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

**Mar 05, 2021**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CARL G.,<sup>1</sup>  
  
Plaintiff,  
  
v.  
  
ANDREW M. SAUL, the Commissioner  
of Social Security,  
  
Defendant.

No. 4:20-CV-5068-EFS

**ORDER GRANTING PLAINTIFF'S  
SUMMARY-JUDGMENT MOTION  
AND DENYING DEFENDANT'S  
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.<sup>2</sup>

Plaintiff Carl G. appeals the denial of benefits by the Administrative Law Judge (ALJ). He alleges the ALJ erred by 1) discounting Plaintiff's symptom reports, 2) improperly weighing the medical opinions, and 3) improperly crafting Plaintiff's residual functional capacity. In contrast, Defendant Commissioner of Social

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<sup>1</sup> To protect the privacy of the social-security Plaintiff, the Court refers to him by first name and last initial or by "Plaintiff." *See* LCivR 5.2(c).

<sup>2</sup> ECF Nos. 18 & 19.

1 Security asks the Court to affirm the ALJ's decision finding Plaintiff not disabled.  
2 After reviewing the record and relevant authority, the Court grants Plaintiff's  
3 Motion for Summary Judgment, ECF No. 18, and denies the Commissioner's  
4 Motion for Summary Judgment, ECF No. 19.

### 5 I. Five-Step Disability Determination

6 A five-step sequential evaluation process is used to determine whether an  
7 adult claimant is disabled.<sup>3</sup> Step one assesses whether the claimant is currently  
8 engaged in substantial gainful activity.<sup>4</sup> If the claimant is engaged in substantial  
9 gainful activity, benefits are denied.<sup>5</sup> If not, the disability-evaluation proceeds to  
10 step two.<sup>6</sup>

11 Step two assesses whether the claimant has a medically severe impairment,  
12 or combination of impairments, which significantly limits the claimant's physical  
13 or mental ability to do basic work activities.<sup>7</sup> If the claimant does not, benefits are  
14 denied.<sup>8</sup> If the claimant does, the disability-evaluation proceeds to step three.<sup>9</sup>

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16 <sup>3</sup> 20 C.F.R. §§ 404.1520(a), 416.920(a).

17 <sup>4</sup> *Id.* §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

18 <sup>5</sup> *Id.* §§ 404.1520(b), 416.920(b).

19 <sup>6</sup> *Id.*

20 <sup>7</sup> 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

21 <sup>8</sup> *Id.* §§ 404.1520(c), 416.920(c).

22 <sup>9</sup> *Id.*

1 Step three compares the claimant's impairment(s) to several recognized by  
2 the Commissioner to be so severe as to preclude substantial gainful activity.<sup>10</sup> If an  
3 impairment meets or equals one of the listed impairments, the claimant is  
4 conclusively presumed to be disabled.<sup>11</sup> If an impairment does not, the disability-  
5 evaluation proceeds to step four.

6 Step four assesses whether an impairment prevents the claimant from  
7 performing work he performed in the past by determining the claimant's residual  
8 functional capacity (RFC).<sup>12</sup> If the claimant is able to perform prior work, benefits  
9 are denied.<sup>13</sup> If the claimant cannot perform prior work, the disability-evaluation  
10 proceeds to step five.

11 Step five, the final step, assesses whether the claimant can perform other  
12 substantial gainful work—work that exists in significant numbers in the national  
13 economy—considering the claimant's RFC, age, education, and work experience.<sup>14</sup>  
14 If so, benefits are denied. If not, benefits are granted.<sup>15</sup>

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16 <sup>10</sup> *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

17 <sup>11</sup> *Id.* §§ 404.1520(d), 416.920(d).

18 <sup>12</sup> *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

19 <sup>13</sup> *Id.*

20 <sup>14</sup> 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,  
21 1497-98 (9th Cir. 1984).

22 <sup>15</sup> 20 C.F.R. §§ 404.1520(g), 416.920(g).

1           The claimant has the initial burden of establishing entitlement to disability  
2 benefits under steps one through four.<sup>16</sup> At step five, the burden shifts to the  
3 Commissioner to show that the claimant is not entitled to benefits.<sup>17</sup>

## 4                           **II.     Factual and Procedural Summary**

5           Plaintiff filed Title II and XVI applications, alleging an amended disability  
6 onset date of June 1, 2014.<sup>18</sup> His claims were denied initially and upon  
7 reconsideration.<sup>19</sup> A video administrative hearing was held before Administrative  
8 Law Judge Stewart Stallings.<sup>20</sup>

9           In denying Plaintiff's disability claims, the ALJ made the following findings:

- 10           • Plaintiff met the insured status requirements through March 31,  
11           2019;
- 12           • Step one: Plaintiff had not engaged in substantial gainful activity  
13           since June 1, 2014, the alleged onset date;
- 14           • Step two: Plaintiff had the following medically determinable severe  
15           impairments: degenerative disc disease of the lumbar spine, left  
16           shoulder impingement, right shoulder acromioclavicular (AC) joint

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18 <sup>16</sup> *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

19 <sup>17</sup> *Id.*

20 <sup>18</sup> AR 64 & 159.

21 <sup>19</sup> AR 66-75 & 77-86.

22 <sup>20</sup> AR 33-65.

1 labrum tear, affective disorder (depression/bipolar), anxiety disorder,  
2 attention deficit hyperactivity disorder (ADHD), and cannabis use  
3 disorder;

- 4 • Step three: Plaintiff did not have an impairment or combination of  
5 impairments that met or medically equaled the severity of one of the  
6 listed impairments;
- 7 • RFC: Plaintiff had the RFC to perform sedentary work with the  
8 following limitations:

9 [Plaintiff] can lift up to ten pounds occasionally. [Plaintiff] can  
10 stand or walk up to two hours, and sit up to eight hours, of an  
11 eight-hour workday with normal breaks. [Plaintiff] requires a  
12 sit/stand option allowing him to change between sitting and  
13 standing positions every 30 minutes for up to five minutes while  
14 remaining at the workstation. [Plaintiff] can occasionally climb  
15 ramps or stairs, but can never climb ladders, ropes, or scaffolds.  
16 [Plaintiff] can occasionally stoop, rarely (15% or less) crouch,  
17 and never kneel or crawl. [Plaintiff] is limited to occasional  
18 overhead reaching with the right upper extremity. [Plaintiff]  
19 must avoid all use of moving or dangerous machinery and  
20 unprotected heights. [Plaintiff] requires simple routine,  
21 repetitive work in which concentration is not critical (defined as  
22 careful and exact evaluation and judgment), and is limited to  
23 occasional interaction with supervisors.

- 17 • Step four: Plaintiff was not capable of performing past relevant work;  
18 and
- 19 • Step five: considering Plaintiff's RFC, age, education, and work  
20 history, Plaintiff could perform work that existed in significant  
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1 numbers in the national economy, such as laminator, final assembler,  
2 and bench assembler.<sup>21</sup>

3 When assessing the medical-opinion evidence, the ALJ gave:

- 4 • considerable weight to the examining opinion of Mark Johnson, PT;
- 5 • partial weight to the treating provider Mark Flesher, M.D.;<sup>22</sup>
- 6 • limited weight to the examining opinion of Scott Roberts, ARNP; and
- 7 • little weight to the examining opinions of William Drenguis, M.D. and  
8 Tabita Lewis, ARNP, and the opinions of the State agency  
9 consultants.<sup>23</sup>

10 The ALJ also found that Plaintiff's medically determinable impairments  
11 could reasonably be expected to cause some of the alleged symptoms, but that his  
12 statements concerning the intensity, persistence, and limiting effects of those  
13 symptoms were not entirely consistent with the medical evidence and other  
14 evidence in the record.<sup>24</sup>

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17 <sup>21</sup> AR 18-26.

18 <sup>22</sup> The ALJ was unable to identify Dr. Flesher as the medical professional who  
19 completed a functional assessment of Plaintiff in March 2017 and referred to him as  
20 an unknown medical professional within his opinion. AR 24.

21 <sup>23</sup> AR 23-25.

22 <sup>24</sup> AR 22.

1 Plaintiff requested review of the ALJ's decision by the Appeals Council,  
2 which denied review.<sup>25</sup> Plaintiff timely appealed to this Court.

### 3 III. Standard of Review

4 A district court's review of the Commissioner's final decision is limited.<sup>26</sup> The  
5 Commissioner's decision is set aside "only if it is not supported by substantial  
6 evidence or is based on legal error."<sup>27</sup> Substantial evidence is "more than a mere  
7 scintilla but less than a preponderance; it is such relevant evidence as a reasonable  
8 mind might accept as adequate to support a conclusion."<sup>28</sup> Moreover, because it is  
9 the role of the ALJ and not the Court to weigh conflicting evidence, the Court  
10 upholds the ALJ's findings "if they are supported by inferences reasonably drawn  
11 from the record."<sup>29</sup> The Court considers the entire record as a whole.<sup>30</sup>

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14 <sup>25</sup> AR 1-3.

15 <sup>26</sup> 42 U.S.C. § 405(g).

16 <sup>27</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

17 <sup>28</sup> *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

18 <sup>29</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

19 <sup>30</sup> *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must  
20 consider the entire record as whole, weighing both the evidence that supports and  
21 the evidence that detracts from the Commissioner's conclusion," not simply the  
22 evidence cited by the ALJ or the parties.); *Black v. Apfel*, 143 F.3d 383, 386 (8th  
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1 Further, the Court may not reverse an ALJ decision due to a harmless  
2 error.<sup>31</sup> An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
3 nondisability determination.”<sup>32</sup> The party appealing the ALJ’s decision generally  
4 bears the burden of establishing harm.<sup>33</sup>

#### 5 IV. Analysis

##### 6 **A. Plaintiff’s Symptom Reports: Plaintiff establishes consequential** 7 **error.**

8 Plaintiff argues the ALJ failed to provide valid reasons for rejecting his  
9 symptom reports. When examining a claimant’s symptom reports, the ALJ must  
10 make a two-step inquiry. “First, the ALJ must determine whether there is objective  
11 medical evidence of an underlying impairment which could reasonably be expected  
12 to produce the pain or other symptoms alleged.”<sup>34</sup> Second, “[i]f the claimant meets  
13 the first test and there is no evidence of malingering, the ALJ can only reject the  
14 claimant’s testimony about the severity of the symptoms if [the ALJ] gives ‘specific,  
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17 Cir. 1998) (“An ALJ’s failure to cite specific evidence does not indicate that such  
18 evidence was not considered[.]”).

19 <sup>31</sup> *Molina*, 674 F.3d at 1111.

20 <sup>32</sup> *Id.* at 1115 (quotation and citation omitted).

21 <sup>33</sup> *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

22 <sup>34</sup> *Molina*, 674 F.3d at 1112.  
23



1 clear and convincing reasons' for the rejection."<sup>35</sup> Here, the ALJ found Plaintiff's  
2 statements concerning the intensity, persistence, and limiting effects of his  
3 symptoms inconsistent with daily activities and the objective medical evidence.<sup>36</sup>

4 First, the ALJ discounted Plaintiff's symptom reports because they were  
5 inconsistent with his activities of daily living.<sup>37</sup> If a claimant can spend a  
6 substantial part of the day engaged in pursuits involving the performance of  
7 exertional or non-exertional functions, the ALJ may find these activities  
8 inconsistent with the reported disabling symptoms.<sup>38</sup> The ALJ highlighted that  
9 Plaintiff could care for his dog, including regular walks, had no difficulties with  
10 self-care (dressing, grooming, and bathing), was able to prepare meals, and finish  
11 household chores (laundry, dishes, vacuuming, dusting, and miscellaneous  
12 repairs).<sup>39</sup> The ALJ also highlighted that Plaintiff took care of his school-aged son.  
13 In order for Plaintiff's cited activities to be deemed "high-functioning activities of  
14 daily living" constituting a clear and convincing reason to discount Plaintiff's  
15 symptoms, the ALJ needed to have more meaningfully articulated this finding.

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17 <sup>35</sup> *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504  
18 F.3d at 1036).

19 <sup>36</sup> AR 22-23.

20 <sup>37</sup> AR 24.

21 <sup>38</sup> *Molina*, 674 F.3d at 1113.

22 <sup>39</sup> AR 23, 44-57, & 274-81.

1 These cited activities, which can be achieved in relatively short periods of time and  
2 with breaks after each activity, as Plaintiff testified to, and not on an everyday  
3 basis, do not “contradict claims of a totally debilitating impairment.”<sup>40</sup>

4 Lastly, the ALJ discounted Plaintiff’s symptom reports because they were  
5 inconsistent with the objective medical evidence, specifically evidence of a normal  
6 gait, station, strength, muscle tone, and negative straight leg raise testing.<sup>41</sup> As to  
7 the ALJ’s finding that Plaintiff’s symptom reports were inconsistent with the  
8 objective medical evidence, symptom reports cannot be solely discounted on the  
9 grounds that they were not fully corroborated by the objective medical evidence.<sup>42</sup>  
10 Thus, having determined Plaintiff’s daily activities – the only other reason the ALJ  
11 discounted Plaintiff symptom reports – were not a clear and convincing reason to  
12 discount Plaintiff’s symptom reports, remand is necessary to reassess Plaintiff’s  
13 subjective symptom claims. As to Plaintiff’s household chores, self-care, providing  
14 for a school aged child, frustration, and anger, the ALJ must more meaningfully  
15 explain how such activities are inconsistent with Plaintiff’s reported back pain and  
16 related limitations, limited range of motion of upper extremities, and difficulties  
17 getting along with others.

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20 <sup>40</sup> *Molina*, 674 F.3d at 1112-13.

21 <sup>41</sup> AR 22.

22 <sup>42</sup> *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

1 **B. Medical Opinions: Plaintiff establishes consequential error.**

2 Plaintiff also challenges the lack of manipulated limitations, as opined by  
3 Mark Johnson, PT, in the RFC after the ALJ assigned considerable weight to the  
4 opinion of Mr. Johnson. Plaintiff also challenges the ALJ's assignment of limited  
5 weight to Scott Roberts, ARNP and Tabita Lewis, ARNP, and partial weight to  
6 Mark Flesher, M.D. The Court determines the ALJ erred because his weighing of  
7 these medical opinions is neither supported by substantial evidence nor  
8 meaningfully explained.

9 1. Standard

10 The weighing of medical opinions is dependent upon the nature of the  
11 medical relationship, i.e., 1) a treating physician, 2) an examining physician who  
12 examines but did not treat the claimant, and 3) a reviewing physician who neither  
13 treated nor examined the claimant.<sup>43</sup> Generally, more weight is given to the  
14 opinion of a treating physician than to an examining physician's opinion and both  
15 treating and examining opinions are to be given more weight than the opinion of a  
16 reviewing physician.<sup>44</sup>

17 When a treating physician's or evaluating physician's opinion is not  
18 contradicted by another physician, it may be rejected only for "clear and  
19 convincing" reasons, and when it is contradicted, it may be rejected for "specific  
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21 <sup>43</sup> *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

22 <sup>44</sup> *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

1 and legitimate reasons” supported by substantial evidence.<sup>45</sup> A reviewing  
2 physician’s opinion may be rejected for specific and legitimate reasons supported by  
3 substantial evidence, and the opinion of an “other” medical source<sup>46</sup> may be  
4 rejected for specific and germane reasons supported by substantial evidence.<sup>47</sup> The  
5 opinion of a reviewing physician serves as substantial evidence if it is supported by  
6 other independent evidence in the record.<sup>48</sup>

7           2.     Mr. Johnson

8           On February 15, 2018, Mr. Johnson performed a functional capacity  
9 evaluation of Plaintiff.<sup>49</sup> Mr. Johnson opined that Plaintiff was limited in the  
10 following activities: frequently lift 10 pounds; occasionally lift 12.5 pounds; some  
11 limitations in forward bending, standing, crouching, kneeling, and walking; slight  
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13 <sup>45</sup> *Lester*, 81 F.3d at 830.

14 <sup>46</sup> *See* 20 C.F.R. § 404.1502 (For claims filed before March 27, 2017, acceptable  
15 medical sources are licensed physicians, licensed or certified psychologists, licensed  
16 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed  
17 audiologists, licensed advanced practice registered nurses, and licensed physician  
18 assistants within their scope of practice—all other medical providers are “other”  
19 medical sources.).

20 <sup>47</sup> *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

21 <sup>48</sup> *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

22 <sup>49</sup> AR 316-27.

1 limitations in standing (frequently needs to lean against objects), stairs, and  
2 sitting; slight and significant limitations in the active range of motion of spine;  
3 slight and significant limitations in the active range of motion of shoulder, elbow,  
4 and wrist; and slight and significant limitations in advance range of motion of hip,  
5 knees, and ankle.

6 The ALJ assigned “considerable weight” to Mr. Johnson’s opined limitations  
7 and “incorporated [them] into the assigned residual capacity.”<sup>50</sup> The ALJ opined  
8 “Mr. Johnson completed a thorough and detailed examination, including specific  
9 testing designed to determine specific capacities. . . backed by findings of  
10 abnormalities found in functional testing, gait, range of motion, and strength. It is  
11 generally consistent with the overall record, including most of the [Plaintiff’s]  
12 allegations.”<sup>51</sup>

13 Plaintiff argues the ALJ failed to incorporated Mr. Johnson’s range of  
14 motion limitations in Plaintiff’s shoulders, grip strengths, and fine motor skills.<sup>52</sup>  
15 The Commissioner agrees “the ALJ essentially adopted the functional limitations  
16 Mr. Johnson assessed” but argues that “Plaintiff’s disagreement with the RFC  
17 assessment simply constitute his own interpretation of the evidence.”<sup>53</sup>  
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19 <sup>50</sup> AR 23.

20 <sup>51</sup> *Id.*

21 <sup>52</sup> ECF No. 18 at 11.

22 <sup>53</sup> ECF No. 19 at 15.

1           On this record, it is unclear what limitations the ALJ intended regarding  
2 Plaintiff's upper extremity fingering and handling limitations. The RFC limits  
3 Plaintiff to "occasional overhead reaching with the right upper extremity." Yet, the  
4 ALJ did not explain why the RFC limited only overhead reaching when Mr.  
5 Johnson seemingly opined limitations in Plaintiff reaching, fingering, and handling  
6 (shoulder, elbow, wrist, and hands). Mr. Johnson's physical examination of Plaintiff  
7 revealed the following in Plaintiff's range of motion: shoulder forward flexion right  
8 150 and left 155 (normal 180), extension right and left 40 (normal 60), and  
9 abduction right 125 and left 117 (normal 180); elbow flexion right and left 145  
10 (normal 150), and extension right and left -15 (normal 0); wrist flexion right and  
11 left 65 (normal 80), extension right 55 and left 45 (normal 70), ulnar deviation right  
12 and left 25 (normal 30), and radial deviation right and left within normal limits;  
13 and gross hand motion right and left within normal limits.<sup>54</sup> Considering Mr.  
14 Johnson's physical examination findings, it seems that Mr. Johnson limited  
15 Plaintiff to not only occasional overhead reaching but also handling and fingering  
16 limitations. Yet, while the ALJ gave "considerable weight" to Mr. Johnson's  
17 opinion, the RFC only restricted overhead reaching.

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19 <sup>54</sup> AR 323. Comments/Quality of Motion – Upper Quarter: "Slightly limited AROM  
20 with B elbow flexion, B elbow extension, B wrist flexion, R wrist extension, and B  
21 wrist ulnar deviation. Significantly limited AROM B shoulder flexion, B shoulder  
22 extension, B should ABD, and L wrist extension." *Id.*

1 This discrepancy is consequential because the vocational expert testified  
2 that there were no sedentary jobs available if Plaintiff was limited to only  
3 occasionally handling and fingering.<sup>55</sup> Without more explanation by the ALJ, it is  
4 unclear whether the ALJ intended the RFC to include limitations in fingering and  
5 handling.

6 3. Scott Roberts, ARNP

7 Mr. Roberts was Plaintiff's primary care physician since fall 2014. In March  
8 and May 2018, Mr. Roberts completed a functional assessment of Plaintiff. Mr.  
9 Roberts diagnosed Plaintiff with degenerative disc disease and chronic back pain  
10 and opined Plaintiff would need to lie down during the day for 1 hour for increased  
11 back pain, miss 1-2 days of work a week because of pain, and be limited to light  
12 work.<sup>56</sup>

13 The ALJ discounted Mr. Roberts' opinion because 1) he did not cite to  
14 examination findings or other objective or observational evidence in support of his  
15 opined limitations, 2) other opinion evidence and functional testing are more  
16 consistent with sedentary work, and 3) Plaintiff's daily activities were inconsistent  
17 with the level of absenteeism.<sup>57</sup>

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20 <sup>55</sup> AR 61.

21 <sup>56</sup> AR 331-32 & 381-83.

22 <sup>57</sup> AR 23-24.

1 First, the ALJ's finding that Mr. Roberts' check-box opinion was not  
2 explained is not supported by substantial evidence.<sup>58</sup> Individual medical opinions  
3 are preferred over check-box reports.<sup>59</sup> An ALJ may permissibly reject opinions  
4 that do not offer any explanation for their limitations.<sup>60</sup> However, if treatment  
5 notes are consistent with the opinion, a check-box opinion may not automatically  
6 be rejected.<sup>61</sup> Here, Mr. Roberts referenced an x-ray and MRI of Plaintiff's lumbar  
7 spine in his functional assessment of Plaintiff.<sup>62</sup> Additionally, the record contains  
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9 <sup>58</sup> See *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)  
10 (recognizing that a medical opinion may be rejected if it is conclusory or  
11 inadequately supported).

12 <sup>59</sup> *Id.*; *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996).

13 <sup>60</sup>, 554 F.3d at 1228; *Crane*, 76 F.3d at 253.

14 <sup>61</sup> *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004);  
15 *Garrison*, 759 F.3d at 1014.

16 <sup>62</sup> The MRI revealed mild reversal of lumbar lordosis, Grade 1 retrolisthesis of L5  
17 on S1, lumbosacral transitional anatomy, small left foraminal annular fissure and  
18 disc protrusion at L5-S1 with mild to moderate left neural foraminal stenosis,  
19 possible impingement on left L5 nerve root, mild right neural foraminal stenosis,  
20 mild spinal canal and mild bilateral neural foraminal stenosis at L2-L3, an mild  
21 bilateral neural foraminal stenosis L3-L4 and L4-L5. AR 310. The x-ray revealed  
22 minimal grade 1 retrolisthesis of L5 on S1, unchanged on flexion, extension, and  
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1 multiple treatment notes by Mr. Roberts where Plaintiff exhibited back pain and  
2 difficulty with the range of motion of his arms – treatment notes not discussed by  
3 the ALJ.<sup>63</sup>

4 Second, the ALJ discounted Mr. Roberts’ light work limitation because  
5 “[o]ther opinion evidence, functional testing, and [Plaintiff’s] allegations are more  
6 consistent with sedentary work.”<sup>64</sup> Any error in the ALJ rejecting Mr. Johnson’s  
7 light-work limitation was harmless because the ALJ included a sedentary work  
8 limitation in the RFC.

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10 neutral views, moderate facet arthropathy at L5-S1, slightly increased; maintained  
11 lumbar spine vertebral body heights, moderate disc degenerate changes seen at L2-  
12 L3 unchanged, and unchanged minimal S-shaped curvature of the thoracolumbar  
13 spine. AR 329.

14 <sup>63</sup> See *e.g.*, AR 602, 625, 631, 678, & 683 (positive for back pain); AR 684 (Plaintiff  
15 exhibits musculoskeletal tenderness, is unable to abduct right arm, passive  
16 abduction elicits severe pain, and tenderness noted over the anterior margin of the  
17 R glenohumeral joint); AR 700 (normal right shoulder x-ray); AR 699 (range of  
18 motion right shoulder: forward elevation 115 degrees, abduction 100 degrees,  
19 external rotation 80 degrees, internal rotation 35 degrees); & AR 781 (Plaintiff  
20 experiencing tenderness in the lumbar, moving forward with radiofrequency  
21 ablation).

22 <sup>64</sup> AR 23.

1           Lastly, the ALJ discounted Mr. Roberts' absenteeism limitation because it  
2 was inconsistent with Plaintiff's "robust level of daily activities."<sup>65</sup> An ALJ may  
3 discount a medical opinion that is inconsistent with the claimant's level of activity,  
4 such as school.<sup>66</sup> "[M]any home activities are not easily transferable to what may  
5 be the more grueling environment of the workplace."<sup>67</sup> Here, as previously  
6 discussed, the ALJ failed to articulate how Plaintiff's activities (grocery shopping,  
7 vacuuming, dressing, grooming, bathing, preparing meals, etc.) conflict with  
8 Plaintiff's claims of needing to rest after completing each activity, laying down for  
9 an hour a day due to back pain, and being unable to complete activities on "bad  
10 days."

11           4.     Mark Flesher, M.D.

12           Dr. Flesher is Plaintiff's primary care physician. On March 3, 2017, Dr.  
13 Flesher completed a functional assessment of Plaintiff.<sup>68</sup> Dr. Flesher diagnosed  
14 Plaintiff with back pain and opined sedentary work limitations, participation limits  
15 per week depending on the pain, and that Plaintiff would require frequent changes  
16 in sitting or standing, 30-60 minutes at a time.

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19           <sup>65</sup> AR 23-24.

20           <sup>66</sup> *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).

21           <sup>67</sup> *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

22           <sup>68</sup> AR 367-69.

1 The ALJ gave partial weight to Dr. Flesher's opined limitations because he  
2 did not reference specific findings to support his opinion.<sup>69</sup> An ALJ may permissibly  
3 reject opinions that do not offer any explanation for their limitations.<sup>70</sup> However, if  
4 treatment notes are consistent with the opinion, a check-box opinion may not  
5 automatically be rejected.<sup>71</sup> The record contains treatment notes from Dr. Flesher  
6 discussing Plaintiff's back pain the ALJ was unable to review in correlation with  
7 Dr. Flesher's opined limitations because the ALJ was unable to identify who  
8 completed the functional assessment because the signature was illegible.<sup>72</sup> On  
9 remand, the ALJ is to reconsider Dr. Flesher's opined limitations, taking into  
10 consideration his treatment notes within the record.

11 5. Tabita Lewis, ARNP

12 On March 12, 2018, Ms. Lewis completed a mental source statement. Ms.  
13 Lewis opined the following limitations:

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15 <sup>69</sup> AR 24.

16 <sup>70</sup> *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)  
17 (recognizing that a medical opinion may be rejected if it is conclusory or  
18 inadequately supported); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996).

19 <sup>71</sup> *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004);  
20 *Garrison*, 759 F.3d at 1014.

21 <sup>72</sup> *See e.g.*, AR 833 (referral to neurology for migraines and low back pain); AR 835  
22 (chronic back pain, awaiting MRI results); & AR 838 (chronic back pain).

- 1 • mildly limited in the ability to understand and remember very short and  
2 simple instructions;
- 3 • moderately limited in the ability to remember locations and work-like  
4 procedures; carry out detailed instructions; perform activities within a  
5 schedule, maintain regular attendance and be punctual within customary  
6 tolerances; work in coordination with or proximity to others without  
7 being distracted by them; and interact appropriately with the general  
8 public;
- 9 • markedly limited in the ability to maintain attention and concentration  
10 for extended periods; complete a normal work-day and workweek without  
11 interruptions from psychologically based symptoms and to perform at a  
12 consistent pace without an unreasonable number and length of rest  
13 periods; accept instructions and respond appropriately to criticism from  
14 supervisors; respond appropriately to changes in the work setting; travel  
15 in unfamiliar places and use public transportation; and set realistic goals  
16 or make plans independently of others; and
- 17 • severely limited in the ability to understand and remember detailed  
18 instructions.

19 Based on these mental limitations, Ms. Lewis opined Plaintiff would be off-task 21-  
20 30 percent of the time and miss work 1 day per month.

1           The ALJ discounted Ms. Lewis' opinion because it was inconsistent with the  
2 longitudinal record, including Ms. Lewis' own evaluations.<sup>73</sup>

3           The ALJ's finding that Ms. Lewis' opinion was inconsistent with the  
4 longitudinal medical record is rational and supported by substantial evidence.  
5 Whether a medical opinion is consistent with the longitudinal record is a factor for  
6 the ALJ to consider.<sup>74</sup> While the ALJ did not explain in the paragraph pertaining  
7 to Ms. Lewis why the opinion was inconsistent with the longitudinal record, in  
8 other sections of the opinion, the ALJ discussed portions of the medical record  
9 permitting the Court to meaningfully assess whether the ALJ's finding that Ms.  
10 Lewis' opinion was inconsistent with the longitudinal record relating to Plaintiff's  
11 impairments is supported by substantial evidence.<sup>75</sup> Here, the ALJ highlighted  
12 that, even though a single treatment note indicating poor delayed recall, the  
13 medical record showed treatment visits with no difficulties in memory or  
14 understanding.<sup>76</sup> The ALJ also highlighted that Plaintiff sporadically presented  
15 with mood disturbances, but on multiple occasions presented with normal mood,  
16

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17 <sup>73</sup> AR 24.

18 <sup>74</sup> See *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007) (recognizing that  
19 the ALJ is to consider the consistency of the medical opinion with the record as a  
20 whole).

21 <sup>75</sup> See *id.*

22 <sup>76</sup> AR 20 (citing AR 397, 787, 831, 835, & 838).  
23

1 affect, and behavior.<sup>77</sup> The ALJ also highlighted that the treatment records  
2 indicated normal concentration and attention span and improvement in  
3 concentration with medications. While there appeared to be conflicting medical  
4 evidence as to Plaintiff's mental limitations, it is the ALJ's role to weigh conflicting  
5 medical evidence. This was a germane reason supported by substantial evidence to  
6 discount Ms. Lewis' opined limitations.

7 **C. RFC: The ALJ must reevaluate.**

8 Because the ALJ's RFC was based on an erroneous weighing of Plaintiff's  
9 symptom reports and the medical evidence, remand is required. The ALJ on  
10 remand must more meaningfully explain how Plaintiff's reported symptoms,  
11 including back pain, range of motion limitations, anger, and frustration, are  
12 inconsistent with the medical record and then reassess Plaintiff's RFC and proceed  
13 with a new step-five analysis.

14 **D. Remand for Further Proceedings**

15 Plaintiff submits a remand for payment of benefits is warranted.  
16  
17  
18  
19

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20 <sup>77</sup> AR 20 (citing AR 408, 411, 418, 464, 469, 475, 478, 626, 666, 774, & 831 (normal  
21 mood and affect) *compare with* (AR 395, 400, 402, 412, 423, 436, 439, 445, & 451  
22 (frustration and irritable))).  
23

1 The decision whether to remand a case for additional evidence, or simply to  
2 award benefits, is within the discretion of the court.”<sup>78</sup> When the court reverses an  
3 ALJ’s decision for error, the court “ordinarily must remand to the agency for  
4 further proceedings.”<sup>79</sup>

5 The Court finds that further development is necessary for a proper disability  
6 determination. On remand, the ALJ is to reevaluate the medical opinion evidence,  
7 consider any additional evidence presented, meaningfully explain how Plaintiff’s  
8 reported symptoms are inconsistent with the medical record and then reassess  
9 Plaintiff’s RFC and proceed with a new step-five analysis.

#### 10 V. Conclusion

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

- 12 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 18**, is  
13 **GRANTED.**
- 14 2. The Commissioner’s Motion for Summary Judgment, **ECF No. 19**, is  
15 **DENIED.**

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17 <sup>78</sup> *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*,  
18 761 F.2d 530 (9th Cir. 1985)).

19 <sup>79</sup> *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379  
20 F.3d 587, 595 (9th Cir. 2004) (“[T]he proper course, except in rare circumstances, is  
21 to remand to the agency for additional investigation or explanation”); *Treichler v.*  
22 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014).

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

5           4.     The case shall be **CLOSED**.

6           **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and  
7 provide copies to all counsel.

8           **DATED** this 5<sup>th</sup> day of March 2021.

9                                       s/Edward F. Shea  
10                                       \_\_\_\_\_  
11                                       EDWARD F. SHEA  
                                      Senior United States District Judge