

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Barrera v. Commissioner of Social Security

Barrera · No. 1:23-cv-1682-JLT-GSA · Decided February 26, 2025

SUMMARY

These Findings and Recommendations address Abel Barrera’s challenge to the Commissioner of Social Security’s denial of supplemental security income. The magistrate judge recommends denying Barrera’s motion for summary judgment, granting the Commissioner’s cross-motion, affirming the Commissioner’s decision, and directing entry of judgment for the Commissioner. The recommendations conclude that the ALJ’s step-five findings, record development, and evaluation of subjective complaints were supported by substantial evidence and applicable law.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
WRITING FOR THE COURT	Gary S. Austin
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	February 26, 2025
DOCKET	1:23-cv-1682-JLT-GSA
DISPOSITION	other
PROCEDURAL POSTURE	Plaintiff sought judicial review under 42 U.S.C. § 405(g) of the Commissioner's final decision denying supplemental security income. The magistrate judge issued findings and recommendations recommending denial of plaintiff's motion for summary judgment, granting the Commissioner's cross-motion, affirming the administrative decision, and directing entry of judgment for defendant.
STANDARD OF REVIEW	The court reviews the Commissioner's decision for legal error and substantial evidence, considering the record as a whole. It may not substitute its judgment for the Commissioner's where the evidence reasonably supports two conclusions, and harmless error does not require reversal.
PRECEDENTIAL VALUE	nonprecedential
PARTIES	Abel Barrera v. Commissioner of Social Security

TOPICS

judicial review of agency action

administrative law

summary judgment

civil procedure

PRACTICE AREAS

Social Security disability

administrative law

federal civil procedure

QUESTIONS PRESENTED

1. Whether the vocational-expert testimony concerning the identified jobs conflicted with the RFC limitation to simple instructions and simple work-related decisions.
2. Whether the ALJ erred by declining to obtain an examining-source physical RFC opinion or consultative orthopedic examination.
3. Whether the ALJ improperly evaluated plaintiff's subjective symptom complaints.

HOLDINGS

1. Any apparent conflict between the RFC limitation to simple work and the mail-clerk position's Reasoning Level 3 was harmless because the vocational expert also identified two Reasoning Level 2 jobs—photocopy machine operator and office clerk—that were compatible with simple work.
2. The ALJ did not err by declining to obtain a consultative physical examination or an additional examining-source RFC opinion because plaintiff failed to explain what evidence or functional limitations would require further development.
3. Plaintiff failed to establish a basis for remand on the subjective-symptom issue because he did not identify, summarize, or cite the testimony or complaints allegedly rejected by the ALJ, nor did he identify the limitations that the testimony would support.

KEY QUOTATIONS

“This court may set aside the Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based on legal error or are not supported by substantial evidence in the record as a whole.”

“If the evidence could reasonably support two conclusions, the court “may not substitute its judgment for that of the Commissioner” and must affirm the decision.”

“the ALJ is responsible for translating and incorporating clinical findings into a succinct RFC.”

FACTUAL BACKGROUND

Barrera alleged disability based on multiple physical and mental impairments, including schizophrenia, mood disorder, obesity, spinal and knee conditions, hypertension, and a history of cerebellar hemorrhage. The ALJ found that he had not engaged in substantial gainful activity, had severe impairments, did not meet or equal a listed impairment, and retained the residual functional capacity for a restricted range of light work with simple-work and social-interaction limitations. Relying on vocational-expert testimony, the ALJ found that Barrera could perform photocopy machine operator, non-postal mail clerk, and office clerk jobs existing in significant numbers in the national economy.

PROCEDURAL HISTORY

Barrera applied for supplemental security income on July 27, 2021. The application was denied initially and on reconsideration; after a January 5, 2023 hearing, the ALJ issued an unfavorable decision on January 31, 2023, and the Appeals Council denied review. In federal court, plaintiff moved for summary judgment and the Commissioner filed a cross-motion. The magistrate judge recommended affirmance, subject to objections and review by the assigned district judge.

DISPOSITION

other

CASES CITED

- Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999)
- Richardson v. Perales, 402 U.S. 389, 401 (1971)
- Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996)
- Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006)
- Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)
- Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008)
- Garrison v. Colvin, 759 F.3d 995, 1011, 1014 (9th Cir. 2014)
- Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)
- Salas v. Astrue, 2011 WL 2620370, at *5 (E.D. Cal. June 29, 2011)
- Grigsby v. Astrue, 2010 WL 309013, at *2 (C.D. Cal. Jan. 22, 2010)
- Cervantes v. O'Malley, No. 1:22-CV-1565 JLT GSA, 2024 WL 1173827, at *3-*4 (E.D. Cal. Mar. 19, 2024)
- Zavalin v. Colvin, 778 F.3d 842 (9th Cir. 2015)
- Davis v. Saul, 846 F. App'x 464, 466 (9th Cir. 2021)
- Meissl v. Barnhart, 403 F. Supp. 2d 981 (C.D. Cal. 2005)
- DeLorme v. Sullivan, 924 F.2d 841, 849 (9th Cir. 1991)
- McLeod v. Astrue, 640 F.3d 881, 885 (9th Cir. 2011)
- Rounds v. Commissioner Social Security Administration, 807 F.3d 996, 1006 (9th Cir. 2015)
- Tidwell v. Apfel, 161 F.3d 599, 600 (9th Cir. 1998)
- Carmickle v. Commissioner, Social Security Administration, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)
- Greenwood v. Federal Aviation Administration, 28 F.3d 971, 977 (9th Cir. 1994)
- Smolen v. Chater, 80 F.3d 1273, 1281-1282 (9th Cir. 1996)
- Burrell v. Colvin, 775 F.3d 1133, 1136 (9th Cir. 2015)
- Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001)
- Ferguson v. O'Malley, 95 F.4th 1194, 1200 (9th Cir. 2024)
- Ukolov v. Barnhart, 420 F.3d 1002, 1005 (9th Cir. 2005)
- Wilkerson v. Wheeler, 772 F.3d 834, 838-839 (9th Cir. 2014)

- *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)

OPINION

2 3 4 UNITED STATES DISTRICT COURT 5 EASTERN DISTRICT OF CALIFORNIA 6 7
ABEL BARRERA, No. 1:23-cv-1682-JLT-GSA 8 Plaintiff, 9 v. FINDINGS AND
RECOMMENDATIONS 10 TO DENY PLAINTIFF’S MOTION FOR COMMISSIONER OF
SOCIAL SUMMARY JUDGMENT, TO AFFIRM 11 SECURITY, THE COMMISSIONER’S
DECISION, AND TO DIRECT ENTRY OF JUDGMENT IN 12 FAVOR OF DEFENDANT
Defendant. COMMISSIONER OF SOCIAL 13 SECURITYAND AGAINST PLAINTIFF 14
(Doc.

15, 17) 15 16 I. Introduction 17 Plaintiff Abel Barrera seeks judicial review of a final decision of
the Commissioner of 18 Social Security denying his application for supplemental security income
pursuant to Title XVI of 19 the Social Security Act.1 20 II. Factual and Procedural Background 21
Plaintiff applied for benefits on July 27, 2021.

The Commissioner denied the applications 22 initially on December 3, 2021, and on
reconsideration on February 28, 2022. AR 102, 126. Plaintiff 23 appeared for a hearing before an
ALJ on January 5, 2023. AR 44. The ALJ issued an unfavorable 24 decision on January 31, 2023.
AR 25.

The Appeals Council denied review and this appeal 25 followed. 26 27 28 1 The parties did not
consent to the jurisdiction of a United States Magistrate Judge. Docs. 9, 10. III. The Disability
Standard 2 Pursuant to 42 U.S.C. §405(g), this court has the authority to review a decision by the 3
Commissioner denying a claimant disability benefits. “This court may set aside the 4
Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based on legal
5 error or are not supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180
6 F.3d 1094, 1097 (9th Cir.

1999) (citations omitted). Substantial evidence is evidence within the 7 record that could lead a
reasonable mind to accept a conclusion regarding disability status. See 8 *Richardson v. Perales*,
402 U.S. 389, 401 (1971). It is more than a scintilla, but less than a 9 preponderance. See *Saelee v.*
Chater, 94 F.3d 520, 522 (9th Cir. 1996) (internal citation omitted).

10 When performing this analysis, the court must “consider the entire record as a whole and 11
may not affirm simply by isolating a specific quantum of supporting evidence.” *Robbins v. Social*
12 *Security Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citations and quotations omitted). If the 13
evidence could reasonably support two conclusions, the court “may not substitute its judgment for
14 that of the Commissioner” and must affirm the decision.

Jamerson v. Chater, 112 F.3d 1064, 1066 15 (9th Cir. 1997) (citation omitted). “[T]he court will
not reverse an ALJ’s decision for harmless 16 error, which exists when it is clear from the record

that the ALJ's error was inconsequential to the 17 ultimate nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). 18 To qualify for benefits under the Social Security Act, a plaintiff must establish that 19 he or she is unable to engage in substantial gainful activity due to a medically determinable physical or mental impairment that has lasted or can be expected to 20 last for a continuous period of not less than twelve months.

42 U.S.C. § 21 1382c(a)(3)(A). An individual shall be considered to have a disability only if... his physical or mental impairment or impairments are of such severity that he is not 22 only unable to do his previous work, but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists 23 in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether 24 he would be hired if he applied for work.

25 42 U.S.C. §1382c(a)(3)(B). 26 To achieve uniformity in the decision-making process, the Commissioner has established a 27 sequential five-step process for evaluating a claimant's alleged disability. 20 C.F.R. §§ 416.920(a)- 28 (f).

The ALJ proceeds through the steps and stops upon reaching a dispositive finding that the claimant is or is not disabled. 20 C.F.R. §§ 416.927, 416.929. 2 Specifically, the ALJ is required to determine: 1- whether a claimant engaged in substantial 3 gainful activity during the period of alleged disability; 2- whether the claimant had medically 4 determinable "severe impairments"; 3- whether these impairments meet or are medically equivalent 5 to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P, Appendix 1; 4- whether 6 the claimant retained the residual functional capacity ("RFC") to perform past relevant work; and 7 5- whether the claimant had the ability to perform other jobs existing in significant numbers at the 8 national and regional level.

20 C.F.R. § 416.920(a)-(f). While the Plaintiff bears the burden of 9 proof at steps one through four, the burden shifts to the commissioner at step five to prove that 10 Plaintiff can perform other work in the national economy given her RFC, age, education and work 11 experience. *Garrison v. Colvin*, 759 F.3d 995, 1011 (9th Cir. 2014). 12 IV.

The ALJ's Decision 13 At step one the ALJ found that Plaintiff had not engaged in substantial gainful activity since 14 the application date of July 27, 2021. AR 30. At step two the ALJ found that Plaintiff had the 15 following severe impairments: schizophrenia, mood disorder, obesity, degenerative disc disease of 16 the cervical spine, hypertension, degenerative joint disease of the left knee, and history of right 17 cerebellar hemorrhage.

AR 30. 18 At step three the ALJ found that Plaintiff did not have an impairment or combination thereof 19 that met or medically equaled the severity of one of the impairments listed in 20 C.F.R. Part 404, 20 Subpart P, Appendix 1. AR 31. 21 Prior to step four, the ALJ evaluated Plaintiff's residual functional capacity (RFC) and 22 concluded that Plaintiff had the RFC to perform a range

of light work as defined in 20 C.F.R. 23 416.967(b) with the following limitations: 24 He can never climb ladders, ropes, or scaffolds.

He can occasionally climb ramps or 25 stairs and occasionally balance, stoop, kneel, crouch, or crawl. He can never be exposed to unprotected high places or unguarded moving mechanical parts. He 26 should avoid concentrated exposure to extreme heat and humidity.

The claimant can 27 understand, remember, and carry out simple instructions and make simple work-related decisions. He can tolerate occasional interactions with the public. The 28 claimant can tolerate occasional interactions with coworkers so long as they are brief and superficial. He can tolerate occasional interactions with supervisors. He can 2 work at a consistent pace in goal-oriented work throughout the workday but cannot perform work requiring a strict production rate (e.g., such as an assembly line work 3 that the worker cannot control), or work that requires hourly quotas.

The claimant can perform work with only occasional changes in a routine work setting. 4 5 AR 33. At step four, the ALJ found that Plaintiff had no past relevant work. AR 38. At step five, 6 in reliance on the Vocational Expert's testimony, the ALJ found that considering Plaintiff's age, 7 education, work experience and RFC, Plaintiff could perform the following jobs existing in 8 significant numbers in the national economy: 1- photocopy machine operator (DOT 207.685-014), 9 2- mail clerk, non-postal (DOT 209.687026), and 3- office clerk (DOT 239.567-010).

AR 38. The 10 ALJ therefore concluded that Plaintiff was not disabled at any point since the application date of 11 July 27, 2021. AR 39. 12 V. Issues Presented 13 Plaintiff asserts three claims of error: 1- "The ALJ's Step 5 determination is unsupported 14 by substantial evidence as there are clear discrepancies between the job descriptions and the 15 limitations set forth in the RFC", 2- "The ALJ's RFC determination is not supported by substantial 16 evidence because he failed in his duty to complete the record and obtain an opinion of Plaintiff's 17 physical RFC from an examining physician", and 3- "The ALJ failed to include work-related 18 limitations in the RFC consistent with the nature and intensity of Plaintiff's limitations, and failed 19 to offer any reason for rejecting Plaintiff's subjective complaints." MSJ at 3, Doc.

15. 20 A. Conflict Between Job Descriptions and the RFC 21 22 1. Applicable Law 23 Before proceeding to steps four and five, the ALJ determines the claimant's residual 24 functional capacity (RFC) which is "the most [one] can still do despite [his or her] limitations" and 25 represents an assessment "based on all the relevant evidence." 20 C.F.R. § 416.945(a)(1).

The 26 RFC must consider all of the claimant's impairments, severe or not. 20 C.F.R. §§ 416.920(e), 27 416.945(a)(2). "The ALJ can meet this burden by setting out a detailed and thorough summary of 28 the facts and conflicting evidence, stating his interpretation thereof, and making findings." 2 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). 3 In the Dictionary

of Occupational Titles, each job description includes a General Educational Development (“GED”) definition that “embraces those aspects of education (formal and informal) which are required of the worker for satisfactory job performance.” *Salas v. Astrue*, 2011 WL 2620370 at *5 (E.D.

Cal. June 29, 6 2011) (quoting *Grigsby v. Astrue*, 2010 WL 309013 at *2 (C.D. Cal. Jan. 22, 2010)). The GED includes a scale for “reasoning development,” which ranges from Level 1 7 (low) to Level 6 (high). *Id.* The Dictionary of Occupational Titles indicates Reasoning Levels 1 through 3 require the following cognitive functioning: 8 9 Level 1: Apply commonsense understanding to carry out simple one-or two-step instructions.

Deal with standardized situations with occasional or no variables in or 10 from these situations encountered on the job. 11 Level 2: Apply commonsense understanding to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a few concrete variables 12 in or from standardized situations. 13 Level 3: Apply commonsense understanding to carry out instructions furnished in 14 written, oral, or diagrammatic form.

Deal with problems involving several concrete variables in or from standardized situations. 15 *Cervantes v. O'Malley*, No. 1:22-CV-1565 JLT GSA, 2024 WL 1173827, at *3–4 (E.D. Cal. Mar. 16 17 19, 2024) (citing DOT- Appendix C, Section III, 1991 WL 688702; *Rounds*, 807 F.3d at 1002- 18 1003). 19 Pursuant to SSR 00-4p: 20 Occupational evidence provided by a VE or VS generally should be consistent with 21 the occupational information supplied by the DOT.

When there is an apparent unresolved conflict between VE or VS evidence and the DOT, the adjudicator must 22 elicit a reasonable explanation for the conflict before relying on the VE or VS evidence to support a determination or decision about whether the claimant is 23 disabled. At the hearings level, as part of the adjudicator's duty to fully develop the record, the adjudicator will inquire, on the record, as to whether or not there is such 24 consistency.

25 Neither the DOT nor the VE or VS evidence automatically “trumps” when there is 26 a conflict. The adjudicator must resolve the conflict by determining if the explanation given by the VE or VS is reasonable and provides a basis for relying on 27 the VE or VS testimony rather than on the DOT information 28 2. Analysis 2 The ALJ formulated an RFC which reflects that Plaintiff can understand, remember and 3 carry out “simple instructions and make simple work-related decisions.” AR 33.

4 5 Plaintiff emphasizes that one of the jobs identified by the VE (mail clerk) has a DOT 6 reasoning level of 3, and that jobs with a reasoning level of 3 are incompatible with a limitation to 7 simple work. MSJ at 6 (citing *Zavalin v. Colvin*, 778 F.3d 842 (9th Cir 2015) (holding that “Today, 8 we join the Tenth Circuit and hold that there is an apparent conflict between the residual functional 9 capacity to perform simple, repetitive tasks, and the demands of Level 3 Reasoning”).

10 Nevertheless, the error was harmless because the VE also identified two jobs with a 11 reasoning level of 2—photocopy machine operator (DOT 207.685-014) and office clerk (DOT 12 13 239.567-010)—and jobs with a reasoning level of 2 are compatible with a limitation to simple work 14 as the Ninth Circuit, this Court, and other courts have uniformly held. See *Davis v. Saul*, 846 F. 15 App'x 464, 466 (9th Cir.

2021) (“simple work is consistent with positions requiring Reasoning Level 16 2.”); *Cervantes v. O'Malley*, No. 1:22-CV-1565 JLT GSA, 2024 WL 1173827, at *4 (E.D. Cal. Mar. 17 19, 2024) (“The Ninth Circuit has repeatedly indicated the ability to perform “simple” work corresponds 18 with Reasoning Level 2 abilities.”); *Meissl v. Barnhart*, 403 F. Supp. 2d 981 (C.D.

Cal. 2005) (finding 19 no conflict between limitation to simple/routine tasks and jobs with a reasoning level of R2). 20 Plaintiff argues that the jobs with a reasoning level of 2 are still inconsistent with the RFC 21 22 notwithstanding the above-cited precedent because: 1- the jobs identified by the VE were not updated 23 in the DOT since 1991, 2- O*NET (not the DOT) is the job database used by “the majority of federal 24 agencies in modern times,” 3- per the O*NET, photocopy machine operator and office clerk are at an 25 SVP (specific vocational preparation) of 4 or higher; 4- jobs with an SVP of 4 or higher are semi-skilled, 26 rather than unskilled; and 5- as such, these jobs are inherently inconsistent with the RFC.

MSJ at 6. 27 Plaintiff’s contentions about O*NET’s widespread use are unsupported. Plaintiff also fails to 28 substantiate the contention that the agency, or the Court, can rely on O*NET over the DOT. Thus, there 2 is no basis to find a conflict between the RFC for simple work and the mental demands of photocopy 3 machine operator or office clerk. 4 B. Duty to Complete the Record with a Physical RFC Opinion from an 5 Examining Source 6 1.

Applicable Law 7 The ALJ has a duty to develop the record ... even when the claimant is represented by 8 counsel.” *DeLorme v. Sullivan*, 924 F.2d 841, 849 (9th Cir. 19 91). The duty is triggered where the 9 evidence is ambiguous or inadequate for adjudication. *Id.* “A specific finding of ambiguity or 10 11 inadequacy of the record is not necessary to trigger this duty to inquire, where the record establishes 12 ambiguity or inadequacy.”).

McLeod v. Astrue, 640 F.3d 881, 885 (9th Cir. 2011). 13 2. Analysis 14 Plaintiff’s argument begins with two pages of string citations and lengthy quotations 15 emphasizing that an ALJ may not play doctor, interpret raw medical data, consult medical textbooks, 16 or substitute her opinion for that of a medical professional. Plaintiff offers no discussion as to how 17 those cases apply here.

MSJ at 7–8. The argument that a medical opinion from an examining source 18 is nearly always required and that an ALJ cannot translate clinical findings in functional terms is not 19 20 altogether correct. More correctly, the ALJ is tasked with that function. See *Rounds v. Comm'r*

Soc. 21 Sec. Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (“the ALJ is responsible for translating and 22 incorporating clinical findings into a succinct RFC.”).

23 Plaintiff then provides the following 1-paragraph analysis: 24 Here, the ALJ denied Plaintiff’s request to be sent for an orthopedic consultative 25 examination for evaluation of his physical impairments. Ar. 28.

The ALJ denied, stating that the “record contains ample evidence of [Plaintiff]’s] physical impairments.” Ar. 28. 26 However, this is simply false. Specifically, although the record contains objective medical imaging and some objective findings (see e.g. Ar. 1000), it is important to note 27 that the record does not contain any medical opinion relating to Plaintiff’s ability to use his extremities.

Rather, the state agency medical consultants only considered Plaintiff’s 28 spinal impairments as opposed to his other orthopedic impairments. Ar. 87, 110-11. The ALJ noted that they did not consider Plaintiff’s ability to use his upper extremities, his 2 knee pain, and neck pain (Ar. 36), but somehow still determined that the record was sufficient to deny Plaintiff’s request for a consultative evaluation.

3 MSJ at 8–9. Plaintiff concludes the argument by asserting that the error was harmful because the 4 medical vocational guidelines (grids) would mandate a disability finding if Plaintiff was limited to the 5 sedentary exertional level. Id. at 9. 6 7 Notably, Plaintiff’s brief contains no summary of medical evidence or related discussion. 8 Rather, under the heading “Summary of Relevant Medical Evidence,” Plaintiff states that “All relevant 9 evidence and testimony has been incorporated into the discussion below.” MSJ at 4.

Yet, as quoted 10 above, that is not the case. Plaintiff does not discuss evidence he believes is pertinent to his ability to 11 use his extremities, his knee impairment, or his neck impairment. Plaintiff likewise does not point out 12 what limitations those records might support. Rather, Plaintiff avoids the issue by simply arguing that 13 the ALJ needed to obtain an examining opinion concerning same.

Importantly, more development of 14 the argument was needed from Plaintiff to explain exactly why remand is necessary. 15 Moreover, Plaintiff has the primary obligation not only to furnish medical evidence but to prove 16 disability. See 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. § 404.1512(a) (“In general, you have to prove to 17 18 use that you are blind or disabled”); Tidwell v. Apfel, 161 F.3d 599, 600 (9th Cir.

1999) (“[a]t all times, 19 the burden is on the claimant to establish her entitlement to disability insurance benefits”); SSR 17-4p 20 (“Although we take a role in developing the evidentiary record in disability claims, claimants and their 21 appointed representatives have the primary responsibility under the Act to provide evidence in support 22 of their disability or blindness

claims.”) Plaintiff’s burden is not limited to the agency level but extends 23 to Plaintiff’s arguments on appeal.

See *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 24 n.2 (9th Cir. 2008) (stating a reviewing court ordinarily will not consider an issue that a claimant 25 fails to argue “with any specificity” in the opening brief). *Greenwood v. Fed. Aviation Admin.*, 28 26 27 F.3d 971, 977 (9th Cir. 1994) (“We will not manufacture arguments for an appellant, and a bare 28 assertion does not preserve a claim...”).

Consistent with that obligation, the scheduling order issued in this case instructs that the motion for summary judgment shall contain: a) “A description 2 of the Plaintiff’s alleged physical or mental impairments...”; and b) “a summary of all relevant 3 medical evidence...”; Doc. 5 at 3. 4 5 Because Plaintiff makes no attempt to discuss the nature of his orthopedic impairments, the 6 evidence concerning the same, and the limitations such evidence might support, there is no basis to 7 conclude the ALJ erred in declining to obtain consultative physical examination.

8 C. Subjective Complaints 9 1. Applicable Law 10 An ALJ performs a two-step analysis to determine whether a claimant’s testimony regarding 11 subjective pain or symptoms is credible. See *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 12 13 2014); *Smolen*, 80 F.3d at 1281; S.S.R. 16-3p at 3.

First, the claimant must produce objective 14 medical evidence of an impairment that could reasonably be expected to produce some degree of 15 the symptom or pain alleged. *Garrison*, 759 F.3d at 1014; *Smolen*, 80 F.3d at 1281–82. If the 16 claimant satisfies the first step and there is no evidence of malingering, the ALJ must “evaluate the 17 intensity and persistence of [the claimant’s] symptoms to determine the extent to which the 18 symptoms limit an individual’s ability to perform work-related activities.” S.S.R.

16-3p at 2. 19 An ALJ’s evaluation of a claimant’s testimony must be supported by specific, clear and 20 21 convincing reasons. *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014); see also S.S.R. 16-3p 22 at *10. Subjective testimony “cannot be rejected on the sole ground that it is not fully corroborated 23 by objective medical evidence,” but the medical evidence “is still a relevant factor in determining 24 the severity of claimant’s pain and its disabling effects.” *Rollins v. Massanari*, 261 F.3d 853, 857 25 (9th Cir.

2001); S.S.R. 16-3p (citing 20 C.F.R. § 404.1529(c)(2)). 26 As the Ninth Circuit recently clarified in *Ferguson*, although an ALJ may use “inconsistent 27 28 objective medical evidence in the record to discount subjective symptom testimony,” the ALJ “cannot effectively render a claimant’s subjective symptom testimony superfluous by demanding 2 positive objective medical evidence fully corroborating every allegation within the subjective 3 testimony.” *Ferguson v. O’Malley*, 95 F.4th 1194, 1200 (9th Cir.

2024) (emphasis in original). 4 5 In addition to the objective evidence, the other factors considered are: 1- daily activities; 2- 6 the location, duration, frequency, and intensity of pain or other symptoms; 3- precipitating and 7 aggravating factors; 4- the type, dosage, effectiveness, and side effects of any medication; 5- 8 treatment other than medication; 6- other measures the claimant uses to relieve pain or other 9 symptom; and 7- Other factors concerning the claimant's functional limitations and restrictions 10 due to pain or other symptoms.

See, 20 C.F.R. § 416.929(c)(3) 11 2. Analysis 12 13 Plaintiff's argument concerning his subjective complaints is devoid of any discussion of the 14 evidence in question, namely his subjective complaints. Rather, Plaintiff provides four pages of 15 legal recitation followed by a conclusory critique of the ALJ's analysis asserting that it was too 16 general: 17 "It is problematic that the ALJ failed to indicate which of Plaintiff's allegations are 18 not supported by objective findings." *Godinez v. Berryhill*, No. SACV 17-0194 SS, 2017 WL 6349720, at *4 (C.D.

Cal. Dec. 11, 2017) (citing *Holohan v. Massanari*, 19 246 F.3d 1195, 1208 (9th Cir. 2001)) ("[T]he ALJ must specifically identify the testimony she or he finds not to be credible and must explain what evidence 20 undermines the testimony.").

The ALJ's general summary of evidence offers no 21 finding or conclusion as to what evidence undermines which portions of Plaintiff's alleged limitations. 22 MSJ at 10. 23 It is not sufficient to simply argue that the ALJ failed to meet his burden to identify the 24 25 testimony being rejected and the evidence that undermines it. This approach would suggest that 26 there is a rebuttable presumption of disability for the ALJ to overcome, which is not the case.

See 27 *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005) ("The claimant carries the initial burden 28 of proving a disability."). Consistent with that obligation, the scheduling order issued in this case instructs that the 2 motion for summary judgment shall contain: c) "a summary of the relevant testimony at the 3 administrative hearing." Doc. 5 at 3.

4 5 Plaintiff neglects to identify, summarize, cite, or reference testimony or subjective 6 complaints from anywhere in the record concerning his pain and other symptoms.² Plaintiff 7 likewise neglects to explain what limitations his subjective complaints would support. 8 Accordingly, the argument falls short of establishing any basis to remand for further evaluation of 9 his subjective complaints.

10 VI. Recommendations 11 For the reasons stated above, substantial evidence and applicable law support the ALJ's 12 13 conclusion that Plaintiff was not disabled. Accordingly, the recommendation is as follows: 14 1. That Plaintiff's motion for summary judgment (Doc. 15) be DENIED. 15 2. That Defendant's cross-motion (Doc. 17) be GRANTED. 16 3. That the decision of the Commissioner of Social Security be AFFIRMED.

17 4. That the Court Clerk of Court be directed to enter judgment in favor of Defendant 18
Commissioner of Social Security and against Plaintiff. 19 VII. Objections Due Within 14 Days 20
21 These Findings and Recommendations will be submitted to the United States District Judge 22
assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).

Within fourteen (14) 23 days after being served with these Findings and Recommendations, any
party may file written 24 objections with the Court. The document should be captioned
“Objections to Magistrate Judge’s 25 26 2 Preemptively addressing Defendant’s potential
counterarguments about activities of daily living undermining his 27 testimony is also insufficient
in that Plaintiff skips the first step: identifying the testimony in question.

See MSJ at 11 (“While Defendant may also attempt to argue that the ALJ noted Plaintiff was able
to perform activities of daily 28 living in discounting his subjective complaints (Ar. 36), this
would do nothing to clear the ALJ’s decision of errors.”). Findings and Recommendations.” The
parties are advised that failure to file objections within the 2 specified time may result in the
waiver of rights on appeal.

Wilkerson v. Wheeler, 772 F.3d 834, 3 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d
1391, 1394 (9th Cir. 1991)). 4 5 6 IT IS SO ORDERED. 7 Dated: February 26, 2025 /s/ Gary S.
Austin UNITED STATES MAGISTRATE JUDGE 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23
24 25 26 27 28