

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

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

Aug 13, 2021

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

KELLY R.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 2:20-cv-00259-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 18, 19

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 18, 19. The parties consented to proceed before a magistrate judge. ECF No.
3 6. The Court, having reviewed the administrative record and the parties' briefing,
4 is fully informed. For the reasons discussed below, the Court grants Plaintiff's
5 motion, ECF No. 18, and denies Defendant's motion, ECF No. 19.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

8 STANDARD OF REVIEW

9 A district court's review of a final decision of the Commissioner of Social
10 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
11 limited; the Commissioner's decision will be disturbed "only if it is not supported
12 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
13 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
14 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
15 (quotation and citation omitted). Stated differently, substantial evidence equates to
16 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
17 citation omitted). In determining whether the standard has been satisfied, a
18 reviewing court must consider the entire record as a whole rather than searching
19 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
7 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
8 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
9 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
10 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
11 *Sanders*, 556 U.S. 396, 409-10 (2009).

12 **FIVE-STEP EVALUATION PROCESS**

13 A claimant must satisfy two conditions to be considered “disabled” within
14 the meaning of the Social Security Act. First, the claimant must be “unable to
15 engage in any substantial gainful activity by reason of any medically determinable
16 physical or mental impairment which can be expected to result in death or which
17 has lasted or can be expected to last for a continuous period of not less than twelve
18 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be
19 “of such severity that he is not only unable to do his previous work[,] but cannot,
20 considering his age, education, and work experience, engage in any other kind of

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §
2 423(d)(2)(A).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
5 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
6 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
7 “substantial gainful activity,” the Commissioner must find that the claimant is not
8 disabled. 20 C.F.R. § 404.1520(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis
10 proceeds to step two. At this step, the Commissioner considers the severity of the
11 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
12 from “any impairment or combination of impairments which significantly limits
13 [his or her] physical or mental ability to do basic work activities,” the analysis
14 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment
15 does not satisfy this severity threshold, however, the Commissioner must find that
16 the claimant is not disabled. *Id.*

17 At step three, the Commissioner compares the claimant’s impairment to
18 severe impairments recognized by the Commissioner to be so severe as to preclude
19 a person from engaging in substantial gainful activity. 20 C.F.R. §
20 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the

1 enumerated impairments, the Commissioner must find the claimant disabled and
2 award benefits. 20 C.F.R. § 404.1520(d).

3 If the severity of the claimant’s impairment does not meet or exceed the
4 severity of the enumerated impairments, the Commissioner must pause to assess
5 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
6 defined generally as the claimant’s ability to perform physical and mental work
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
8 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

9 At step four, the Commissioner considers whether, in view of the claimant’s
10 RFC, the claimant is capable of performing work that he or she has performed in
11 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is
12 capable of performing past relevant work, the Commissioner must find that the
13 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of
14 performing such work, the analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant’s
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
18 must also consider vocational factors such as the claimant’s age, education, and
19 past work experience. *Id.* If the claimant is capable of adjusting to other work, the
20 Commissioner must find that the claimant is not disabled. 20 C.F.R. §

1 404.1520(g)(1). If the claimant is not capable of adjusting to other work, analysis
2 concludes with a finding that the claimant is disabled and is therefore entitled to
3 benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
7 capable of performing other work; and 2) such work “exists in significant numbers
8 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
9 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 On December 5, 2017, Plaintiff applied for Title II disability insurance
12 benefits alleging a disability onset date of November 7, 2017. Tr. 24, 94, 178-84.
13 The application was denied initially and on reconsideration. Tr. 118-20, 122-24.
14 Plaintiff appeared before an administrative law judge (ALJ) on April 25, 2019. Tr.
15 37-93. On May 22, 2019, the ALJ denied Plaintiff’s claim. Tr. 21-36.

16 At step one of the sequential evaluation process, the ALJ found Plaintiff,
17 who met the insured status requirements through December 31, 2022, has not
18 engaged in substantial gainful activity since November 7, 2017. Tr. 26. At step
19 two, the ALJ found that Plaintiff has the following severe impairments: lumbar
20

1 degenerative disc disease, cervical degenerative disc disease, asthmatic bronchitis,
2 right ventricular enlargement, and polyarthralgia. Tr. 26.

3 At step three, the ALJ found Plaintiff does not have an impairment or
4 combination of impairments that meets or medically equals the severity of a listed
5 impairment. Tr. 27. The ALJ then concluded that Plaintiff has the RFC to perform
6 sedentary work with the following limitations:

7 [Plaintiff can] lift no more than ten pounds at a time occasionally and
8 can lift or carry five pounds at a time frequently; he can, at one time,
9 stand for fifteen minutes and walk for fifteen minutes; in an eight-
10 hour workday with normal breaks, he can sit for eight hours and can
11 stand [and] walk for two hours total; he can occasionally stoop,
12 crouch, kneel, crawl, and balance; he can occasionally climb ramps
13 and stairs; he can never climb ramps and scaffolds; he cannot work
14 [at] unprotected heights, around hazardous machinery, or around
15 heavy industrial type vibration; he cannot work in marked temperature
16 extremes of heat and cold; he should avoid concentrated exposure to
17 pulmonary irritants; and he needs a clean, well ventilated, temperature
18 controlled environment.

19 Tr. 27-28.

20 At step four, the ALJ found Plaintiff is unable to perform any of his past
relevant work. Tr. 31. At step five, the ALJ found that, considering Plaintiff's
age, education, work experience, RFC, and testimony from the vocational expert,
there were jobs that existed in significant numbers in the national economy that
Plaintiff could perform, such as document preparer, election clerk, addresser, and
call-out operator. Tr. 32. Therefore, the ALJ concluded Plaintiff was not under a

1 disability, as defined in the Social Security Act, from the alleged onset date of
2 November 7, 2017, through the date of the decision. *Id.*

3 On May 29, 2020, the Appeals Council denied review of the ALJ's decision,
4 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
5 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

6 ISSUES

7 Plaintiff seeks judicial review of the Commissioner's final decision denying
8 him disability insurance benefits under Title II of the Social Security Act. Plaintiff
9 raises the following issues for review:

- 10 1. Whether the ALJ properly evaluated the medical opinion evidence; and
- 11 2. Whether the ALJ properly evaluated Plaintiff's symptom claims.

12 ECF No. 18 at 2-3.

13 DISCUSSION

14 A. Medical Opinion Evidence

15 Plaintiff contends the ALJ erred in his consideration of the opinion of Mari
16 Hunter, ARNP. ECF No. 18 at 3-11.

17 As an initial matter, for claims filed on or after March 27, 2017, new
18 regulations apply that change the framework for how an ALJ must evaluate
19 medical opinion evidence. *Revisions to Rules Regarding the Evaluation of*
20 *Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18, 2017); 20

1 C.F.R. § 404.1520c. The new regulations provide that the ALJ will no longer
2 “give any specific evidentiary weight...to any medical opinion(s)...” *Revisions to*
3 *Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §
4 404.1520c(a). Instead, an ALJ must consider and evaluate the persuasiveness of
5 all medical opinions or prior administrative medical findings from medical sources.
6 20 C.F.R. § 404.1520c(a) and (b). The factors for evaluating the persuasiveness of
7 medical opinions and prior administrative medical findings include supportability,
8 consistency, relationship with the claimant (including length of the treatment,
9 frequency of examinations, purpose of the treatment, extent of the treatment, and
10 the existence of an examination), specialization, and “other factors that tend to
11 support or contradict a medical opinion or prior administrative medical finding”
12 (including, but not limited to, “evidence showing a medical source has familiarity
13 with the other evidence in the claim or an understanding of our disability
14 program’s policies and evidentiary requirements”). 20 C.F.R. § 404.1520c(c)(1)-
15 (5).

16 Supportability and consistency are the most important factors, and therefore
17 the ALJ is required to explain how both factors were considered. 20 C.F.R. §
18 404.1520c(b)(2). Supportability and consistency are explained in the regulations:

19 (1) *Supportability*. The more relevant the objective medical evidence
20 and supporting explanations presented by a medical source are to
support his or her medical opinion(s) or prior administrative medical

1 finding(s), the more persuasive the medical opinions or prior
2 administrative medical finding(s) will be.

3 (2) *Consistency*. The more consistent a medical opinion(s) or prior
4 administrative medical finding(s) is with the evidence from other
5 medical sources and nonmedical sources in the claim, the more
6 persuasive the medical opinion(s) or prior administrative medical
7 finding(s) will be.

8
9 20 C.F.R. § 404.1520c(c)(1)-(2). The ALJ may, but is not required to, explain how
10 the other factors were considered. 20 C.F.R. § 404.1520c(b)(2).³ However, when
11

12
13 ³ The parties disagree over whether Ninth Circuit case law continues to be
14 controlling in light of the amended regulations. ECF No. 18 at 4-5; ECF No. 19 at
15 3-4. The Court finds resolution of this question unnecessary to the disposition of
16 this case. “It remains to be seen whether the new regulations will meaningfully
17 change how the Ninth Circuit determines the adequacy of [an] ALJ’s reasoning
18 and whether the Ninth Circuit will continue to require that an ALJ provide ‘clear
19 and convincing’ or ‘specific and legitimate reasons’ in the analysis
20 of medical opinions, or some variation of those standards.” *Gary T. v. Saul*, No.
EDCV 19-1066-KS, 2020 WL 3510871, at *3 (C.D. Cal. June 29,
2020) (citing *Patricia F. v. Saul*, No. C19-5590-MAT, 2020 WL 1812233, at *3
(W.D. Wash. Apr. 9, 2020)). “Nevertheless, the Court is mindful that it must defer
to the new regulations, even where they conflict with prior judicial precedent,

1 two or more medical opinions or prior administrative findings “about the same
2 issue are both equally well-supported ... and consistent with the record ... but are
3 not exactly the same,” the ALJ is required to explain how “the other most
4 persuasive factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.
5 § 404.1520c(b)(3).

6 On April 5, 2019, Ms. Hunter, ARNP, a treating provider, rendered an
7 opinion on Plaintiff’s functioning. Tr. 519-23. Under the new regulations, Ms.
8 Hunter is an acceptable medical source. 20 C.F.R. § 404.1520c(a)(7). Ms. Hunter
9 diagnosed Plaintiff with scleroderma, left leg numbness, and lumbar compression
10 fracture. Tr. 519. Ms. Hunter opined Plaintiff’s symptoms are often severe
11 enough to interfere with his attention/concentration; Plaintiff has a moderate
12 limitation in his ability to deal with work stress; Plaintiff can walk one block

13 _____
14 unless the prior judicial construction ‘follows from the unambiguous terms of the
15 statute and thus leaves no room for agency discretion.’” *Gary T.*, 2020 WL
16 3510871, at *3 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet*
17 *Services*, 545 U.S. 967, 981-82 (2005); *Schisler v. Sullivan*, 3 F.3d 563, 567-58 (2d
18 Cir. 1993) (“New regulations at variance with prior judicial precedents are upheld
19 unless ‘they exceeded the Secretary’s authority [or] are arbitrary and
20 capricious.’”).

1 without rest; he can sit for 15 minutes at a time and stand for 15 minutes at a time;
2 he can sit and stand/walk for a total of two hours each in an eight-hour work day;
3 Plaintiff needs to walk around every 15 minutes for 15 minutes at a time; Plaintiff
4 needs to be able to shift positions at will; Plaintiff needs to take three to four
5 unscheduled breaks for fifteen minutes each; Plaintiff must use a cane or other
6 assistive device; Plaintiff can occasionally lift less than 10 pounds and can never
7 lift 10 pounds or more; Plaintiff can spend five percent of his time grasping,
8 fingering, and reaching, and cannot bend or twist; and Plaintiff would miss work
9 more than three times per month if he worked. Tr. 521-23. The ALJ found Ms.
10 Hunter's opinion was not persuasive. Tr. 30.

11 First, the ALJ found Ms. Hunter did not support her opinion with a specific
12 explanation. *Id.* Supportability is one of the most important factors an ALJ must
13 consider when determining how persuasive a medical opinion is. 20 C.F.R. §
14 404.1520c(b)(2). The more relevant objective evidence and supporting
15 explanations that support a medical opinion, the more persuasive the medical
16 opinion is. 20 C.F.R. § 404.1520c(c)(1). Ms. Hunter's opinion contains an
17 explanation of Plaintiff's diagnoses, symptoms, clinical findings, and treatment,
18 and Ms. Hunter noted she had seen Plaintiff at least every three months. Tr. 519-
19 23. The ALJ's finding that Ms. Hunter did not support her opinion with an
20

1 explanation is not supported by substantial evidence. *See Bray v. Comm'r of Soc.*
2 *Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009).

3 Second, the ALJ found Ms. Hunter's opinion was inconsistent with her own
4 medical records and the longitudinal record. Tr. 30. The more relevant objective
5 evidence and supporting explanations that support a medical opinion, the more
6 persuasive the medical opinion is. 20 C.F.R. § 404.1520c(c)(1). The ALJ found
7 Ms. Hunter's own records do not provide significant support for her opinion, but
8 the ALJ noted the records demonstrate "decreased range of motion, back spasms,
9 and tenderness along the spine," and the ALJ does not point to any of Ms. Hunter's
10 records that are inconsistent with her opinion. Tr. 30. Ms. Hunter's records note
11 Plaintiff has tried multiple medications, heat, ice, stretching, and physical therapy,
12 with continued pain. Tr. 392. She noted Plaintiff appeared in obvious discomfort
13 when standing, he was very guarded and stiff in his positioning, he had diffuse
14 tenderness, and severely limited range of motion mainly due to stiffness/guarding.
15 *Id.* At other appointments with Ms. Hunter, Plaintiff had abnormal range of
16 motion, tender points, pain, and a bit of crepitus in the neck. Tr. 398, 404.
17 Plaintiff also had decreased grip strength in his left hand, and Ms. Hunter noted
18 Plaintiff's neck examination demonstrated muscle and nerve involvement. Tr.
19 408-10.

1 The ALJ also noted Ms. Hunter's opinion that Plaintiff has manipulative
2 limitations is inconsistent with the longitudinal record, including no significant
3 deficits in gait, strength, and reflexes, and unremarkable findings from the
4 rheumatologist. Tr. 30. Despite some normal examination findings, the
5 rheumatologist noted skin thickening, and Plaintiff had a positive Scl-70 and ANA
6 test, and the normal examination findings were in the context of Plaintiff being on
7 prednisone. Tr. 526-27. At some appointments, Plaintiff has been noted as having
8 a slow gait, a gait disturbance, and having difficulty getting on/off tables. Tr. 340,
9 409. Plaintiff had abnormal range of motion and strength at multiple
10 appointments. Tr. 409, 450-51, 464-65, 509, 511. The ALJ also noted the imaging
11 showed only moderate findings, Tr. 30, however the lumbar spine imaging noted
12 moderate to severe discogenic spondylosis, Tr. 423. The ALJ's finding that Ms.
13 Hunter's opinion is not supported by the record is not supported by substantial
14 evidence. *See Bray*, 554 F.3d at 1228; *Connett v. Barnhart*, 340 F.3d 871, 875 (9th
15 Cir. 2003).

16 On remand, the ALJ is instructed to reconsider Ms. Hunter's opinion and
17 incorporate the limitations into the RFC or give reasons supported by substantial
18 evidence to reject the opinion. The ALJ is further instructed to perform the five-
19 step analysis anew, including accepting new evidence and testimony, and
20 reconsidering whether scleroderma is a severe medically determinable impairment.

1 B. Plaintiff's Symptom Claims

2 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
3 convincing in discrediting his symptom claims. ECF No. 18 at 12-16. An ALJ
4 engages in a two-step analysis to determine whether to discount a claimant's
5 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
6 "First, the ALJ must determine whether there is objective medical evidence of an
7 underlying impairment which could reasonably be expected to produce the pain or
8 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
9 "The claimant is not required to show that [the claimant's] impairment could
10 reasonably be expected to cause the severity of the symptom [the claimant] has
11 alleged; [the claimant] need only show that it could reasonably have caused some
12 degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

13 Second, "[i]f the claimant meets the first test and there is no evidence of
14 malingering, the ALJ can only reject the claimant's testimony about the severity of
15 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
16 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
17 omitted). General findings are insufficient; rather, the ALJ must identify what
18 symptom claims are being discounted and what evidence undermines these claims.
19 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
20 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently

1 explain why it discounted claimant’s symptom claims)). “The clear and
2 convincing [evidence] standard is the most demanding required in Social Security
3 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
4 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

5 Factors to be considered in evaluating the intensity, persistence, and limiting
6 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
7 duration, frequency, and intensity of pain or other symptoms; 3) factors that
8 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
9 side effects of any medication an individual takes or has taken to alleviate pain or
10 other symptoms; 5) treatment, other than medication, an individual receives or has
11 received for relief of pain or other symptoms; 6) any measures other than treatment
12 an individual uses or has used to relieve pain or other symptoms; and 7) any other
13 factors concerning an individual’s functional limitations and restrictions due to
14 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
15 404.1529(c). The ALJ is instructed to “consider all of the evidence in an
16 individual’s record,” to “determine how symptoms limit ability to perform work-
17 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

18 The ALJ found that Plaintiff’s medically determinable impairments could
19 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff’s
20

1 statements concerning the intensity, persistence, and limiting effects of his
2 symptoms were not entirely consistent with the evidence. Tr. 28.

3 *1. Activities of Daily Living*

4 The ALJ found Plaintiff's activities of daily living were inconsistent with his
5 symptom claims. Tr. 29. The ALJ may consider a claimant's activities that
6 undermine reported symptoms. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
7 2001). If a claimant can spend a substantial part of the day engaged in pursuits
8 involving the performance of exertional or non-exertional functions, the ALJ may
9 find these activities inconsistent with the reported disabling symptoms. *Fair v.*
10 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Molina*, 674 F.3d at 1113. "While a
11 claimant need not vegetate in a dark room in order to be eligible for benefits, the
12 ALJ may discount a claimant's symptom claims when the claimant reports
13 participation in everyday activities indicating capacities that are transferable to a
14 work setting" or when activities "contradict claims of a totally debilitating
15 impairment." *Molina*, 674 F.3d at 1112-13.

16 While the ALJ found Plaintiff's activities of daily living were not consistent
17 with his allegations, the ALJ pointed to an occasion in 2019 when Plaintiff helped
18 his children get their car unstuck from a snowy ditch. Tr. 29. The ALJ noted
19 Plaintiff was sore and fatigued afterward, but found the fact that Plaintiff attempted
20 to help with the stuck vehicle, "shows that he believed he was capable of

1 performing the activity,” and Plaintiff did not report an injury from the event. *Id.*
2 A single incident of Plaintiff assisting his children with getting a vehicle unstuck is
3 not inconsistent with Plaintiff’s allegations. Further, Plaintiff was sore and
4 fatigued after the incident. Tr. 439. The ALJ does not point to any other
5 inconsistent activities in the record. Plaintiff’s reported activities are consistent
6 with his allegations. Tr. 228-35. The ALJ’s finding that Plaintiff’s activities of
7 daily living were inconsistent with his symptom claims is not supported by
8 substantial evidence.

9 2. *Conservative Treatment*

10 The ALJ found Plaintiff’s symptom claims were inconsistent with his
11 conservative level of treatment. Tr. 29. Evidence of “conservative treatment” is
12 sufficient to discount a claimant’s testimony regarding the severity of an
13 impairment. *Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007) (citing *Johnson v.*
14 *Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (treating ailments with an over-the-
15 counter pain medication is evidence of conservative treatment sufficient to
16 discount a claimant’s testimony regarding the severity of an impairment)); *see also*
17 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (holding that the ALJ
18 permissibly inferred that the claimant’s “pain was not as all-disabling as he
19 reported in light of the fact that he did not seek an aggressive treatment program”
20 and “responded favorably to conservative treatment including physical therapy and

1 the use of anti-inflammatory medication, a transcutaneous electrical nerve
2 stimulation unit, and a lumbosacral corset”).

3 The ALJ found that Plaintiff’s “arc of treatment has largely been
4 conservative.” Tr. 29. The ALJ noted that while Plaintiff consulted with a
5 neurosurgeon, the surgeon recommended weight loss, core strengthening
6 treatment, muscle relaxers, and anti-inflammatories, and stated that if the
7 conservative measures failed, surgery could then be considered. *Id.* Plaintiff also
8 received trigger point injections. Tr. 308. The Ninth Circuit has questioned
9 whether occipital nerve block and trigger point injections can constitute
10 “conservative treatment.” *See Lapeirre-Gutt v. Astrue*, 382 F. App’x 662, 664 (9th
11 Cir. 2010); *Garrison*, 759 F.3d at 1015 (casting doubt on characterizing epidural
12 injections and physical therapy as “conservative treatment”).

13 Further, the cited neurosurgery consult relates only to Plaintiff’s lumbar
14 impairment. Tr. 361. Plaintiff also alleges limitations due to his other
15 impairments which the ALJ rejected, such as Plaintiff’s reported pain and
16 numbness that radiates down his arms into his hands, Tr. 62, 72-73, which causes
17 difficulty lifting and carrying items with his left hand, and causes difficulty
18 gripping items bilaterally, Tr. 72-73. While the ALJ found there is not objective
19 evidence of a medically determinable impairment that could reasonably cause
20 Plaintiff’s bilateral hand symptoms, the ALJ erred in failing to address objective

1 evidence that supports Plaintiff's claims, as discussed *infra*. The ALJ does not
2 provide any analysis as to whether Plaintiff received only conservative treatment
3 for his other impairments, nor whether any additional treatment was suggested for
4 Plaintiff's other impairments. The ALJ's finding that Plaintiff's symptom
5 complaints were inconsistent with Plaintiff's conservative treatment is not
6 supported by substantial evidence.

7 3. *Inconsistent Objective Medical Evidence*

8 The ALJ found the objective medical evidence was inconsistent with
9 Plaintiff's symptom claims. Tr. 29. An ALJ may not discredit a claimant's
10 symptom testimony and deny benefits solely because the degree of the symptoms
11 alleged is not supported by objective medical evidence. *Rollins*, 261 F.3d at 857;
12 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601;
13 *Burch*, 400 F.3d 676, 680 (9th Cir. 2005). However, the objective medical
14 evidence is a relevant factor, along with the medical source's information about the
15 claimant's pain or other symptoms, in determining the severity of a claimant's
16 symptoms and their disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §
17 404.1529(c)(2).

18 As the Court finds the other two reasons offered by the ALJ to reject
19 Plaintiff's symptom claims are not supported by substantial evidence, the ALJ
20 erred in rejecting Plaintiff's claims as inconsistent with the objective medical

1 evidence. For the purposes of the remand, the Court notes that the ALJ rejected
2 Plaintiff's reported bilateral hand pain and resulting limitations, because there is
3 not objective evidence of an impairment that could reasonably cause the
4 symptoms. Tr. 26. However, Plaintiff had decreased grip strength and finger
5 extension in the left hand, Tr. 409, and Plaintiff was noted as having mild to
6 moderate degenerative changes in the cervical spine, Tr. 431, cervical neck pain,
7 and an examination that was positive for nerve involvement, Tr. 410. Plaintiff had
8 decreased strength, Tr. 465, abnormal cervical range of motion, Tr. 476, and had
9 numbness and pain down his left arm and into his hand at physical therapy, Tr.
10 473-74.

11 On remand the ALJ is instructed to reconsider Plaintiff's symptom
12 testimony and incorporate the reported limitations into the RFC or give clear and
13 convincing reasons to reject the symptom claims.

14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, the Court concludes the
16 ALJ's decision is not supported by substantial evidence and is not free of harmful
17 legal error. Accordingly, **IT IS HEREBY ORDERED:**

18 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
19 Defendant and update the docket sheet.
20

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **GRANTED**.

2 3. Defendant's Motion for Summary Judgment, **ECF No. 19**, is **DENIED**.

3 4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
4 REVERSING and REMANDING the matter to the Commissioner of Social
5 Security for further proceedings consistent with this recommendation pursuant to
6 sentence four of 42 U.S.C. § 405(g).

7 The District Court Executive is directed to file this Order, provide copies to
8 counsel, and **CLOSE THE FILE**.

9 DATED August 13, 2021.

10 *s/Mary K. Dimke*
11 MARY K. DIMKE
12 UNITED STATES MAGISTRATE JUDGE
13
14
15
16
17
18
19
20