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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JAMES NUNEZ,)	Case No. CV 11-10219-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	AFFIRMING THE COMMISSIONER
)	
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	
)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security Supplemental Security Income ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed September 28, 2012, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner's decision is affirmed and this action is dismissed.

II. BACKGROUND

Plaintiff was born on November 17, 1969. (Administrative

1 Record ("AR") 173.) He has a high school education and is able
2 to communicate in English. (AR 38.) Plaintiff worked beginning
3 in approximately 1985 as a parts clerk and delivery-route driver.
4 (AR 67, 178.) He stopped working sometime between 2005 and
5 2008.¹ (See AR 39-40, 578, 743.) On March 12, 2008, Plaintiff
6 filed an application for SSI, alleging a disability onset date of
7 February 1, 2007.² (AR 168-74, 182.) The application was
8 initially denied on April 18, 2008 (AR 81), and again upon
9 reconsideration on August 29, 2008 (AR 88).³

10 After Plaintiff's application was denied, he requested a
11 hearing before an Administrative Law Judge ("ALJ"); an initial
12 hearing was held on August 19, 2009, during which the ALJ found
13 that the record was not sufficiently developed and ordered that
14 further evidence be obtained. (AR 33-34.) A full hearing was
15

16 ¹Plaintiff testified that he stopped working in March 2005,
17 when he was diagnosed with lupus (AR 39-40), but there is
18 evidence in the record that he continued to work until at least
19 December 2007, when he was hospitalized with complications from
20 lupus and had a stroke (see AR 743), and possibly all the way
21 until September 2008 (see AR 578 (September 18, 2008 treatment
22 notes noting doctor is "having the nurse try to contact
[Plaintiff] at work"); see also AR 480 (June 5, 2008 treatment
notes noting Plaintiff "is having some return of dermatitis with
increasing sun exposure during the day and travels to and from
work when he started work again"))).

23 ²Plaintiff's Disability Report states that the alleged onset
24 date is "December 1, 1999." (AR 182.) The interview notes
25 further state that "Claimant has been disabled however the
26 doctors could not diagnose him until 2005" and "[h]e last worked
in 1999 due to his disability he could no longer work." (AR
185.) As discussed below, it is unclear when, or if, Plaintiff
actually stopped working.

27 ³Plaintiff also applied for Disability Insurance Benefits on
28 March 12, 2008. (AR 173-74.) He has not appealed any denial of
those benefits to this Court. (See generally Compl., J. Stip.)

1 held on December 17, 2009, at which Plaintiff, who was
2 represented by counsel, appeared and testified on his own behalf.
3 (AR 37-56.) Medical Expert ("ME") Steven Gerber, M.D., and
4 Vocational Expert ("VE") Gail Maron also testified. (AR 56-72.)
5 In a written decision issued on July 19, 2010, the ALJ determined
6 that Plaintiff was not disabled. (AR 14-24.) Plaintiff then
7 requested review of the ALJ's decision, and on October 20, 2011,
8 the Appeals Council denied review. (AR 1-5.) This action
9 followed.

10 **III. STANDARD OF REVIEW**

11 Pursuant to 42 U.S.C. § 405(g), a district court may review
12 the Commissioner's decision to deny benefits. The ALJ's findings
13 and decision should be upheld if they are free from legal error
14 and are supported by substantial evidence based on the record as
15 a whole. § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91
16 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481
17 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such
18 evidence as a reasonable person might accept as adequate to
19 support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter
20 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than
21 a scintilla but less than a preponderance. Lingenfelter, 504
22 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880,
23 882 (9th Cir. 2006)). To determine whether substantial evidence
24 supports a finding, the reviewing court "must review the
25 administrative record as a whole, weighing both the evidence that
26 supports and the evidence that detracts from the Commissioner's
27 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
28 1996). "If the evidence can reasonably support either affirming

1 or reversing," the reviewing court "may not substitute its
2 judgment" for that of the Commissioner. Id. at 720-21.

3 **IV. THE EVALUATION OF DISABILITY**

4 People are "disabled" for purposes of receiving Social
5 Security benefits if they are unable to engage in any substantial
6 gainful activity owing to a physical or mental impairment that is
7 expected to result in death or which has lasted, or is expected
8 to last, for a continuous period of at least 12 months. 42
9 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
10 (9th Cir. 1992).

11 A. The Five-Step Evaluation Process

12 The ALJ follows a five-step sequential evaluation process in
13 assessing whether a claimant is disabled. 20 C.F.R.
14 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
15 1995) (as amended Apr. 9, 1996). In the first step, the
16 Commissioner must determine whether the claimant is currently
17 engaged in substantial gainful activity; if so, the claimant is
18 not disabled and the claim must be denied. § 416.920(a)(4)(i).
19 If the claimant is not engaged in substantial gainful activity,
20 the second step requires the Commissioner to determine whether
21 the claimant has a "severe" impairment or combination of
22 impairments significantly limiting his ability to do basic work
23 activities; if not, a finding of not disabled is made and the
24 claim must be denied. § 416.920(a)(4)(ii). If the claimant has
25 a "severe" impairment or combination of impairments, the third
26 step requires the Commissioner to determine whether the
27 impairment or combination of impairments meets or equals an
28 impairment in the Listing of Impairments ("Listing") set forth at

1 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is
2 conclusively presumed and benefits are awarded.

3 § 416.920(a)(4)(iii). If the claimant's impairment or
4 combination of impairments does not meet or equal an impairment
5 in the Listing, the fourth step requires the Commissioner to
6 determine whether the claimant has sufficient residual functional
7 capacity ("RFC")⁴ to perform his past work; if so, the claimant
8 is not disabled and the claim must be denied.

9 § 416.920(a)(4)(iv). The claimant has the burden of proving that
10 he is unable to perform past relevant work. Drouin, 966 F.2d at
11 1257. If the claimant meets that burden, a prima facie case of
12 disability is established. Id. If that happens or if the
13 claimant has no past relevant work, the Commissioner then bears
14 the burden of establishing that the claimant is not disabled
15 because he can perform other substantial gainful work available
16 in the national economy. § 416.920(a)(4)(v). That determination
17 comprises the fifth and final step in the sequential analysis.
18 § 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

19 B. The ALJ's Application of the Five-Step Process

20 At step one, the ALJ found that Plaintiff had not engaged in
21 any substantial gainful activity since March 12, 2008, the date
22 of his SSI application. (AR 16.) At step two, the ALJ concluded
23 that Plaintiff had the severe impairments of "systemic lupus
24 erythematosus in remission, chronic hypertension, status-post
25 cardiovascular accident, obesity, and a mood disorder associated
26

27 ⁴RFC is what a claimant can still do despite existing
28 exertional and nonexertional limitations. 20 C.F.R. § 416.945;
see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 with a general medical condition." (AR 17 (citations omitted).)
2 He also found that Plaintiff claimed to have the additional
3 impairments of "autoimmune hepatitis, polyneuropathy, and
4 fatigue," but there was insufficient evidence in the record
5 showing that those impairments caused significant limitations on
6 Plaintiff's ability to perform basic work activities.⁵ (Id.) At
7 step three, the ALJ determined that Plaintiff's impairments did
8 not meet or equal any of the impairments in the Listing. (AR 17-
9 19.) At step four, the ALJ found that Plaintiff retained the RFC
10 to perform "light work"⁶ with the limitations that Plaintiff
11 "cannot have prolonged exposure to sunlight, he is limited to
12 simple, routine, repetitive tasks, he can have only occasional
13 contact with co-workers, supervisors, or the public, and he have
14 [sic] only occasional changes in his work environment." (AR 19.)
15 Based on the VE's testimony, the ALJ concluded that Plaintiff was
16 not able to perform his past relevant work as a parts clerk or
17 delivery-route driver. (AR 23.) At step five, the ALJ found

19 ⁵In the ALJ's opinion, the two sentences directly following
20 his findings that insufficient evidence supported Plaintiff's
21 claims of hepatitis, polyneuropathy, and fatigue state, "The
22 above listed physical and mental impairments cause the claimant
23 significant limitations in her ability to perform basic work
24 activities. I therefore find that the impairments are severe."
(AR 17.) These sentences, which do not logically follow from the
statement directly before them and which incorrectly refer to
Plaintiff as "her," appear to result from transcription error.

25 ⁶"Light work involves lifting no more than 20 pounds at a
26 time with frequent lifting or carrying of objects weighing up to
27 10 pounds," a "good deal of walking or standing" or sitting,
28 "with some pushing and pulling of arm or leg controls." 20
C.F.R. § 416.967(b). A person capable of performing light work
is also capable of performing sedentary work, as defined in
§ 416.967(a). Id.

1 that jobs existed in significant numbers in the national economy
2 that Plaintiff could perform. (Id.) The ALJ agreed with the VE
3 that Plaintiff could perform the jobs of housekeeping cleaner,
4 inspector hand packager, and blind-stitch sewing-machine
5 operator. (AR 24.) Accordingly, the ALJ determined that
6 Plaintiff was not disabled. (Id.)

7 **V. DISCUSSION**

8 Plaintiff alleges that the ALJ erred in (1) evaluating the
9 opinions of Plaintiff's treating physicians; (2) evaluating
10 Plaintiff's mental impairments; and (3) finding Plaintiff's
11 subjective symptom testimony not credible. (J. Stip. at 3.)⁷

12 A. The ALJ Did Not Err in His Consideration of the
13 Opinions of Plaintiff's Treating Physicians

14 Plaintiff contends that the ALJ did not properly evaluate
15 rheumatologist Dr. Paul Sussman's RFC analysis and treating notes
16 or the treating notes of Plaintiff's other rheumatologists at the
17 Facey Medical Group, all of which allegedly showed that Plaintiff
18 had several additional severe impairments that prevented him from
19 working. (J. Stip. at 5-8, 18-21.) Reversal is not warranted on
20 this basis because the ALJ gave clear and convincing reasons for
21 rejecting the opinions at issue, and the ALJ's evaluation of the
22 medical evidence was consistent with substantial evidence in the
23 record.

24 1. Applicable law

25 Three types of physicians may offer opinions in social
26

27 ⁷In the Joint Stipulation, the first and second issues are
28 addressed together. For clarity, the Court addresses them
separately.

1 security cases: "(1) those who treat[ed] the claimant (treating
2 physicians); (2) those who examine[d] but d[id] not treat the
3 claimant (examining physicians); and (3) those who neither
4 examine[d] nor treat[ed] the claimant (non-examining
5 physicians)." Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995)
6 (as amended Apr. 9, 1996). A treating physician's opinion is
7 generally entitled to more weight than the opinion of a doctor
8 who examined but did not treat the claimant, and an examining
9 physician's opinion is generally entitled to more weight than
10 that of a nonexamining physician. Id.

11 The opinions of treating physicians are generally afforded
12 more weight than the opinions of nontreating physicians because
13 treating physicians are employed to cure and have a greater
14 opportunity to know and observe the claimant. Smolen v. Chater,
15 80 F.3d 1273, 1285 (9th Cir. 1996). The weight given a treating
16 physician's opinion depends on whether it was supported by
17 sufficient medical data and was consistent with other evidence in
18 the record. See 20 C.F.R. § 416.927(c)(2). If a treating
19 physician's opinion was well supported by medically acceptable
20 clinical and laboratory diagnostic techniques and is not
21 inconsistent with the other substantial evidence in the record,
22 it should be given controlling weight and rejected only for
23 "clear and convincing" reasons. See Lester, 81 F.3d at 830;
24 § 416.927(c)(2). When a treating physician's opinion conflicts
25 with other medical evidence or was not supported by clinical or
26 laboratory findings, the ALJ must provide only "specific and
27 legitimate reasons" for discounting that doctor's opinion. Orn
28 v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007). Factors relevant

1 to the evaluation of a treating physician's opinion include the
2 "[l]ength of the treatment relationship and the frequency of
3 examination" as well as the "[n]ature and extent of the treatment
4 relationship" between the patient and the physician.

5 § 416.927(c)(2)(i)-(ii).

6 The ALJ may discredit treating-doctor opinions that are
7 conclusory, brief, and unsupported by the record as a whole or by
8 objective medical findings. See Batson v. Comm'r of Soc. Sec.
9 Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); Thomas v. Barnhart,
10 278 F.3d 947, 957 (9th Cir. 2002). On the other hand, the ALJ
11 may give more weight to doctors, nonexamining or otherwise, who
12 testify because they have been subject to cross-examination. See
13 Andrews v. Shalala, 53 F.3d 1035, 1042 (9th Cir. 1995).

14 2. Relevant facts

15 Plaintiff was hospitalized and diagnosed with lupus in
16 October 2005. (AR 579.) In March 2006 he had "some joint
17 pains," which improved with medication, but no synovitis, skin
18 lesions, or other symptoms indicating active lupus. (AR 774,
19 795, 806-87.) In September 2006 Plaintiff's rheumatologist noted
20 that his "pain and stiffness of joints has markedly improved
21 since on prednisone" and "[t]here is no evidence of synovitis of
22 small and large joints of upper and lower extremities on either
23 side." (AR 858.) By the end of 2006, however, Plaintiff's
24 symptoms began to worsen.

25 Plaintiff was hospitalized in November 2007 because of
26 complications from "severe" lupus, including a history of
27 pancytopenia, focal renal glomerulonephritis, severe subacute
28 dermatitis, organic brain syndrome with cognitive defects,

1 generalized skin leukocytoclastic vasculitis, polyarthrititis,
2 polymyositis, and polyneuritis. (AR 563.) In December 2007,
3 apparently while he was hospitalized, Plaintiff also had a
4 stroke. (AR 929.)

5 In February 2008, Plaintiff had a "dramatically beneficial
6 effect" from receiving two monthly doses of Cytoxan. (AR 338-
7 39.) His hyperuricemia and hypertension were under control,
8 decubitus on his thoracic spine and skin were almost totally
9 healed, and his bleeding internal hemorrhoids were resolved.

10 (Id.) His doctor, rheumatologist Dr. Richard Hollcraft, noted
11 that he "has been very active and running around a lot." (AR
12 338.) On March 19, 2008, Dr. Hollcraft noted that Plaintiff's
13 lupus, focal membranous glomerular nephritis, polyarthrititis,
14 polymyositis, and polyneuritis were resolved and in remission.

15 (AR 379-80.) Plaintiff also reported to his doctors that his
16 symptoms had significantly improved; in April 2008, he stated
17 that he was doing well, had few active symptoms, and had good
18 energy levels. (AR 501-02.) Dr. Hollcraft noted at that time
19 that Plaintiff was "doing extremely well and almost all other
20 symptoms have disappeared completely." (AR 501.) The record
21 does not contain any rheumatology treatment notes from April 2008
22 to September 2009, so Plaintiff presumably did not seek treatment
23 during that time. In September and October 2009, Plaintiff's new
24 rheumatologist, Dr. Paul Sussman, who apparently took over
25 Plaintiff's case after Dr. Hollcraft retired (AR 584), described
26 Plaintiff's lupus as "quiescent." (AR 927-31.) In December
27 2009, Plaintiff reported that he was "stable" and had had "no
28 lupus flares." (AR 925.)

1 On November 18, 2009, Dr. Sussman filled out a check-box RFC
2 Questionnaire. (AR 750-56.) He indicated that he had first seen
3 Plaintiff on September 30, 2009. (AR 750.) He circled "Yes"
4 when asked if Plaintiff "fulfill[ed] the diagnostic criteria for
5 systemic lupus erythematosus (SLE)" and wrote that Plaintiff also
6 had "Autoimmune hepatitis" and "CVA." (Id.) He then checked
7 boxes indicating that Plaintiff had "Malar rash (over the
8 cheeks)," "Photosensitivity," and "Oral ulcers," and he wrote
9 that Plaintiff had pain in the hands and hips. (AR 750.) He
10 also checked boxes indicating that Plaintiff had "Cardiopulmonary
11 involvement," "Renal involvement," "Central nervous system
12 involvement," "Positive LE cell preparation or anti-DNA or anti-
13 Sm anti-body or false positive serum test for syphilis known to
14 be positive for at least six months," and "Positive test for ANA
15 at any point in time." (AR 751.) He further checked boxes
16 indicating that Plaintiff had "Gastrointestinal complaints with
17 diarrhea or constipation" and "severe" fatigue, weight loss,
18 fever, and malaise, as well as "Muscle weakness," "Poor sleep,"
19 "Peripheral neuropathy," and "Raynaud's phenomenon." (Id.) He
20 indicated that Plaintiff was not a malingerer, "emotional
21 factors" contributed to the severity of Plaintiff's symptoms, and
22 Plaintiff's impairments were "reasonably consistent with the
23 symptoms and functional limitations described in the evaluation."
24 (AR 752.) He stated that Plaintiff's symptoms would "constantly"
25 interfere with his ability to concentrate but that Plaintiff was
26 "capable of low stress jobs." (Id.) He stated that Plaintiff
27 could walk one city block before needing to rest; could sit or
28 stand 10 minutes at a time before needing to change positions;

1 could sit, stand, or walk for less than two hours total in an
2 eight-hour workday; and would need to take 30- to 60-minute rest
3 breaks "often" throughout the workday. (AR 753.) Plaintiff
4 could never lift or carry even 10 pounds; could never twist,
5 stoop, crouch, climb ladders, or climb stairs; and would have
6 "significant limitations in doing repetitive reaching, handling,
7 or fingering." (AR 754.) He further stated that Plaintiff must
8 avoid all exposure to extreme cold and concentrated exposure to
9 other environmental factors such as extreme heat, gases, and
10 chemicals. (AR 755.) He also stated that Plaintiff would likely
11 be absent from work "[m]ore than four days per month." (Id.)

12 At the hearing, the ME, Dr. Gerber, testified that based on
13 his review of the medical record, between September 2007 and
14 March 2008, Plaintiff likely would have met Listing 14.02
15 (systemic lupus erythematosus)⁸ and thus would have been

16 _____
17 ⁸To meet Listing 14.02, a claimant must produce objective
18 medical evidence of a diagnosis of SLE, with:

19 A. Involvement of two or more organs/body systems, with:

20 1. One of the organs/body systems involved to at
21 least a moderate level of severity; and

22 2. At least two of the constitutional symptoms or
23 signs (severe fatigue, fever, malaise, or involuntary
24 weight loss).

25 or

26 B. Repeated manifestations of SLE, with at least two of
27 the constitutional symptoms or signs (severe fatigue,
28 fever, malaise, or involuntary weight loss) and one of
the following at the marked level:

1. Limitation of activities of daily living.

1 disabled, but since March 2008 Plaintiff's symptoms were in
2 remission and "the record supports ability to perform the full
3 range of light level of activity with no prolonged exposure to
4 sunlight." (AR 57.) Dr. Gerber testified that he based his
5 conclusion on several indications in the record that Plaintiff's
6 lupus was in remission and there were "no symptoms" documented.
7 (AR 58 (citing AR 377, 467, 576).) He also testified that
8 Plaintiff's hypernatremia and associated "fatigue and confusion"
9 "[did] not appear to be a chronic condition" but instead "an
10 acute condition that was treated." (AR 59.) He further
11 testified that to the extent Plaintiff alleged that he had
12 hepatitis, the record did not show any abnormalities in liver
13 function (AR 60); Plaintiff's "mild neuropathy" did not appear to
14 affect his ability to stand or walk (AR 60-61); and there was no
15 "consistent documentation of very noteworthy fatigue" in the
16 record (AR 62). When questioned about Dr. Sussman's RFC
17 questionnaire, Dr. Gerber noted that it did not appear to be
18 based on "any physical examination or laboratory results." (AR
19 64.)

20 The ALJ found that Dr. Gerber, although he "did not have
21 access to the exhibits that were submitted after the hearing
22 (Exhibits 27-30)," had "the majority of the medical record,
23 including the claimant's testimony," and thus his opinion was

24
25 2. Limitation in maintaining social functioning.

26 3. Limitation in completing tasks in a timely manner
27 due to deficiencies in concentration, persistence, or
28 pace.

20 C.F.R. § 404, Subpart P, App. 1, 14.02.

1 entitled to "great weight." (AR 17.) The ALJ also found that
2 Exhibits 27-30, the new treatment notes from Dr. Sussman dated
3 September to December 2009, "do not include any evidence that
4 indicates that the claimant's condition worsened after January
5 2009." (Id.) He further found that Dr. Gerber's opinion that
6 Plaintiff "could perform a full range of light work without
7 prolonged exposure to sunlight" was consistent with the state
8 agency medical consultants' opinions and with "the longitudinal
9 record," and thus it was entitled to "controlling weight." (AR
10 22.)

11 As to Dr. Sussman's opinions, the ALJ made the following
12 findings:

13 Dr. Sussman began treating the claimant on September
14 30, 2009 and opined on November 18, 2009 that the
15 claimant was capable of low stress jobs, that he could
16 stand, walk, and/or sit for less than two hours in an
17 eight-hour workday, that he must be able to shift between
18 sitting, standing, and walking, that he requires
19 unscheduled breaks of between 30-60 minutes, that he must
20 avoid all exposure to extreme temperatures or hazards,
21 that he must avoid concentrated exposure to environmental
22 irritants, and that he will likely be absent more than
23 four days per month due to health-related issues [(AR
24 750-56)]. I give this opinion less weight. First, the
25 record does not indicate the frequency of the claimant's
26 visits to Dr. Sussman during the two-month period between
27 when Dr. Sussman began treating the claimant and when he
28 offered this opinion. Secondly, the record does not

1 indicate Dr. Sussman's specialization and it is therefore
2 difficult to weigh his relative expertise. Finally,
3 these extreme limitations are not supported by the
4 extensive objective evidence.

5 (AR 22.)

6 3. Analysis

7 Plaintiff argues that the ALJ improperly discounted Dr.
8 Sussman's opinion. (J. Stip. at 5-7.) As an initial matter, Dr.
9 Sussman did not opine that Plaintiff was unable to work; rather,
10 he found that Plaintiff was "[c]apable of low stress jobs." (AR
11 752.) But to the extent that Dr. Sussman's RFC Questionnaire
12 failed to recognize the improvement in Plaintiff's symptoms after
13 March 2008⁹ (see AR 338-39, 379-80, 457-58, 471-72, 501-02, 503-
14 04, 579-83, 584-86), which Dr. Sussman himself explicitly
15 recognized in his treatment notes (see AR 925-31 (repeatedly
16 referring to Plaintiff's lupus as "currently quiescent" and
17 noting that Plaintiff reported feeling well and having no acute
18 symptoms)), it was appropriate for the ALJ to discount it on that
19 basis. See Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir.
20 2005) (ALJ may reject treating physician's assessment of
21 plaintiff's limitations when physician's notes and other recorded
22 observations contradict assessment). Dr. Sussman's conclusion
23 that Plaintiff would likely be absent for health-related reasons
24 more than four days a month also conflicted with Plaintiff's own
25

26
27 ⁹To establish eligibility for SSI benefits, Plaintiff must
28 show that he was disabled on or after the date of his SSI
application, March 12, 2008. (AR 168); see 20 C.F.R. §§ 416.330,
416.335.

1 testimony that in the past year he had had only three lupus-
2 related "flare ups" and had spent no more than four hours in the
3 hospital each time before he was discharged. (AR 52.) Moreover,
4 the ALJ's findings that Plaintiff could not sit, stand, or walk
5 for more than 10 minutes at a time and could "never" lift even 10
6 pounds (AR 753-54) conflict with Plaintiff's testimony that he
7 could sit, stand, and walk at least 15 minutes at a time, longer
8 with his medication, and he could lift at least 20 pounds (AR
9 51). Dr. Sussman's finding that Plaintiff suffered from "severe"
10 "weight loss" (AR 750) is also belied by the record, which shows
11 that Plaintiff gained significant weight as a result of taking
12 Prednisone (see AR 47, 735) and then lost 23 pounds when his
13 dosage was reduced (AR 46). The ALJ was also entitled to reject
14 the RFC Questionnaire because it was in a check-box form, did not
15 appear to be based on any objective medical findings or an
16 examination, and was filled out after Dr. Sussman had seen
17 Plaintiff only two times in little over a month. See Batson, 359
18 F.3d at 1195 ("The ALJ need not accept the opinion of any
19 physician, including a treating physician, if that opinion is
20 brief, conclusory, and inadequately supported by clinical
21 findings."); Thomas, 278 F.3d at 957; cf. 20 C.F.R.
22 § 416.927(c)(2) (treating source opinion entitled to greater
23 weight "[w]hen the treating source has seen [claimant] a number
24 of times and long enough to have obtained a longitudinal picture
25 of [claimant's] impairment").

26 Plaintiff also asserts that to the extent the ALJ was unsure
27 whether Dr. Sussman was indeed a rheumatologist, he had a duty to
28 recontact him and expand the record. (J. Stip. at 21.) The ALJ

1 did not discount Dr. Sussman's opinion solely because he did not
2 know whether Dr. Sussman was a rheumatologist, however - he
3 discounted it primarily because it was drastically inconsistent
4 with the other evidence of record, and he gave specific and
5 legitimate reasons why. Thus, any error the ALJ made in failing
6 to recognize that Dr. Sussman was a rheumatologist was harmless
7 and does not require reversal. See Stout v. Comm'r, Soc. Sec.
8 Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (nonprejudicial or
9 irrelevant mistakes harmless).

10 Plaintiff also faults the ALJ for giving "controlling
11 weight" to the ME's testimony because the ME, Dr. Gerber, was not
12 a rheumatologist and "only reviewed 'the majority of the medical
13 record'" without having access to "key rheumatology treatment
14 records" from Dr. Sussman dated September 30, 2009, October 14,
15 2009, and December 9, 2009. (J. Stip. at 5-6.) Plaintiff
16 similarly argues that the ALJ erred in relying on the state
17 agency medical consultant's opinion that Plaintiff was capable of
18 performing light work as of April 2008 (AR 441-45) because "[t]he
19 medical consultant was not privy to medical records after that
20 date, and as such, his assessment that Mr. Nuñez was capable of
21 light work on April 18, 2008, does not mean Mr. Nuñez was capable
22 of light work after that date." (J. Stip. at 6.) Plaintiff also
23 argues that Dr. Gerber's assessment was unreliable because he
24 "admitted that he had never treated anyone for lupus." (J. Stip.
25 at 5-6.)

26 First, as previously discussed, Dr. Sussman's September and
27 October 2009 treatment notes - representing the only times Dr.
28 Sussman saw Plaintiff before filling out the RFC Questionnaire -

1 were inconsistent with that questionnaire and consistent with Dr.
2 Gerber's testimony that Plaintiff's lupus was in remission and he
3 currently was suffering no acute symptoms. (See AR 927-31.)
4 Moreover, the ALJ did not err in giving Dr. Gerber's opinion
5 "controlling weight" because, as the ALJ correctly noted, it was
6 "consistent with the longitudinal record." (AR 22.) Further,
7 because Dr. Gerber testified at the hearing and was subject to
8 cross-examination, the ALJ was entitled to give even more weight
9 to his opinion. Andrews, 53 F.3d at 1042. Moreover, there was
10 ample evidence in the record from several doctors, including
11 Plaintiff's treating rheumatologists, that Plaintiff's lupus was
12 in remission as of March 2008 and remained so until at least the
13 time of the hearing in December 2009. (See AR 338-39, 379-80,
14 457-58, 471-72, 501-02, 503-04, 579-83, 584-86, 925-31.) The ALJ
15 thus properly relied on Dr. Gerber's testimony. He also properly
16 relied on the medical consultant's RFC analysis because the
17 evidence showed that Plaintiff's symptoms remained in remission
18 between the time the medical consultant evaluated Plaintiff, in
19 April 2008, and the time of the hearing, December 2009. (See
20 id.) Reversal is therefore not warranted on this basis. See
21 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)
22 (opinion of nonexamining medical expert "may constitute
23 substantial evidence when it is consistent with other independent
24 evidence in the record").

25 Plaintiff further argues that the ALJ erred in not making
26 in-depth findings as to the limiting effects of the following
27 impairments: autoimmune hepatitis, polyneuropathy, fatigue,
28 severe urinary frequency, back pain, numbness, chronic

1 hyponatremia, chronic anemia, lupus nephritis, and history of
2 skin ulcerations including cellulitis. (J. Stip. at 4-5.) In
3 determining a claimant's RFC, an ALJ must consider the
4 "limitations and restrictions" imposed by all of the claimant's
5 impairments. SSR 96-8p, 1996 WL 374184, at *5. "An ALJ is not
6 required to discuss all the evidence presented in a case, but
7 must explain why he chooses to discount 'significant probative
8 evidence.'" Houghton v. Comm'r, Soc. Sec. Admin., No. 11-35623,
9 ___ F. App'x ___, 2012 WL 3298201, at *1 (9th Cir. Aug. 14, 2012)
10 (quoting Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir.
11 1984)).

12 Here, the ALJ properly found that there was no significant
13 probative evidence underlying Plaintiff's claims that his
14 functional capacity was significantly limited by autoimmune
15 hepatitis, polyneuropathy, or fatigue (AR 17); thus, the ALJ did
16 not err in failing to further address those claims. Although Dr.
17 Sussman noted in his RFC Questionnaire that Plaintiff had
18 "autoimmune hepatitis" (AR 750), Dr. Gerber testified that there
19 was no evidence of "active clinically significant" hepatitis in
20 the record such as "abnormal liver function studies and if severe
21 enough liver biopsy," and thus to the extent Plaintiff had
22 hepatitis, it did not limit his ability to work. (AR 60.)
23 Plaintiff does not point to any evidence of abnormal liver
24 functioning, and indeed, the record does not appear to contain
25 any. Dr. Gerber also noted that Plaintiff was diagnosed with
26 "mild neuropathy" in February 2007, but the neurologic
27 examinations did not show any significant impairment of
28 Plaintiff's motor functions. (AR 61; see AR 534-35.) Plaintiff

1 again does not point to any evidence to the contrary.

2 With respect to Plaintiff's claims of fatigue, the ALJ found
3 that there was "no documentation of fatigue after March 2008."
4 (AR 17.) But in October 2008 and January 2009, Dr. Howard Young
5 noted that Plaintiff had "fatigue . . . [p]robably due to the
6 combination of above [lupus-related] medical problems." (AR 575,
7 577.) To the extent the ALJ erred, however, the error was
8 harmless because there was no evidence in the record that
9 Plaintiff's ability to work was significantly limited by fatigue.
10 See Stout, 454 F.3d at 1055. Plaintiff did not cite fatigue as a
11 debilitating condition in either his SSI application or his
12 hearing testimony. (See AR 42-55, 187, 198, 201, 212.) The only
13 documentation in the record that Plaintiff's fatigue limited his
14 ability to work is Dr. Sussman's RFC Questionnaire, on which he
15 checked a box next to "severe fatigue." (AR 751.) As explained
16 above, the ALJ properly discounted that questionnaire. Dr.
17 Gerber noted that fatigue can be related to lupus and "[i]f
18 untreated it could be profound" but that there was no evidence in
19 the record of "very noteworthy fatigue." (AR 62.) He also
20 acknowledged that fatigue could be a side effect of the narcotic
21 medications that Plaintiff had been prescribed, but the doses he
22 was prescribed "don't seem to be very high," and there was no
23 evidence of severe fatigue in the record as a result of taking
24 them. (AR 62-63.) Plaintiff has not pointed to any evidence to
25 the contrary. Thus, the ALJ did not err in not further
26 discussing Plaintiff's fatigue.

27 Similarly, Plaintiff provided no objective evidence of his
28 claims of urinary frequency, back pain, or numbness other than

1 his own self-serving statements. As discussed below, the ALJ
2 properly rejected Plaintiff's subjective symptom testimony. In
3 the absence of objective medical evidence supporting these
4 claims, he was not required to further address them. See Hopkins
5 v. Astrue, 227 F. App'x 656, 657 (9th Cir. 2007) ("The ALJ was
6 not obligated to consider Hopkins's claim that his medication
7 made him drowsy because Hopkins provided no evidence to support
8 this claim other than a statement in his daily activities
9 questionnaire." (citing Nyman v. Heckler, 779 F.2d 528, 531 (9th
10 Cir. 1985) ("[A] claimant's self-serving statements may be
11 disregarded to the extent they are unsupported by objective
12 findings.")); see also Johnson v. Shalala, 60 F.3d 1428, 1432
13 (9th Cir. 1995) (claimant has burden to produce evidence
14 regarding claimed disability). There was also no significant
15 evidence in the record that Plaintiff's ability to work was
16 impaired by chronic hyponatremia, chronic anemia, lupus
17 nephritis, or skin ulcerations; indeed, the record showed that
18 these conditions were healed or well-controlled with medication
19 by March 2008 and remained under control from 2008 through the
20 time of the hearing (see AR 338-39, 379-80, 471-72, 584-86, 923-
21 24), and thus the ALJ was not required to discuss them. See
22 Houghton, 2012 WL 3298201, at *1 (holding that ALJ "was not
23 required to discuss" plaintiff's alleged limitations "arising
24 from depression, a heart condition, sleep apnea, a right heel
25 injury, diabetes with neuropathy in the right leg, or obesity"
26 "in the absence of significant probative evidence that they had
27 some functional impact on [plaintiff's] ability to work").

28 The Court must consider the ALJ's decision in the context of

1 "the entire record as a whole," and if the "evidence is
2 susceptible to more than one rational interpretation, the ALJ's
3 decision should be upheld." Ryan v. Comm'r of Soc. Sec., 528
4 F.3d 1194, 1198 (9th Cir. 2008) (internal quotation marks
5 omitted). Plaintiff selectively points out places in the
6 treatment notes where he complained of various ailments (see J.
7 Stip. at 7-9), but read in the context of the record as a whole,
8 Plaintiff's symptoms clearly were controlled with medication and
9 his health had dramatically improved by March 2008; the ALJ
10 reasonably found that Plaintiff's limitations did not prevent him
11 from being able to work. Reversal is therefore not warranted on
12 this basis.

13 B. The ALJ Did Not Err in Evaluating Plaintiff's Mental
14 Impairments

15 _____Plaintiff argues that the ALJ erred in rejecting the
16 psychological evaluation of Dr. Gale Schuler in favor of the
17 evaluations performed by consultative evaluator Dr. Rosa Colonna.
18 (J. Stip. at 7-9.) Reversal is not warranted on this basis.

19 _____1. Relevant facts

20 Plaintiff was initially examined by consultative
21 psychological examiner Dr. Colonna on August 8, 2008. (AR 506-
22 10.) She administered the following five tests: Complete
23 Psychological Evaluation; Bender Visual Motor Gestalt Test -
24 second edition ("Bender Gestalt 2"); Trail Making Test, Parts A
25 and B; Wechsler Adult Intelligence Scale, third edition ("WAIS-
26 III"); and Weschler Memory Scale, third edition ("WMS-III"). (AR
27 506.) She noted that Plaintiff reported being "highly anxious"
28 and that his "speech is slurred and he has short term memory

1 loss." (AR 506-07.) She further noted that Plaintiff reported
2 getting along "generally well with others" and was "generally
3 pleasant and cooperative." (AR 507-08.) She determined that he
4 had "low average" intellectual functioning; his mood was
5 "dysthymic" and his affect was "anxious"; he had no psychotic
6 indicators; his memory was "mildly diminished for immediate
7 recall" but "[i]ntermediate and remote memory is intact"; his
8 attention and concentration span were "mildly diminished"; his
9 fund of knowledge was "fair"; and his insight and judgment were
10 "average." (AR 508.) Based on the tests she administered, she
11 concluded that Plaintiff's "overall cognitive ability falls
12 within the low average range." (AR 509, 510.) She then made the
13 following findings regarding Plaintiff's ability to work, based
14 on her examination:

15 Based on today's assessment, the claimant would be
16 able to understand, remember and carry out short,
17 simplistic instructions without difficulty. He presents
18 with a moderate inability to understand, remember and
19 carry out detailed instructions. He would be able to
20 make simplistic work-related decisions without special
21 supervision.

22 The claimant is essentially socially appropriate
23 with the examiner. However, in the competitive job
24 market he presents with a mild inability to consistently
25 interact appropriately with supervisors, coworkers and
26 peers. The claimant does appear able to manage finances
27 on his own behalf.

28 (AR 510.)

1 Dr. Colonna examined Plaintiff again on November 8, 2009.
2 (AR 761-71.) She administered the following eight tests:
3 Complete Psychological Evaluation; Bender Gestalt 2; Minnesota
4 Multiphasic Personality Inventory-2 ("MMPI-2"); Rey 15-Item
5 Memory Test, second edition; Test of Memory Malingered ("TOMM");
6 WAIS-III; WMS-III; and OHA Assistance Request. (AR 765.) She
7 noted that Plaintiff asked her to draw the shades because the sun
8 hurt his face, that he was "slightly anxious with dysarthric and
9 slurred speech," and his effort was "fair to poor on psychometric
10 testing." (AR 765-66.) She described his mood as "dysthymic"
11 and his affect as "slightly labile" and noted that he had no
12 psychotic indicators; his memory "is moderately diminished for
13 immediate recall, intermediate and remote recall"; his "attention
14 and concentration span are moderately diminished"; and his fund
15 of knowledge, insight, and judgment were "fair." (AR 768.) She
16 noted that the MMPI-2 test produced an "unreliable and invalid
17 profile" because Plaintiff "probably in an attempt for [sic] cry
18 for help, endorses items of severe psychopathology that are not
19 evidenced at time of examination." (AR 769.) She concluded that
20 Plaintiff's test results "are an underestimation of the
21 claimant's ability at this time and are of mixed reliability and
22 validity." (Id.) Based on her examination, Dr. Colonna made the
23 following findings as to Plaintiff's ability to work:

24 Based on today's assessment, the claimant would be
25 able to understand, remember and carry out short,
26 simplistic instructions without difficulty. He presents
27 with a moderate inability to understand, remember and
28 carry out detailed instructions. He would be able to

1 make simplistic work-related decisions without special
2 supervision.

3 The claimant is generally appropriate with this
4 examiner. However, on a consistent basis he presents
5 with a mild inability to interact appropriately with
6 supervisors, coworkers and peers in the job market. The
7 claimant does appear able to manage finances on his own
8 behalf.

9 (AR 770.)

10 On August 28, 2008, consultative examiner Dr. R. Tyl
11 performed a Mental Residual Functional Capacity Assessment. (AR
12 524-26.) He found that Plaintiff was "moderately limited" in his
13 ability to "understand and remember detailed instructions";
14 "ability to carry out detailed instructions"; "ability to
15 maintain attention and concentration for extended periods";
16 "ability to work in coordination with or proximity to others
17 without being distracted by them"; "ability to complete a normal
18 workday and workweek without interruptions from psychologically
19 based symptoms and to perform at a consistent pace without an
20 unreasonable number and length of rest periods"; "ability to
21 interact appropriately with the general public"; "ability to
22 accept instructions and respond appropriately to criticism from
23 supervisors"; "ability to get along with coworkers or peers
24 without distracting them or exhibiting behavioral extremes";
25 "ability to respond appropriately to changes in the work
26 setting"; and "ability to be aware of normal hazards and take
27 appropriate precautions." (AR 524-25.) He did not find that
28 Plaintiff had any limitations in any other categories. (Id.) He

1 concluded that Plaintiff was capable of "adaptation for 1-2 step
2 tasks with limited contact with others" and "tasks within
3 physical tolerance." (AR 526.)

4 On August 14, 2009, Plaintiff was examined by Dr. Schuler, a
5 privately retained psychological examiner. (AR 732-48.) She
6 noted that Plaintiff reported feeling "depressed and frustrated"
7 because of his medical conditions, "frequently angry and
8 apprehensive," and "impatient and irritable." (AR 734-35.)

9 Based on her examination of Plaintiff, she diagnosed him with
10 "Major Depressive Disorder, Severe Without Psychotic Features,"
11 "Anxiety Disorder Due to a General Medical Condition," and "Rule
12 Out Dementia Due to Cerebral Vascular Complications of Systemic
13 Lupus Erythematosus versus Long Term Effects of Chemotherapy."
14 (AR 742.) She assigned him a Global Assessment of Function score
15 of 35, which "suggests some impairment in communication and major
16 impairment in several areas, including family relations,
17 judgment, thinking and mood." (AR 743.) She concluded that
18 Plaintiff

19 is totally psychiatrically disabled and has likely been
20 so for the past 12 months and quite probably for a longer
21 period of time. It is medically probable that this
22 disability will continue for the next 12 months and for
23 a longer indeterminate period of time. The prognosis for
24 this illness is deferred to the appropriate treating
25 medical doctors.

26 (AR 744.) There is no evidence that Dr. Schuler ever saw
27 Plaintiff more than once.

28 The ALJ provided the following analysis of the psychiatric

1 evidence:

2 The consultative, examining psychologist, Dr.
3 Colonna, opined in August 2008 that the claimant could
4 understand, remember, and carry out short, simple
5 instructions and he had a mild inability to interact
6 consistently appropriately with supervisors, coworkers,
7 and peers [(AR 510)]. She reached the same conclusion in
8 November 2009 [(AR 770)]. The State Agency provided a
9 generally consistent opinion [(AR 524-26)]. I give these
10 opinions controlling weight as they are supported by the
11 record as a whole.

12 The private psychological evaluator opined that the
13 claimant was, among other things, between moderately-and-
14 markedly limited in his ability to understand and
15 remember simple or detailed instructions and between
16 slightly-and-moderately limited in his ability to carry
17 out short and simple instructions or interact with the
18 general public [(AR 732-48)]. I give this opinion less
19 weight as it was made by a private psychologist who was
20 apparently hired by the claimant's attorney in connection
21 with this case and who therefore was not entirely
22 objective. Further, these extreme limitations are not
23 supported by the evidence, including the claimant's
24 testimony, which does not reference difficulty
25 interacting with others.

26 (AR 22.)

27 2. Analysis

28 The ALJ did not err in his evaluation of Plaintiff's mental

1 impairments. First, Dr. Schuler's opinion was not entitled to
2 any greater weight than the other opinions because Dr. Schuler
3 was not Plaintiff's treating physician. See 20 C.F.R.
4 § 416.927(c)(2). Indeed, Dr. Schuler apparently saw Plaintiff
5 only once, whereas Dr. Colonna examined him twice. (See AR 732-
6 48; AR 506-10, 761-71.) Second, as the ALJ correctly found, Dr.
7 Schuler's opinion that Plaintiff was "totally psychiatrically
8 disabled" was inconsistent with the other evidence in the record.
9 Dr. Schuler opined that Plaintiff was moderately to markedly
10 limited in his ability to understand and remember short and
11 simple or detailed instructions; was slightly to moderately
12 limited in his ability to carry out short and simple instructions
13 or interact with the general public; was moderately limited in
14 his ability to interact with supervisors and coworkers; was
15 moderately to markedly limited in the ability to make simple
16 work-related decisions; and had major impairment in, among other
17 things, family relations, judgment, thinking, and mood. (AR 731-
18 48.) But Plaintiff's testimony did not reflect such severe
19 difficulties. Plaintiff testified generally that he had
20 "problems communicating and talking and remembering certain
21 things" (AR 43) and that dealing with his medical condition made
22 him "irritable" (AR 53), but he did not testify to any
23 significant difficulty in interacting with others. He testified
24 to getting along well with his family and helping his children
25 get ready for school and do their homework; there was no
26 indication in the record that he had "major impairment" in
27 "family relations" or any other type of relations. (See AR 49-
28 50; see also AR 582 (noting Plaintiff was "pleasant" in

1 demeanor); AR 585 (noting Plaintiff was "alert".) Moreover, the
2 record contains no evidence that Plaintiff suffered from any
3 severe mental disorders. (See AR 534-35 (neurological exam
4 results showing only "mild" neuropathy).) The hearing transcript
5 reflects that Plaintiff was able to understand the questions
6 posed to him and respond appropriately. (See AR 42-55.) The ALJ
7 was thus entitled to reject Dr. Schuler's opinion in favor of
8 those rendered by Drs. Colonna and Tyl because the latter two
9 were consistent with significant medical evidence in the record,
10 whereas the former was not. See Tonapetyan, 242 F.3d at 1149.¹⁰

11 Plaintiff's argument that Dr. Colonna's evaluation was
12 invalid because it was short and cursory and she treated him
13 rudely during the examination (J. Stip. at 8-9) is unavailing.
14 To the extent that argument is based on Plaintiff's own self-
15 serving testimony, the ALJ was entitled to reject his testimony
16 for the reasons outlined below. Moreover, there is no evidence
17 that Dr. Colonna relied on any invalid data. Dr. Colonna
18 completed several tests of Plaintiff and made several
19 observations supporting her conclusions. (AR 506-10, 761-71.)

21
22 ¹⁰Because the ALJ gave specific and legitimate reasons for
23 rejecting Dr. Schuler's opinion that were supported by
24 substantial evidence in the record, any error he made in noting
25 that Dr. Schuler's opinion was unreliable because she was
26 "apparently hired by the claimant's attorney in connection with
27 this case and . . . therefore was not entirely objective" (AR 22)
28 was harmless. See Stout, 454 F.3d at 1055; but see Matney v. Sullivan,
981 F.2d 1016, 1020 (9th Cir. 1992) (ALJ properly discounted physician's
opinion because "he had agreed to become an advocate and assist in
presenting a meaningful petition for Social Security benefits"). In any
event, the ALJ's remark could reasonably be interpreted to mean simply
that Dr. Schuler was not a treating physician.

1 Only one test, the MMPI-2, produced an invalid result (AR 769),
2 and that may have been the result of Plaintiff's exaggerating his
3 symptoms, as Dr. Colonna reasonably concluded. In any event,
4 there is no evidence that Dr. Colonna relied on that result in
5 reaching her ultimate conclusions, nor is there evidence that Dr.
6 Colonna's evaluation could not have been valid without reliable
7 MMPI-2 test results. Finally, the record contains indicia that
8 Dr. Colonna's evaluation of Plaintiff was more thorough than Dr.
9 Schuler's - she saw Plaintiff twice and Dr. Schuler saw him only
10 once, and she reviewed medical records (AR 766-67) whereas Dr.
11 Schuler did not (AR 732) - so any complaint that Dr. Colonna's
12 evaluation was cursory rings hollow. The ALJ thus did not err in
13 relying on Dr. Colonna's opinion and reversal is not warranted on
14 that basis.

15 C. The ALJ Did Not Improperly Discount Plaintiff's
16 Subjective Symptom Testimony

17 Plaintiff next argues that the ALJ erred in evaluating his
18 credibility. (J. Stip. at 21-23, 29-31.) Reversal is not
19 warranted on this basis, however, because the ALJ made specific,
20 clear findings as to Plaintiff's credibility that were consistent
21 with the medical evidence of record.

22 1. Applicable law

23 An ALJ's assessment of pain severity and claimant
24 credibility is entitled to "great weight." See Weetman v.
25 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779
26 F.2d 528, 531 (9th Cir. 1986). When the ALJ finds a claimant's
27 subjective complaints not credible, the ALJ must make specific
28 findings that support the conclusion. See Berry v. Astrue, 622

1 F.3d 1228, 1234 (9th Cir. 2010). Absent affirmative evidence of
2 malingering, the ALJ must give "clear and convincing" reasons for
3 rejecting the claimant's testimony. Lester, 81 F.3d at 834. "At
4 the same time, the ALJ is not required to believe every
5 allegation of disabling pain, or else disability benefits would
6 be available for the asking, a result plainly contrary to 42
7 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674 F.3d 1104, 1112
8 (9th Cir. 2012) (internal quotation marks and citation omitted).
9 If the ALJ's credibility finding was supported by substantial
10 evidence in the record, the reviewing court "may not engage in
11 second-guessing." Thomas, 278 F.3d at 959.

12 2. Relevant facts

13 In connection with his SSI application, Plaintiff alleged
14 that he was unable to work because of "Lupus/stroke, I also have
15 had kidney failure." (AR 187.) He further stated that he had
16 "had two kidney failures," was "constantly sick," and could not
17 "be in the sun," "be in front of the computer," or "lift anything
18 heavy." (Id.) He also claimed that he could not "stand for long
19 periods of time" (AR 198) and alleged the following regarding his
20 daily activities:

21 Have to stay out of sun because of medication and of
22 oral chemo. Have no strength to do pushup, legs are
23 always tingling. Have problem with stairs. Face, scalp
24 and arms are red from chemo. Cant do a lot of movement
25 in one day. It will take 3 days to recover. Cant eat on
26 daily basis because of pills. Because of stroke, speech
27 and writing skills are bad. I havent got back some
28 memory. Cant put 3 good days together. Kidneys arent

1 100%. I go to the bathroom all night. Instead of
2 calling hospital who I only see once every couple of
3 months, I call my doctor whom I see monthly.

4 (AR 201.) He further alleged that he had difficulty "get[ting]
5 in and out of appointments if elevator isnt working and have to
6 use stairs or any walks over a couple hundred yards or
7 concentrate on thing[s] for a period of time." (AR 212.) He
8 continued:

9 still have problems with feeling in feet and fingers 30%
10 strength in right arm and left leg still have a problem
11 with stairs or long walks cant be in sun still have
12 trouble watching anything or paying attention to things
13 for a medium period of time lack in interest in reading
14 cant work to hard without being out for a couple of days
15 at home have no problem driving because im setting as
16 long as im out of sun.

17 (Id.)

18 At the hearing, Plaintiff testified that he had not worked
19 since being diagnosed with lupus in approximately 2005. (AR 42.)
20 He stated that without his pain medication he was "in very good
21 pain discomfort at least 5 between 1 and 10"; his back was "in
22 discomfort"; he could not be exposed to the sun because he had a
23 rash on his face and head; and he could not lift "anything"
24 because of the stroke he had in December 2007, which caused
25 weakness in his right arm and left leg. (AR 43.) He also stated
26 that he had "problems communicating and talking and remembering
27 certain things." (Id.) He further testified that he had a lupus
28 rash on his back but that it had mostly healed, though it was

1 "still sensitive," and he could only wear certain types of
2 material on his skin because of the sensitivity. (AR 43-44, 46.)
3 He testified that the rash could be "very irritable" and he
4 needed to protect his skin from the sun because of it. (AR 52.)
5 He stated that he was prone to infections because of the lupus
6 and claimed to be in pain in his back and legs during the
7 hearing. (AR 45, 49.) He also stated that he had "numbness" in
8 his legs for the past three years. (Id.) He then testified that
9 his pain medications made him gain weight and made his stomach
10 upset, but when he took his medication his pain level was a
11 "three." (AR 47-48.) He testified that "dealing with pain" from
12 his medical condition made him "irritable." (AR 53.)

13 As to his daily activities, Plaintiff testified that he
14 helped his kids get ready for school, drove them to school,
15 picked them up from school, and helped them with their homework
16 in the evenings. (AR 49-50.) He stated that he made his own bed
17 but could not take out the garbage because the garbage bags were
18 too heavy for him to lift with six or seven people living in his
19 house. (AR 50.) He also stated that he could not use stairs
20 because he had trouble with his balance following his stroke, and
21 that he did not help with any other household chores. (Id.) He
22 stated that he could not go grocery shopping because he could not
23 tolerate extreme cold. (Id.)

24 The transcript is unclear as to what amount of time
25 Plaintiff stated that he could stand and walk without his
26 medication, though he testified that he could stand and walk 15
27 minutes longer with his medication; he stated that he could sit
28 for at least 15 minutes at a time and could lift "roughly 20

1 pounds." (AR 51.) He testified that he had had three "flare
2 ups" of lupus in the past year; during a flare up, he testified,
3 he would have to go to the hospital to get an IV for "about four
4 hours and I was done." (AR 52.) At the close of his testimony,
5 Plaintiff asked to be excused to go to the restroom. (AR 55.)

6 In his written opinion, the ALJ discussed Plaintiff's
7 testimony as follows:

8 Mr. Nunez testified that he is unable to work due
9 to: back discomfort, sensitivity to sunlight, problems
10 with his right arm and left leg due to a stroke,
11 difficulty communicating and with his memory, skin rashes
12 and sensitivity, irritability, and urinary frequency. He
13 further testified that he has gained weight as a side
14 effect of taking Prednisone, his medications cause him
15 stomach problems, and he cannot lift his children who are
16 six and seven years old. Previously, Mr. Nunez stated
17 that he had two kidney failures, he cannot be in front of
18 a computer, he cannot lift heavy items, his legs
19 constantly tingle, his speech and writing skills were
20 affected by his stroke, his eyesight is decreased, and
21 his lungs lack full capacity due to pneumonia. [(AR 186-
22 93, 197-203, 207-14.)]

23 With respect to activities of daily living, the
24 claimant states that he is able to drive as long as he
25 does not have sun exposure [(AR 212)], he helps to care
26 for his children, including helping them with their
27 homework, he cannot walk up stairs, he does not shop for
28 groceries or perform household chores, he socializes with

1 his family when they visit him, and he has to choose
2 clothing and hats that protect him from the sun or air
3 conditioning.

4 After careful consideration of the evidence, I find
5 that the claimant's medically determinable impairments
6 could reasonably be expected to cause the alleged
7 symptoms; however, the claimant's statements concerning
8 the intensity, persistence and limiting effects of these
9 symptoms are not credible to the extent they are
10 inconsistent with the above residual functional capacity
11 assessment.

12 (AR 19-20.) After summarizing the medical evidence in the
13 record, the ALJ made the following specific findings regarding
14 Plaintiff's credibility:

15 The claimant is not entirely credible. Mr. Nunez
16 testified that he last worked five years ago [in 2005]
17 when he was diagnosed with lupus. However, the claimant
18 told his treating doctor on June 5, 2008 that he was
19 experiencing greater sun exposure when traveling to and
20 from work [(AR 480)]. The claimant's medical care
21 provider mentioned in September 2008 that they attempted
22 to reach Mr. Nunez at his work telephone number [(AR
23 578)]. This is a clear contradiction. Moreover, a
24 consultative psychologist observed in August 2008 that
25 the claimant was muscularly built [(AR 506)]. This, too,
26 indicates that the claimant was capable of exerting more
27 physical effort than he alleges. It is significant that
28 the medical expert testified that, after March 2008, he

1 did not find a good correlation between the claimant's
2 subjective complaints and the objective evidence.

3 I note that the claimant alleges an onset date of
4 December 1, 1999. There is absolutely no indication as
5 to why he chose this date when his lupus-related symptoms
6 did not begin until at least October 2005. Similarly, it
7 is noted that the claimant has a very poor earnings
8 record, with no earnings reported in 15 of the last 20
9 years since 1990 when he was 20 years old [(AR 177-81)].
10 Yet Mr. Nunez told a private psychological evaluator that
11 he continued to work until December 2007 but this was
12 eight years after his alleged onset date and the record
13 contains no reported earnings for this year [(AR 743)].
14 Thus, it appears both that the claimant did not report
15 his earnings to the Social Security Administration and
16 that he was able to work until he was hospitalized in
17 November 2007, if not later as discussed above. This is
18 highly significant and certainly calls the claimant's
19 credibility into question.

20 (AR 21-22.)

21 _____ 3. Analysis

22 Reversal is not warranted based on the ALJ's alleged failure
23 to make proper credibility findings or properly consider
24 Plaintiff's subjective symptoms. The ALJ correctly noted that
25 Plaintiff's testimony and statements in the record provided
26 inconsistent reports as to the date on which he last worked,
27 which indicated that he was not truthful as to his work history.

28 (AR 21-22.) Plaintiff's SSI application states that he last

1 worked on "February 1, 2007." (AR 168.) His Disability Report,
2 however, notes an alleged onset date of "December 1, 1999" and
3 further notes that in the interview Plaintiff claimed he was
4 disabled before his formal diagnosis "but the doctors could not
5 diagnose him until 2005," and "[h]e last worked in 1999 due to
6 his disability he could no longer work." (AR 182, 185.) At the
7 hearing, Plaintiff testified that he last worked in about March
8 2005, when he was diagnosed with lupus. (AR 39.) But, as the
9 ALJ noted, on June 5, 2008, Plaintiff told his doctor that he was
10 having trouble with sun exposure when traveling to and from work.
11 (AR 480.) On September 18, 2008, his physician noted that a
12 nurse had tried to contact Plaintiff at work. (AR 578.) In
13 August 2009, Plaintiff told Dr. Colonna that he last worked in
14 December 2007. (AR 732, 743.) Moreover, Plaintiff's earnings
15 record shows that he had no reported income after the year 1999,
16 suggesting, as the ALJ noted, that Plaintiff had not been
17 truthful in reporting his earnings. (AR 177-81.)

18 The ALJ properly discounted Plaintiff's credibility based on
19 the inconsistencies in Plaintiff's testimony and prior statements
20 regarding his work history. See Light v. Soc. Sec. Admin., 119
21 F.3d 789, 792 (9th Cir. 1997) (as amended) (in weighing
22 plaintiff's credibility, ALJ may consider "inconsistencies either
23 in [plaintiff's] testimony or between his testimony and his
24 conduct"); see also Fair v. Bowen, 885 F.2d 597, 603, 604 n.5
25 (9th Cir. 1989) (ALJ can reject pain testimony based on
26 contradictions in plaintiff's testimony); Tommasetti v. Astrue,
27 533 F.3d 1035, 1040 (9th Cir. 2008) (ALJ may discredit
28 plaintiff's subjective statements using ordinary techniques of

1 credibility evaluation). Moreover, to the extent Plaintiff's
2 testimony conflicted with the medical evidence that his lupus was
3 in remission and his condition was stable, the ALJ properly
4 discounted it. See, e.g., 20 C.F.R. § 416.929(c)(4)(iv) (ALJ may
5 consider effectiveness of medication in evaluating severity and
6 limiting effects of an impairment); SSR 96-7p, 1996 WL 374186, at
7 *6 ("medical signs and laboratory findings that . . . demonstrate
8 worsening or improvement of the underlying medical condition . .
9 . may also help an adjudicator to draw appropriate inferences
10 about the credibility of an individual's statements");
11 Tonapetyan, 242 F.3d at 1148 (credibility determination based on,
12 among other things, plaintiff's "tendency to exaggerate" proper
13 when supported by "substantial evidence"); Johnson v. Shalala, 60
14 F.3d 1428, 1434 (9th Cir. 1995) (holding that "contradictions
15 between claimant's testimony and the relevant medical evidence"
16 provided clear and convincing reasons for ALJ to reject
17 plaintiff's subjective symptom testimony).

18 The ALJ stated in his written opinion that Plaintiff's
19 alleged onset date was December 1, 1999 (AR 22); Plaintiff faults
20 him for not recognizing the discrepancy between the February 1,
21 2007 onset date noted in Plaintiff's SSI application and the
22 December 1, 1999 onset date noted in the Disability Report. (J.
23 Stip. at 22-23.) No error occurred. The ALJ did not find
24 Plaintiff not credible simply because he determined Plaintiff
25 falsely alleged an onset date of December 1, 1999; rather, the
26 ALJ properly found that there were several inconsistencies
27 between Plaintiff's testimony and the evidence in the record as
28 to when Plaintiff actually stopped working. (See AR 22.) The

1 December 1, 1999 onset date was just one such example noted by
2 the ALJ.

3 Plaintiff also argues that the ALJ erred in finding that
4 Plaintiff was not being truthful because there was evidence that
5 Plaintiff had memory impairment; thus, Plaintiff argues, any
6 discrepancies in what Plaintiff alleged were caused by his poor
7 memory. (J. Stip. at 30.) Plaintiff was diagnosed with "mild"
8 neuropathy, but there is no evidence in the record that it was a
9 significant impairment. (See AR 534-35.) Dr. Colonna also noted
10 that Plaintiff had "mild" to "moderate" memory loss. (AR 506-08,
11 768.) But even if Plaintiff's "mild" neuropathy or "mild" to
12 "moderate" memory loss accounted for some of his uncertainty as
13 to the dates when certain events occurred, nowhere in the record
14 is there evidence that his mental functioning was so deficient
15 that he would tell a doctor that he was still working when in
16 fact he hadn't worked for several years or would not know the
17 difference between events that occurred in 1999 and those that
18 occurred around the time of the hearing, ten years later. In
19 fact, as noted above, the evidence showed just the opposite -
20 that Plaintiff's mental functioning was grossly intact. (See AR
21 506-08, 534-35, 768; see also AR 18 (noting that Plaintiff at the
22 hearing "was able to recite from memory a large number of
23 prescription pain medications that he takes"); AR 582 (noting
24 that Plaintiff "is a pleasant, nontoxic, well-hydrated, well-
25 nourished male who is comfortably seated in no acute distress");
26 AR 585 (noting that Plaintiff was "awake" and "alert" and in
27 "[n]o acute distress".) Moreover, Plaintiff's memory problems
28 do not account for his persistent failure to report his earnings

1 to the Social Security Administration beginning in 2000, years
2 before his alleged onset date, which was another valid reason for
3 the ALJ to reject Plaintiff's credibility. See Maxwell v.
4 Astrue, No. EDCV 10-1579-CW, 2011 WL 2940701, at *6 (C.D. Cal.
5 July 20, 2011) (holding that ALJ properly relied on
6 inconsistencies between plaintiff's testimony regarding her work
7 history and her reported earnings in finding plaintiff not
8 credible).

9 The ALJ provided legally sufficient reasons for rejecting
10 Plaintiff's testimony and specific examples of how Plaintiff's
11 testimony was contradicted by the record. He thus did not
12 materially err in assessing Plaintiff's credibility and reversal
13 is not warranted on this basis.

14 **VI. CONCLUSION**

15 Consistent with the foregoing, and pursuant to sentence four
16 of 42 U.S.C. § 405(g),¹¹ IT IS ORDERED that judgment be entered
17 AFFIRMING the decision of the Commissioner and dismissing this
18 action with prejudice. IT IS FURTHER ORDERED that the Clerk
19 serve copies of this Order and the Judgment on counsel for both
20 parties.

21
22 DATED: December 12, 2012



JEAN ROSENBLUTH
U.S. Magistrate Judge

23
24
25
26 _____
27 ¹¹This sentence provides: "The [district] court shall have
28 power to enter, upon the pleadings and transcript of the record,
a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."