about how long he
22 could walk before needing a break, and how long of a break he would need; his
23 documented activities; and his reports to his doctors regarding improvement with
24 treatment. Tr. 20-21. The Court finds none of these factors rise to the level of clear
25 and convincing.

26 An ALJ may consider inconsistent statements by a claimant in assessing
27 their credibility. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). “A
28 single discrepancy fails, however, to justify the wholesale dismissal of a claimant’s

1 testimony.” *Popa v. Berryhill*, 872 F.3d 901, 906-07 (9th Cir. 2017). The Court
2 finds Plaintiff’s varying reports of how long he was able to walk before needing a
3 rest, and how long the rest needed to be, do not indicate any clear inconsistency,
4 given the length of time between the varying statements. Tr. 253 (March 2018,
5 function report); 43 (May 2019, hearing testimony). The records indicate that
6 Plaintiff’s symptoms periodically waxed and waned, with reported pain levels
7 varying and Plaintiff experiencing greater or reduced relief from his pain
8 medication and other treatments. *See* Tr. 311, 396, 524-29, 531-36, 583-91, 660-
9 67. Plaintiff also testified that he would push himself some days more than others
10 but would have more pain in the following days. Tr. 44. There is no inconsistency
11 that justifies finding Plaintiff’s allegations generally unreliable.

12 The ALJ additionally found Plaintiff’s “strong participation in activities of
13 daily living” was inconsistent with his testimony at the hearing. Tr. 20. The ALJ
14 pointed to Plaintiff caring for his dog, engaging in general household and personal
15 care, splitting firewood, running errands, and jumping rope with his grandchild. *Id.*
16 A claimant’s daily activities may support an adverse credibility finding if the
17 claimant’s activities contradict their other testimony. *Orn v. Astrue*, 495 F.3d 625,
18 639 (9th Cir. 2007). However, “the mere fact that a plaintiff has carried on certain
19 daily activities ... does not in any way detract from [their] credibility as to [their]
20 overall disability.” *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004). The
21 Ninth Circuit has consistently found that the ability to engage in basic daily
22 activities and personal care is not necessarily inconsistent with disability:

23 We have repeatedly warned that ALJs must be especially cautious in
24 concluding that daily activities are inconsistent with testimony about
25 pain, because impairments that would unquestionably preclude work
26 and all the pressures of a workplace environment will often be
27 consistent with doing more than merely resting in bed all day.

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1 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). There is nothing about
2 Plaintiff’s testimony regarding his pain and limitations that is inconsistent with
3 performing personal care, doing minimal chores, or running brief errands. Indeed,
4 Plaintiff’s function report and testimony indicate he is capable of doing these
5 things for short periods of time while taking rests. Tr. 48-49, 250. With respect to
6 caring for his dog and splitting firewood, Plaintiff indicated he was only able to
7 take his dog on short walks, and not every day, and that he could do “limited”
8 cutting of wood. Tr. 250-52. As for Plaintiff jumping rope with his granddaughter,
9 this is only noted once in the record, and Plaintiff injured his knee attempting to do
10 it. Tr. 566, 574. This does not constitute substantial evidence of Plaintiff “playing
11 very physical games with grandchildren.” The Court finds the ALJ’s conclusion
12 that Plaintiff participated in activities that were inconsistent with his testimony is
13 not supported by the record.

14 Finally, the ALJ found Plaintiff’s contemporaneous statements to providers
15 were inconsistent with his allegations of disability, noting his reports that treatment
16 worked well and that he had good responses to injections. Tr. 20. While an ALJ
17 may consider the consistency between a claimant’s reports to their doctors and
18 their reports to the Agency, the Court finds the ALJ failed to identify any
19 inconsistency. Plaintiff reported he received some relief from his medications and
20 other treatments, but never reported sustained resolution of his problems. He
21 consistently reported significant pain levels, and substantial interference with his
22 ability to engage in regular activities, and he rarely reported more than 50%
23 improvement in his condition with treatment. Tr. 311-16, 531-36, 583-91, 615-22,
24 643-49, 669-74, 683-88. Reports of doing well and improvement must be read in
25 context. *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001). The Court
26 finds the ALJ’s analysis is not supported by substantial evidence.

27 *b. Course of treatment*
28

1 The ALJ found Plaintiff’s course of treatment was inconsistent with his
2 allegations of disability, noting he pursued a relatively conservative course of pain
3 management and was “unwilling to even entertain the thought of surgery.” Tr. 20-
4 21. While an ALJ may discount a claimant’s allegations based on him only
5 receiving “conservative” treatment, *Tommasetti v. Astrue*, 533 F.3d 1035, 1039-40
6 (9th Cir. 2008), the ALJ’s characterization of Plaintiff’s treatment as conservative
7 is not supported. Plaintiff received epidural steroid injections and had branch
8 blocks to address his pain, in addition to being seen by a pain management clinic
9 and receiving opiate pain medications. Tr. 305, 571, 595, 611, 677. In August 2017
10 Plaintiff’s treating provider indicated that Plaintiff had failed conservative therapy
11 and was being referred for an MRI and consultation for neurosurgery. Tr. 400.
12 With respect to the issue of surgery, the record reflects the surgeon’s discussion
13 with Plaintiff regarding further testing and treatment options and noted a lumbar
14 fusion could be warranted. Tr. 391. The surgeon noted: “He indicated to me that he
15 is not interested in considering this.” *Id.* The ALJ’s implication that Plaintiff’s
16 conditions were not as severe as alleged due to his desire to not have a lumbar
17 fusion is not reasonable. Prior to his visit with the surgeon, Plaintiff had requested
18 the referral to evaluate possible surgery. Tr. 297. A later note documented
19 Plaintiff’s report that he was still in discussions with the orthopedic team about the
20 possibility of surgery or a nerve ablation. Tr. 540. At the hearing, Plaintiff testified
21 that while he did not want surgery, he did not shut down the option, and further
22 testified that surgery had not actually been recommended yet, as there were other
23 treatment modalities to try first. Tr. 52. This appears to be consistent with the
24 records from the surgeon, noting the need for further testing before a fusion would
25 be recommended, and exploring other possibilities for treatment. Tr. 391.
26 Therefore, the Court finds that the ALJ’s assessment of Plaintiff’s treatment as
27 conservative and unresponsive to his allegations is not supported by the record.

28 *c. Objective medical findings*

1 The only other rationale offered by the ALJ for discounting Plaintiff's
2 allegations was that they were not consistent with the objective medical findings,
3 including the MRI showing mild to moderate abnormalities, and the normal exam
4 results throughout the record. Tr. 20. An ALJ may cite inconsistencies between a
5 claimant's testimony and the objective medical evidence in discounting the
6 claimant's symptom statements. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d
7 1219, 1227 (9th Cir. 2009). But this cannot be the only reason provided by the
8 ALJ. *See Lester*, 81 F.3d at 834 (the ALJ may not discredit the claimant's
9 testimony as to subjective symptoms merely because they are unsupported by
10 objective evidence); *see Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001)
11 (Although it cannot serve as the sole ground for rejecting a claimant's credibility,
12 objective medical evidence is a "relevant factor in determining the severity of the
13 claimant's pain and its disabling effects."). Because none of the ALJ's other
14 reasons reach the clear and convincing standard, the objective medical findings
15 alone may not be the ALJ's only rationale.³

16 On remand, the ALJ shall reassess Plaintiff's subjective reports.

17 **2. Medical expert Robert Smiley, M.D.**

18 Plaintiff contends the ALJ erred by improperly rejecting the opinion of the
19 medical expert who testified at the hearing, Robert Smiley, M.D. ECF No. 13 at
20 17-20.

21 For claims filed on or after March 27, 2017, new regulations apply that
22 change the framework for how an ALJ must weigh medical opinion evidence.
23 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
24 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c.

25
26 ³ Furthermore, it is not clear to the Court that the ALJ's characterization of
27 the objective evidence as inconsistent with Plaintiff's allegations is correct, given
28 the medical expert's testimony that Plaintiff had "significant pathology."

1 The new regulations provide the ALJ will no longer give any specific evidentiary
2 weight to medical opinions or prior administrative medical findings, including
3 those from treating medical sources. 20 C.F.R. § 404.1520c(a). Instead, the ALJ
4 will consider the persuasiveness of each medical opinion and prior administrative
5 medical finding, regardless of whether the medical source is an Acceptable
6 Medical Source. 20 C.F.R. § 404.1520c(c). The ALJ is required to consider
7 multiple factors, including supportability, consistency, the source's relationship
8 with the claimant, any specialization of the source, and other factors (such as the
9 source's familiarity with other evidence in the file or an understanding of Social
10 Security's disability program). *Id.* The regulations make clear that the
11 supportability and consistency of the opinion are the most important factors, and
12 the ALJ must articulate how they considered those factors in determining the
13 persuasiveness of each medical opinion or prior administrative medical finding. 20
14 C.F.R. § 404.1520a(b). The ALJ may explain how they considered the other
15 factors, but is not required to do so, except in cases where two or more opinions
16 are equally well-supported and consistent with the record. *Id.*

17 Supportability and consistency are further explained in the regulations:

18
19 (1) *Supportability*. The more relevant the objective medical evidence
20 and supporting explanations presented by a medical source are to
21 support his or her medical opinion(s) or prior administrative medical
22 finding(s), the more persuasive the medical opinions or prior
administrative medical finding(s) will be.

23 (2) *Consistency*. The more consistent a medical opinion(s) or prior
24 administrative medical finding(s) is with the evidence from other
25 medical sources and nonmedical sources in the claim, the more
26 persuasive the medical opinion(s) or prior administrative medical
finding(s) will be.

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1 20 C.F.R. § 404.1520c(c).⁴

2 Dr. Smiley testified that he agreed with Plaintiff's treating ARNP, Mr.
3 Wright, that Plaintiff was limited to performing sedentary work, and agreed that it
4 was reasonable that Plaintiff would need to lay down to relieve pain. Tr. 38, 41.
5 Upon further questioning he testified that Plaintiff could maybe stand or walk for
6 four hours in a day, but not for more than 30 minutes at a time. Tr. 40.

7 The ALJ found Dr. Smiley's opinion regarding standing and walking was
8 consistent with and supported by the record, and thus was persuasive, but found the
9 remainder of his testimony was not consistent with or supported by the
10 longitudinal evidence. Tr. 21. The ALJ noted Dr. Smiley missed a reference in the
11 record regarding Plaintiff jumping rope and found Dr. Smiley did not know
12 whether Plaintiff showed gait impairment on physical exams in the record. *Id.* The
13 ALJ thus concluded that Dr. Smiley over-relied on the lumbar MRI in the record
14 and ignored other evidence of Plaintiff's actual functioning, rendering his opinion
15 unpersuasive. *Id.*

16 Plaintiff argues the evidence of him jumping rope does not warrant the
17 rejection of the medical expert's testimony and asserts the ALJ failed to explain
18 how the findings of normal gait throughout the record showed Plaintiff was less
19 limited than Dr. Smiley testified. ECF No. 13 at 20. Defendant argues the ALJ
20 reasonably found Dr. Smiley's testimony to be inconsistent with the record and
21 lacking in support and adequate explanation. ECF No. 14 at 14-15.

22 _____
23 ⁴ The parties disagree over whether Ninth Circuit case law continues to be
24 controlling in light of the amended regulations, specifically whether an ALJ is still
25 required to provide specific and legitimate reasons for discounting a contradicted
26 opinion from a treating or examining physician. ECF No. 13 at 18-19; ECF No. 14
27 at 9-13. The Court finds resolution of this question unnecessary to the disposition
28 of this case.

1 The Court finds that the ALJ’s discussion is not supported by substantial
2 evidence and failed to comply with the new regulations.

3 Under the new regulations, an ALJ is required to articulate how they
4 considered the consistency and supportability factors in determining the
5 persuasiveness of each medical opinion or prior administrative medical finding. 20
6 C.F.R. § 404.1520a(b). The ALJ here did not address the consistency between Dr.
7 Smiley’s opinion and other opinions in the file, and only discussed the
8 supportability within the record.

9 As discussed above, the record reflects only a single incident of Plaintiff
10 jumping rope with his granddaughter, at which point he injured his knee. Tr. 566,
11 574. The ALJ additionally mischaracterized Dr. Smiley’s testimony: the doctor
12 testified that he didn’t know whether Plaintiff was regularly able to jump rope or
13 simply had the occasional good day where he was able to do so, and stated that
14 given the significance of Plaintiff’s pathology, it was hard to imagine that he could
15 stand and walk for six hours, let alone jump rope *on a regular basis*. Tr. 40. The
16 ALJ’s discussion of Dr. Smiley’s testimony does not acknowledge the isolated
17 nature of the event or Dr. Smiley’s statements that this was not an activity Plaintiff
18 could engage in on a regular basis, while noting it was possible he had the
19 occasional good day. Tr. 21.

20 Finally, the ALJ’s discussion of Dr. Smiley’s statements about Plaintiff’s
21 gait are not accurate. The ALJ stated “Dr. Smiley did not know whether the
22 claimant showed gait impairment on physical examination,” then cited to
23 numerous instances where Plaintiff’s gait was recorded as normal. Tr. 20. The
24 actual exchange between the ALJ and the medical expert was as follows:

25 ALJ: In terms of clinical observations, do we have any physical exams
26 in which he demonstrates difficulty walking or standing or otherwise
27 being on his feet?
28

1 Doctor: I didn't record that in my notes, Your Honor, so you have me.
2 It may be there, it may not be there, but usually if that was the case I
3 would have put it in my notes, and I didn't.

4 ALJ: You mean like if there were findings that his gait was antalgic or
5 abnormal, you would have written that down?

6 Doctor: Yes.

7 ALJ: Okay. I mean, I wrote down in my notes that his gait was always
8 normal, so I mean, it sounds like we're agreeing on that. Is that
9 correct?

10 Doctor: Yes.

11 Tr. 39. The ALJ failed to explain how this testimony or the cited records in any
12 way undermine Dr. Smiley's opinion.

13 The Court therefore finds the ALJ's conclusion that Dr. Smiley overly relied
14 on the MRI results and ignored evidence of Plaintiff's actual functioning is
15 unsupported by substantial evidence. On remand the ALJ will reconsider Dr.
16 Smiley's testimony.

17 CONCLUSION

18 The ALJ's decision is not supported by substantial evidence. On remand, the
19 ALJ shall reevaluate the medical evidence and Plaintiff's subjective complaints,
20 making findings on each of the five steps of the sequential evaluation process,
21 obtain supplemental testimony from a vocational expert as needed, and take into
22 consideration any other evidence or testimony relevant to Plaintiff's disability
23 claim.

24 Accordingly, **IT IS ORDERED:**

25 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
26 **GRANTED.**

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1 2. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is
2 **DENIED.**

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

5 4. An application for attorney fees may be filed by separate motion.
6 The District Court Executive is directed to file this Order and provide a copy
7 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and
8 the file shall be **CLOSED.**

9 **IT IS SO ORDERED.**

10 DATED May 11, 2021.



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A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE