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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 JOHN M.,

7 Plaintiff,

8 v.

9 COMMISSIONER OF SOCIAL
SECURITY,

10 Defendant.

Case No. 3:17-cv-06006-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

11 Plaintiff has brought this matter for judicial review of defendant's denial of his
12 application for disability insurance benefits. The parties have consented to have this matter heard
13 by the undersigned Magistrate Judge. 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73;
14 Local Rule MJR 13. For the reasons set forth below, the Court reverses and remands defendant's
15 decision to deny benefits for further administrative proceedings.

16 FACTUAL AND PROCEDURAL HISTORY

17 On July 1, 2014, plaintiff filed an application for disability insurance benefits and
18 supplemental security income, alleging that he became disabled beginning June 26, 2014. Dkt. 6,
19 12 (Supplement), Administrative Record (AR) 81, 95, 168-201. The claim was denied on initial
20 administrative review and on reconsideration. AR 109-12,114-15.

21 A hearing was held on September 21, 2016. AR 55-80, 720-51. In a written decision
22 dated November 14, 2016, the ALJ determined that plaintiff was not disabled. AR 17-37. The
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1 ALJ documented his analysis at each of the five steps of the Commissioner's sequential
2 disability evaluation process. AR 17-37.

3 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity
4 during the period from his alleged onset date of June 26, 2014. AR 22. At step two, the ALJ
5 found plaintiff had the following severe impairments: affective disorder, obesity, mild bilateral
6 degenerative joint disease of the knees, and bilateral plantar fasciitis. AR 22. At step three, the
7 ALJ found that plaintiff did not have an impairment or combination of impairments that met or
8 medically equaled the severity of one of the listed impairments. AR 23-24. The ALJ then
9 considered plaintiff's residual functional capacity (RFC) and found at step four that he could
10 perform his past relevant work as a sanitation worker and video rental clerk. AR 32. The ALJ
11 also determined that other jobs exist in the national economy that plaintiff is able to perform, and
12 therefore the ALJ made an alternative finding at step five: that plaintiff would be able to perform
13 requirements of the jobs of parking lot cashier, laundry worker, and production assembler. AR
14 33.

15 Plaintiff's request for review was denied by the Appeals Council on October 6, 2017, AR
16 1-7, making the ALJ's decision the final decision of the Commissioner, which plaintiff then
17 appealed to this Court. Dkt. 1.

18 Plaintiff seeks reversal of the ALJ's November 14, 2016, decision and remand for an
19 award of benefits, or in the alternative for further administrative proceedings, arguing the ALJ
20 erred: (1) in evaluating the medical opinion evidence; (2) in evaluating plaintiff's testimony; and
21 (3) in finding plaintiff is able to perform past relevant work. Dkt. 8. The Court agrees the ALJ
22 erred, and the appropriate remedy is reversal and remand for further administrative proceedings.

23 DISCUSSION

24 The Court will uphold an ALJ's decision unless: (1) the decision is based on legal error;
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1 or (2) the decision is not supported by substantial evidence. *Revels v. Berryhill*, 874 F.3d 648,
2 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a reasonable mind might
3 accept as adequate to support a conclusion.” *Trevizo v. Berryhill*, 871 F.3d 664, 674 (9th Cir.
4 2017) (quoting *Desrosiers v. Sec’y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.
5 1988)). This requires “more than a mere scintilla,” though “less than a preponderance” of the
6 evidence. *Id.* (quoting *Desrosiers*, 846 F.2d at 576).

7 If more than one rational interpretation can be drawn from the evidence, then the Court
8 must uphold the ALJ’s interpretation. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). That is,
9 “[w]here there is conflicting evidence sufficient to support either outcome,” the Court “must
10 affirm the decision actually made.” *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (quoting
11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)). The Court, however, may not affirm by
12 locating a quantum of supporting evidence and ignoring the non-supporting evidence. *Orn*, 495
13 F.3d at 630.

14 The Court must consider the administrative record as a whole. *Garrison v. Colvin*, 759
15 F.3d 995, 1009 (9th Cir. 2014). The Court also must weigh both evidence that supports and
16 evidence that does not support the ALJ’s conclusion. *Id.* The Court may not affirm the decision
17 of the ALJ for a reason upon which the ALJ did not rely. *Id.* Rather, only the reasons identified
18 by the ALJ are considered in the scope of the Court’s review. *Id.*

19 I. ALJ’s Evaluation of the Medical Opinion Evidence

20 Plaintiff challenges the ALJ’s decision discounting the opinions of examining
21 psychologist, Dr. Kathleen Mayers, Ph.D., and treating physician, Dr. Albert Luh, M.D. Dkt. 8 at
22 5-10.

23 Three types of physicians may offer opinions in Social Security cases: “(1) those who
24 treat[ed] the claimant (treating physicians); (2) those who examine[d] but d[id] not treat the
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1 claimant (examining physicians); and (3) those who neither examine[d] nor treat[ed] the claimant
2 (non-examining physicians).” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). A treating
3 physician's opinion is generally entitled to more weight than the opinion of a doctor who
4 examined but did not treat the plaintiff, and an examining physician's opinion is generally
5 entitled to more weight than that of a non-examining physician. *Id.* A non-examining physician’s
6 opinion may constitute substantial evidence if “it is consistent with other independent evidence
7 in the record.” *Id.* at 830-31; *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). An ALJ
8 need not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
9 inadequately supported by clinical findings” or “by the record as a whole.” *Batson v. Comm’r*
10 *Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004).

11 Even when a treating or examining physician’s opinion is contradicted, an ALJ may only
12 reject that opinion “by providing specific and legitimate reasons that are supported by substantial
13 evidence.” *Trevizo*, 871 F.3d at 675. However, the ALJ “need not discuss *all* evidence
14 presented” to him or her. *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (internal
15 citation omitted) (emphasis in original). The ALJ must only explain why “significant probative
16 evidence has been rejected.” *Id.*

17 “[A]n ALJ errs when he rejects a medical opinion or assigns it little weight while doing
18 nothing more than ignoring it, asserting without explanation that another medical opinion is more
19 persuasive, or criticizing it with boilerplate language that fails to offer a substantive basis for his
20 conclusion.” *Garrison*, 759 F.3d at 1012-13. As the Ninth Circuit has stated:

21 To say that medical opinions are not supported by sufficient objective findings or
22 are contrary to the preponderant conclusions mandated by the objective findings
23 does not achieve the level of specificity our prior cases have required, even when
24 the objective factors are listed seriatim. The ALJ must do more than offer his
25 conclusions. He must set forth his own interpretations and explain why they, rather
than the doctors’, are correct.

1 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) (internal footnote omitted).

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3 A. Examining psychologist, Dr. Mayers

4 In September 2014, Dr. Mayers evaluated plaintiff. AR 436-42. Dr. Mayers diagnosed
5 plaintiff with specific learning disorder with impairment in mathematics and possibly other
6 areas, major depressive disorder, and probably past alcohol use disorder. AR 440. Dr. Mayers
7 opined plaintiff is capable of understanding, remembering, and carrying out two to three-stage
8 instructions, generally able to interact with others in a work setting, likely able to tolerate minor
9 changes in a competitive work situation, and—if pain did not interfere and if plaintiff were not
10 required to use academic skills—possibly able to maintain attention and concentration through a
11 normal eight-hour workday. AR 441.

12 The ALJ gave Dr. Mayer’s opinion partial weight. AR 30. The ALJ found Dr. Mayers’
13 opinion regarding plaintiff’s ability to perform three-step commands is well supported by the
14 record, and the record shows plaintiff’s social abilities are greater than Dr. Mayers believed them
15 to be. AR 30. Plaintiff does not challenge the ALJ’s reasons for assigning partial weight to Dr.
16 Mayers’ opinion, but argues the ALJ did not include all of Dr. Mayers’ assessed limitations in
17 the RFC or provide specific and legitimate reasons¹ to reject those limitations. Dkt. 8 at 5-6.
18 Plaintiff argues the ALJ did not include or reject Dr. Mayers’ opinion that plaintiff is likely to
19 tolerate minor changes in a competitive work situation and that plaintiff might be able to

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22 ¹ Dr. Mayers’ opinion was contradicted by Dr. Thomas Clifford, Ph.D., who opined plaintiff could carry out routine
23 work-related tasks. Thus, the ALJ was required to articulate specific and legitimate reasons supported by substantial
24 evidence in the record to discount Dr. Mayers’ opinion. *Trevizo*, 871 F.3d at 675.

1 maintain attention and concentration (if pain did not interfere and academic skills were not
2 required) in his RFC. Dkt. 8 at 5-6.

3 As the ALJ did not reject Dr. Mayers' opinion, he was required to include Dr. Mayers'
4 limitations regarding plaintiff's ability to tolerate minor changes in the workplace if pain did not
5 interfere and if he were not required to use academic skills, plaintiff may be able to maintain
6 attention and concentration in a normal eight-hour workday. AR 30, 440-41; *Lingenfelter v.*
7 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (stating that the ALJ was required to include in his
8 RFC assessment claimant's limitations unless ALJ gave reasons for rejecting). Here, the ALJ's
9 RFC assessment does not address plaintiff's ability to adapt to changes in the workplace, even
10 though Dr. Mayers stated that plaintiff would only be able to tolerate minor changes. AR 30.
11 Moreover, the ALJ's RFC assessment does not account for Dr. Mayers' opinion that plaintiff
12 could maintain attention and concentration if pain did not interfere and plaintiff was not required
13 to use academic skills. Thus, the ALJ erred by failing to include or reject to Dr. Mayers'
14 limitations findings in his RFC determination.

15 Defendant argues that even if the ALJ erred, any error with respect to Dr. Mayers'
16 opinion is harmless. Dkt. 15 at 5-6. "[H]armless error principles apply in the Social Security
17 context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). An error is harmless, however,
18 only if it is not prejudicial to the claimant or "inconsequential" to the ALJ's "ultimate
19 nondisability determination." *Stout v. Comm'r Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir.
20 2006); *see Molina*, 674 F.3d at 1115. The determination as to whether an error is harmless
21 requires a "case-specific application of judgment" by the reviewing court, based on an
22 examination of the record made "without regard to errors' that do not affect the parties'
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1 ‘substantial rights.’” *Molina*, 674 F.3d at 1118-19 (quoting *Shinseki v. Sanders*, 556 U.S. 396,
2 407 (2009)).

3 As discussed above, the ALJ’s RFC assessment makes no mention of the limitations
4 described by Dr. Mayers related to plaintiff’s ability to tolerate minor changes in the workplace,
5 and his ability to maintain attention and concentration if pain does not interfere, and that plaintiff
6 is not required to use academic skills. AR 24, 30. The ALJ did not reference these limitations in
7 the hypothetical posed to the vocational expert (“VE”). AR 747-50. Defendant argues the error is
8 harmless because the jobs the ALJ named at step five do not require academic skills or the ability
9 to tolerate more than minor changes in a competitive work situation, and cites to the Dictionary
10 of Occupational Titles (DOT) description for a parking lot cashier, laundry worker, and
11 production assembler, which the ALJ found plaintiff could perform, in support of this argument.²
12 Dkt. 15 at 7 (citing DOT 211.462.010, DOT 706.687-010, DOT 361.687.010).

13 First, as identified by the VE, the jobs involve simple, routine tasks, AR 747, but the
14 descriptions do not describe the level of change in work environment. *See* DOT 211.462.010,
15 DOT 706.687-010, DOT 361.687.010. Moreover, while the parking lost cashier, laundry worker,
16 and production assembler jobs are “unskilled,” the descriptions do not necessarily show that the
17 jobs do not require *any* academic skills. *See id.* For example, the cashier position requires
18 computing bills and itemized lists reading and recording totals on cash registers and verifying
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20 ² Defendant also asks this Court to uphold the ALJ’s decision for a reason the ALJ did not state. Defendant
21 contends that the ALJ did not include Dr. Mayers’ assessed limitations because plaintiff’s pain did not interfere with
22 attention and concentration. Dkt. 15 at 5-6. However, “[l]ong-standing principles of administrative law require us to
23 review the ALJ’s decision based on the reasoning and factual findings offered by the ALJ—not post hoc
24 rationalizations that attempt to intuit what the adjudicator may have been thinking.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1225–26 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).
25 Following these principles, the Court declines to review the post-hoc reason defendant offers for the ALJ’s decision.
In addition, defendant does not argue how, if at all, the record shows plaintiff would not have pain-related attention
and concentration problems while taking over over-the-counter pain medication. *See* Dkt. 15.

1 that amount against cash on hand, which are arguably mathematical and academic skills. *See*
2 DOT 211.462.010; *see also* DOT 706.687-010 (production assembler requires placing parts in a
3 “specified relationship to each other[,]” which is rooted in the concept of mathematical skills of
4 sorting and patterning); DOT 361.687-010 (laundry worker requires counting key-tags and
5 comparing and counting laundry ticket numbers, also related to mathematical skills).

6 Because neither the RFC assessment nor the VE hypothetical fully account for Dr.
7 Mayers’ opinion, the Court cannot find that the ALJ’s error is harmless. On remand, the ALJ
8 must reconsider the entirety of Dr. Mayers’ opinion and either credit it fully and account for all
9 of the limitations in the RFC assessment, or provide legally sufficient reasons to discount it.

10 B. Treating physician, Dr. Luh

11 In August 2016, Dr. Luh found that plaintiff suffers from complications from severe
12 obesity including bilateral plantar fasciitis, sleep apnea, and pre-diabetes. AR 461. Dr. Luh
13 opined that plaintiff could lift and carry up to 20 pounds occasionally and ten pounds frequently.
14 AR 460. Dr. Luh opined that plaintiff can sit up to four hours, stand one hour, and walk one hour
15 in an eight-hour work day. AR 460. Dr. Luh opined plaintiff cannot bend, squat, or crawl, and
16 can occasionally climb and reach above shoulder level. AR 461. Dr. Luh opined plaintiff is likely
17 to miss more than four days of work per month. AR 461.

18 The ALJ gave Dr. Luh’s opinion “limited weight” weight for three reasons: (1) Dr. Luh
19 did not describe any objective medical evidence or clinical observations to support the opined
20 limitations; (2) the objective medical evidence, including Dr. Luh’s own treatment notes, did not
21 support the opined limitations; and (3) Drs. Robert Hander, M.D., and Robert Bernandez-Fu,,
22 M.D., who had the opportunity to review the record, have greater persuasive value than Dr. Luh.
23 AR 30-31.

1 Dr. Luh's opinion was contradicted by the opinion of Dr. Hander (who opined plaintiff
2 could perform work light work, AR 102-03); thus, the ALJ was required to articulate specific
3 and legitimate reasons supported by substantial evidence in the record to discount his opinion.
4 *Trevizo*, 871 F.3d at 675.

5 1. *Lack of Support*

6 The ALJ first assigned limited weight to Dr. Luh's opinion because it lacked support for
7 the limitations assessed. AR 30-31. Dr. Luh's opinion was completed on a "Physical Capacities
8 Evaluation" form. AR 460-61.

9 An ALJ need not accept the opinion of any physician, including a treating physician, if
10 that opinion is brief, conclusory, and inadequately supported by clinical findings. *See Bray v.*
11 *Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). However, discrediting a
12 doctor's opinion simply because she used a check-box form is not valid unless that opinion is
13 inconsistent with the underlying clinical records. *See Garrison*, 759 F.3d at 1014 n.17 ("the ALJ
14 was [not] entitled to reject [medical] opinions on the ground that they were reflected in mere
15 check-box forms" where the "check-box forms did not stand alone" but instead "reflected and
16 were entirely consistent with the hundreds of pages of treatment notes").

17 Here, contrary to the ALJ's finding, when asked to provide remarks regarding plaintiff's
18 functional limitations, Dr. Luh noted plaintiff suffered from complications from severe obesity
19 including bilateral plantar fasciitis, sleep apnea, and pre-diabetes, on the Physical Capacities
20 Evaluation form. AR 461. Moreover, Dr. Luh's entire treatment record including plaintiff's
21 symptoms, diagnoses, and assessments is included in the record. AR 315-435, 443-59, 462-719.
22 The ALJ erred by discounting Dr. Luh's opinion on the basis that Dr. Luh used a check-box
23 form, particularly where the opinion was accompanied by Dr. Luh's treatment notes. *See*

1 *Garrison*, 759 F.3d at 1014 n.17. To the extent the ALJ also discounted Dr. Luh’s opinion
2 because it was inconsistent with the underlying records, as discussed below, this rationale also
3 fails.

4 2. *Inconsistent with Objective Evidence and Dr. Luh’s Treatment Notes*

5 Next, the ALJ gave limited weight to Dr. Luh’s opinion on the basis that the opinion was
6 inconsistent with the objective evidence and Dr. Luh’s own treatment notes. AR 30-31. A
7 physician’s opinion of the level of impairment may be rejected because it is unreasonable in light
8 of other evidence in the record. *Morgan v. Comm’r Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir.
9 1999). Contradictions between a medical source’s opinion and her own clinical notes and
10 observations is a legally sufficient basis for rejecting the opinion. *Bayliss v. Barnhart*, 427 F.3d
11 1211, 1216 (9th Cir. 2005); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (upholding
12 ALJ’s rejection of a medical opinion which was internally inconsistent).

13 In this case, the ALJ did not identify which evidence was inconsistent with Dr. Luh’s
14 opinion or identify how Dr. Luh’s opinion was internally inconsistent. AR 30-31. The ALJ
15 merely concluded Dr. Luh’s opinion was inconsistent, without stating a basis for that conclusion.

16 To reject a physician’s opinion, an ALJ

17 can satisfy the substantial evidence requirement by setting out a detailed and
18 thorough summary of the facts and conflicting clinical evidence, stating his
19 interpretation thereof, and making findings. The ALJ must do more than state
conclusions. He must set forth his own interpretations and explain why they,
rather than the doctors’, are correct.

20 *Garrison*, 759 F.3d at 1012 (internal quotation marks and citation omitted). And even
21 considering the ALJ’s discussion of Dr. Luh’s treatment notes elsewhere in the opinion, *see* AR
22 25-26, “[t]o say that medical opinions are not supported by sufficient objective findings or are
23 contrary to the preponderant conclusions mandated by the objective findings does not achieve
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1 the level of specificity our prior cases have required, even when the objective factors are listed
2 seriatim.” *Embrey*, 849 F.2d at 421.

3 3. *Opinions of Drs. Hander and Bernandez- Fu, Non-examining Physicians*

4 Third, the ALJ stated the opinions of Drs. Hander and Bernandez-Fu, who had the
5 opportunity to review the record, “have greater persuasive value” than Dr. Luh. AR 30-31.
6 Plaintiff argues Drs. Hander and Bernandez-Fu are non-examining physicians and only reviewed
7 a limited record, not including the last two years of medical records. Dkt. 8 at 9. Defendant does
8 not respond to this argument. *See* Dkt. 15.

9 An examining physician’s opinion is “entitled to greater weight than the opinion of a
10 nonexamining physician.” *Lester*, 81 F.3d at 830 (citations omitted). A non-examining
11 physician’s or psychologist’s opinion may not constitute substantial evidence by itself sufficient
12 to justify the rejection of an opinion by an examining physician or psychologist. *Lester*, 81 F.3d
13 at 831 (citations omitted). However, “it may constitute substantial evidence when it is consistent
14 with other independent evidence in the record.” *Tonapetyan*, 242 F.3d at 1149 (citing
15 *Magallanes v. Bowen*, 881 F.2d 747, 752 (9th Cir. 1989)).

16 To the extent the ALJ rejected Dr. Luh’s opinion, in favor of and as inconsistent with the
17 opinions of Drs. Hander and Bernandez-Fu, the ALJ erred. The opinion of a non-examining
18 doctor, such as Drs. Hander and Bernandez-Fu, cannot by itself constitute substantial evidence
19 that justifies the rejection of the opinion of either an examining physician or a treating physician,
20 and the ALJ did not cite to any other independent evidence in the record consistent with their
21 opinions. *See Tonapetyan*, 242 F.3d at 1149 (internal citation omitted).

22 To the extent the ALJ rejected Dr. Luh’s opinion on the grounds the doctor did not have
23 the opportunity to review the record, the ALJ also erred. First, as plaintiff points, Drs. Hander
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1 and Bernandez-Fu did not review the *entire* record, and did not review the last two years of
2 records. AR 88-90 (Dr. Bernandez-Fu's opinion dated August 2014), 102-04 (Dr. Hander's
3 opinion dated January 2015), 462-719. In addition, the ALJ points to nothing in the record
4 indicating there are contrary medical test results or reports from a treating or examining doctor
5 that undermines Dr. Luh's opinion. Instead, the ALJ simply provided a conclusory statement
6 which as discussed above fails to achieve the level of specificity required to reject the opinion of
7 an examining doctor.

8 4. *Harmless Error*

9 In the RFC assessment, the ALJ found that plaintiff could perform light work with the
10 exception that plaintiff can only occasionally climb ramps and stairs, stoop, kneel, crouch, and
11 crawl and can never climb ladders, ropes, and scaffolds. AR 24. If the ALJ had given full credit
12 to Dr. Luh's opinion, the RFC would have included additional limitations in plaintiff's ability to
13 work. *See* AR 460-61. The ALJ's error with respect to Dr. Luh's opinion is not harmless and
14 requires reversal. *Stout*, 454 F.3d at 1055 (an error is harmless if it is not prejudicial to the
15 claimant or inconsequential to the ALJ's ultimate nondisability determination).

16 II. The ALJ's Evaluation of Plaintiff's Subjective Symptom Testimony

17 Plaintiff argues the ALJ improperly rejected plaintiff's subjective symptom testimony.
18 Dkt. 8 at 10-13. Plaintiff alleged limitations from physical pain, depression and anxiety. AR 62,
19 66, 68. Specifically, plaintiff testified he constantly lies down throughout the day due to pain
20 caused by plantar fasciitis and arthritis in his knees. AR 62. Plaintiff testified he can stand 15 to
21 30 minutes and sit 10 to 15 minutes at a time before experiencing severe pain or numbness. AR
22 70. Plaintiff testified he has depression and anxiety which limit his ability to maintain attention
23 and focus. AR 66, 72. Plaintiff testified he can follow a movie or TV show for 30 minutes at a
24 time. AR 72.

1 The ALJ gave three reasons for his adverse finding: (1) plaintiff sought conservative
2 treatment for his pain; (2) plaintiff's depression improved with medication; and (3) plaintiff's
3 testimony is inconsistent with the objective medical evidence. AR 25-28.

4 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent
5 reasons for the disbelief." *Lester*, 81 F.3d at 834 (citation omitted). The ALJ "must identify what
6 testimony is not credible and what evidence undermines the claimant's complaints." *Id.*; *see also*
7 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the
8 claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear
9 and convincing." *Lester*, 81 F.2d at 834. The evidence as a whole must support a finding of
10 malingering. *See O'Donnell v. Barnhart*, 318 F.3d 811, 818 (8th Cir. 2003).

11 In determining a claimant's credibility, the ALJ may consider a claimant's prior
12 inconsistent statements concerning symptoms. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
13 1996). The ALJ also may consider a claimant's work record and observations of physicians and
14 other third parties regarding the nature, onset, duration, and frequency of symptoms. *Id.*

15 A. Conservative Treatment and Improvement with Treatment

16 The ALJ found plaintiff sought conservative treatment for his pain and this was
17 inconsistent with plaintiff's testimony. AR 26. The ALJ also found plaintiff's depression
18 improved with medication. AR 26, 28.

19 As an initial matter, the Court notes that plaintiff does not challenge the ALJ's finding
20 that plaintiff only sought conservative treatment for his pain and that his depression improved
21 with medication. Instead, plaintiff argues only that the ALJ erred by rejecting plaintiff's
22 testimony because the ALJ failed to state what specific testimony he found credible and what
23 evidence shows such testimony is not credible. Dkt. 8 at 10-13 (citing AR 23). As plaintiff does
24 not challenge these reasons for discrediting his testimony, he has waived the argument. *See Bray*
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1 *v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1226, n.7 (9th Cir. 2009) (an argument not raised in
2 the plaintiff's opening brief was deemed waived).

3 Moreover, the ALJ's finding plaintiff sought conservative treatment is supported by
4 substantial evidence. Relying on over-the-counter pain medication is an example of conservative
5 treatment that "is sufficient to discount a claimant's testimony regarding severity of an
6 impairment." *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (citing *Johnson v. Shalala*,
7 60 F.3d 1428, 1434 (9th Cir. 1995). Here, plaintiff received one shot of Cortisone injections and
8 treated his pain with over-the-counter pain medication such as ibuprofen. AR 340-342 (Jacob
9 Heck, DPM, administered one set of Cortisone injections to plaintiff's bilateral heels, advised
10 plaintiff to ice his feet two to three times per day, recommended over-the-counter orthotics,
11 shoes, arch supports, NSAIDs, and stretching); AR 328, 337, 344, 362, 372, 376, 407, 465, 490,
12 498 (plaintiff prescribed ibuprofen for pain and inflammation). There is evidence in one
13 treatment note that plaintiff stated he could not afford Motrin. AR 457. However, plaintiff does
14 not allege that he had a good reason for failing to seek more aggressive treatment. *See Carmickle*
15 *v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) ("[A]lthough a conservative
16 course of treatment can undermine allegations of debilitating pain, such fact is not a proper basis
17 for rejecting the claimant's credibility where the claimant has a good reason for not seeking more
18 aggressive treatment."). This evidence also fails to indicate that pain was not treated
19 conservatively or that plaintiff's testimony was consistent with his treatment plan.

20 The ALJ's finding plaintiff's depression improved with treatment is also supported by
21 substantial evidence. AR 533-34 (plaintiff reported his mood was "much better"), AR 703
22 (Plaintiff reported he was "doing well[,] his current doses of Bupropion and Trazodone were
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1 “working well[,]” and he had been attending “a lot of therapy” which was “very helpful.” Dr.
2 Pamela Jean Edwards, M.D., reported plaintiff’s depression to be in remission).

3 B. Objective Medical Evidence

4 The ALJ also found plaintiff’s testimony was inconsistent with the objective medical
5 evidence. AR 25-26. Determining a claimant’s complaints are “inconsistent with clinical
6 observations” can satisfy the clear and convincing requirement. *Regennitter v. Comm’r Soc. Sec.*
7 *Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999). However, a claimant’s pain testimony may not be
8 rejected “solely because the degree of pain alleged is not supported by objective medical
9 evidence.” *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995) (quoting *Bunnell v. Sullivan*,
10 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc)); *see also Rollins*, 261 F.3d at 856; *Fair v.*
11 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). The same is true with respect to a claimant’s other
12 subjective complaints. *See Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995).

13 The ALJ is responsible for assessing the medical evidence and resolving any conflicts or
14 ambiguities in the record. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th
15 Cir. 2014); *Carmickle*, 533 F.3d at 1164. When evidence reasonably supports either confirming
16 or reversing the ALJ’s decision, the Court may not substitute its judgment for that of the ALJ.
17 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). “Where the evidence is susceptible to
18 more than one rational interpretation, it is the ALJ’s conclusion that must be upheld.” *Morgan*,
19 169 F.3d at 599.

20 Here, the ALJ reasonably construed the objective evidence in the record that plaintiff is
21 not as limited as he alleged. AR 25-29. For example, in May 2014, x-rays of plaintiff’s feet were
22 within normal limits showing “quite good mineral content without acute injury or notable
23 arthritic abnormalities” and x-rays of his knees demonstrated “minimal medial femorotibial joint
24 space narrowing with minimal subchondral sclerosis of the medial tibial plateaus.” AR 350-51.
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1 In June 2014, three weeks prior to plaintiff's alleged onset date of July 1, 2014, a small plantar
2 spur was noted and plaintiff presented with tenderness in his heels and his central and lateral
3 insertions were minimally tender. AR 340-41.

4 However, plaintiff also exhibited 5/5 strength in his bilateral lower extremities, and had
5 no arch pain in the distal medial band or with medial to lateral compression of his heels. AR 340-
6 41. Plaintiff had full range of motion and no edema or erythema. AR 341. Plaintiff was not found
7 to be in any apparent distress. AR 341. In a telephone encounter with Dr. Luh on June 14, 2014,
8 and office visit on June 30, 2014, plaintiff complained of continued foot and knee pain, but there
9 is no associated objective evidence. AR 343-44. Plaintiff was advised to take Motrin. AR 344.

10 Plaintiff argues the ALJ failed to identify *which* evidence contradicts plaintiff's
11 testimony. Dkt. 8 at 10-14. However, the ALJ spent several pages of his decision describing
12 plaintiff's testimony and explaining why the medical evidence contradicts the severity of his
13 allegations. AR 25-29. The ALJ reasonably interpreted the objective evidence as contradictory to
14 plaintiff's testimony as to the extent of his limitations. Even if a contrary interpretation could be
15 deemed rational, the ALJ's at least equally rational interpretation suffices to uphold the decision.
16 *See Tackett*, 180 F.3d at 1098; *Morgan*, 169 F.3d at 599. The Court concludes the ALJ
17 articulated clear and convincing reasons for rejecting plaintiff's subjective complaints, and
18 permissibly discounted his subjective symptom testimony.

19 III. Plaintiff's Past Relevant Work

20 Plaintiff argues the ALJ's decision is not supported by substantial evidence because the
21 record did not contain any evidence of the VE's testimony that he could return to past relevant
22 work as a sanitation worker and video rental clerk, or testimony that he could work as a parking
23 lot cashier, laundry worker, and production assembler. Dkt. 8 at 3-4. At the time plaintiff filed
24 his opening brief, the record did not contain testimony from the vocational expert. *See* Dkt. 6, 8,
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1 12. A supplemental administrative record was filed which includes a transcript of the entire
2 administrative hearing and all of the VE's testimony. Dkt. 12, AR 720-51.

3 The Court concludes the ALJ committed harmful error when he failed to address a
4 portion of Dr. Mayers' opinion and in his consideration of Dr. Luh's opinion. *See* Sections I(A)
5 and (B), *supra*. The ALJ must therefore reassess the RFC on remand. *See* Social Security Ruling
6 96-8p ("The RFC assessment must always consider and address medical source opinions.");
7 *Valentine v. Commissioner Social Sec. Admin.*, 574 F.3d 685, 690 ("an RFC that fails to take into
8 account a claimant's limitations is defective"). As the ALJ must reassess plaintiff's RFC on
9 remand, he must also re-evaluate the findings at Step Four and Step Five to determine if plaintiff
10 can perform the jobs identified by the VE in light of the new RFC. *See* *Watson v. Astrue*, 2010
11 WL 4269545, *5 (C.D. Cal. Oct. 22, 2010) (finding the ALJ's RFC determination and
12 hypothetical questions posed to the vocational expert defective when the ALJ did not properly
13 consider a doctor's findings).

14 IV. Remand for Further Proceedings

15 Plaintiff argues that this case should be remanded for an award of benefits, or in the
16 alternative, remanded for further administrative proceedings. Dkt. 8 at 13. "The decision whether
17 to remand a case for additional evidence, or simply to award benefits[,] is within the discretion of
18 the court." *Trevizo*, 871 F.3d at 682 (quoting *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.
19 1987)).

20 A direct award of benefits would be warranted if the following conditions are met: First,
21 the record has been fully developed; second, there would be no useful purpose served by
22 conducting further administrative proceedings; third, the ALJ's reasons for rejecting evidence
23 (claimant's testimony or medical opinion) are not legally sufficient; fourth, if the evidence that
24 was rejected by the ALJ were instead given full credit as being true, then the ALJ would be
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1 required on remand to find that the claimant is disabled; and fifth, the reviewing court has no
2 serious doubts as to whether the claimant is disabled. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th
3 Cir. 2017) (amended January 25, 2018); *Revels*, 874 F.3d at 668.

4 If an ALJ makes an error and there is uncertainty and ambiguity in the record, the district
5 court should remand to the agency for further proceedings. *Leon*, 880 F.3d at 1045. If the district
6 court concludes that additional proceedings can remedy the errors that occurred in the original
7 hearing, the case should be remanded for further consideration. *Revels*, 874 F.3d at 668.

8 As discussed above, the ALJ failed to provide legally sufficient reasons for giving partial
9 weight to Dr. Mayers' opinion and for giving limited weight to Dr. Luh's opinion. Accordingly,
10 issues remain regarding the evidence in the record concerning plaintiff's functional limitations,
11 and therefore serious doubt remains as to whether plaintiff is in fact disabled. Accordingly,
12 remand for further consideration of those issues is warranted. Specifically, on remand, the ALJ
13 must re-evaluate Dr. Luh's opinion and reconsider the entirety of Dr. Mayers' opinion and either
14 credit it fully and account for all of the limitations in the RFC assessment, or provide legally
15 sufficient reasons to discount it.

16 CONCLUSION

17 Based on the foregoing discussion, the Court concludes the ALJ erred in finding that
18 plaintiff was not disabled. Therefore, the ALJ's decision is reversed and remanded for further
19 administrative proceedings.

20 Dated this 18th day of December, 2018.

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Theresa L. Fricke
23 United States Magistrate Judge
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