White v. Commissioner of Social Security Administration

2023 | Cited 0 times | D. Arizona | July 31, 2023

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Matthew White,

Plaintiff, v. Commissioner of Social Security Administration,

Defendant.

No. CV-22-08113-PCT-JAT ORDER

supplemental security

income disability insurance DI Security Act, 42 U.S.C. § 401 et seq. (Doc. 1). The appeal is fully briefed. (Docs. 10; 13;

14). I. BACKGROUND

Plaintiff filed an application for DI and SSI benefits in April of 2020, alleging neck, shoulder, back, and leg pain. (Docs. 9-3 at 28; 9-5 at 2

a hearing. (Docs. 9-3 at 36, 46, 63, 76; 9-2 at 39). The Social Security Administration

9- decision under 42 U.S.C. § 405(g).

a. The Disability Determination Process

A claimant qualifies for SSI and DI benefits if, among other things, he is disabled. See any substantial gainful activity by reason of any medically determinable physical or mental

impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(a)(1), 1382c(a)(3)(A). The SSA

has created a five-step process for an ALJ to determine whether a claimant is disabled. See 20 C.F.R. §§ 404.1520(a)(1), § 416.920(a)(1). Each step is potentially dispositive. See id. §§ 404.1520(a)(4); 416.920(a)(4).

At step one the claimant is not disabled if he is doing substantial gainful activity. Id. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). At step two the claimant is not disabled if he does which significantly limits . . Id. §§

404.1420(a)(4)(ii), (c), 416.920(a)(4)(ii), (c). At step three the claimant is disabled (and entitled to benefits) if his impairment or combination of impairments Appendix 1 to Subpart P of 20

C.F.R. Part 404. See id. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

do despite [his Compare id. § 404.1520(a)(4), with id. § 404.1545(a)(1); and

compare id. § 416.920(a)(4), with id. § 416.945(a)(1). At step four the claimant is not

past relevant work, he can still perform such work. Id. §§ 404.1520(a)(4)(iv), (f), 416.920(a)(4)(iv), (f). If the claimant cannot perform (or does not have) past work, at step five the claimant is not disabled if, considering his onal

Compare id. § 404.1520(a)(4)(v), (g)(1), with id. § 404.1560(c); and compare id. § 416.920(a)(4)(v), (g)(1), with id. § 416.960(c). But if the ALJ finds the claimant cannot adjust to other work, he is disabled. See id. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

b.

At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity since his alleged disability onset date. 1 degenerative disc disease with spondylosis was severe. (Id.). At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of a listed impairment. (Id. at 31 32).

The ALJ then found that Plaintiff had the RFC to do light work with postural and environmental limitations. (Id. at 32 37). Specifically, the ALJ found that Plaintiff could lift and carry up to 10 pounds frequently and 20 pounds occasionally; stand and walk for four hours and sit for 6 hours in an 8-hour day; not climb ladders, ropes, or scaffolds; occasionally climb ramps or stairs; occasionally stoop, crouch, and kneel; frequently balance; and occasionally work with exposure to dangerous moving machinery and unprotected heights. (Id. at 32).

At step four, the ALJ found that Plaintiff was unable to do any past relevant work. (Id. at 37). At step five, the ALJ found that Plaintiff could adjust to other work that exists

perform the work of a parking lot cashier, information clerk, and bench assembler. (Id. at 38). As a result, the ALJ found Plaintiff not disabled. (Id. at 38 39). II. ANALYSIS

Plaintiff argues that the promulgation of the 2017 SSA regulations governing s authority under the 2

Plaintiff also argues that the ALJ erred in discrediting 1 (Doc. 9- See, e.g., Doc. 9-3 at 5). 2 (Doc. 10 at 6). Plaintiff also states that promulgating the 2017 regulations exceeded explains this contention nor cites any provision of the APA. (See Docs. 10; 14). unpersuasive the opinion of Id. at 12 23). The Court considers each issue in turn.

a. Validity of the 2017 Regulations

full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of [the subchapters dealing with DI and SSIDI], which are necessary or appropriate to carry out such provisions adopt reasonable and proper rules and regulations to regulate and provide

for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to see id. to make rules and regulations regarding the evaluation of medical evidence. Woods v.

Kijakazi, 32 F.4th 785, 790 (9th Cir. 2022).

Because Congress left a gap which it explicitly directed Defendant to fill with

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A regulation exceeds the authority granted by an expre Harner v. Soc. Sec. Admin., 38 F.4th 892, 897 (11th Cir. 2022); see Mead, 533

U.S. at 227. The Act itself Woods, 32 F.4th at 790. It does

. . and the reason or reasons upon which any unfavorable estab Id. (cleaned up)

(first quoting 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A), then quoting id. § 423(d)(5)(A)). But Id. 3 Id. (citing Bowen v. Yuckert, 482 U.S. 137, 145 (1987)); see also Heckler v. Campbell, 461 U.S. 458, 466 (1983); United States v. Mead Corp., 533 U.S. 218, 227 (2001) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 44 (1984)). Plaintiff does not argue that the challenged regulations are arbitrary and capricious. (See Docs. 10; 14).

The relevant SSA regulations in effect between 1991 and 2017 directed ALJs to

claimant, with treating sources generally receiving the most evidentiary weight, followed by examining sources and then non-examining sources. Id. at 790 91 (citing 20 C.F.R. § 404.1527(c)(1) [d] any semblance of hierarchy provider . . . remains Id. at 788, 790. Under the 2017 regulations, while ALJs

must always consider relationship with the claimant in weighing a medical opinion, ALJs are not required to articulate this consideration in explaining their decision 404.1520c(b)(2), (c)(3) (4), 416.920c(b)(2), (c)(3) (4). Rather, consistency and

supportability are now the most important factors in evaluating medical opinions. Id. §§ 404.1520c(b)(2), 416.920c(b)(2).

statutory authority, identifies several supposed conflicts between the Act and certain provisions of the 2017 regulations. (Doc. 10 at 8 12). The Court considers each

supposed conflict in turn.

i. Section 421(k)(1) Plaintiff first argues that tions are inconsistent with the Act because they create different standards for determining disability at different stages of review. (Doc. 10 at 8). Plaintiff notes that t regulation uniform standards which shall be applied at all levels of determination, review,

421(k)(1). Plaintiff also notes that 20 C.F.R. § 404.1593(b) requires recipients of disability

benefits who have alr to

C.F.R. §§ 404.1593(b), 416.993(b). Plaintiff argues that this provision makes while the priority the 2017 regulations place on supportability and consistency make - disability determination process. (Doc. 10 at 8).

Plaintiff is wrong on both counts. First, sections 404.1520c and 416.920c do not make relationship with the claiman - direct ALJs to consider relationship to the claimant and to articulate

their consideration of that 20 C.F.R. §§ 404.1520c(b)(2), 416.920c(b)(2). They also (which can include relationship to the claimant) . . . are both equally well-supported . . . and consistent with the record . . . but are not Id. §§ 404.1520c(b)(3), 416.920c(b)(3). These provisions therefore do not make relationship with the claimant a predetermined non-determinative fact.

Second, sections 404.1593 and 416.993 do not require Defendant to find a medical opinion more persuasive if it is from a treating source and indeed do not provide any instructions whatsoever regarding how Defendant should weigh medical evidence. See 20 C.F.R. §§ 404.1593, 416.993. Rather, these provisions merely direct benefits recipients to submit certain kinds of evidence for continuing

disability review. But the regulations allow recipients to submit evidence other than reports from treating and evaluating sources, and state that Defendant Id. §§ 404.1594(b)(6),

416.994(b)(1)(vi). These provisions therefore do not require Defendant to give controlling weight to reports from treating or examining physicians, and thus do not make relationship with the claimant a necessarily determinative fact after disability has been established.

The Court finds that the above provisions do not conflict with one another or create non-uniform review standards in violation of 42 U.S.C. § 421(k).

ii. Section 421(h) Plaintiff next focuses on 42 U.S.C. § 421(h), which directs Defendant to make an RFC where evidence indicates mental impairment,

completes an RFC where evidence indicates physical impairment. Plaintiff argues that this conflicts with the priority the 2017 regulations place on consistency and supportability over area of specialty. But Plaintiff has again identified a provision that describes which evidence should be evaluated in determining disability, but not how that evidence should be evaluated. The Court finds that sections 404.1520c(b)(2) and 416.920c(b)(2) are not manifestly contrary to section 42 U.S.C. § 421(h).

iii. Section 421(j) Plaintiff next argues that 42 U.S.C. § 421(j), which directs Defendant to prescribe regulations setting forth the standards and procedures for obtaining a consultative examination of a claimant, conflicts with the priority the 2017 regulations place on consistency and supportability. (Doc. 10 at 9 regulations implementing this subsection provide that is qualified,

equipped, and willing to perform the additional examination or test(s) for the fee schedule payment, and generally furnishes complete and timely reports relationship

supportability and consistency.

Once again, the provisions Plaintiff identifies set out requirements for what evidence will be considered and how that evidence will be obtained, but are not relevant to how such evidence will be evaluated. Thus, even if these provisions could be construed as implicitly recognizing the probativeness of a medical sourc they certainly do not require Defendant to give this factor the same level of importance as consistency and supportability. The Court finds that sections 404.1520c and 416.920c are not manifestly contrary to 42 U.S.C. § 421(j).

iv. Section 405(b)(1) Plaintiff argues lastly that the 2017 regulations are manifestly contrary to 42 U.S.C. § 8, 11 12) (citing 42 U.S.C.

§ 405(b)); see also id. § 1383(c)(1)(A). Plaintiff specifically argues that, because sections 404.1520c and 416.920c relationship to the claimant, but do not require ALJs to explain their consideration of these

factors, these sections an adverse determination is based. The linchpin of Plaintiff argument is the unexamined assumption that every fact or factor an ALJ considers before reaching a determination is necessarily Plaintiff provides no explanation and cites no authority in support of this proposition.

The Court finds that this proposition is false. The word r Act, see 42 U.S.C. §§ 410, 411, 1382c, and must therefore be given its ordinary meaning. In Re Hawkeye Ent., LLC, 49 F.4th 1232, 1237 (9th Cir. 2022). Reason induc see also 1502 (2d ed. 1975) (defining

. Third New International as . . . a justification of an act or procedure . . . [;] a consideration, motive, or judgment inducing or confirming a belief, influencing the will, or leading to a words, is a cause for or justification of an action or

conclusion. Thus, to comply with § 405(b)(1), an ALJ must discuss only the considerations which caused her decision, and which show it to be justified.

This is consistent with the interpretations of several of the circuit courts of appeal, which have generally construed § 405(b)(1) as requiring not an exhaustive discussion of every probative fact, but only enough reasoning to permit a reviewing court to determine See, e.g., Williams v. Colvin Wilson v. Astrue, 602 F.3d 1136, 1148 (10th Cir. 2010)); Peck v. Barnhart, No. 05 4090, 2006 WL 3775866, at *5 (10th Cir. Dec. 26, 2006); Brown-Hunter v. Colvin, 806 F.3d 487, 494 95 (9th Cir. 2015); Cox 61 (6th Cir. 2015) (citing Treichler v. , 775 F.3d 1090, 1102 03 (9th Cir. 2014)); Dykes ex rel. Brymer v. Barnhart, No. 03 6076, 2004 WL 2297874, at *4 (6th Cir. Oct. 12, 2004) (citing Craig v. Apfel, 212 F.3d 433, 436 (8th Cir. 2000)); Audler v. Astrue, 501 F.3d 446, 448 (5th Cir. 2007); Soc. Sec., 769 F.3d 861, 865 (4th Cir. 2014); Anderson , No. 21-2009, 2022 WL 1635628, at *2 (3d Cir. May 24, 2022).

This interpretation is also reinforced by a review of relevant legislative history. The language at issue was added to § 405(b)(1) by amendment in 1980. See Pub. L. No. 96- 265, 94 Stat. 457. Before this amendment, -944, at 58 (1980)

(Conf. Rep.). discussion of the pertinent law and regulations, a list and summary of the evidence of

co Id. The conference committee report emphasized that the explanation

Id.

The Senate Finance Committee report, meanwhile, suggests that the language eventually adopted was selected out of a desire to provide to claimants causes for a -2, at 56 (1979). The report noted that the then-current practice

provide th Id.

The report reasoned could both put the non- give the

likely to appeal the decision Id. Thus, the legislative history of the 1980 amendment suggests that Congress intended ALJs, in explaining a denial of benefits, to include only enough detail to communicate the causes of a denial and persuade a claimant that the determination was correct, without necessarily discussing every piece of evidence.

The Court finds that 42 U.S.C. § 405(b)(1) requires an ALJ to discuss only those considerations which caused the determination, with enough detail to allow the claimant and the reviewing court to determine whether the ALJ reasonably and correctly applied the law to the facts of each case. To the extent an consideration of a medical source s area of specialty or relationship to a claimant, that ALJ

is free under the 2017 regulations to discuss those factors in explaining her decision. See 20 C.F.R. §§ 404.1520c(b), 416.

complies with 42 U.S.C. § 405(b)(1) will typically been subsumed into the broader analysis of whether the decision was free of legal error and supported by substantial evidence.

The Court therefore proceeds to that broader inquiry. b. T Disability Determination

This Court may not overturn the ALJ s denial of disability benefits absent legal error or a lack of substantial evidence. Luther v. Berryhill, 891 F.3d 872, 875 (9th Cir. 2018). . . . such relevant evidence as a reasonable mind might accept Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017) (citation omitted weighing both the evidence that supports and the evidence that detracts from the [ALJ s]

conclusion, and may not affirm simply by isolating a specific quantum of supporting Id. (citation omitted). The ALJ, not this Court, draws inferences, resolves conflicts in medical testimony, and determines credibility. See Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995); Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984). Thus,

Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984). But by the same token t and may not affirm the ALJ on a ground upon which [s] Garrison v. Colvin,

759 F.3d 995, 1010 (9th Cir. 2014).

regarding the severity of his symptoms and in finding unpersuasive the medical opinion of

i. Subjective Symptom Testimony Plaintiff argues that the ALJ did not provide legally sufficient reasons supported by

(Docs. 10 at 12 17; 14 at 4 7). To discredit subjective symptom testimony an ALJ must determine

whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged. Lingenfelter v. Astrue, 504 F.3d 1028, 1036 37 (9th Cir. 2007)

malingering, the ALJ can reject the claimant s testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so. Id. (cleaned up).

reasonably be expected to produce his alleged symptoms, and did not make a finding that

he was malingering. (Doc. 9-2 at 33). But the AL regarding the severity of his symptoms were inconsistent with evidence in the record.

Because the ALJ did not make a finding that Plaintiff was malingering, the Court must determine whether the ALJ gave specific, clear, and convincing reasons for partly

An adverse credibility determination is sufficiently specific if the ALJ identifies what testimony is not credible and what evidence undermines the claimant s complaints Ghanim v. Colvin clear enough that it has

the power to convince See Smartt v. Kijakazi, 53 F.4th 489, 499 (9th Cir. 2022).

(1) ordinary techniques of credibility evaluation, such as the claimant s reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony by the claimant that appears less than candid; (2) unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment; and (3) the claimant s daily Id. at 1163 (citations omitted). medical evidence in the record is inconsistent . . weigh it as Smartt ALJ has made specific findings justifying a decision to disbelieve an allegation of excess Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989).

Plaintiff testified at the hearing that he had daily pain in his neck, shoulders, arms, back, buttocks, legs, feet, and toes that he rated at a severity of 8 or 9 out of 10, with 10 -2 at 61). He testified that this pain: prevented him from sitting for more than one hour and standing or walking for more than one hour in an eight-hour day; prevented him from lifting more than ten pounds; prevented him from driving more than one mile per day; and required him to take numerous breaks to stretch and lie down. (Id. at 51, 58, 61 62). testimony, each of which Plaintiff argues was erroneous. The Court considers each set of

reasons in turn.

1. Inconsistencies with the Medical Evidence testimony was inconsistency between that testimony and medical evidence in the record. (Id. at 33 34). 4 debilitating pain. (Id. at 33 (citing Docs. 9-7 at 4, 7 15, 25, 30, 44, 49, 57, 62)). The ALJ

also noted the consultative examiner that Plaintiff is capable of and engages

Id. at 34 (citing Doc. 9-7 at 7 8)). These are legally permissible reasons to discount claims of chronic pain. See De Mello v. Kijakazi, 2022 WL 17583054, at *1 (9th Cir. 2022); Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (stating that being - .

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Plaintiff argues that some of the cited reports contain no relevant observations, and that t 14). Specifically, Plaintiff argues that one report contains no observation of distress or

otherwise, and is irrelevant because it describes a visit which occurred eight days before (Doc. 10 at 14 (citing Doc. 9-7 at 4)). But that report See Doc. 9-7 -developed, well-nourished man in

The visit at which this note was made addressed the only eight days later, and the note is therefore relevant to his credibility regarding those symptoms. Cf. Lacy v. , No. CV-21-01908-PHX-JAT, 2023 WL 2624459, at *4 (D. Ariz. Mar. 24, 2023). 4 characterization of Plaintiff as having argues that this description is not sufficiently specific to identify the testimony the ALJ discredited. (Doc. 10 at 13; 14 at 6). hearing testimony regarding pain and pain-induced limitations, as well as other such subjective complaints in the record. symptom sonable.

Plaintiff concedes that most of the other cited reports do contain observations of no apparent distress, but argues that because some tests in those same reports were inference that Plaintiff has less pain than he alleges was unreasonable. Plaintiff essentially argues that this set of observations could be adequately explained by inferring that Plaintiff conceals his chronic pain except when he is being medically tested for it. But this is merely an alternative interpretation of the evidence. Because interpretation was reasonable, the Court defers to it. 5

The ALJ also noted that physical exams mostly showed normal gait as well as imbs, had ed standing

and walking limitations, as well as with the alleged weakness and numbness in his limbs. This finding is reasonable and supported by substantial evidence.

Plaintiff asserts that the ALJ does not cite a medical interpretation of the EMG test, but this assertion is incorrect. (See Doc. 9-2 at 34 (citing 9-7 at 31, 73 75) (respectively, the medical interpretation of an EMG test as normal, and the test results)). Plaintiff also argues that this

limitations, when actually Plaintiff was able to walk or stand for one hour. But it is evident that the ALJ used as shorthand to refer to standing and walking limitations, not to state a belief that Plaintiff could not stand or walk

at all. See (Doc. 9- not sustain sedentary work based on the inability to sit, stand and/or walk for an hour per 8-

an instance in which Plaintiff reported pain that sometimes radiated down his right leg, but in

-2 at 34 (citing Doc. 9-7 at 3 4)). Plaintiff argues that the 5 -7 at 7 15), which does not note whether or not Plaintiff was in apparent distress, neither supports nor detracts from substantial evidence nonetheless supports that finding given the other supporting citations. claimed severity of his symptoms because it could be interpreted to mean that Plaintiff had radiating pain but not radicular pain. (Doc. 10 at 15). While this interpretation would be statement (as suggesting that Plaintiff did not have radicular pain and therefore had less pain than he had reported) is also reasonable. Where the evidence admits of more than one rational interpretation this Co

Plaintiff argues that some of the test results the ALJ cited appear to support See Doc. 9-2 at 34 (citing Doc. 9-7 at 6, 80) (imaging). But the ALJ cited these test results in support

full extent of the alleged severity . . . of See id.) (emphasis added). The ALJ then discussed these results together with a number of results which contradicted disabled. (See Doc 9-

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The Court finds that these inconsistencies with the medical evidence are clear and convincing reason

2. Inconsistent Statements The ALJ noted that Plaintiff made several inconsistent statements regarding his symptoms. (Doc. 9- tingling, and radiating pain were inconsistent with both his denial at a March 2018 medical

appointment of any numbness and tingling, and his statement at the same appointment that -2 at 34 (referring to Doc. 9-7 at 3)). The 6 Additionally, to the extent Plaintiff argues the ALJs consideration of objective medical this is incorrect. See, e.g., Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citing 20 C.F.R. § 404.1529c(2)) (While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects. ALJ also found that , at the July 2018 consultative exam, of radiating pain, tingling, and numbness in his lower extremities was inconsistent with other instances when he claimed to have these symptoms. (Id. (citing Doc. 9-7 at 7)). The Court finds that this is a clear and convincing reason supported by substantial subjective symptom testimony.

3. Daily Activities activities were inconsistent with his alleged degree of limitation. (Doc. 9 2 at 34 35).

Daily activities are a proper basis supporting an adverse credibility determination where to spend a

substantial part of [her] day engaging in pursuits involving the performance of

Ghanim, 763 F.3d at 1165 (citing Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007); , 359 F.3d 1190, 1196 (9th Cir. 2004)). 7

The ALJ laundromat for one to two hours per day, which involved dusting and mopping; was

independent in self-care; prepared his own meals; could drive a car; and reported doing cardiovascular exercise. (Doc. 9-2 at 34 35).

The Court finds reasonable inconsistent with statements that he does cardiovascular exercise and regularly does part-time work are inconsistent

require treatment at a hospital. (See Doc. 9-2 at 61). Further, it appears unlikely that Plaintiff would be able to accomplish all of the above tasks independently if he can only stand and walk for one hour in an eight-hour day.

The ALJ also reasoned, from Plainti statement that he was a s]tay at home dad, that Plaintiff could work but chooses not to. (Doc. 9-2 at 35 (citing Doc. 9-7 at 29)). 7 those daily activities must be directly transferable to a work setting. (See Doc. 10 at 16). This is incorrect. See Ghanim, 763 F.3d at 1165; Rollins, 261 F.3d at 856; Valentine v. , 574 F.3d 685, 693 (9th Cir. 2009). Plaintiff argues that this inference is unreasonable, and that having children is not evidence of functionality. (Docs. 10 at 17; 14 at 7). But being a stay-at-home parent is commonly understood to involve caring for children, which requires some capacity to perform the tasks incidental to childcare. See, e.g., Rollins, 261 F.3d at 857. Further, th interpretation is bolstered by the fact that Plaintiff said he was a stay-at-home dad in response to being asked about his employment status which could suggest that, for Plaintiff, being a stay-at-home dad involves tasks at least somewhat comparable to those required for gainful employment. (Doc. 9-7 at 29). Because Plaintiff would have to perform the childcare tasks of a stay-at-home dad in addition to the tasks listed above, it was

statement that he was a stay-at-home dad was inconsistent with his alleged symptom severity. The Court finds that this inconsistency is a clear and convincing reason supported

4. Failure to Comply with Treatment his prescribed course of physical therapy visits, reasoning that he did not need physical

therapy services because his overall condition was improving with home exercise. (Doc. 9-2 at 35). -3p provides that an ALJ may not fail[ure]

including inability to afford treatment. SSR 16-3p, 2017 WL 5180304, at *9 10.

ary suggests that Plaintiff initially failed to begin physical therapy after his December 2019 surgery because his insurance would not cover the services, but that he later did begin treatment before stopping for some different, unexplained reason. (See Doc. 9-2 at 35). But there are only end of January 2020, and a second one on February 17 stating that Plaintiff had not shown

up for three consecutive visits and would be discharged as a result. (Doc. 9-7 at 26, 29). Moreover, at the hearing, when the ALJ cited the February 17 treatment record to Plaintiff and asked him to explain it, Plaintiff stated that he had stopped attending because his insurance would not pay for additional visits. (Doc. 9-2 at 54 55). interpretation of therapy is not supported by substantial evidence.

Nonetheless, the Court finds that this error is harmless because the ALJ gave other by substantial

evidence in the record. , 533 F.3d 1155, 1162 63 (9th Cir. 2008).

ii. Medical Opinion Plaintiff next argues that the ALJ erred in finding unpersuasive the opinion of surgeon, Dr. Singh. unsupported or inconsistent without providing an explanation supported by substantial

Woods, 32 F.4th at 792. In providing this explanation, the ALJ must articulate how she considered the supportability of that medical opinion and its consistency with other evidence in the record. See id. (citing 20 C.F.R. § 404.1520c(b)(2); 20 C.F.R. § 416.920(b)(2), (c)(1) (2)).

Dr. Singh opined that Plaintiff: was unable to sit for more than one hour, or stand or walk for more than one hour, in an eight hour day; had constant severe pain in the lower back, intermittent moderate pain in the lumbar spine, and moderate numbness in the legs and feet; had to walk once every 10 minutes for three minutes and take 5 10 minute breaks to rest every two hours; had to elevate his legs 20% of the time; would miss three days of work per month; and could only lift 10 pounds occasionally and less than 10 pounds frequently. (Doc. 9-8 at 2 5).

istent with (Doc. 9-2 at 36). An ALJ may reject a medical opinion to the extent it is based on subjective complaints of pain which have been properly discounted. Fair, 885 F.2d at 605 answered

-ups impact the function of the . . .[l]umbar -8 at 2). opinion subjective complaints which, as discussed, the ALJ properly discounted. Further, Dr. Keer,

whose opinion the ALJ found mostly

9-3 at 61). Thus, although the form did direct Dr. Singh to answer the questions based on his judgment, examination, and treatment of the Plaintiff, (Doc. 9-8 at 2), there was a least resolution of that ambiguity was reasonable, and the Court defers to it. See Tommasetti v.

Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) (holding that a medical consultant statement that a medical of that opinion).

it was a check-box

-2 at 36). While a check- any less reliable than any other type of form Trevizo v. Berryhill, 871 F.3d 664, 667 n.4 (9th Cir. 2017),

Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001) (citing the supportability factor of 20 C.F.R. § 404.1527); see also . . . supporting explanations are to support . . . medical opinion(s) . . . the more persuasive

medical opinion(s) . . . Dr. Singh, upon being particular medical signs, laboratory findings

Patient is status post B/L L4 5 Decompression that took place on 12/16/19. Since surgery patient still continues to have bilateral leg pain. He continues to numbness, tingling and weakness in bilateral legs and feet. Before, surgery was done patient had Injections done that did not help as well as an MRI was completed. I have ordered a new MRI since surgery. (Doc. 9-8 at 5 this limitations and need for leg elevation was reasonable, as the explanation primarily without discussing the need for elevation, without spelling out the specific mechanism , and without 8

The Court finds that substantial evidence supports 9

The ALJ also with one another. (Doc. 9-2 at 36). Although Dr. Singh opined that Plaintiff had

that Plaint with the hands, fine manipulating with the fingers, and reaching with the arms, 100% of

the time during an 8-hour work day. (Doc. 9-8 at 5). Substantial evidence supports the

activities should translate to an inability to do these activities at least some of the time.

o take a break -2 at 36). Plaintiff argues that the ALJ was

opinion because ALJs are only permitted to consider consistency between, rather than within, medical opinions. factors that tend to support or contradict a medical opinion c(c)(5).

8 bjective symptom testimony. 9 To the extent the ALJ erred by suggesting that a check-box form is inherently less the ALJ also gave a permissible reason supported by substantial evidence for rejecting the check-box form.

properly understood, these limitations are not inconsistent. (Doc. 10 at 22 (discussing Doc.

9-8 at 4)). Specifically, Plaintiff reads Dr. Singh could walk for one hour, stand for one hour, and sit for one hour (for a total of three hours combined walking, standing, and sitting), which Plaintiff argues is consistent with Dr. need to take a five-to- or less. But because the check-box form Dr. Singh used is ambiguous on this point, the

Court cannot say with certainty whether Dr. Singh meant to opine that Plaintiff could sit, stand, and walk for a total of one, two, or three hours per day. (See Doc. 9-8 at 4). If the sit/stand/walk for an hour at a time is correct, these limitations would be inconsistent because a person who can only sit, stand, and walk for one hour total would need to take a break every one hour or less, not every opinion as internally inconsistent was reasonable. 10

Alternatively, any error was harmless unpersuasive. See Carmickle, 533 F.3d at 1162 63.

Plaintiff additionally argues that the ALJ erred by stating 20; 14 at 4 inaccurate

February 26, 2020 -7 at 84; 9-8 at 2-6)).

But under the SSA regulations, statements on issues reserved to the Commissioner are assigned no value or persuasiveness, and consideration of such statements is not explained. 20 C.F.R. § 404.1520b(c); see also Callahan v. Kijakazi, 2023 WL 2166989, at 10 really consistent because Plaintiff could lie down while working is not persuasive. It was reasonable for the ALJ to presume that lying down was equivalent to taking a break from work, as lying down frequently is inconsistent with the requirements of most occupations. See, e.g., Voelker v. Kijakazi, 2023 WL 3062111, at *3 (E.D. Cal. Apr. 24, 2023); Lingenfelter, 504 F.3d at 1035. *8 (E.D. Cal. Feb. 22, 2023). Essentially, such statements are simply treated as if they are not there and are given no weight. See , No. 22-10938, 2023 WL 2606614, at *1 (11th Cir. 2023); Rogers v. Kijakazi, 62 F.4th 872, 878 79 (4th Cir. 2023); Miller v. Kijakazi, No. 22-60541, 2023 WL 234773, at *2 (5th Cir. 2023); Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844-01, multiple categories of evidence, we will consider each kind of evidence according to its

applicable rules. We will not consider an entire document to be a statement on an issue to the Commissioner simply because the document contains a statement on an issue that is reserved by classifying it as a statement on an issue reserved to Defendant. Plaintiff does not explain

how treating a statement that really was not there as if it were not there could have affected non-disability determination. This was, at most, harmless error.

The Court concludes that the ALJ gave sufficient and legally permissible reasons

III. CONCLUSION

For the foregoing reasons, IT IS ORDERED the Court shall enter judgment accordingly. To the extent a mandate is required, the

judgment shall serve as the mandate.

Dated this 31st day of July, 2023.