

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SCOTT WHITLEY,)	NO. EDCV 09-02283 SS
)	
Plaintiff,)	
)	
v.)	
)	MEMORANDUM DECISION AND ORDER
MICHAEL J. ASTRUE,)	
Commissioner of the Social)	
Security Administration,)	
)	
Defendant.)	

I.
INTRODUCTION

Plaintiff Scott Whitley ("Plaintiff") brings this action seeking to reverse the decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for a period of Disability Insurance Benefits ("DIB") and for Supplemental Security Income ("SSI"). Alternatively, Plaintiff asks for a remand. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge. For the reasons stated below, the decision of the Commissioner is AFFIRMED.

II.
PRIOR PROCEEDINGS

On May 22, 2006, Plaintiff filed an application for DIB and SSI claiming that he became disabled beginning September 30, 2001. (Administrative Record ("AR") 10). The Agency initially denied his application on August 4, 2006. (Id.). After submitting a request for reconsideration, the application was again denied on December 26, 2006. (Id.). On February 14, 2007, Plaintiff requested a hearing. The hearing was held before Administrative Law Judge ("ALJ") Gene Duncan on January 23, 2008. (AR 18). Plaintiff appeared with counsel and testified. (AR 21-24, 34-46). Also testifying were Samuel Landau, a medical expert, Gregory S. Jones, a vocational expert, and Gail Wagner, Plaintiff's fiancé. (AR 25-33, 47-64). On February 15, 2008, the ALJ issued a decision denying benefits. (AR 7-17). Plaintiff sought review before the Appeals Council, which denied the request on November 9, 2009. (AR 1-3). On December 16, 2009, Plaintiff filed the instant action.

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III.

FACTUAL BACKGROUND

Plaintiff was born on June 27, 1958, and was forty-three years old at the time of the alleged disability onset date. (AR 16). He has a tenth grade education and is able to communicate in English. (Id.). Plaintiff formerly worked as a construction worker. (Id.). Plaintiff's claimed impairments include rheumatoid arthritis, Hepatitis C, a back injury, arthritis, and high blood pressure. (AR 116).

A. Plaintiff's Medical History

In May 2005, while serving a sixteen-month sentence for a DUI conviction at Calipatria State Prison, Plaintiff was treated for pain and trouble breathing. (AR 134). The prison doctors prescribed Malox, Metamucil, Motrin, Penicillin, and Prilosec to Plaintiff. (Id.). Both before and after his incarceration, Plaintiff visited Rancho Springs Medical Center for treatment of back pain. (AR 119, 133, 143). At Rancho Springs, he received x-rays, a CT scan, and medication. (AR 133, 143). Plaintiff was treated by Dr. Moody, Dr. Wayne, Dr. Odubela, and Dr. Simms, all affiliated with Rancho Springs Medical Center. (AR 148).

Plaintiff listed Dr. Jesus Lucas as his primary physician. (AR 234). Dr. Lucas ordered numerous tests through Quest Diagnostics, UniLab, and Cardiopulmonary Diagnostic Services. (AR 329, 339, 349, 353, 354, 356, 363, 364, 366, 367, 369, 370, 371, 375). Dr. Lucas is listed as prescribing Plaintiff various medications for herpes, an infection, and an undisclosed stomach ailment. (AR 149).

1 On May 26, 2006, Dr. Lucas completed a Consent for Release of
2 Medical Information form. (AR 336). In this one-page, fill-in-the-box
3 form, Dr. Lucas diagnosed Plaintiff with degenerative disc disease,
4 arthritis, and Hepatitis C. (Id.). The form does not indicate what
5 type of examination was conducted to reach these conclusions. (Id.).
6 The boxes did not provide space for elaboration. (Id.). In the
7 "prognosis and recommendations for treatment" box, Dr. Lucas found
8 Plaintiff "temporarily disab[led] at least until 9/1/06 while the above
9 work-up and therapy are being carried out." (Id.).
10

11 On March 29, 2007, Dr. Lucas completed an Authorization to Release
12 Medical Information form. (AR 335). Dr. Lucas again concluded in this
13 check-off-the-box form that Plaintiff does not require someone to care
14 for him, and that Plaintiff could provide care to children in his home.
15 (Id.). Dr. Lucas found that Plaintiff did not have any limitations that
16 affect his ability to work or participate in education or training.
17 However, Dr. Lucas also checked the box indicating that Plaintiff was
18 not, in fact, able to work. Dr. Lucas did not provide any other
19 specific diagnosis on this release form. (Id.).
20

21 **B. Consultative Examinations**
22

23 At the Agency's request, Dr. Thomas J. Sabourin completed an
24 Orthopedic Consultation on July 25, 2006. (AR 188-92). The
25 examination included formal physical examination procedures and
26 observations of Plaintiff's movements. (AR 189). Dr. Sabourin found
27 that Plaintiff had normal gait and did not need an assistive device.
28 (Id.). Dr. Sabourin performed x-rays which showed no significant

1 decrease in the disc spaces of Plaintiff's back except for some perhaps
2 slight decrease at L5-S1. (AR 191). The examination revealed that
3 Plaintiff's range of motion was normal in his extremities. (AR 190-91).
4 Furthermore, Dr. Sabourin found that Plaintiff had no manipulative
5 limitations. (AR 192). Dr. Sabourin concluded that Plaintiff's
6 symptoms were "somewhat disproportionate to the determinable condition"
7 and that Plaintiff could lift fifty pounds occasionally, twenty-five
8 pounds frequently, and is capable of standing, walking, or sitting for
9 six out of eight hours. (Id.).

10
11 On August 1, 2006, Dr. A.W. Lizarraras completed a Physical
12 Residual Functional Capacity ("RFC") Assessment after reviewing medical
13 evidence in the file. (AR 197-202). Dr. Lizarraras found that
14 Plaintiff had no limitations with regard to manipulation, vision,
15 communication, or environment. (AR 199-200). Dr. Lizarraras found that
16 Plaintiff's postural limitations included climbing, balancing, stooping,
17 kneeling, crouching, and crawling due to back strain. (AR 199). Dr.
18 Lizarraras concluded that Plaintiff had frequent postural limitations,
19 but no manipulative limitations. (AR 202). He found that Plaintiff's
20 allegations are partially credible for arthritis. (Id.). However, the
21 examination discovered no indication of significant liver disease and
22 Plaintiff appeared capable of at least medium work.¹ (Id.).

23
24 On December 26, 2006, Dr. G.D. Taylor-Holmes also completed a
25 Physical RFC Assessment after reviewing the evidence in the file. (AR

26
27 ¹ Medium level is defined as work involving "lifting no more than
28 50 pounds at a time with frequent lifting or carrying of objects weight
up to 25 pounds." 20 C.F.R. § 404.1567(c).

1 206-10). Dr. Taylor-Holmes also found Plaintiff to have frequent
2 postural limitations, but no limitations with regard to manipulation,
3 vision, communication, or environment. (AR 208-09). In conclusion, Dr.
4 Taylor-Holmes also found that Plaintiff could perform medium level work.
5 (AR 210).

6
7 **C. Subjective Complaints**

8
9 In his disability report, Plaintiff complained that he suffers from
10 rheumatoid arthritis, Hepatitis C, a back injury, arthritis, and high
11 blood pressure. (AR 116).

12
13 On June 10, 2005, Plaintiff completed an Exertional Daily
14 Activities Questionnaire. (AR 125-27). In the questionnaire, he
15 complained of chronic joint pain, chronic hip pain, a metatarsal stress
16 fracture to his right foot, dizziness, and difficulty sleeping because
17 of pain. (AR 125). Plaintiff stated that to temporarily relieve pain
18 he tries to "put in a mile or two of walking a day, [he] swim[s] and
19 sit[s] in a hot spa" (Id.). Further, he stated that he
20 "walk[s] to the grocery store, which is 3/4 of a mile." (AR 126).
21 However, Plaintiff also states in the same questionnaire that he does
22 not do his own grocery shopping. (Id.).

23
24 Plaintiff reported that he does not drive a car, clean his home,
25 or do yard work even though he used to be able to. (AR 126-27).
26 Because of pain he is forced to rest every few hours. (AR 127). He is
27 only capable of sleeping for a few hours at a time because his pain
28 causes substantial discomfort. (Id.).

1 Testifying before the ALJ on January 23, 2008, Plaintiff stated
2 that he has a tenth grade education and has worked in construction. (AR
3 21). Also, he testified he has not been able to eat correctly because
4 of his sickness and, as a result, has lost weight. (Id.). He further
5 testified that he last worked in 2001. (AR 23). He has sustained
6 injuries from a car accident and has carpal tunnel syndrome. (AR 23-
7 24). Plaintiff testified that, while in prison, he discovered that he
8 had liver problems and also had broke his foot. (AR 35-36). He rates
9 his pain at a level of seven or eight on a scale of one-to-ten. (AR
10 42). Generally, he complains about being depressed all the time, not
11 being able to sleep well, not having sex, getting headaches, having
12 herpes breakouts, and being unable to move properly. (AR 41).

13
14 **D. Vocational Expert Testimony**

15
16 Gregory Stewart Jones testified at the hearing as a vocational
17 expert. (AR 53). Mr. Jones testified that Plaintiff's primary
18 occupation is a "framing carpenter." (AR 54). Mr. Jones found that
19 although Plaintiff's work is classified as "skilled", none of his skills
20 are transferable to light work.² (Id.). Plaintiff's skills in "blue
21 print reading" could be transferred to a building inspector occupation.
22 (Id.). However, Mr. Jones testified that additional training would be
23 required. (Id.).

24
25
26 ² Light work is defined as work involving "lifting no more than 20
27 pounds at a time with frequent lifting or carrying of objects weighing
28 up to 10 pounds" and requiring "a good deal of walking or standing" or
"sitting most of the time with some pushing and pulling of arm or leg
controls." 20 C.F.R. §§ 404.1567(b) and 416.967(b).

1 When presented with a hypothetical employee matching Plaintiff's
2 abilities and limitations, Mr. Jones found that this person could not
3 perform Plaintiff's former work. (AR 56-57). However, Mr. Jones stated
4 that there are jobs in the local, regional, or national economies for
5 a person who can occasionally lift twenty pounds, can frequently lift
6 ten pounds, can stand or walk for four hours of an eight-hour work day,
7 can sit for six hours of an eight-hour work day, should be allowed to
8 stretch, and can not have access to alcohol. (AR 57-58). These jobs
9 include a small products assembler, a counter clerk, or a parking lot
10 cashier. (AR 58-61).

11
12 **IV.**
13 **FIVE STEP PROCESS**
14

15 To qualify for disability benefits, a claimant must demonstrate
16 a medically determinable physical or mental impairment that prevents him
17 from engaging in substantial gainful activity³ and that is expected to
18 result in death or to last for a continuous period of at least twelve
19 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing
20 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant
21 incapable of performing the work he previously performed and incapable
22 of performing any other substantial gainful employment that exists in
23 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.
24 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

25
26 _____
27 ³ Substantial gainful activity means work that involves doing
28 significant and productive physical or mental duties and is done for pay
or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 To decide if a claimant is entitled to benefits, an ALJ conducts
2 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

3
4 (1) Is the claimant presently engaged in substantial gainful
5 activity? If so, the claimant is found not disabled.
6 If not, proceed to step two.

7 (2) Is the claimant's impairment severe? If not, the
8 claimant is found not disabled. If so, proceed to step
9 three.

10 (3) Does the claimant's impairment meet or equal one of a
11 list of specific impairments described in 20 C.F.R. Part
12 404, Subpart P, Appendix 1? If so, the claimant is
13 found disabled. If not, proceed to step four.

14 (4) Is the claimant capable of performing his past work? If
15 so, the claimant is found not disabled. If not, proceed
16 to step five.

17 (5) Is the claimant able to do any other work? If not, the
18 claimant is found disabled. If so, the claimant is
19 found not disabled.
20

21 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
22 949, 953-54 (9th Cir. 2001) (citing Tackett); 20 C.F.R. §§ 404.1520(b) -
23 404.1520(f)(1) & 416.920(b) - 416.920(f)(1).
24

25 The claimant has the burden of proof at steps one through four, and
26 the Commissioner has the burden of proof at step five. Bustamante, 262
27 F.3d at 953-54 (citing Tackett). Additionally, the ALJ has an
28 affirmative duty to assist the claimant in developing the record at

every step of the inquiry. Id. at 954. If, at step four, the claimant meets his burden of establishing an inability to perform past work, the Commissioner must show that the claimant can perform some other work that exists in "significant numbers" in the national economy, taking into account the claimant's residual functional capacity,⁴ age, education, and work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1). The Commissioner may do so by the testimony of a vocational expert or by reference to the Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett). When a claimant has both exertional (strength-related) and nonexertional limitations, the Grids are inapplicable and the ALJ must take the testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

V.

THE ALJ'S DECISION

The ALJ employed the five-step sequential evaluation process and concluded that Plaintiff was not disabled within the meaning of the Social Security Act. (AR 12-17). At the first step, the ALJ observed that Plaintiff has not engaged in substantial gainful activity since September 30, 2001. (AR 12). At step two, he found that Plaintiff's

⁴ Residual functional capacity is "what [one] can still do despite [his] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 healed right foot fracture, arthritis, Hepatitis C, and hypertension
2 qualified as severe impairments. (Id.).
3

4 At the third step, the ALJ found that the severe impairments at
5 step two did not meet or medically equal a listed impairment. (Id.).
6 Next, at step four, the ALJ found that Plaintiff has retained the RFC
7 to perform light work "except he can occasionally stoop, bend, climb,
8 kneel, crouch and balance. He should be allowed to stretch 1-3 minutes
9 in every hour. He cannot operate motorized equipment, work around
10 dangerous machinery or at heights. He cannot perform security work or
11 work with access to alcohol. Mentally, [Plaintiff] can perform simple,
12 routine and detailed work." (AR 12-13). Also, the ALJ concluded that
13 Plaintiff is unable to perform any of his past relevant work. (AR 15).
14

15 Finally, at step five, the ALJ concluded that Plaintiff could
16 perform work that exists in significant numbers in the national economy.
17 (AR 16). Specifically, Plaintiff could perform the requirements of a
18 small products assembler, a counter clerk, and a parking lot attendant.
19 (Id.). Accordingly, the ALJ determined that Plaintiff was not disabled,
20 as defined in the Social Security Act, at any time through the date of
21 the decision. (AR 17).
22

23 VI.

24 STANDARD OF REVIEW

25

26 Under 42 U.S.C. § 405(g), a district court may review the
27 Commissioner's decision to deny benefits. The court may set aside the
28 Commissioner's decision when the ALJ's findings are based on legal error

1 or are not supported by substantial evidence in the record as a whole.
2 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (citing
3 Tackett, 180 F.3d at 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th
4 Cir. 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

5
6 "Substantial evidence is more than a scintilla, but less than a
7 preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v. Chater,
8 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant evidence which
9 a reasonable person might accept as adequate to support a conclusion."
10 Id. (citing Jamerson, 112 F.3d at 1066; Smolen, 80 F.3d at 1279). To
11 determine whether substantial evidence supports a finding, the court
12 must "'consider the record as a whole, weighing both evidence that
13 supports and evidence that detracts from the [Commissioner's]
14 conclusion.'" Aukland, 257 F.3d at 1035 (citing Penny v. Sullivan, 2
15 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support
16 either affirming or reversing that conclusion, the court may not
17 substitute its judgment for that of the Commissioner. Reddick, 157 F.3d
18 at 720-21 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

20 VII.

21 DISCUSSION

22
23 Plaintiff contends that: (1) the ALJ's RFC determination is invalid
24 because of his failure to weigh the opinion of Dr. Jesus Lucas as a
25 treating physician (Memorandum in Support of Plaintiff's Complaint
26 ("Complaint Memo") at 2); (2) the ALJ failed to make proper credibility
27 findings and to properly consider Plaintiff's subjective testimony (Id.
28 at 8); and (3) the ALJ failed to properly consider the lay witness

1 testimony of Gail Wagner. (Id. at 5). The Court disagrees with
2 Plaintiff's contentions.

3
4 **A. The ALJ's RFC Is Supported By Substantial Evidence In The Record**

5
6 Plaintiff contends that Dr. Lucas is Plaintiff's treating physician
7 and that the ALJ failed to properly consider Dr. Lucas's findings.
8 (Complaint Memo at 2). Plaintiff asserts that the ALJ never mentioned
9 Dr. Lucas's opinion and that the ALJ never explicitly accepted or
10 rejected Dr. Lucas's opinion. (Id. at 3). Ultimately, Plaintiff
11 contends that because the ALJ failed to explicitly consider Dr. Lucas's
12 medical opinion, the ALJ's RFC determination is invalid. The Court
13 disagrees.

14
15 Dr. Lucas's most significant detailed statement in the record is
16 found in the "Consent for Release of Information" form. (AR 336). Dr.
17 Lucas found that Plaintiff suffered from degenerative disc disease,
18 arthritis, and Hepatitis C. (Id.). Dr. Lucas checked-off the box that
19 indicated Plaintiff was unable to work, but also found that he did not
20 need care or supervision. (Id.). Dr. Lucas checked-off the box that
21 indicated Plaintiff would "benefit from job rehabilitation." (Id.).
22 The form does not include any information revealing the type of
23 examination performed by Dr. Lucas or how he reached his conclusions.
24 (Id.). Other than listing Plaintiff's conditions and stating Plaintiff
25 that he is unable to work, the form merely contains routine information
26 about Plaintiff. (Id.).

1 Although there are remaining records from Dr. Lucas, none of them
2 offer more detailed information regarding his opinion of Plaintiff's
3 impairments. It is questionable whether Dr. Lucas qualifies for
4 treating physician status, as the records do not clearly demonstrate an
5 ongoing treatment relationship. Plaintiff made a few visits to Dr.
6 Lucas, for a variety of complaints, but the visits were infrequent and
7 of limited duration.

8
9 Assuming arguendo that Dr. Lucas' check-off form is entitled to
10 treating doctor weight, and assuming that the ALJ erred by failing to
11 directly address it, the Court must decide if it was harmless error.
12 Because more than substantial evidence exists in the record for the
13 ALJ's opinion, the Court finds that even if the ALJ erred by failing to
14 directly address Dr. Lucas's form opinion, the error was harmless. See
15 Curry v. Sullivan, 925 F.2d 1127, 1129 (9th Cir. 1990) (harmless error
16 applies to review of administrative decision regarding disability); Booz
17 v. Sec'y of Health and Human Servs., 734 F.2d 1378, 1380-81 (9th Cir.
18 1984). Substantial evidence in the record ultimately supports the ALJ's
19 RFC finding. See Carmickle v. Comm'r of Social Sec. Admin., 533 F.3d
20 1155, 1162 (9th Cir. 2008).

21
22 Dr. Sabourin, Dr. Lizarraras, and Dr. Taylor-Holmes each
23 independently concluded, in detailed written opinions, that Plaintiff
24 has a RFC for medium work with certain limitations. (AR 192, 202, 210).
25 Specifically, each doctor concluded that in an eight-hour work-day
26 Plaintiff could stand and walk for at least six hours, or sit for six
27 hours. (AR 192, 198, 207). They agreed that Plaintiff's symptoms were
28 somewhat disproportionate to his condition and that Plaintiff is

1 employable. (AR 192, 202, 210). The examinations conducted by the
2 consulting physicians provide substantial evidence for the ALJ's
3 findings.

4
5 Even if Dr. Lucas was a treating doctor, the ALJ's lack of reasons
6 for rejecting his limited opinion was harmless error. See Curry 925
7 F.2d at 1129. Dr. Lucas's completed Consent for Release of Medical
8 Information form, (AR 336), consisting mostly of a conclusory check-off-
9 the-box form, did not deserve significant weight. See Magallanes v.
10 Bowen, 881 F.2d 747, 851 (9th Cir. 1989) (finding that the ALJ need not
11 consider conclusory opinions); Crane v. Shalala, 76 F.3d 251, 253 (9th
12 Cir. 1996) (ALJ properly rejected doctor's opinion set forth in check-
13 off reports that did not contain any explanation of the bases of their
14 conclusions).

15
16 Dr. Lucas's conclusions are not supported by medical evidence found
17 in the record. For example, the evidence regarding Hepatitis C is
18 unclear, at best. (AR 14). Dr. Landau specifically stated that the
19 tests do not show Hepatitis C. (AR 25). The same can be said for the
20 degenerative disk disease. On January 24, 2002, an examination showed
21 Plaintiff's "lumbar spine [was] normally aligned. Vertebral body
22 heights and intervertebral disc spaces [were] maintained. No fracture
23 or spondylolisthesis [was] evident." (AR 160). Similarly, x-rays taken
24 on July 24, 2006 of Plaintiff's back did not reveal any degenerative
25 disk disease. (AR 15, 27).

26
27 Accordingly, as Dr. Lucas's opinions are conclusory and are not
28 consistent with medical evidence in the record, the ALJ was not obliged

1 to accept or credit Dr. Lucas's findings. Magallanes, 881 F.2d at 851.
2 Where conflicting medical evidence is present, the ALJ has the
3 responsibility of resolving the conflict. See Andrews, 53 F.3d at 1039
4 (the ALJ is responsible for determining credibility, resolving conflicts
5 in medical testimony, and for resolving ambiguities). Accordingly,
6 Plaintiff's claim does not warrant reversal or remand.

7
8 **B. The ALJ Properly Rejected Plaintiff's Subjective Pain Testimony**

9
10 Plaintiff contends that the ALJ erred when he failed to provide
11 legally sufficient reasons for discrediting Plaintiff's testimony.
12 (Complaint Memo at 8). As such, Plaintiff contends that reversal or,
13 in the alternative, remand is required. The Court disagrees.

14
15 To determine whether a claimant's testimony regarding subjective
16 pain or symptoms is credible, an ALJ must engage in a two-step analysis.
17 First, the ALJ must determine whether the claimant has presented
18 objective medical evidence of an underlying impairment "which could
19 reasonably be expected to produce the pain or other symptoms alleged.
20 Lingenfelter v. Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007) (citing
21 Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991) (en
22 banc)) (internal quotation marks omitted). The claimant, however, "need
23 not show that her impairment could reasonably be expected to cause the
24 severity of the symptom she has alleged; she need only show that it
25 could reasonably have caused some degree of the symptom." Id. (quoting
26 Smolen, 80 F.3d at 1282).

1 Second, if the claimant meets this first test, and there is no
2 evidence of malingering, "the ALJ can reject the claimant's testimony
3 about the severity of her symptoms only by offering specific, clear, and
4 convincing reasons for doing so." Smolen, 80 F.3d at 1281.

5
6 If the ALJ only makes vague findings, i.e., the plaintiff's
7 statements are not consistent with the medical evidence, then the ALJ
8 has not satisfied his obligation to supply specific, clear, and
9 convincing reasons. Vasquez v. Astrue, 572 F.3d 586,592 (9th Cir.
10 2009). To support a lack of credibility finding, the ALJ is required
11 to identify specific facts in the record that show that the claimant is
12 in less pain than he claims. Id.

13
14 Here, Plaintiff testified regarding numerous ailments and the
15 resulting symptoms. He stated that he needs the assistance of a walker
16 or a cane because of the pain in his foot. (AR 23). Further, using a
17 cane has become unmanageable because of carpal tunnel in his hand. (AR
18 23-24). Similarly, due to the condition in his hand Plaintiff has
19 testified that he is unable to properly use his hand. (Id.). Plaintiff
20 also reported that he is unable to walk more than one block without
21 feeling pain. (AR 145). Regarding his back, Plaintiff stated it causes
22 "excruciating pain" and that "even laying down gets irritating, so
23 either I stand for a little bit, or I lay down." (AR 42).

24
25 Taking the record into consideration, the ALJ found "that the
26 claimant's medically determinable impairments could reasonably be
27 expected to produce the alleged symptoms, but that the claimant's
28 statements concerning the intensity, persistence and limiting effects

1 of these symptoms are not entirely credible.” (AR 14). The ALJ’s
2 decision contains sufficient reasoning to show that he did not
3 arbitrarily disregard Plaintiff’s testimony.
4

5 The ALJ notes that Plaintiff testified as to his challenges with
6 Hepatitis C and carpal tunnel syndrome. (AR 14). However, the ALJ also
7 observed a lack of evidence to support Plaintiff’s allegations
8 concerning these conditions. (Id.). The ALJ found no support in the
9 record for Plaintiff’s claimed need for a cane. (Id.). Indeed, while
10 in prison, Plaintiff was evaluated and then denied a cane because his
11 ambulation was only “minimally impaired.” (AR 26).⁵ The ALJ noted
12 that on examination dated July 25, 2006, Plaintiff had normal gait and
13 straight leg raising. (Id.). Similarly, the grip strength test results
14 of 60-65 pounds on his right hand and 50-55 pounds on his left hand, (AR
15 189), was proper grounds to disregard Plaintiff’s alleged inability to
16 properly grip objects.
17

18 A major complaint from Plaintiff is the “excruciating pain” caused
19 by his back. (AR 42). However, numerous test results concluded there
20 is minimal damage to his back. Plaintiff’s back was found to be normal
21 by a lumbar spine x-ray. (AR 160). An x-ray of the cervical spine
22 revealed only mild osteoarthritis with no fractures. (AR 161).
23

24 ⁵ Plaintiff’s testimony regarding his inability to walk more than
25 a block was contradicted by an examination on July 25, 2006, which
26 showed Plaintiff had normal gait and straight leg raising. (AR 189-
27 190). Plaintiff’s testimony regarding his walking ability was further
28 undermined by his statement in his Daily Activities Questionnaire that he
“put[s] in a mile or two of walking a day,” swims and sits in a spa.
(AR 125).

1 Plaintiff's testimony was inconsistent with the record. Thus, it was
2 proper for the ALJ to find Plaintiff's statements not credible. See
3 Connett v. Barnhart, 340 F.3d 871, 873 (9th Cir. 2003) (negative
4 credibility finding properly based on contradiction between subjective
5 complaints of pain and "normal" x-ray, CT scan, and myelogram results);
6 see also Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (claimant
7 properly discredited because hearing testimony was inconsistent with
8 medical evidence).

9
10 The ALJ provided clear and convincing reasons for rejecting
11 Plaintiff's testimony. As a result, remand is not required.

12
13 **C. Because The Lay Witness Testimony Was Cumulative Of Plaintiff's**
14 **Testimony, It Was Harmless Error For ALJ To Reject Without**
15 **Express Reasons**

16
17 Plaintiff contends that reversal, or in the alternative, remand,
18 is necessary because the ALJ failed to properly consider the testimony
19 of Gail Wagner, Plaintiff's fiancé. (Complaint Memo at 8). More
20 specifically, Plaintiff contends that the ALJ failed to provide germane
21 reasons for disregarding relevant lay witness statements. The Court
22 disagrees that a remand is necessary on this basis.

23
24 In determining whether a claimant is disabled, an ALJ must consider
25 lay witness testimony concerning a claimant's ability to work. Stout
26 v. Commissioner, 454 F.3d 1050, 1053 (9th Cir. July 25, 2006); Smolen,
27 80 F.3d at 1288; 20 C. F. R. §§ 404.1513(d) (4) & (e), and 416.913(d) (4)
28 & (e). The ALJ may discount the testimony of lay witnesses only if she

1 gives "reasons that are germane to each witness." Lewis v. Apfel, 236
2 F.3d 503, 511 (9th Cir. 2001) ("Lay testimony as to a claimant's
3 symptoms is competent evidence that an ALJ must take into account,
4 unless he or she expressly determines to disregard such testimony and
5 gives reasons germane to each witness for doing so." (citations
6 omitted)); see also Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir.
7 1993).

8
9 If an ALJ fails to expressly consider lay witness testimony, the
10 court must determine whether the ALJ's decision remains legally valid,
11 despite such error. Carmickle, 533 F.3d at 1162. If the ALJ's ultimate
12 credibility determination and reasoning are adequately supported by
13 substantial evidence in the record, no remand is required. Id. (citing
14 Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1195-97 (9th Cir.
15 2004)).

16
17 Ms. Wagner testified on Plaintiff's behalf on January 23, 2008.
18 (AR 47-53). She stated that despite Plaintiff's trouble climbing stairs
19 he often attempts to alleviate his back condition by going up and down
20 a staircase. (AR 47). Also, Plaintiff is unable to help around the
21 house, does not go out for dinner, does not cook, and is generally
22 depressed because of his limitations. (AR 48). His pain makes him
23 unable to clothe himself and consequently, he requires assistance. (AR
24 52). Ms. Wagner testified that Plaintiff is "not the same person as
25 when [she] met him." (AR 52). Ms. Wagner testified that Plaintiff's
26 back goes out, he sleeps a lot, does not want to eat, does not do chores
27 anymore, does not drive, and does not have proper insurance to cover MRI
28 costs. (AR 47-53). While each of these assertions were noted by the

1 ALJ, he did not explicitly accept or reject Ms. Wagner's testimony. (AR
2 14). Plaintiff contends that the ALJ's failure to offer express reasons
3 to reject Ms. Wagner's testimony was error. (Complaint Memo at 7).
4

5 However, Ms. Wagner's statements essentially mirrored that of
6 Plaintiff's own testimony and did not strengthen Plaintiff's impairment
7 claims. Like Ms. Wagner, Plaintiff specifically testified that due to
8 his pain he has trouble sleeping for more than a few hours. (AR 41, 51,
9 52). Plaintiff testified to all the same limitations noted by Ms.
10 Wagner and the ALJ considered these limitations in his opinion. (AR
11 14). Specifically, the ALJ took into consideration that Plaintiff is
12 unable to work in the same capacity with tools as he once did and he is
13 often tired and sleeps through the day. (Id.). Ms. Wagner's statement
14 failed to add any additional information for the ALJ to consider.
15

16 The ALJ's failure to give express reasons for rejecting Ms.
17 Wagner's testimony was harmless error. This Court concludes that no
18 reasonable ALJ would have reached a different decision based upon this
19 evidence even if Ms. Wagner's statement were fully credited. See Stout,
20 454 F.3d at 1056 ("Where the ALJ's error lies in a failure to properly
21 discuss competent lay testimony favorable to the claimant, a reviewing
22 court cannot consider the error harmless unless it can confidently
23 conclude that no reasonable ALJ, when fully crediting the testimony,
24 could have reach a different determination"). As discussed above, the
25 ALJ rejected the testimony of Plaintiff because it was inconsistent with
26 the record. By rejecting Plaintiff's testimony which mirrored that of
27 Ms. Wagner, the ALJ implicitly rejected Ms. Wagner's testimony. No
28 reasonable ALJ could be swayed by testimony that is identical to

1 testimony that has already been properly rejected. The ALJ's decision
2 was legally valid and supported by substantial evidence. As the
3 decision remains legally valid, it must be affirmed. See Carmickle, 533
4 F.3d at 1162 (relevant inquiry for harmless error analysis in social
5 security context is whether the ALJ's decision remains legally valid,
6 despite error).

7
8 **VIII.**

9 **CONCLUSION**

10
11 Consistent with the foregoing, IT IS ORDERED that the decision of
12 the Commissioner is AFFIRMED. IT IS FURTHER ORDERED that the Clerk of
13 the Court serve copies of this Order and the Judgment herein on counsel
14 for both parties.

15
16 DATED: September 13, 2010

17 /s/
18 SUZANNE H. SEGAL
19 UNITED STATES MAGISTRATE JUDGE
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