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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

DAMOND HARRIS,	)	No. EDCV 08-507 CW
	)	
Plaintiff,	)	DECISION AND ORDER
v.	)	
	)	
MICHAEL J. ASTRUE,	)	
Commissioner, Social	)	
Security Administration,	)	
	)	
Defendant.	)	
_____	)	

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned magistrate judge. Plaintiff seeks review of the denial of disability benefits. The court finds that judgment should be granted in favor of defendant, affirming the Commissioner's decision.

**I. BACKGROUND**

Plaintiff Damond Harris was born on January 30, 1973, and was thirty-four years old at the time of his administrative hearing. [Administrative Record ("AR") 37, 138.] He has a high school education and past relevant work experience as a warehouse laborer,

1 industrial painter, painter's helper and construction laborer. [AR  
2 20.] Plaintiff alleges disability on the basis of a pain in his left  
3 foot, back, neck, left hip and knees, and depression, due to a  
4 workplace accident. [AR 80.]

5 **II. PROCEEDINGS IN THIS COURT**

6 Plaintiff's complaint was lodged on April 10, 2008, and filed on  
7 April 23, 2008. On October 30, 2008, defendant filed an answer and  
8 plaintiff's Administrative Record ("AR"). On January 8, 2009, the  
9 parties filed their Joint Stipulation ("JS") identifying matters not  
10 in dispute, issues in dispute, the positions of the parties, and the  
11 relief sought by each party. This matter has been taken under  
12 submission without oral argument.

13 **III. PRIOR ADMINISTRATIVE PROCEEDINGS**

14 Plaintiff applied for disability insurance benefits ("DIB") and  
15 supplemental security income ("SSI") on October 19, 2005, alleging  
16 disability since August 19, 2003. [AR 70, 138.] After the  
17 applications were denied initially and on reconsideration, plaintiff  
18 requested an administrative hearing, which was scheduled for February  
19 21, 2007, before Administrative Law Judge ("ALJ") Jay Levine. [AR 59.]  
20 Plaintiff did not appear at the hearing, but he later wrote a letter  
21 to the Commissioner stating that he had been involved in an automobile  
22 accident on February 15, 2007. [AR 115.] The ALJ ordered the case  
23 dismissed on April 24, 2007, citing plaintiff's failure to provide  
24 evidence corroborating the explanation. [AR 70-71.] Plaintiff later  
25 submitted a police report documenting the accident. [AR 117-24.] On  
26 July 21, 2007, the Appeals Council ordered remand for an  
27 administrative hearing, finding that plaintiff had good reason not to  
28 appear at the initial hearing. [AR 126-27.]

1 An administrative hearing was held on November 28, 2007, before  
2 ALJ Levine. [AR 37.] Plaintiff appeared with counsel, and testimony  
3 was taken from plaintiff and vocational expert David Rinehart. [AR  
4 38.] The ALJ denied benefits in a decision filed on February 12,  
5 2008. [AR 14-21.] When the Appeals Council denied review on March 14,  
6 2008, the ALJ's decision became the Commissioner's final decision. [AR  
7 5-7.]

#### 8 IV. STANDARD OF REVIEW

9 Under 42 U.S.C. § 405(g), a district court may review the  
10 Commissioner's decision to deny benefits. The Commissioner's (or  
11 ALJ's) findings and decision should be upheld if they are free of  
12 legal error and supported by substantial evidence. However, if the  
13 court determines that a finding is based on legal error or is not  
14 supported by substantial evidence in the record, the court may reject  
15 the finding and set aside the decision to deny benefits. See Aukland  
16 v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v.  
17 Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240  
18 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094,  
19 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
20 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada  
21 v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

22 "Substantial evidence is more than a scintilla, but less than a  
23 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence  
24 which a reasonable person might accept as adequate to support a  
25 conclusion." Id. To determine whether substantial evidence supports  
26 a finding, a court must review the administrative record as a whole,  
27 "weighing both the evidence that supports and the evidence that  
28 detracts from the Commissioner's conclusion." Id. "If the evidence

1 can reasonably support either affirming or reversing," the reviewing  
2 court "may not substitute its judgment" for that of the Commissioner.  
3 Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

#### 4 **V. DISCUSSION**

##### 5 **A. THE FIVE-STEP EVALUATION**

6 To be eligible for disability benefits a claimant must  
7 demonstrate a medically determinable impairment which prevents the  
8 claimant from engaging in substantial gainful activity and which is  
9 expected to result in death or to last for a continuous period of at  
10 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at  
11 721; 42 U.S.C. § 423(d)(1)(A).

12 Disability claims are evaluated using a five-step test:

13 Step one: Is the claimant engaging in substantial  
14 gainful activity? If so, the claimant is found not  
15 disabled. If not, proceed to step two.

16 Step two: Does the claimant have a "severe" impairment?  
17 If so, proceed to step three. If not, then a finding of not  
18 disabled is appropriate.

19 Step three: Does the claimant's impairment or  
20 combination of impairments meet or equal an impairment  
21 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If  
22 so, the claimant is automatically determined disabled. If  
23 not, proceed to step four.

24 Step four: Is the claimant capable of performing his  
25 past work? If so, the claimant is not disabled. If not,  
26 proceed to step five.

27 Step five: Does the claimant have the residual  
28 functional capacity to perform any other work? If so, the  
claimant is not disabled. If not, the claimant is disabled.

29 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended  
30 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107  
31 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20  
32 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or  
33 "not disabled" at any step, there is no need to complete further  
34 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

1 Claimants have the burden of proof at steps one through four,  
2 subject to the presumption that Social Security hearings are non-  
3 adversarial, and to the Commissioner's affirmative duty to assist  
4 claimants in fully developing the record even if they are represented  
5 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at  
6 1288. If this burden is met, a prima facie case of disability is  
7 made, and the burden shifts to the Commissioner (at step five) to  
8 prove that, considering residual functional capacity ("RFC")<sup>1</sup>, age,  
9 education, and work experience, a claimant can perform other work  
10 which is available in significant numbers. Tackett, 180 F.3d at 1098,  
11 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

12 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

13 Here, the ALJ found that plaintiff had not engaged in substantial  
14 gainful activity since his alleged disability onset date (step one);  
15 that plaintiff had "severe" impairments, namely degenerative joint and  
16 disc disease of the cervical and lumbar spine, torn left knee  
17 ligament, and adjustment disorder (step two); and that plaintiff did  
18 not have an impairment or combination of impairments that met or  
19 equaled a "listing" (step three). [AR 16, 18.] The ALJ found that  
20 plaintiff had an RFC for light work with the exception of standing or  
21 walking occasionally (two out of eight hours per day), no significant  
22 pushing or pulling with the left leg, no significant walking on uneven

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24 <sup>1</sup> Residual functional capacity measures what a claimant can  
25 still do despite existing "exertional" (strength-related) and  
26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155  
27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to  
28 work without directly limiting strength, and include mental, sensory,  
postural, manipulative, and environmental limitations. Penny v.  
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155  
n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a  
nonexertional limitation. Penny, 2 F.3d at 959; Perminter v. Heckler,  
765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 terrain, no significant climbing or balancing, only occasional  
2 overhead lifting, and only occasional stooping, kneeling, crouching or  
3 crawling. [AR 18.] The ALJ found that this would preclude plaintiff  
4 from performing his past relevant work (step four). [AR 20.] The  
5 vocational expert testified that a person with plaintiff's RFC could  
6 perform work existing in significant numbers in the national economy,  
7 such as food and beverage order clerk, paramutual ticket checker, and  
8 telephone quotation clerk (step five). [AR 20-21.] Accordingly,  
9 plaintiff was found not "disabled" as defined by the Social Security  
10 Act. [AR 21.]

11 **C. ISSUES IN DISPUTE**

12 The Joint Stipulation identifies six disputed issues:

- 13 1. Whether the ALJ properly considered the opinion of Dr.  
14 Khalid Ahmed;
- 15 2. Whether the ALJ properly considered the opinion of Dr. Grace  
16 Roark;
- 17 3. Whether the ALJ properly considered evidence of plaintiff's  
18 depression;
- 19 4. Whether the ALJ properly considered plaintiff's testimony;
- 20 5. Whether the ALJ properly considered plaintiff's RFC; and
- 21 6. Whether the ALJ posed a complete hypothetical question to  
22 the vocational expert.

23 [JS 2-3.]

24 **D. ISSUE ONE: DR. AHMED**

25 In September 2003, while he was working as a warehouse worker,  
26 plaintiff injured himself when a forklift ran over his left foot,  
27 causing him to twist his body while trying to pull away. [AR 291-92.]  
28 Dr. Ahmed conducted an initial orthopedic evaluation in October 2003

1 and recommended additional testing. [AR 291.] In November 2003, Dr.  
2 Ahmed diagnosed lumbar disc herniation, left foot hypertrophy and left  
3 knee internal derangement. [AR 280.] Following additional visits in  
4 October 2003, November 2003, and April 2004, Dr. Ahmed completed a  
5 permanent and stationary report in July 2004. [AR 252-63.] Dr. Ahmed  
6 concluded that plaintiff was "permanently partially disabled" and that  
7 his pain would reach a "severe level" if he stood for more than 35 to  
8 40 minutes, walked for more than 35 to 40 minutes, walked over uneven  
9 ground, or attempted kneeling, squatting and climbing. [AR 260.] Dr.  
10 Ahmed also concluded that plaintiff "suffered definitive loss in terms  
11 of unrestricted gainful employment in the open labor market" and that  
12 he was a qualified injured worker in need of vocational  
13 rehabilitation.<sup>2</sup> [AR 261.]

14 In October 2005, Dr. Ahmed was presented with a sub rosa video  
15 from plaintiff's worker's compensation case showing plaintiff  
16 performing chores in March 2005. [AR 227.] The video showed plaintiff  
17 pushing a child in a grocery cart, shopping for approximately two  
18 hours, driving to a laundromat, folding laundry, and periodically  
19 carrying the child while finishing the chores. [AR 228-29.] Based on  
20 the video, Dr. Ahmed stated that the video "appears to show that  
21 [plaintiff] does have the ability for prolonged standing and walking"  
22 but that the video "did not show spontaneous motion of the neck, the  
23 lumbar spine, and the ability to kneel and squat." [AR 229.]

24 Almost one year later, in July 2006, Dr. Ahmed completed a  
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26 <sup>2</sup> In worker's compensation terms, a qualified injured worker is  
27 eligible for vocational rehabilitation when he is precluded from  
28 engaging in his past work and rehabilitation services would help him  
return to suitable gainful employment. See Gamble v. Workers' Comp.  
Appeals Board, 143 Cal. App. 4th 71, 81, 49 Cal. Rptr. 3d 36 (2006).

1 questionnaire regarding Medical Opinion Re: Ability to Do Work-Related  
2 Activities (Physical). [AR 450-52.] Dr. Ahmed opined, among other  
3 things, that plaintiff could lift twenty pounds occasionally and ten  
4 pounds frequently, stand, walk and sit for less than two hours in an  
5 eight-hour workday, that he could not sit or stand for more than five  
6 minutes before changing position, and that he could not walk for more  
7 than ten minutes at a time. [AR 450-51.] Dr. Ahmed also stated that  
8 plaintiff's impairments would cause him to be absent from work more  
9 than three times per month. [AR 452.]

10 In the administrative opinion, the ALJ summarized Dr. Ahmed's  
11 treatment of plaintiff and the questionnaire. [AR 17, 19.] As to the  
12 latter, the ALJ stated that Dr. Ahmed's questionnaire was a "check-  
13 the-box type form without any comment [and] can be given little weight  
14 especially given the lack of related findings in his notes." [AR 17.]  
15 The ALJ also found it "inconsistent with Dr. Ahmed's findings in 2004  
16 . . . and his repeated statements in his notes that the claimant's  
17 condition continued to be permanently partially disabled." [AR 19.]  
18 Although the ALJ found that Dr. Ahmed's opinion was not entitled to  
19 controlling weight, the ALJ's RFC determination, which limited  
20 Plaintiff to light work with two hours of standing or walking in an  
21 eight-hour workday, was consistent in some respects with Dr. Ahmed's  
22 opinion. [AR 18.] Plaintiff argues that the ALJ's analysis of Dr.  
23 Ahmed's opinion was not supported by substantial evidence. [JS 3-5.]

24 The Ninth Circuit held in Lester v. Chater, 81 F.3d 821 (9th Cir.  
25 1995), that more weight should be given to the opinions of treating  
26 doctors over non-treating doctors. If the ALJ chooses to reject the  
27 opinion of a treating doctor that has been controverted by the opinion  
28 of another physician, the ALJ must provide "specific and legitimate



1 reasons" supported by substantial evidence in the record for doing  
2 so.<sup>3</sup> Id. at 830. Here, the reasons stated by the ALJ to reject the  
3 most restrictive limitations in Dr. Ahmed's opinion satisfy that  
4 standard. Dr. Ahmed's opinion that plaintiff should be limited in  
5 standing to five minutes at a time, walking to less than ten minutes  
6 at a time, and would be absent from work more than three days per  
7 month was wholly inconsistent with his earlier findings, such as his  
8 evaluation of the sub rosa video that plaintiff was capable of  
9 prolonged standing and walking, as well as his conclusion that  
10 plaintiff was only permanently "partially" disabled; the record  
11 contains no explanation for the inconsistency. See Connett v.  
12 Barnhart, 340 F.3d 871 (9th Cir. 2003) (contradicted opinion of a  
13 treating physician was properly rejected as not supported by treatment  
14 notes); Morgan v. Chater, 169 F.3d 595, 603 (9th Cir. 1999)(holding  
15 that the ALJ permissibly relied on inconsistencies within and between  
16 the reports of the treating and examining doctors to reject their  
17 opinions); Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1996) (per  
18 curiam) (holding that the ALJ was entitled to reject a treating  
19 physician's opinion because, among other things, his report varied  
20 from his treatment notes). Accordingly, the ALJ properly declined to  
21 give full credit to Dr. Ahmed's opinion.

22 **E. ISSUE TWO: DR. ROARK**

23 In April 2006, plaintiff visited Dr. Grace Roark for an initial  
24 psychological pain evaluation. [AR 424.] Dr. Roark made a mental  
25 status evaluation and administered psychological tests. [AR 426-35.]

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27 <sup>3</sup> Here, Dr. Ahmed's opinion was controverted by the opinion of  
28 an examining physician, Dr. Thomas Dorsey, who concluded in an  
orthopedic consultation that plaintiff had no impairment-related  
physical limitations. [AR 304.]

1 Dr. Roark concluded that plaintiff had an adjustment disorder due to  
2 chronic pain and that his pain had triggered emotional symptoms. [AR  
3 436.] Dr. Roark commented that, "Such symptoms do not constitute a  
4 psychological disability, but are an expected reaction and adjustment  
5 to his continuous experience of pain." [Id.] Dr. Roark recommended  
6 eight weeks of biofeedback therapy, with the goals that plaintiff use  
7 his relaxation skills and alleviate tension. [AR 437.] Approximately  
8 eight weeks later, Dr. Roark conducted a final treatment summary. [AR  
9 419.] Dr. Roark noted that plaintiff had "demonstrated his ability to  
10 utilize techniques taught to him to reduce stress and tension" and  
11 "noted feeling better periodically" with psychotropic medications.  
12 [Id.] Dr. Roark assigned plaintiff a Global Assessment of Functioning  
13 ("GAF") score of 58<sup>4</sup> and commented that he "should continue to  
14 practice techniques learned in biofeedback and stress management  
15 therapy." [AR 422.]

16 In the administrative decision, the ALJ summarized the treatment  
17 plaintiff received under Dr. Roark's supervision, including her  
18 assignment of the 58 GAF score and her recommendation that plaintiff  
19 continue with stress management techniques. [AR 17.] The ALJ also  
20 noted that Dr. Roark had not been aware of the sub rosa video. [Id.]  
21 Plaintiff contends that the ALJ failed to properly consider Dr.  
22 Roark's "highly probative opinion." [JS 9.] Upon review of the  
23 record, however, Dr. Roark's opinion was not highly probative as to  
24 the issue of disability. Dr. Roark reported that plaintiff's symptoms

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26 <sup>4</sup> A GAF score measures the patient's ability to function on a  
27 scale of 1 to 100. A score of 51 to 60 indicates moderate symptoms  
28 (e.g., flat affect and circumstantial speech, occasional panic  
attacks) OR moderate difficulty in social, occupational, or school  
functioning (e.g., few friends, conflicts with peers or co-workers).  
Attorneys Medical Deskbook (Third), Pt. 4, Ch. 11, §11:6 (2004).

1 were not disabling from a psychological standpoint, that he learned  
2 effective techniques in biofeedback therapy, that he had a GAF score  
3 reflecting moderate symptoms, and that he should continue to use the  
4 techniques learned in therapy. Dr. Roark did not opine that plaintiff  
5 would be functionally limited in any way by his emotional symptoms;  
6 however, the ALJ did credit her opinion by finding that plaintiff's  
7 adjustment disorder was a "severe" impairment. Under these  
8 circumstances, the ALJ's discussion of Dr. Roark's opinion was not  
9 erroneous.

10 **F. ISSUE THREE: DEPRESSION**

11 In late 2006, plaintiff received one month of psychiatric  
12 treatment from Dr. Ochuko Diamreyan. [AR 443-49.] Plaintiff  
13 complained of severe depression and insomnia since the injury. [AR  
14 444, 448.] In his final visit, plaintiff reported sleeping better and  
15 that he was not hearing voices or experiencing paranoia. [AR 445.]  
16 Dr. Diamreyan made a diagnosis of major depression with a GAF score of  
17 40<sup>5</sup> and prescribed Cymbalta. [AR 444.]

18 In the administrative decision, the ALJ noted the one-month  
19 treatment with Dr. Diamreyan, the diagnosis of major depression, the  
20 prescription for Cymbalta, and the GAF score of 40. [AR 17.] The ALJ  
21 also noted that Dr. Diamreyan, like Dr. Roark, had not seen the sub  
22 rosa video. [Id.] The ALJ found that plaintiff's medically  
23 determinable mental impairments, involving reactive anxiety and  
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25 <sup>5</sup> A GAF score of 31 to 40 indicates some impairment in reality  
26 testing or communication (e.g., speech is at times illogical, obscure,  
27 or irrelevant) OR major impairment in several areas, such as work or  
28 school, family relations, judgment, thinking, or mood (e.g., depressed  
man avoids friends, neglects family, and is unable to work; child  
frequently beats up younger children, is defiant at home, and is  
failing at school).

1 depression, with reference to the "B" criteria for the evaluation of  
2 mental disorders,<sup>6</sup> "do not cause more than minimal limitation in the  
3 claimant's ability to perform basic mental work activities and is  
4 therefore nonsevere." [AR 16.]

5 Plaintiff argues that the ALJ did not properly consider Dr.  
6 Diamreyan's opinion that plaintiff has major depression. [JS 15.]  
7 However, based on the lack of evidence in the record that plaintiff  
8 had any significant limitations in mental functioning, the ALJ  
9 properly determined that plaintiff's depression was not severe. Dr.  
10 Diamreyan's diagnosis was unaccompanied by any findings that plaintiff  
11 had any functional deficits in relation to work ability; neither is  
12 there any evidence in the record of such limitations. Moreover, the  
13 unexplained GAF score of 40, by itself, was not essential to the  
14 accuracy of the ALJ's findings. See Howard v. Commissioner of Social  
15 Sec., 276 F.3d 235, 241 (6th Cir. 2002). Accordingly, there was no  
16 error.

17 **G. ISSUE FOUR: CREDIBILITY**

18 During the administrative hearing, plaintiff testified that he  
19 experiences pain and fatigue and has to lie down for up to three-  
20 fourths of the day; he also complained of depression and lack of  
21 concentration. [AR 42-43.] In the administrative decision, the ALJ  
22 described plaintiff's testimony and found that, although plaintiff's  
23 medically determinable impairments could reasonably be expected to  
24 produce the alleged symptoms, his statements concerning the intensity,  
25 persistence and limiting effects of these symptoms was "not entirely

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27 <sup>6</sup> The four areas of mental functioning that are evaluated under  
28 the "B" criteria are activities of daily living; social functioning;  
concentration, persistence or pace; and episodes of decompensation. 20  
C.F.R. Part 404, Subpart P, Appendix 1, § 12.00C.

1 credible." [AR 19.] The ALJ noted that the treating medical records  
2 indicated no change in plaintiff's condition since he became permanent  
3 and stationary in 2004, that the objective medical findings were mild,  
4 that his treatment had been limited and fairly conservative except for  
5 epidural injections, and that there was no evidence of the need for  
6 more aggressive treatment or further testing and evaluation. [Id.]  
7 The ALJ also cited the sub rosa video and the lack of credible  
8 evidence of any significant ongoing psychiatric or mental health  
9 treatment. [AR 19-20.]

10 Plaintiff contends that this credibility evaluation was not  
11 legally sufficient under the Ninth Circuit's standard. [JS 18, citing  
12 Holohan v. Massanari, 246 F.3d 1195, 1208 (9th Cir. 2001).] Upon  
13 review of the record, however, it is evident that the ALJ provided  
14 clear and convincing reasons to find plaintiff's allegations not  
15 entirely credible. See Bunnell v. Sullivan, 947 F.2d 341, 345-46 (9th  
16 Cir. 1991)(en banc)(ALJ may rely on lack of objective medical evidence  
17 to support severity of plaintiff's subjective symptom testimony as  
18 long as it is not the only reason); Fair v. Bowen, 885 F.2d 597, 604  
19 n. 5 (9th Cir. 1989)(ALJ may use "ordinary techniques of credibility  
20 evaluation," such as plaintiff's reputation for truthfulness); Meanel  
21 v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (ALJ properly  
22 considered, as part of his credibility evaluation, the treating  
23 physician's failure to prescribe, and the claimant's failure to  
24 request, medical treatment commensurate with the degree of pain  
25 alleged).

26 **H. ISSUES FIVE AND SIX: RFC AND HYPOTHETICAL QUESTIONS**

27 Finally, plaintiff contends that the ALJ's determination of his  
28 RFC and the hypothetical questions posed to the vocational expert

1 failed to take into account the limitations set out in the opinions of  
2 Dr. Ahmed and Dr. Diamreyan. [JS 22, 26.] As discussed above,  
3 however, the ALJ provided legally sufficient reasons for why these  
4 opinions should not be fully credited. Accordingly, these issues do  
5 not warrant reversal.

6 **VI. ORDERS**

7 Accordingly, **IT IS ORDERED** that:

8 1. The decision of the Commissioner is **AFFIRMED**.

9 2. This action is **DISMISSED WITH PREJUDICE**.

10 3. The Clerk of the Court shall serve this Decision and Order  
11 and the Judgment herein on all parties or counsel.

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13 DATED: February 2, 2009

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15 CARLA M. WOEHRLE  
16 United States Magistrate Judge  
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