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

RALPH DAVID REY,)	Case No. EDCV 11-0234-MLG
)	
Plaintiff,)	MEMORANDUM OPINION AND ORDER
)	
v.)	
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
)	
Defendant.)	
_____)	

Plaintiff Ralph David Rey seeks judicial review of the Commissioner's denial of his application for Social Security Disability Insurance ("SSDI") and Supplemental Security Income ("SSI") benefits under the Social Security Act. For the reasons set forth below, the decision of the Administrative Law Judge ("ALJ") is affirmed and the action is dismissed with prejudice.

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1 **I. Factual and Procedural History**

2 Plaintiff was born on July 31, 1957. (Administrative Record ("AR")
3 20.) He earned a GED degree and has relevant work experience as a
4 janitor, laborer, general construction worker, and tree cutter. (AR 20,
5 375.)

6 Plaintiff filed applications for SSDI and SSI benefits on May 25,
7 2007, alleging disability beginning December 1, 2006 due to seizures,
8 coronary artery disease, and hypertension. (AR 125.) The Commissioner
9 denied Plaintiff's application initially and upon reconsideration. A
10 hearing was held before ALJ Jesse J. Pease on January 15, 2009, at which
11 Plaintiff, his then-wife, and a vocational expert ("VE") testified. (AR
12 23-61.) The ALJ issued an unfavorable decision on March 3, 2009. (AR 9-
13 22.) After the Appeals Council denied review, Plaintiff filed an action
14 for judicial review in this Court, *Rey v. Astrue*, Case No. EDCV 09-1584-
15 MLG. On March 25, 2010, the administrative decision was vacated and the
16 case was remanded to the Commissioner based upon the ALJ's failure to
17 make proper credibility findings. (AR 396-411.)

18 A second administrative hearing was held before ALJ Pease on April
19 30, 2010. (AR 359-378.) On October 20, 2010, the ALJ again denied
20 Plaintiff's application for benefits. (AR 348-356.) The ALJ found that
21 Plaintiff had not engaged in substantial gainful activity since his
22 alleged onset date of December 1, 2006. (AR 350.) The ALJ further found
23 that Plaintiff had the following severe impairments: alcoholism,
24 alcohol-induced seizure disorder, and alcohol-induced liver disease.
25 (Id.) After determining that Plaintiff's severe impairments did not meet
26 or equal any listed impairment, the ALJ found that Plaintiff had the
27 residual functional capacity ("RFC") to perform work at "less than a
28 full range of light exertion." (AR 350-351.) Specifically, the ALJ found

1 that Plaintiff retained the following RFC: "The claimant can lift and
2 carry 20 pounds occasionally and 10 pounds frequently. He can stand and
3 walk for 6 hours out of an 8-hour workday. He cannot climb, but he can
4 occasionally balance, stoop, kneel, crouch, and crawl. He should avoid
5 hazardous conditions such as working at heights or with dangerous
6 machinery." (AR 351.)

7 The ALJ concluded that, given this residual functional capacity,
8 Plaintiff was unable to perform any past relevant work. (AR 355.) The
9 ALJ found, however, that given Plaintiff's age, education, work
10 experience and RFC, there were other jobs that exist in significant
11 numbers in the national economy that he could perform, including small
12 products assembler, inspector/hand packer, and office helper. (AR 356.)
13 The ALJ then concluded that Plaintiff was not disabled within the
14 meaning of the Social Security Act.

15 Plaintiff timely filed this action, and the parties filed a Joint
16 Stipulation ("Joint Stip.") addressing the disputed issues on September
17 14, 2011. Plaintiff alleges that the ALJ erred by: (1) failing to
18 properly consider all of the relevant medical evidence of record in the
19 case and, in particular, disregarding the opinion of Plaintiff's
20 treating physician, Dr. Manuel Montemayor; and (2) failing to properly
21 assess the credibility of Plaintiff and his ex-wife. (Joint Stip. 4.)
22 Plaintiff requests that the Court vacate the ALJ's decision and remand
23 solely for an award of benefits, or, in the alternative, that the matter
24 be remanded for further proceedings. (Joint Stip. 20.) Defendant
25 requests that the ALJ decision be affirmed. (Joint Stip. 20-21.)

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1 **II. Standard of Review**

2 Under 42 U.S.C. § 405(g), a district court may review the Social
3 Security Commissioner's decision to deny benefits. The Court must uphold
4 the Social Security Administration's disability determination unless it
5 is not supported by substantial evidence or is based on legal error.
6 *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008)(citing
7 *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.
8 2006)). Substantial evidence means more than a scintilla, but less than
9 a preponderance; it is evidence that "a reasonable person might accept
10 as adequate to support a conclusion." *Lingenfelter v. Astrue*, 504 F.3d
11 1028, 1035 (9th Cir. 2007)(citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d
12 880, 882 (9th Cir. 2006)). To determine whether substantial evidence
13 supports a finding, the reviewing court "must review the administrative
14 record as a whole, weighing both the evidence that supports and the
15 evidence that detracts from the Commissioner's conclusion." *Reddick v.*
16 *Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support
17 either affirming or reversing the ALJ's conclusion," the reviewing court
18 "may not substitute [its] judgment for that of the ALJ." *Robbins*, 466
19 F.3d at 882.

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21 **III. Analysis**

22 **A. The ALJ Accorded Appropriate Weight to the Opinion of**
23 **Plaintiff's Treating Physician**

24 Plaintiff claims that the ALJ erred in failing to discuss the
25 August 10, 2010 opinion of his treating physician, Dr. Manuel
26 Montemayor, M.D. (Joint Stip. 4.) Plaintiff contends that the medical
27 report prepared by Dr. Montemayor on August 10, 2010 establishes that he
28 has marked limitations in the ability to perform various work-related

1 functions. More specifically, Dr. Montemayor diagnosed Plaintiff with
2 alcohol-related liver disease with a poor prognosis and opined that he
3 was permanently incapacitated, although a liver biopsy would be
4 necessary before the degree and permanence of the incapacity could be
5 determined. (AR 504.) The ALJ did not specifically reference this report
6 in his decision. (AR 348-356.)

7 An ALJ should generally accord greater probative weight to a
8 treating physician's opinion than to opinions from non-treating sources.
9 See 20 C.F.R. § 404.1527(d)(2). The ALJ must give specific and
10 legitimate reasons for rejecting a treating physician's opinion in favor
11 of a non-treating physician's contradictory opinion. *Orn v. Astrue*, 495
12 F.3d 625 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
13 1996). However, the ALJ need not accept the opinion of any medical
14 source, including a treating medical source, "if that opinion is brief,
15 conclusory, and inadequately supported by clinical findings." *Thomas v.*
16 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); accord *Tonapetyen v.*
17 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The factors to be
18 considered by the adjudicator in determining the weight to give a
19 medical opinion include: "[l]ength of the treatment relationship and the
20 frequency of examination" by the treating physician; and the "nature and
21 extent of the treatment relationship" between the patient and the
22 treating physician. *Orn*, 495 F.3d at 631-33; 20 C.F.R. §§
23 404.1527(d)(2)(i)-(ii), 416.927(d)(2)(i)-(ii).

24 The ALJ did not err by failing to mention Dr. Montemayor's August
25 2010 report. An ALJ is not required to discuss all evidence presented
26 but need only explain why "significant probative evidence has been
27 rejected." See *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393,
28 1394-95 (9th Cir. 1984). Here, Dr. Montemayor's report cannot be deemed

1 to be "significant probative evidence." The report was merely a "check-
2 the-box" form without any supporting clinical or laboratory findings. It
3 is a one-page report, in which Dr. Montemayor checked off preprinted
4 choices and did not provide any elaboration or explanation for his
5 opinions. See *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995)
6 (holding that the ALJ properly rejected a physician's determination
7 where it was "conclusory and unsubstantiated by relevant medical
8 documentation"); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (ALJ
9 permissibly rejected "check-off reports that did not contain any
10 explanation of the bases of their conclusions").

11 Further, Dr. Montemayor's August 2010 report acknowledges that
12 additional medical testing, namely a biopsy of Plaintiff's liver, would
13 be needed before the degree and permanence of any incapacity could be
14 determined. (AR 504.) Thus, it was reasonable for the ALJ not to give
15 controlling weight to a report that was equivocal in its conclusion that
16 Plaintiff was permanently disabled and unable to work.

17 Finally, although the ALJ did not specifically discuss the August
18 2010 report by Dr. Montemayor, he nevertheless discussed other medical
19 reports arising from Plaintiff's visits to Dr. Montemayor that were
20 inconsistent with the report's conclusion that Plaintiff was permanently
21 incapacitated. For example, the ALJ noted that when Plaintiff was seen
22 by Dr. Montemayor in March 2010 for complaints of a rash, he denied
23 having any seizures for the past year and Plaintiff was "without any
24 other new significant complaint." (AR 353, citing AR 487.) The ALJ also
25 specifically discussed various other records from Dr. Montemayor and
26 other practitioners at the San Manuel Clinic from November 2008 through
27 September 2009, which were largely normal and unremarkable. (AR 352-
28 353.)

1 Accordingly, the ALJ did not err in failing to discuss Dr.
2 Montemayor's August 2010 one-page report. Moreover, even if the ALJ
3 erred in failing to discuss this report, any error was harmless. See
4 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (harmless
5 error rule applies to review of administrative decisions regarding
6 disability), *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1991).
7 Therefore, Plaintiff is not entitled to relief on this claim of error.

8 **B. The ALJ Made Proper Credibility Determinations Regarding the**
9 **Testimony of Plaintiff and His Wife**

10 Plaintiff contends that the ALJ again failed to properly assess the
11 credibility of Plaintiff and his ex-wife, despite this Court's order
12 requiring the ALJ to make proper credibility determinations on remand.
13 (Joint Stip. 12.)

14 To determine whether a claimant's testimony about subjective pain
15 or symptoms is credible, the ALJ must engage in a two-step analysis.
16 *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (citing
17 *Lingenfelter*, 504 F.3d at 1035-36). "First, the ALJ must determine
18 whether the claimant has presented objective medical evidence of an
19 underlying impairment 'which could reasonably be expected to produce'
20 the alleged pain or other symptoms. *Lingenfelter*, 504 F.3d at 1036
21 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en
22 banc)). "[O]nce the claimant produces objective medical evidence of an
23 underlying impairment, an adjudicator may not reject a claimant's
24 subjective complaints based solely on a lack of objective medical
25 evidence to fully corroborate the alleged severity of pain." *Bunnell v.*
26 *Sullivan*, 947 F.2d at 345. To the extent that an individual's claims of
27 functional limitations and restrictions are reasonably consistent with
28 the objective medical evidence and other evidence in the case, the

1 claimant's allegations will be credited. SSR 96-7p, 1996 WL 374186 at *2
2 (explaining 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4)).¹

3 Unless there is affirmative evidence showing that the claimant is
4 malingering, the ALJ must provide clear and convincing reasons for
5 discrediting a claimant's complaints. *Robbins*, 466 F.3d at 883. "General
6 findings are insufficient; rather, the ALJ must identify what testimony
7 is not credible and what evidence undermines the claimant's complaints."
8 *Reddick*, 157 F.3d at 722 (quoting *Lester v. Chater*, 81 F.3d 821, 834
9 (9th Cir. 1995)). The ALJ may consider objective medical evidence and
10 the claimant's treatment history, as well as the claimant's daily
11 activities, work record, and observations of physicians and third
12 parties with personal knowledge of the claimant's functional
13 limitations. *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). The
14 ALJ may additionally employ "ordinary techniques of credibility
15 evaluation," such as weighing inconsistent statements regarding symptoms
16 by the claimant. *Id.*

17 In the present case, the ALJ found that Plaintiff's "medically
18 determinable impairments could reasonably be expected to cause the
19 alleged symptoms," but that "the claimant's statements concerning the
20 intensity, persistence and limiting effects of these symptoms are not
21 credible to the extent they are inconsistent with [the ALJ's] residual
22 functional capacity assessment." (AR 352.) Because Plaintiff met his
23 burden of producing objective medical evidence of underlying impairments
24 reasonably likely to cause his symptoms, the ALJ was required to offer

25 ¹ "The Secretary issues Social Security Rulings to clarify the
26 Secretary's regulations and policy Although SSRs are not published
27 in the federal register and 'do not have the force of law,' [the Ninth
28 Circuit] nevertheless give[s] deference to the Secretary's
interpretation of its regulations." *Bunnell*, 947 F.2d at 346 n.3
(internal citations omitted).

1 specific, clear and convincing reasons for rejecting Plaintiff's and his
2 wife's testimony regarding Plaintiff's symptoms and their affect on his
3 ability to work. See *Bunnell*, 947 F.2d at 343; see also *Vasquez*, 572
4 F.3d at 592 (quoting *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
5 1993))("To support a lack of credibility finding, the ALJ [is] required
6 to 'point to specific facts in the record which demonstrate that [the
7 claimant] is in less pain than she claims.'")

8 **1. The ALJ Properly Discredited Plaintiff's Testimony**

9 At the April 30, 2010 hearing, Plaintiff testified that his
10 condition was largely unchanged from the date of the last administrative
11 hearing on January 15, 2009, except that he has gotten weaker. (AR 362.)
12 Plaintiff testified that he had a grand mal seizure the previous July
13 and that he has three petit mal seizures per week. (AR 363.) He
14 testified that he continues to have tremors in his arms and legs. (AR
15 364.) He also testified that he has trouble concentrating and
16 remembering and that he has difficulty sleeping. (AR 364-365.) He
17 reported that he has fecal incontinence once every two weeks and that
18 his cirrhosis medication requires him to take frequent bathroom breaks
19 throughout the day. (AR 367-369.)

20 The ALJ provided three reasons for discrediting Plaintiff's
21 testimony regarding his symptoms and functional limitations, each of
22 which is fully supported by the record. First, the ALJ noted that,
23 although Plaintiff complained of serious symptoms, such as weakness, arm
24 and leg tremors, and fecal incontinence, the medical record demonstrates
25 that Plaintiff generally did not report these symptoms to his
26 physicians. (AR 353.) For example, the treatment notes demonstrate that
27 his arm and leg tremors were only noted on a single occasion in
28 September 2007, and that he has otherwise not reported this symptom to

1 his physicians. (Id., citing AR 340.) Similarly, although Plaintiff
2 complained of fecal incontinence occurring at least once every two
3 weeks, the treatment notes show that Plaintiff never raised this issue
4 with his physicians, and his ex-wife mentioned occasional incontinence
5 only once during an October 2008 office visit. (Id., citing AR 470.)

6 The ALJ also properly noted that Plaintiff's claims regarding the
7 frequency of his grand and petit mal seizures was contradicted by the
8 medical records. (AR 352-353.) The records indicate that Plaintiff
9 reported to his medical providers that he had four seizures in 2007 and
10 one in 2008, which the ALJ noted was of less frequency than Plaintiff
11 testified. (AR 352, citing AR 181, 186, 216, 340, 470.) The ALJ also
12 noted that Plaintiff reported to his physicians in November 2008 and
13 September 2009 that he had not had any recent seizure episodes. (AR 352-
14 353, citing AR 473, 484.) The ALJ also observed that, although Plaintiff
15 testified to having three petit mal seizures per week, he reported in
16 March 2010 to the San Manuel Clinic that he had not had any seizures in
17 a year. (AR 353, citing AR 487-488.) Thus, the ALJ properly determined
18 that Plaintiff was not fully credible given his inconsistent statements
19 regarding his symptoms. *Smolen*, 80 F.3d at 1284.

20 The ALJ also properly determined that Plaintiff's ability to
21 perform certain daily activities, such as washing dishes, cooking,
22 mopping the floor, watering the lawn, grocery shopping and watching his
23 young grandchildren for extended periods, were at odds with his claims
24 of debilitating pain. (AR 354, citing AR 198.) While it is true that
25 "one does not need to be 'utterly incapacitated' in order to be
26 disabled," *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001), the
27 extent of Plaintiff's activity here supports the ALJ's finding that
28 Plaintiff's reports of his impairment were not fully credible. See *Bray*

1 *v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009);
2 *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990) (finding that the
3 claimant’s ability to “take care of her personal needs, prepare easy
4 meals, do light housework and shop for some groceries ... may be seen as
5 inconsistent with the presence of a condition which would preclude all
6 work activity”) (citing *Fair*, 885 F.2d at 604).

7 The ALJ made specific findings articulating clear and convincing
8 reasons for his rejection of Plaintiff’s subjective testimony. *Smolen v.*
9 *Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). It is the responsibility of
10 the ALJ to determine credibility and resolve conflicts or ambiguities in
11 the evidence. *Magallanes v. Brown*, 881 F.2d 747, 750 (9th Cir. 1989). A
12 reviewing court may not second-guess the ALJ’s credibility determination
13 when it is supported by substantial evidence in the record, as here. See
14 *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). It was reasonable for
15 the ALJ to rely on the reasons stated above, each of which is fully
16 supported by the record, in rejecting the credibility of Plaintiff’s
17 subjective complaints. In sum, the ALJ reasonably and properly
18 discredited Plaintiff’s subjective testimony regarding the severity of
19 his symptoms as not being wholly credible.

20 **2. The ALJ Properly Discredited Plaintiff’s Wife’s Testimony**

21 Plaintiff contends that the ALJ also erred by not crediting his ex-
22 wife’s testimony regarding the severity of Plaintiff’s symptoms. (Joint
23 Stip. 14-15.) Plaintiff’s then-wife, Theresa M. Rey, testified at the
24 first administrative hearing that Plaintiff had seven grand mal seizures
25 in 2008, each requiring a week of recovery time (AR 48-49); that
26 Plaintiff experienced petit seizures approximately three times a week,
27 which caused his arms and legs to shake and left him confused and sore
28 the next day (AR 43-44); that Plaintiff experienced body tremors three

1 or four times a week, lasting for several hours, that sapped Plaintiff
2 of his strength (AR 45-46); that she and her brother often had to help
3 Plaintiff to the restroom because he was confused and shaky (AR 47);
4 that Plaintiff often has bathroom accidents as a result of his
5 medication (AR 47); and that she does everything for Plaintiff (AR 46-
6 47).

7 "Lay testimony as to a claimant's symptoms is competent evidence
8 that an ALJ must take into account, unless he or she expressly
9 determines to disregard such testimony and gives reasons germane to each
10 witness for doing so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir.
11 2001); see also *Dodrill*, 12 F.3d at 918-19. The ALJ provided two reasons
12 for finding Ms. Rey's testimony not wholly credible, both of which the
13 Court finds to be clear and convincing.

14 First, the ALJ found that Plaintiff's ex-wife's testimony was not
15 fully credible because it was contradicted by other evidence in the
16 record. For instance, the ALJ noted that Ms. Rey testified that
17 Plaintiff had at least seven grand mal seizures in 2008 but the medical
18 records show that Plaintiff reported having only one seizure in 2008.
19 (AR 354, 470.) Similarly, the ALJ noted that Ms. Rey's testimony that
20 Plaintiff had three petit mal seizures per week was contradicted by
21 Plaintiff's own report in March 2010 to the San Manuel Clinic that he
22 had not had any seizures in a year. (AR 354, 487-488.) As discussed
23 above with respect to Plaintiff's testimony, inconsistencies between Ms.
24 Rey's testimony and other statements in the record is a legitimate
25 reason for the ALJ to discredit her testimony.

26 The ALJ also declined to give great weight to Ms. Rey's testimony
27 because it conflicted with the medical evidence. The ALJ noted that,
28 although Ms. Rey testified that Plaintiff had chronic arm tremors,

1 needed assistance with basic hygiene and was confused and in pain for a
2 week after a seizure, there is no evidence that any of these symptoms
3 were reported to Plaintiff's health care providers. The ALJ may discount
4 lay testimony if it conflicts with medical evidence. *Lewis*, 236 F.3d at
5 511.

6 The ALJ's credibility determination regarding Plaintiff's ex-wife's
7 testimony was supported by substantial evidence in the record
8 Accordingly, Plaintiff is not entitled to relief on this claim.

9
10 **IV. Conclusion**

11 For the reasons stated above, the decision of the Social Security
12 Commissioner is **AFFIRMED**.

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14 DATED: September 29, 2011

15
16 MARC L. GOLDMAN
17 Marc L. Goldman
18 United States Magistrate Judge
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