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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFONSO G. VALENZUELA,)	NO. CV 12-0754-MAN
)	
Plaintiff,)	MEMORANDUM OPINION
)	
v.)	AND ORDER
)	
CAROLYN W. COLVIN, ¹)	
Acting Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

Plaintiff filed a Complaint on February 1, 2012, seeking review of the denial by the Social Security Commissioner ("Commissioner") of plaintiff's application for supplemental security income ("SSI"). On March 6, 2012, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge. The parties filed a Joint Stipulation on October 18, 2012, in which: plaintiff seeks an order reversing the Commissioner's decision and awarding benefits or, alternatively, remanding for further

¹ Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration on February 14, 2013, and is substituted in place of former Commissioner Michael J. Astrue as the defendant in this action. (See Fed. R. Civ. P. 25(d).)

1 administrative proceedings; and the Commissioner requests that his
2 decision be affirmed or, alternatively, remanded for further
3 administrative proceedings.

4
5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

6
7 On October 30, 2009, plaintiff filed an application for SSI,
8 alleging an inability to work since January 1, 2009, due to paranoia,
9 schizophrenia, diabetes, neuropathy, and right hand injury.
10 (Administrative Record ("A.R.") 38, 99-101, 125.)

11
12 The Commissioner denied plaintiff's claim initially, and upon
13 reconsideration. (A.R. 48-52, 57-62.) On May 3, 2011, plaintiff, who
14 was represented by counsel, testified at a hearing before Administrative
15 Law James L. Moser (the "ALJ"). (A.R. 35-45.) Medical expert David
16 Peterson and vocational expert Sandra Trost also testified. (*Id.*) On
17 May 13, 2011, the ALJ denied plaintiff's claim. (A.R. 18-34.) The
18 Appeals Council subsequently denied plaintiff's request for review of
19 the ALJ's decision. (A.R. 1-6.) That decision is now at issue in this
20 action.

21
22 **SUMMARY OF ADMINISTRATIVE DECISION**

23
24 The ALJ found that plaintiff had not engaged in substantial gainful
25 activity since October 30, 2009, the date his SSI application was filed.
26 (A.R. 23.) The ALJ determined that plaintiff has the severe impairments
27 of: diabetes mellitus type II, chronic pancreatitis, and arthritis of
28 the hands, but he does not have an impairment or combination of

1 impairments that meets or medically equals one of the listed impairments
2 in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d),
3 416.925, 416.926). (A.R. 23, 26.)
4

5 After reviewing the record, the ALJ determined that plaintiff has
6 the residual functional capacity ("RFC") to perform "less than the full
7 range of light work." (A.R. 26.) Specifically, plaintiff can:

8
9 lift and carry up to 20 pounds occasionally and 10 pounds
10 frequently; stand and walk up to 6 hours in an 8-hour day; and
11 sit up to 6 hours in an 8-hour day. He can occasionally climb
12 ramps, stairs, ladders, ropes, and scaffolds. He can
13 occasionally balance, stoop, kneel, crouch, or crawl.
14 Furthermore, he is limited to occasional handling and
15 fingering with the right hand.
16

17 (*Id.*)
18

19 The ALJ found that plaintiff had no past relevant work. (A.R. 28.)
20 However, based upon plaintiff's age, education, work experience, and
21 RFC, the ALJ found that jobs exist in the national economy that
22 plaintiff could perform, including "flagger," "counter clerk," and
23 "bakery work[er] convey[or] line." (A.R. 29.) Accordingly, the ALJ
24 concluded that plaintiff has not been under a disability, as defined in
25 the Social Security Act, since October 30, 2009, the date he filed his
26 SSI application. (*Id.*)

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1 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
2 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
3 the Commissioner's decision if it is based on harmless error, which
4 exists only when it is "clear from the record that an ALJ's error was
5 'inconsequential to the ultimate nondisability determination.'" Robbins
6 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006)(quoting Stout v.
7 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
8 at 679.

10 DISCUSSION

11
12 Plaintiff alleges the following two issues: (1) whether the ALJ
13 properly determined that plaintiff can engage in other work; and (2)
14 whether the ALJ properly considered plaintiff's testimony. (Joint
15 Stipulation ("Joint Stip.") at 4.)

16 17 I. The ALJ Properly Relied On The Vocational Expert's 18 Testimony In Finding That Plaintiff Can Engage In "Other" 19 Work.

20
21 Plaintiff contends that the ALJ's determination that plaintiff
22 could perform "other work" is not supported by substantial evidence,
23 because the jobs identified by the vocational expert do not exist in
24 "significant numbers." (Joint Stip. at 4-8.)

25
26 At step five of the sequential evaluation, the burden shifts from
27 the claimant to the ALJ to show that, based on the claimant's RFC, age,
28 education, and past work experience, the claimant is able to perform

1 other work that exists in significant numbers in the national economy.
2 Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999); 20 C.F.R. §
3 416.960(b)(3). The ALJ can meet his burden at step five by either
4 taking the testimony of a vocational expert or by referring to the
5 Grids. See Lounsbury v. Barnhart, 468 F.3d 1111, 1114-15 (9th Cir.
6 2006); see also Tackett, 180 F.3d at 1101 (describing how the vocational
7 expert's testimony and the Grids are used at step five). If the ALJ
8 chooses, as in this case, to rely upon the testimony of a vocational
9 expert, the hypothetical posed to the vocational expert must be
10 "accurate, detailed, and supported by the medical record." *Id.* If the
11 hypothetical presented to the vocational expert reflects all of the
12 claimant's limitations and is supported by substantial evidence, the ALJ
13 may rely on the vocational expert's response. Bayliss v. Barnhart, 427
14 F.3d 1211, 1217-18 (9th Cir. 2005). A vocational expert's recognized
15 expertise provides the necessary foundation for his or her testimony.
16 *Id.* at 1218. No additional foundation is required. *Id.*

17
18 At the administrative hearing, the vocational expert ("VE")
19 testified that a person having the limitations² identified by the ALJ

21 ² The ALJ asked the VE to assume a hypothetical individual with the
22 following limitations:

23 This person can occasionally lift and/or carry with the use of
24 both hands a maximum of 20 pounds. But the same person can
25 frequently, and this is, of course, as a hypothetical person,
26 lift and/or carry, including upward pulling, up to ten pounds.
27 The person can stand and/or walk with normal breaks for about
28 six hours in an eight-hour day and can sit with normal breaks
for about six hours in an eight-hour day. Push and pull is
unlimited, except for -- it's completely unlimited, push and
pull. As far as climbing ramps and stairs, ladders, ropes and
scaffolds, can only be done occasionally. He can only
occasionally balance. He can only occasionally stoop, kneel,
crouch or crawl. And as far as manipulative limitations, he

1 could perform jobs existing in significant numbers in the local and
2 national economy. (A.R. 42-43.) Specifically, the VE responded that
3 the hypothetical person could perform:

4
5 [At t]he light exertional level, with an SVP: 2, he could be
6 a flagger assistant, essentially a one-handed job. DOT code
7 number 372.667-022, local jobs are 3,560 and nationally
8 681,530. At the light SVP: 2, he could be a counter clerk,
9 249.366-010. This only needs occasional use of the hands.
10 Locally 6,180 and nationally 176,400. He could also be a
11 bakery worker conveyor line, which is a light SVP: 2; it's
12 occasional use of the hands. The local jobs are 9,000, I
13 mean, 978 and nationally 11,655.

14
15 (A.R. 43.) Plaintiff's counsel never challenged the job numbers the
16 vocational expert presented, never inquired about the sources of her job
17 numbers, never made any argument to the ALJ about the reliability of
18 those numbers, and never presented other jobs data. (A.R. 44.) Indeed,
19 although plaintiff's counsel had the opportunity to do so, he did not
20 cross-examine the vocational expert. (*Id.*)

21
22 After the ALJ issued his adverse decision, plaintiff submitted
23 additional vocational evidence to the Appeals Council. (See A.R. 172-

24
25 _____
26 can reach in all directions, including overhead, but he is
27 limited in occasionally handling and fingering with his right
28 hand. He's limited as to gross manipulation and handling and
fine manipulation in fingering. And that's the right hand
only.

(A.R. 43.)

1 79.) Specifically, plaintiff submitted reports from "Job Browser Pro,"
2 a software program that compiles and analyzes job statistics. (*Id.*)
3 According to the information contained in these reports, there were
4 significantly fewer "flagger," "counter clerk," and "bakery worker" jobs
5 available in the local and national economy than the vocational expert
6 claimed. (*Id.*) After considering the additional evidence submitted by
7 plaintiff, the Appeals Council denied review, noting that the evidence
8 did not provide a basis for changing the ALJ's decision. (A.R. 1-6.)
9

10 In view of the data from Job Browser Pro, and as noted *supra*,
11 plaintiff contends that the ALJ erred in relying on the vocational
12 expert's testimony that there was a significant number of jobs in the
13 economy which plaintiff could perform. This argument is rejected for
14 the following reasons:
15

16 First, the ALJ was entitled to rely on the vocational expert's
17 testimony regarding the number of jobs in the economy. See 20 C.F.R. §
18 416.966(e) (authorizing the ALJs to rely on vocational expert's testimony
19 to determine occupational issues); Bayliss, 427 F.3d at 1217-18
20 (upholding ALJ's reliance on vocational expert's testimony regarding job
21 numbers). Further, the vocational expert's testimony amounts to
22 substantial evidence. Osenbrock v. Apfel, 240 F.3d 1157, 1163 (9th Cir.
23 2001) (testimony of a vocational expert constitutes substantial
24 evidence). Contrary to plaintiff's contention, neither the ALJ nor the
25 vocational expert was required to identify the methodology used to
26 determine the jobs plaintiff can perform. Rather, the vocational
27 expert's expertise alone was a sufficient foundation. *Id.* at 1218
28 (finding that a "[vocational expert]'s recognized expertise provides the

1 necessary foundation for his or her testimony," and thus, "no additional
2 foundation is required"). Accordingly, the ALJ's reliance on the
3 vocational expert's testimony that there were a significant number of
4 jobs in the economy was supported by substantial evidence.

5
6 Second, plaintiff's lay assessment of the raw vocational data
7 derived from Job Browser Pro does not undermine the reliability of the
8 vocational expert's opinion, which the ALJ adopted at step five. As an
9 initial matter, the data presented by plaintiff was unaccompanied by any
10 analysis or explanation from a vocational expert or other expert source
11 to put the raw data into context. In fact, Job Browser Pro is not
12 included in the list of published sources recognized as authoritative by
13 the Social Security regulations. See 20 C.F.R. § 416.966(d). Further,
14 while plaintiff identifies several decisions in which courts have
15 acknowledged that a vocational expert's testimony that relies on Job
16 Browser Pro data can constitute substantial evidence, none hold that a
17 vocational expert must rely on it or that this source controls when it
18 conflicts with the vocational expert's testimony.³

19
20 ³ See, e.g., Poisson v. Astrue, 2012 U.S. Dist. LEXIS 43147,
21 2012 WL 1067661, at *9 (D. Me. March 28, 2012)(holding that a vocational
22 expert's testimony was reliable when she relied on Job Browser Pro as
23 well as her own professional experience and expertise in endorsing the
24 job numbers provided), report and recommendation adopted, 2012 U.S.
25 Dist. LEXIS 57351, 2012 WL 1416669 (D. Me. Apr. 24, 2012); Cole v.
26 Astrue, 2011 U.S. Dist. LEXIS 129272, 2011 WL 5358557, at *26 (D. Or.
27 June 7, 2011)(vocational expert testimony based, in part, on information
28 obtained from "Skill Trend by Job Browser" was "reliable" evidence of
the number of jobs available in the national economy which plaintiff
could perform), report and recommendation adopted, 2011 U.S. Dist. LEXIS
128012, 2011 WL 5358550 (D. Or. Nov. 4, 2011); Pitts v. Astrue, 2011
U.S. Dist. LEXIS 69186, 2011 WL 2553340, at *6 (N.D. Ohio May 19,
2011)(ALJ properly relied on vocational expert's testimony regarding
number of jobs available when vocational expert relied, in part, on
information provided by Job Browser Pro program), report and
recommendation adopted 2011 U.S. Dist. LEXIS 69185, 2011 WL 2553311

1 Third, assuming *arguendo* that the data from Job Browser Pro
2 constitutes substantial evidence, the data, at best, would support an
3 alternative finding regarding the number of job available for plaintiff
4 in the economy. The Ninth Circuit has held that “[w]here the evidence
5 is susceptible to more than one rational interpretation, one of which
6 supports the ALJ’s decision, the ALJ’s conclusion must be upheld.”
7 Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). Moreover, when
8 the record contains ambiguous or conflicting evidence, the
9 Administration is responsible for resolving the conflict. See Lewis v.
10 Apfel, 236 F.3d 503, 509 (9th Cir. 2001). As such, the ALJ’s decision
11 should be upheld.

12
13 Fourth, plaintiff’s counsel utterly failed to challenge the
14 vocational expert’s job numbers, inquire about the methodology used to
15 derive those numbers, or present competent evidence regarding other jobs
16 data at the administrative hearing. Rather, plaintiff waited until
17 *after* the ALJ’s adverse decision to submit alternative jobs data to the
18 Appeals Council. “Counsel are not supposed to be potted plants at
19 administrative hearings. They have an obligation to take an active role
20 and to raise issues that may impact the ALJ’s decision while the hearing
21 is proceeding so that they can be addressed.” Solorazo v. Astrue, 2012
22 U.S. Dist. LEXIS 4059, 2012 WL 84527, at *6 (C.D. Cal. Jan. 10,
23 2012)(rejecting plaintiff’s contention that “apparent conflicts” existed

24
25 _____
26 (N.D. Ohio June 28, 2011); Drossman v. Astrue, 2011 U.S. Dist. LEXIS
27 109921, 2011 WL 4496568, at *7-*8 (N.D. Ohio July 15, 2011)(ALJ properly
28 relied on vocational expert’s opinion regarding job availability rather
than plaintiff’s post-hearing submission of conflicting statistical
information from Job Browser Pro program), report and recommendation
adopted, 2011 U.S. Dist. LEXIS 109922, 2011 WL 4496561 (N.D. Ohio Sept.
27, 2011).

1 between the vocational expert's testimony and the Dictionary of
2 Occupational Titles when plaintiff's counsel failed to question the
3 vocational expert at the hearing about any alleged conflicts or request
4 the ALJ do so). Further, plaintiff's counsel has not explained why he
5 did not proffer the Jobs Browser Pro data, which presumably was
6 available at the time of the hearing, to the ALJ rather than waiting to
7 submit it to the Appeals Counsel, which, in effect, invited the alleged
8 error now at issue.

9
10 Accordingly, for these reasons, this Court finds no reversible
11 error and upholds the Appeals Council decision⁴ notwithstanding the
12 conflict between the vocational expert's testimony and the vocational
13 evidence submitted by plaintiff to the Appeals Council.⁵

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19 ⁴ Courts in this district consistently have reached the same
20 conclusion on this issue. See, e.g., Engrave v. Colvin, 2013 U.S. Dist.
21 LEXIS 55146, 2013 WL 1661754 (C.D. Cal. April 17, 2013)(United States
22 Magistrate Judge Jacqueline Chooljian); Gonzales v. Colvin, 2013 U.S.
23 Dist. LEXIS 53777, 2013 WL 1614937 (C.D. Cal. April 15, 2013)(United
24 States Magistrate Judge Patrick J. Walsh); McCaleb v. Colvin, 2013 U.S.
25 Dit. LEXIS 3757, 2013 WL 1516259 (C.D. Cal. April 12, 2013)(United
26 States Magistrate Judge John E. McDermott); Newsome v. Colvin, 2013 U.S.
27 Dist. LEXIS 38779, 2013 WL 800699 (C.D. Cal. Mar. 4, 2013)(United States
28 Magistrate Judge Arthur Nakazato); Gardner v. Colvin, 2013 U.S. Dist.
LEXIS 28907, 2013 WL 781984 (C.D. Cal. Mar. 1, 2013)(United States
Magistrate Judge Marc Goldman); Bradley v. Astrue, 2012 U.S. Dist. LEXIS
167522, 2012 WL 5902349 (C.D. Cal. Nov. 26, 2012)(United States
Magistrate Judge Charles F. Eick).

⁵ The Court need not and does not determine whether, if the
vocational evidence submitted by plaintiff controlled over the testimony
of the vocational expert, the numbers of jobs reflected in plaintiff's
evidence would constitute "significant numbers" of jobs. See generally
Beltran v. Astrue, 700 F.3d 389 (9th Cir. 2012).

1 **II. The ALJ Set Forth Clear And Convincing Reasons For**
2 **Finding Plaintiff's Testimony Regarding His Subjective**
3 **Symptoms And Pain To Be Not Credible.**
4

5 Once a disability claimant produces objective medical evidence of
6 an underlying impairment that is reasonably likely to be the source of
7 claimant's subjective symptom(s), all subjective testimony as to the
8 severity of the symptoms must be considered. Moisa v. Barnhart, 367
9 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
10 (9th Cir. 1991); see also 20 C.F.R. § 416.929(a) (explaining how pain
11 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of
12 malingering based on affirmative evidence thereof, he or she may only
13 find an applicant not credible by making specific findings as to
14 credibility and stating clear and convincing reasons for
15 each." Robbins, 466 F.3d at 883. The factors to consider in weighing
16 a claimant's credibility include: (1) the claimant's reputation for
17 truthfulness; (2) inconsistencies either in the claimant's testimony or
18 between the claimant's testimony and his conduct; (3) the claimant's
19 daily activities; (4) the claimant's work record; and (5) testimony from
20 physicians and third parties concerning the nature, severity, and effect
21 of the symptoms of which the claimant complains. See Thomas, 278 F.3d
22 at 958-59; see also 20 C.F.R. § 416.929(c).

23
24 Here, the ALJ found that, "[a]fter careful consideration of the
25 evidence, . . . [plaintiff]'s medically determinable impairments could
26 reasonably be expected to cause the alleged symptoms." (A.R. 27.)
27 Further, the ALJ cited no evidence of malingering by plaintiff.
28 Nonetheless, the ALJ concluded that plaintiff's "statements concerning

1 the intensity, persistence and limiting effects of [his] symptoms are
2 not credible" to the extent they varied from the ALJ's own RFC
3 assessment. (*Id.*) Accordingly, the ALJ's reasons for finding that
4 plaintiff was not credible with respect to his subjective symptom and
5 pain testimony must be "clear and convincing."
6

7 During the May 3, 2011 hearing, plaintiff testified that he is
8 unable to work, because he gets "tired real fast," is "constantly in
9 pain," and cannot bend three fingers on his right hand. (A.R. 38-39.)
10 He testified that he experiences constant pain, particularly in his
11 legs. (A.R. 39.) Plaintiff asserts that he always uses a cane, because
12 his left knee "buckles up." (*Id.*) He also testified that he is unable
13 to work, because sometimes he hears voices, he has attempted suicide,
14 and he is unable to get along with people. (A.R. 40.) He testified
15 that he last used drugs, specifically cocaine, in July 2010. (*Id.*)
16

17 In his November 28, 2009 "Function Report," plaintiff reported that
18 he can walk 50 feet before he needs to rest. (A.R. 133, 137.) He noted
19 that he has difficulty putting on his pants, because lifting his legs
20 causes a lot of pain. (A.R. 133.) He is able to travel independently,
21 shop for groceries, prepare his own meals daily, iron, wash his laundry,
22 and play piano every other day, but he needs help with his house
23 cleaning and yard work, because it causes pain in his legs and shortness
24 of breath, and because he gets very tired. (A.R. 134-35.)
25

26 The ALJ rejected plaintiff's subjective complaints, because: (1)
27 the objective evidence did not support plaintiff's allegations of pain
28 or other limitations; (2) plaintiff's statements regarding his daily

1 activities were inconsistent with his subjective complaints; and (3)
2 plaintiff's statements regarding his drug use were inconsistent. (A.R.
3 28.) The reasons stated by the ALJ are legally sufficient reasons for
4 declining to credit plaintiff's statements.

5
6 First, the ALJ noted that plaintiff's alleged limitations were out
7 of proportion to the objective clinical findings and his observed
8 functional restrictions. (A.R. 28.) The ALJ cited consultative
9 examiner Dr. John Sedgh's March 5, 2010 evaluation of plaintiff, which
10 did not reflect that plaintiff's impairments were as severe as plaintiff
11 alleges. (A.R. 27.) As noted by the ALJ, despite plaintiff's
12 complaints that the pain in his lower extremities renders him unable to
13 walk more than 50 feet, Dr. Sedgh observed that plaintiff had normal
14 motor strength in all extremities and exhibited a normal gait without
15 the use of any assistive device. (A.R. 27, 335-36.) Dr. Sedgh also
16 opined that plaintiff could: lift and carry 20 pounds occasionally and
17 10 pounds frequently; stand and walk six hours in an eight-hour day with
18 normal breaks; and sit for six hours in an eight-hour day, although his
19 kneeling, crouching, and stooping should be limited to occasionally.
20 (A.R. 336.) Dr. Sedgh further opined that repetitive fine or gross
21 manipulations with the right hand should be limited to occasional such
22 manipulations. (*Id.*) A subsequent "Physical Residual Functional
23 Capacity Assessment" based on Dr. Sedgh's records, as well as
24 plaintiff's medical records, was performed by a non-examining state
25 physician on March 12, 2010, and it generally confirmed Dr. Sedgh's
26 findings, noting, in particular, that plaintiff's functional allegations
27 were "partially credible." (A.R. 27-28, 346.) An ALJ may consider a
28 physician's opinion that plaintiff could work, which contradicts

1 plaintiff's assertion to the contrary, in determining credibility.
2 Moncada v. Chater, 60 F.3d 521, 524 (9th Cir. 1995). Although a lack of
3 medical evidence cannot form the sole basis for discounting plaintiff's
4 pain testimony, it is a factor that the ALJ can consider in his
5 credibility analysis.⁶ Burch, 400 F.3d at 681.

6
7 Next, the ALJ noted that plaintiff made "several inconsistent
8 statements with regard to his history of drug abuse," thus detracting
9 from his credibility.⁷ (A.R. 28.) The medical records indicate that on
10 December 29, 2009, plaintiff reported he had been using alcohol and
11 cocaine two days ago. (A.R. 282.) One month later, on January 25,
12 2010, plaintiff reported that he had been recovering alcoholic for one
13 year and was not using drugs. (A.R. 416.) Four days later, on January
14 29, 2010, plaintiff reported he used crystal methamphetamine three days
15 ago, smoked cocaine yesterday, and drinks two 24 ounce beers per day.
16 (A.R. 427.) On March 9, 2010, plaintiff reported that he recently
17 stopped using alcohol and methamphetamine and had stopped using "crack
18 3 months ago." (A.R. 429, 435.) On April 5, 2010, plaintiff reported

19
20 ⁶ To the extent the ALJ rejects plaintiff's subjective
21 complaints based on the fact that plaintiff's medical treatment appears
22 to be limited and conservative, it is not a convincing reason to reject
23 plaintiff's credibility. (A.R. 27.) While it is permissible for an ALJ
24 to evaluate the credibility of a claimant's subjective limitations
25 based, in part, on plaintiff's record of receiving minimal and
26 conservative treatment, he must make detailed findings of fact so that
a reviewing court may determine whether substantial evidence supports
the ALJ's conclusion. The ALJ failed to meet his burden here. See Fair
v. Bowen, 885 F.2d at 597, 601-02 (9th Cir. 1989); Lewin v. Schweiker,
654 F.2d 631, 634-635 (9th Cir. 1981). Further, there is no substantial
evidence in the record to support the ALJ's belief that more aggressive
treatment would alleviate plaintiff's symptoms significantly.

27 ⁷ The record reflects that plaintiff has had a long history of
28 alcohol and drug use, including a February 26, 2009 "treatment for a
burnt throat after the screen from his crack pipe fell off." (A.R. 25.)

1 he "drinks minimal alcohol" and "no crystal meth for six months." (A.R.
2 439.) On May 5, 2010, plaintiff denied drug use within the last three
3 months; however, the physician reported that plaintiff had a "positive
4 U-tox for amphetamines, [and] cocaine." (A.R. 361, 446.) Thus, as the
5 ALJ can use ordinary techniques of credibility evaluation, such as the
6 claimant's reputation for lying, prior inconsistent statements
7 concerning the symptoms, and other testimony by the claimant that
8 appears less than candid, Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir.
9 1996), this was a clear and convincing reason for discounting
10 plaintiff's testimony.

11
12 Finally, while the ALJ may look at plaintiff's daily activities as
13 a basis for determining whether plaintiff can perform certain work, the
14 ALJ fails to explain how plaintiff's ability to "travel independently,
15 spend time with family, shop in stores, prepare meals, iron and wash
16 clothes, and even play the piano at a professional level," translates
17 into the ability to perform full-time work. See Vertigan v. Halter, 260
18 F.3d 1044, 1050 (9th Cir. 2001)(noting that the "mere fact that a
19 plaintiff has carried on certain daily activities, such as grocery
20 shopping, driving a car, or limited walking for exercise, does not in
21 any way detract from her credibility as to her overall disability");
22 Smolen, 80 F.3d at 1283 n.7 ("The Social Security Act does not require
23 that claimants be utterly incapacitated to be eligible for benefits, and
24 many home activities may not be easily transferable to a work
25 environment where it might be impossible to rest periodically or take
26 medication."). Thus, without more, this is not a clear and convincing
27 reason for discrediting plaintiff's subjective symptom testimony.

1 The Court finds, however, that the ALJ's error in relying on this
2 third reason was harmless, because the ALJ's two other reasons and
3 ultimate credibility determination are supported by substantial
4 evidence. See Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155,
5 1162-63 (9th Cir. 2008)(holding that ALJ's reliance on two invalid
6 reasons in support of adverse credibility determination was harmless
7 where remaining reasons were adequately supported by substantial
8 evidence). The Court therefore finds and concludes that reversal is not
9 warranted based on the ALJ's alleged failure to properly consider
10 plaintiff's testimony.

11
12 **CONCLUSION**

13
14 For the foregoing reasons, the Court finds that the Commissioner's
15 decision is supported by substantial evidence and is free from material
16 legal error. Neither reversal of the Commissioner's decision nor remand
17 is warranted.

18
19 Accordingly, IT IS ORDERED that Judgment shall be entered affirming
20 the decision of the Commissioner of the Social Security Administration.
21 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of
22 this Memorandum Opinion and Order and the Judgment on counsel for
23 plaintiff and for the Commissioner.

24
25 DATED: May 23, 2013

26 *Margaret A. Nagle*

27 _____
28 MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE