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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 ALAN D.,

9 Plaintiff,

CASE NO. C18-5212-MAT

10 v.

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

11 NANCY A. BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

12 Defendant.

13
14 Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of
15 the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's
16 applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) after
17 a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the
18 administrative record (AR), and all memoranda of record, this matter is REVERSED and
19 REMANDED for further proceedings.

20 **FACTS AND PROCEDURAL HISTORY**

21 Plaintiff was born on XXXX, 1965.¹ He has a high school diploma and training as a truck
22

23 ¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

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1 driver, and has worked as a delivery driver, paper machine operator, and telephone operator. (AR
2 44, 58-59, 263.)

3 Plaintiff applied for SSI and DIB in March 2014 and May 2014, respectively. (AR 152-
4 65.) Those applications were denied initially and upon reconsideration, and Plaintiff timely
5 requested a hearing. (AR 117-19, 121-27.)

6 On October 14, 2016, ALJ Linda Thomasson held a hearing in Portland, Oregon, taking
7 testimony from Plaintiff and a vocational expert (VE). (AR 38-66.) On May 4, 2016, the ALJ
8 issued a decision finding Plaintiff not disabled. (AR 18-31.) Plaintiff timely appealed. The
9 Appeals Council denied Plaintiff's request for review on January 12, 2018 (AR 1-6), making the
10 ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of
11 the Commissioner to this Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
18 engaged in substantial gainful activity since August 26, 2012, the amended alleged onset date.
19 (AR 20.) At step two, it must be determined whether a claimant suffers from a severe impairment.
20 The ALJ found severe Plaintiff's obesity, hypertension, sleep apnea, and spine disorder. (AR 20-
21 23.) Step three asks whether a claimant's impairments meet or equal a listed impairment. The
22 ALJ found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment.
23 (AR 24.)

1 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
2 residual functional capacity (RFC) and determine at step four whether the claimant has
3 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
4 performing a range of sedentary work, with additional limitations: he can occasionally climb ramps
5 and stairs, stoop, and balance. He cannot climb ladders, ropes, or scaffolds; kneel; crouch; or
6 crawl. He can have occasional exposure to extreme cold and heat, and no exposure to vibration or
7 hazards such as unprotected heights or moving mechanical parts. He must be able to adjust from
8 sitting to standing at will, but he does not have to leave his workstation. (AR 24.) With that
9 assessment, the ALJ found Plaintiff able to perform past relevant work as a telephone operator.
10 (AR 30-31.)

11 If a claimant demonstrates an inability to perform past relevant work, the burden shifts to
12 the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
13 adjustment to work that exists in significant levels in the national economy. Because the ALJ
14 found Plaintiff capable of performing past relevant work, the ALJ did not proceed to step five.

15 This Court's review of the ALJ's decision is limited to whether the decision is in
16 accordance with the law and the findings supported by substantial evidence in the record as a
17 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
18 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
19 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
20 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
21 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
22 2002).

23 Plaintiff argues the ALJ erred in (1) assessing certain medical opinions, (2) discounting his

1 subjective symptom testimony, and (3) discounting a lay opinion.² The Commissioner argues that
2 the ALJ's decision is supported by substantial evidence and should be affirmed.

3 Medical opinions

4 Plaintiff challenges the ALJ's assessment of multiple medical opinions. In general, more
5 weight should be given to the opinion of a treating physician than to a non-treating physician, and
6 more weight to the opinion of an examining physician than to a non-examining physician. *Lester*
7 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted by another physician, a
8 treating or examining physician's opinion may be rejected only for "clear and convincing"
9 reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted,
10 a treating or examining physician's opinion may not be rejected without "specific and legitimate
11 reasons' supported by substantial evidence in the record for so doing." *Id.* at 830-31 (quoting
12 *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

13 Less weight may be assigned to the opinions of other sources. *Gomez v. Chater*, 74 F.3d
14 967, 970 (9th Cir. 1996). However, the ALJ's decision should reflect consideration of such
15 opinions, SSR 06-3p, and the ALJ may discount the evidence by providing reasons germane to
16 each source. *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (citing *Turner v. Comm'r of*
17 *Social Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010) and *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.
18 2001)). *See also* SSR 06-03p (ALJ should explain weight given to other source opinions or
19 otherwise ensure that discussion of the evidence allows for following the ALJ's reasoning "when
20 such opinions may have an effect on the outcome of the case").

22 ² Plaintiff's opening brief also challenges the ALJ's RFC assessment and step-five findings, but in
23 doing so only reiterates arguments made elsewhere. Dkt. 13 at 16-17. Accordingly, these issues will not
be analyzed separately.

1 Zane Smith, MPT

2 The ALJ gave partial weight to a 2009 opinion of Mr. Smith, an examining physical
3 therapist. (AR 298.) The ALJ found that some of Mr. Smith's opinions were consistent with the
4 record, specifically regarding Plaintiff's need to frequently change positions, but found that other
5 limitations described by Mr. Smith either over- or underestimated Plaintiff's abilities. (AR 29.)

6 Plaintiff asserts that the ALJ's reasoning is not supported by substantial evidence, and thus
7 the ALJ erred in discounting Mr. Smith's opinion. Dkt. 13 at 3-4. Plaintiff's brief mentions other
8 medical evidence in the subsection devoted to challenging the ALJ's assessment of Mr. Smith's
9 opinion, but Plaintiff does not explain how that evidence relates to his argument regarding Mr.
10 Smith's opinion. Instead, the brief simply describes certain medical findings without any analysis
11 of why those findings are relevant. Plaintiff's bare assertion that the ALJ's assessment of Mr.
12 Smith's opinion is not supported by substantial evidence is insufficient to establish error in the
13 ALJ's decision. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003)
14 (declining to address assertions unaccompanied by legal arguments: "We require contentions to
15 be accompanied by reasons."). Because Plaintiff has provided no legal analysis of the ALJ's
16 assessment of Mr. Smith's opinion, his challenge to this portion of the decision fails.

17 Brigitte Engelhardt, M.D.

18 Dr. Engelhardt conducted a consultative examination of Plaintiff in October 2014, and
19 found that Plaintiff could stand/walk for two hours per day and sit for "[a]bout six hours." (AR
20 354-59.) Dr. Engelhardt noted that Plaintiff used a cane, and she said that this device is
21 "recommended for long distances and uneven terrain." (AR 358.) She opined that Plaintiff could
22 not climb or balance, but could occasionally stoop, kneel, crouch, and crawl. (*Id.*) She also limited
23 Plaintiff to frequent reaching, handling, fingering, and feeling, but did not explain the reason for

1 these limitations. (*Id.*) Lastly, Dr. Engelhardt indicated that Plaintiff could not work at heights or
2 around heavy machinery. (AR 358-59.)

3 The ALJ gave partial weight to Dr. Engelhardt’s opinion, because it is “in part inconsistent
4 with the record of medical evidence as a whole as thoroughly described previously in this decision,
5 and she did not provide relevant evidence to support some of her opinions.” (AR 29-30.) The
6 ALJ went on to discuss specific limitations mentioned in Dr. Engelhardt’s opinion, but did not
7 explicitly identify which portions of the opinions she was crediting and which portions she was
8 rejecting, or which parts were inconsistent with what evidence or were overstated. (AR 30.) As a
9 result, the ALJ’s reasoning is not sufficiently specific and the ALJ should provide more specificity
10 on remand.

11 Wayne Hurley, M.D.

12 Dr. Hurley conducted a State agency review of Plaintiff’s file and described Plaintiff’s
13 workplace limitations. (AR 108-12.) The ALJ found that the limitations described by Dr. Hurley
14 were consistent with the record, but that he did not provide for a sit-stand option, which the ALJ
15 found was warranted by the record as a whole. (AR 30.)

16 Plaintiff contends that Dr. Hurley “erroneously failed” to find that he would require extra
17 breaks and could not perform a full-time job due to pain. Dkt. 13 at 6. This contention fails to
18 identify an error in the ALJ’s decision, and neither does Plaintiff’s subsequent selective citation to
19 various medical findings. Dkt. 13 at 6-7. Because Plaintiff failed to identify an error in the ALJ’s
20 assessment of Dr. Hurley’s opinion, his challenge to this portion of the decision fails.

21 Subjective symptom testimony

22 The ALJ discounted Plaintiff’s subjective testimony for a number of reasons, including (1)
23 inconsistency between his allegations and the objective medical evidence, (2) his failure to

1 consistently seek treatment for allegedly disabling symptoms, (3) the conservative nature of the
2 treatment he did obtain and the improvement he experienced with that treatment, and (4)
3 inconsistencies between his daily activities and the severity of his allegations. (AR 25-28.)
4 Plaintiff argues that these reasons are not clear and convincing, as required in the Ninth Circuit.
5 *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

6 The Court agrees with Plaintiff that the ALJ's discussion of his daily activities is
7 insufficiently specific: the ALJ described Plaintiff's activities, but did not explain how those
8 activities were either inconsistent with his allegations or demonstrated transferable work skills.
9 (AR 28.) Accordingly, the ALJ erred in relying on Plaintiff's activities as a reason to discount his
10 subjective statements. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (activities may
11 undermine credibility where they (1) contradict the claimant's testimony or (2) "meet the threshold
12 for transferable work skills").

13 The ALJ's other reasons, however, are legally sufficient. The ALJ pointed out
14 inconsistencies between Plaintiff's allegations and the objective medical evidence. (AR 25-26.)
15 Specifically, the ALJ noted that although Plaintiff traced his limitations to his workplace injury,
16 many of Plaintiff's physical examinations showed only mild changes after his workplace injury.
17 (AR 25-27.) The ALJ also noted that there were many periods during which Plaintiff did not seek
18 any medical treatment (February 2010-June 2012, April 2013-February 2014, and May 2014-
19 February 2015), which undermined his allegation of disability since 2012. (AR 27.) The ALJ
20 further found that the treatment and recommendations Plaintiff did receive were conservative, and
21 that some of Plaintiff's symptoms resolved with that conservative treatment, such as medication
22 and physical therapy. (AR 27-28.) The ALJ emphasized that the main treatment recommendation
23 was weight loss, and that Plaintiff's treatment provider believed that physical therapy would not

1 be beneficial until Plaintiff lost weight. (AR 28 (referencing AR 682).)

2 The ALJ's specific references to the medical record constitute clear and convincing reasons
3 to discount Plaintiff's subjective allegations. See Social Security Ruling (SSR) 16-3p, 2017 WL
4 5180304, at *5 (Oct. 25, 2017) ("We must consider whether an individual's statements about the
5 intensity, persistence, and limiting effects of his or her symptoms are consistent with the medical
6 signs and laboratory findings of record."); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)
7 ("The ALJ is permitted to consider lack of treatment in his credibility determination."); *Parra v.*
8 *Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (stating that "evidence of 'conservative treatment' is
9 sufficient to discount a claimant's testimony regarding severity of an impairment"); *Warre v.*
10 *Comm'r of Social Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be
11 controlled effectively with medication are not disabling for the purpose of determining eligibility
12 for SSI benefits.").

13 Plaintiff disputes the ALJ's characterization of his objective findings as "mild" (Dkt. 13 at
14 9), but has not shown that the ALJ was unreasonable in finding that the objective evidence post-
15 dating the injury represented a "rather mild" change when compared the evidence pre-dating the
16 injury. (AR 25 (referencing AR 736).)

17 Plaintiff also argues that the ALJ erred in failing to ask him to explain his gaps in treatment,
18 and that she should not have found the gaps to undermine his testimony without first seeking that
19 explanation. Dkt. 13 at 10. Plaintiff cites no authority requiring the ALJ to ask for an explanation.
20 SSR 16-3p indicates that an ALJ *may* ask a claimant to explain why he or she has not sought
21 treatment, but does not require the ALJ to do so. 2017 WL 5180304, at *9-10. Plaintiff did not
22 assert any reason for his lack of treatment at the hearing or to his providers, and this undermines
23 his allegations of disabling symptoms. See *Molina v. Astrue*, 674 F.3d 1104, 1113-14 (9th Cir.

1 2012) (“Moreover, a claimant’s failure to assert a good reason for not seeking treatment, ‘or a
2 finding by the ALJ that the proffered reason is not believable, can cast doubt on the sincerity of
3 the claimant’s pain testimony.’”).

4 Plaintiff goes on to argue that the ALJ erred in finding that his conservative treatment
5 undermined his allegations, because there is no evidence that he could afford more intensive
6 treatment. Dkt. 13 at 10. But the ALJ emphasized that more intensive treatment was not even
7 recommended: Plaintiff’s providers recommended conservative treatment, and this treatment was
8 beneficial. (AR 27-28 (discussing medications and physical therapy for his back pain, medication
9 for hypertension, and CPAP machine for his sleep apnea).) Thus, the ALJ reasoned that because
10 Plaintiff’s symptoms were treated in a conservative manner, and many of those symptoms resolved
11 with treatment, the course of Plaintiff’s treatment undermined his allegations of disabling
12 limitations. This rationale is reasonable.

13 Plaintiff goes on to summarize his subjective statements at length. Dkt. 13 at 11-15. This
14 summary does not advance Plaintiff’s legal arguments, and fails to identify error in the ALJ’s
15 decision. Because the ALJ provided multiple legally sufficient reasons to discount Plaintiff’s
16 subjective statements, the error with regard to Plaintiff’s activities (discussed *supra*) is harmless.
17 *See Carmickle v. Comm’r of Social Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008). Because
18 this case must be remanded for a reconsideration of Dr. Engelhardt’s opinion, however, the ALJ
19 shall also reconsider her findings regarding Plaintiff’s activities on remand.

20 Lay statement

21 In July 2014, a human resources manager for Plaintiff’s most recent employer completed
22 a form opinion regarding Plaintiff’s work performance. (AR 204-05.) This document indicates
23 that Plaintiff received no special accommodations at work and was not frequently absent, but was

1 only 60% as productive as other employees. (*Id.*) The form also indicates both that Plaintiff
2 completed his work in the same amount of time as employees in similar positions, and that he
3 could not complete his work without special assistance. (AR 204.)

4 The ALJ gave little weight to this form opinion because it contained no explanations and
5 was internally inconsistent. (AR 28-29.) An ALJ can reject the testimony of lay witnesses only
6 upon giving germane reasons. *Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996). Plaintiff
7 argues that the ALJ's reasoning was not germane because the form supports his testimony that he
8 was not productive in his job and required special accommodations. Dkt. 13 at 15. This argument
9 does not identify an error in the ALJ's decision, however, and not wholly accurate: the form
10 opinion is equivocal as to whether Plaintiff received accommodations, and contradicts Plaintiff's
11 testimony that he was often absent from work. (AR 204-05.)

12 Furthermore, whether the form opinion is consistent with Plaintiff's testimony is not
13 relevant to whether the ALJ erred in assessing the opinion, because the ALJ did not discount the
14 opinion as inconsistent with Plaintiff's testimony. Instead, the ALJ discounted the opinion as
15 unexplained and internally inconsistent, and these are legally valid reasons to discount an opinion.
16 *See Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999) (ALJ
17 appropriately considers internal inconsistencies within and between physicians' reports); *Molina*,
18 674 F.3d at 1111 (finding no error in an ALJ's rejection of a checkbox report as unexplained).
19 Plaintiff has failed to establish error in the ALJ's assessment of the lay opinion.

20 CONCLUSION

21 For the reasons set forth above, this matter is REVERSED and REMANDED for further
22 administrative proceedings. On remand, the ALJ shall reconsider Dr. Engelhardt's opinion and
23 either credit it or provide specific, legitimate reasons to discount it. The ALJ shall also reconsider

1 her reliance on Plaintiff's activities as a basis for discounting his subjective symptom testimony.

2 DATED this 26th day of February, 2019.

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5 Mary Alice Theiler
6 United States Magistrate Judge
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