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

PATRICK MOONEY,)	Case No. EDCV 11-1251-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	AFFIRMING THE COMMISSIONER
)	
COMMISSIONER OF SOCIAL)	
SECURITY ADMINISTRATION,)	
)	
Defendant.)	
)	
)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying his application for Supplemental Security Income ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed May 4, 2012. The Court has taken the Joint Stipulation under submission without oral argument. For the reasons stated below, the Commissioner's decision is affirmed and this action is dismissed.

II. BACKGROUND

Plaintiff was born on January 31, 1957. (Administrative Record ("AR") 166.) He has a ninth-grade education. (AR 42.) He claims to have been disabled because of several impairments,

1 including a back condition, hepatitis C, liver disease, and type
2 II diabetes. (AR 148.) Plaintiff originally claimed that his
3 disability started in August 2003, but he later changed the onset
4 date to January 2009. (AR 77, 148.)

5 On August 19, 2008, Plaintiff filed an application for SSI.¹
6 (AR 144.) After Plaintiff's application was denied, he requested
7 a hearing before an Administrative Law Judge ("ALJ"), which was
8 held on December 11, 2009. (AR 40-82.) Plaintiff, who was
9 represented by counsel, testified at the hearing, as did medical
10 expert Dr. Samuel Landau and vocational expert ("VE") Corinne
11 Porter. (Id.) On January 19, 2010, the ALJ denied Plaintiff's
12 claim, determining that he had the severe impairments of "liver
13 cirrhosis[,] chronic active hepatitis caused by hepatitis C[,]
14 degenerative disc disease of lumbar spine, obesity, and type II
15 diabetes" (AR 28) but retained the residual functional capacity
16 ("RFC")² to perform "less than a full range of light work," with
17 several specified limitations (AR 29).

18 On March 31, 2010, after retaining a new attorney, Plaintiff
19 requested review by the Appeals Council. (AR 13-16.) On June 1,
20 2011, Plaintiff submitted a brief and additional evidence to the
21 Council. (AR 187-92, 420-78.) On July 8, 2011, the Council
22 considered the additional evidence but denied Plaintiff's request
23

24 ¹ The AR does not contain Plaintiff's SSI application, but
25 his disability report and several other documents reflect that it
26 was filed on August 19, 2008. (See, e.g., AR 28, 83-86, 144.)

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

1 for review. (AR 1-6.) The Council ordered that the additional
2 evidence be made part of the administrative record.³ (AR 6.)
3 This action followed.

4 **III. STANDARD OF REVIEW**

5 Pursuant to 42 U.S.C. § 405(g), a district court may review
6 the Commissioner's decision to deny benefits. The Commissioner's
7 findings and decision should be upheld if they are free of legal
8 error and are supported by substantial evidence based on the
9 record as a whole. § 405(g); Richardson v. Perales, 402 U.S.
10 389, 401, 91 S. Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v.
11 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence
12 means such evidence as a reasonable person might accept as
13 adequate to support a conclusion. Richardson, 402 U.S. at 401;
14 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It
15 is more than a scintilla but less than a preponderance.
16 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.

17
18
19 ³ The Council ordered that the records designated as
20 "Exhibit 17F" before the agency be made part of the
21 administrative record. (AR 6.) Exhibit 17F included treatment
22 notes from the California Department of Corrections ("CDC")
23 dating from 2006 to 2008 and a March 2010 prescription and two
24 June 2010 assessments from Dr. Minh Yu at the Riverside County
25 Regional Medical Center ("RCRMC"). (AR 420-78.) In its order,
26 the Council described Exhibit 17F as "[t]reatment notes from the
27 [CDC] for the period July 2006 through January 2008" and did not
28 mention the records from Dr. Yu. (AR 6.) But the Council
specifically considered Dr. Yu's records when denying review, and
those records were included in the AR filed with the Court. (AR
2, 472-78.) Thus, the full Exhibit 17F was apparently made a
part of the administrative record. In any event, under Taylor v.
Comm'r of Soc. Sec. Admin., the Court considers Dr. Yu's records
when reviewing the ALJ's decision because they were submitted to
and considered by the Council when it denied review. 659 F.3d
1228, 1232 (9th Cir. 2011).

1 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
2 substantial evidence supports a finding, the reviewing court
3 "must review the administrative record as a whole, weighing both
4 the evidence that supports and the evidence that detracts from
5 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
6 720 (9th Cir. 1998). "If the evidence can reasonably support
7 either affirming or reversing," the reviewing court "may not
8 substitute its judgment" for that of the Commissioner. Id. at
9 720-21.

10 **IV. THE EVALUATION OF DISABILITY**

11 People are "disabled" for purposes of receiving Social
12 Security benefits if they are unable to engage in any substantial
13 gainful activity owing to a severe physical or mental impairment
14 that is expected to result in death or which has lasted, or is
15 expected to last, for a continuous period of at least 12 months.
16 42 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
17 (9th Cir. 1992).

18 **A. The Five-Step Evaluation Process**

19 The ALJ follows a five-step sequential evaluation process in
20 assessing whether a claimant is disabled. 20 C.F.R.
21 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
22 1995) (as amended Apr. 9, 1996). In the first step, the ALJ must
23 determine whether the claimant is currently engaged in
24 substantial gainful activity; if so, the claimant is not disabled
25 and the claim is denied. § 416.920(a)(4)(i). If the claimant is
26 not engaged in substantial gainful activity, the second step
27 requires the ALJ to determine whether the claimant has a "severe"
28 impairment or combination of impairments significantly limiting

1 his ability to do basic work activities; if not, a finding of
2 nondisability is made and the claim is denied.
3 § 416.920(a)(4)(ii). If the claimant has a "severe" impairment
4 or combination of impairments, the third step requires the ALJ to
5 determine whether the impairment or combination of impairments
6 meets or equals an impairment in the Listing of Impairments
7 ("Listing") set forth at 20 C.F.R., Part 404, Subpart P, Appendix
8 1; if so, disability is conclusively presumed and benefits are
9 awarded. § 416.920(a)(4)(iii). If the claimant's impairment or
10 combination of impairments does not meet or equal an impairment
11 in the Listing, the fourth step requires the ALJ to determine
12 whether the claimant has sufficient RFC to perform his past work;
13 if so, the claimant is not disabled and the claim is denied.
14 § 416.920(a)(4)(iv). The claimant has the burden of proving that
15 he is unable to perform past relevant work. Drouin, 966 F.2d at
16 1257. If the claimant meets that burden, a prima facie case of
17 disability is established. Id. If that happens or if the
18 claimant has no past relevant work, the ALJ then bears the burden
19 of establishing that the claimant is not disabled because he can
20 perform other substantial gainful work in the national economy.
21 § 416.920(a)(4)(v). That determination comprises the fifth and
22 final step in the sequential analysis. § 416.920; Lester, 81
23 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

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

25 At step one, the ALJ found that Plaintiff had not engaged in
26 any substantial gainful activity since August 19, 2008, the date
27 of his SSI application. (AR 28.) At step two, the ALJ concluded
28 that Plaintiff had the severe impairments of "liver cirrhosis[,]"

1 chronic active hepatitis caused by hepatitis C[,] degenerative
2 disc disease of lumbar spine, obesity, and type II diabetes."
3 (Id.) At step three, the ALJ found that Plaintiff did not have
4 an impairment or combination of impairments that met or equaled
5 any of the impairments in the Listing. (AR 29.) At step four,
6 the ALJ found that Plaintiff had the RFC to perform "less than a
7 full range of light work," with the following limitations:

8 [Plaintiff] can stand and or walk for 4 hours in an 8-
9 hour workday for 30 minutes at a time; he can sit for
10 eight hours in an 8-hour workday but needs to stand and
11 stretch for a few seconds every 30 minutes; he requires
12 regular 15 minute breaks every 2 hours; he can lift
13 and/or carry 10 pounds frequently and 20 pounds
14 occasionally; he can occasionally stoop or bend; he can
15 not climb stairs, ladders, work at heights or balance; he
16 can not do work requiring hypervigilance; he must work in
17 an air conditioned environment; he can not operate
18 motorized equipment or work around unprotected machinery;
19 he can not do extremes of twisting with the upper torso;
20 he may need to use a cane to walk but not to stand; and
21 he may miss work once or twice a month.

22 (AR 29.) At step five, the ALJ found that Plaintiff had no past
23 relevant work but had the RFC to perform the jobs of "garment
24 sorter" and "electronics worker." (AR 32-33.) The ALJ therefore
25 concluded that Plaintiff had not been under a disability since
26 August 19, 2008, the date his application was filed. (AR 33-34.)

27 **V. RELEVANT FACTS**

28 In August 2007, a California Department of Corrections

1 ("CDC") initial health screening record noted that Plaintiff
2 suffered from hypertension, diabetes mellitus, and mid-lower back
3 pain; it also indicated that he used a cane and a walker. (AR
4 198.) That same month, a liver biopsy showed "[c]hronic
5 hepatitis, with moderate inflammatory activity (grade 3) and
6 septal fibrosis to cirrhosis (stage 3-4)," and a gallbladder
7 biopsy showed chronic cholecystitis and cholelithiasis. (AR
8 202.) In June 2008, a CDC record noted that Plaintiff had
9 "persistent pain in the thoracic region," and a CT scan showed
10 spinal stenosis and degenerative joint disease. (AR 204.)

11 In August 2008, Plaintiff was hospitalized at the Riverside
12 County Regional Medical Center ("RCRMC") for complaints of
13 vomiting blood and right-upper-quadrant pain. (AR 227, 229, 232,
14 234, 236-41, 293, 297-99.) A right-upper-quadrant abdominal
15 sonogram revealed fatty infiltrate of the liver and an
16 unremarkable pancreas (AR 322, 326), and an
17 esophagogastroduodenoscopy revealed trace esophageal varices⁴ (AR
18 241-43, 301-02). That same month, an MRI of Plaintiff's left
19 wrist revealed cellulitis. (AR 255-56, 318-19.)

20 In September 2008, Plaintiff complained of chronic low-back
21 pain from an "old disc problem," and the RCRMC doctor noted that
22 Plaintiff had had an L-spine fusion in 2003. (AR 225-26, 284-
23 85.) An x-ray revealed "[l]evoscoliosis with [p]ostsurgical
24

25 ⁴ "Bleeding esophageal varices are very swollen veins in
26 the walls of the lower part of the esophagus (the tube that
27 connects your throat to your stomach) that begin to bleed."
28 MedlinePlus, U.S. Nat'l Library of Med., Nat'l Inst. of Health,
<http://www.nlm.nih.gov/medlineplus/ency/article/000268.htm> (last
visited May 30, 2012). Scarring (or cirrhosis) of the liver is
the most common cause of esophageal varices. Id.

1 changes" and "[d]egenerative disk disease as with lumbar
2 spondylosis."⁵ (AR 320.) In October, Plaintiff complained of
3 right-upper-quadrant abdominal pain; he was noted to have liver
4 disease. (AR 221-24.)

5 On October 22, 2008, Bunsri T. Sophon, M.D., a board-
6 certified orthopaedic surgeon, examined Plaintiff at the Social
7 Security Administration's ("SSA") request. (AR 259-64.)
8 Plaintiff complained of low-back pain and reported a fall injury
9 and lumbar spinal-fusion surgery in 2003. (AR 259.) Dr. Sophon
10 noted that Plaintiff "brought in a cane for ambulation but
11 demonstrated a normal gait without using the cane." (AR 260.)
12 Dr. Sophon noted that Plaintiff "demonstrate[d] non-painful
13 restriction of motion of the lumbosacral spine, and a normal
14 neurological examination"; he diagnosed lumbar disc disease,
15 "status post lumbar spinal fusion." (AR 263.) Dr. Sophon opined
16 that Plaintiff was "capable of lifting and carrying 50 pounds
17 occasionally, 20 pounds frequently" and was "restricted to
18 sitting, standing and walking 6 hours out of an 8-hour workday."
19 (Id.)

20 Later in October 2008, Plaintiff was seen at the RCRMC for
21 _____

22 ⁵ The radiology report also included the following
23 findings:

24 Post laminectomy changes are seen at L2 through L5 with
25 pedicle screws in place. A stimulation device is seen
26 with leads noted posteriorly. Compression deformity of
27 T11 is noted. Degenerative disk disease is seen at the
28 T10-11 through the T12-L1 disk levels. The remaining
vertebral heights are maintained. Levoscoliosis is
noted. Exuberant osteophytic formation is identified.

(AR 320.)

1 complaints of upper abdominal pain. (AR 280-81.) He was noted
2 to have "chostochondritis⁶ vs pancreatitis," hypertension,
3 hepatitis C with history of esophageal varices and liver
4 cirrhosis, psoriatic rash, type II diabetes mellitus, and a
5 history of chronic back pain. (AR 219-20, 280-81.)

6 On November 3, 2008, Dr. R. Jacobs completed a physical
7 residual capacity assessment of Plaintiff at the SSA's request.
8 (AR 266-70.) Dr. Jacobs's diagnoses included "L/S disc disease,"
9 "S/P spinal lumbar fusion," and hepatitis C. (AR 266.) Dr.
10 Jacobs opined that Plaintiff could lift 50 pounds occasionally
11 and 25 pounds frequently, stand and/or walk about six hours in an
12 eight-hour workday, sit for a total of about six hours in an
13 eight-hour workday, and perform unlimited pushing and pulling.
14 (AR 267.) Plaintiff could never climb ladders, ropes, or
15 scaffolds; he could only occasionally climb ramps and stairs; and
16 he was limited to "frequent" reaching in all directions. (AR
17 268.) Plaintiff was unlimited in his ability to balance, stoop,
18 kneel, crouch, crawl, and perform gross or fine manipulation.
19 (Id.) Dr. Jacobs also found that Plaintiff should avoid
20 concentrated exposure to extreme cold or heat, vibration, and
21 hazards. (AR 269.)

22 Later in November 2008, Dr. Yu at RCRMC saw Plaintiff for
23 complaints of upper abdominal pain. (AR 277-78.) Dr. Yu noted
24

25 ⁶ "Costochondritis is an inflammation of a rib or the
26 cartilage connecting a rib." MedlinePlus, U.S. Nat'l Library of
27 Med., Nat'l Inst. of Health, <http://www.nlm.nih.gov/medlineplus/ency/article/000164.htm> (last visited May 30, 2012). It is a
28 common cause of chest pain and usually goes away in a few days or
weeks. Id.

1 that Plaintiff was suffering from "likely chostochondritis but
2 need to rule out pancreatitis," hepatitis C with liver cirrhosis,
3 "hypertension (improved)," and diabetes mellitus "(not on any
4 medication)." (AR 277.) In December, an RCRMC note reflected
5 that Plaintiff suffered from lower-back pain, hepatitis C,
6 diabetes "at goal," and hypertension "at goal." (AR 353.)

7 In January 2009, Dr. D. Rose completed a physical RFC
8 assessment at the SSA's request. (AR 329-33.) Dr. Rose's
9 diagnoses included hepatitis C virus, "status post lumbar fusion"
10 in 2003, diabetes, and hypertension. (AR 329.) Dr. Rose
11 concluded that Plaintiff was capable of lifting 20 pounds
12 occasionally and 10 pounds frequently, standing and/or walking
13 for about six hours in an eight-hour workday, sitting for about
14 six hours in an eight-hour workday, and unlimited pushing and
15 pulling. (AR 330.) Plaintiff could never climb ladders, ropes,
16 or scaffolds but could occasionally climb ramps and stairs,
17 balance, stoop, kneel, crouch, and crawl. (AR 331.) He had no
18 manipulative limitations and could reach in all directions.
19 (Id.) He had to avoid all exposure to hazards, such as machinery
20 and heights, but his exposure to other environmental hazards,
21 such as cold, heat, and vibration, was not limited. (AR 332.)
22 Dr. Rose noted that Dr. Sophon had found that Plaintiff had the
23 RFC to perform "medium" work but "did not accommodate the lumbar
24 fusion" and "did not address [Plaintiff's] liver impairment at
25 all." (AR 333.)

26 In April 2009, Plaintiff went to the RCRMC emergency
27 department complaining of back pain and seeking a medication
28 refill. (AR 356.) He was noted to have chronic low-back pain

1 but normal motor strength, intact senses, and negative straight-
2 leg raising. (AR 357.) In June 2009, an RCRMC note indicated
3 that Plaintiff reported weakness of his lower extremity and used
4 a cane with ambulation, he suffered from chronic low-back pain,
5 his diabetes was at goal, his hepatitis was stable, and his
6 hypertension was controlled. (AR 349-50.)

7 In August 2009, Plaintiff was seen at RCRMC for complaints
8 of back and left-foot pain and was eventually hospitalized for
9 two days for treatment of cellulitis. (AR 342, 362, 365-66, 373-
10 76, 390.) His discharge diagnoses included cellulitis of the
11 left foot, hyperkalemia, hepatitis C, acute renal insufficiency,
12 diabetes mellitus type II, and hypertension. (AR 362.) A Morse
13 Fall Scale performed around that time was zero.⁷ (AR 344, 372.)
14 In September and October, Dr. Yu noted that Plaintiff had chronic
15 lower-back pain, controlled hypertension, hepatitis C and
16 cirrhosis, and diabetes. (AR 408-09, 415.) Dr. Yu referred
17 Plaintiff to the "Spine Clinic" for treatment of his back pain.
18 (Id.) In the October note, Dr. Yu remarked that Plaintiff was
19 ambulating with a cane. (AR 408.) In November, an RCRMC note
20 reflected that Plaintiff walked with a cane and had chronic low-
21 back pain, hypertension controlled with medication, hepatitis C

23 ⁷ The Morse Fall Scale is used to assess how likely it is a
24 person will fall and considers factors such as history of
25 falling, diagnosis, use of ambulatory aide or intravenous line,
26 quality of gait, and mental status. VHA NCPS Fall Prevention and
27 Management, Morse Fall Scale, Dep't of Veterans Affairs, Nat'l
28 Ctr. for Patient Safety, available at <http://www.patientsafety.gov/CogAids/FallPrevention/> (follow "Morse Fall Scale"
hyperlink). A score of 0-24 indicates no risk of falling, a
score of 25-50 indicates a low risk, and a score of 51 or higher
indicates a high risk. Id.

1 with cirrhosis, and diabetes mellitus controlled with medication.
2 (AR 402-03.)

3 At the December 11, 2009 hearing before the ALJ, Plaintiff
4 testified that he could not work because of pain in his back and
5 stomach. (AR 45.) He said he could stand for three to five
6 minutes without using a cane,⁸ sit for 30 minutes without
7 changing position, lift about five to 10 pounds, and "stumble"
8 about 10 feet without his cane. (AR 60-61.) He occasionally
9 used a wheelchair and walker. (AR 58.) Plaintiff said it would
10 take 30 minutes for him to climb a flight of stairs, and he
11 usually spent four to six hours a day lying down. (Id.)
12 Plaintiff testified that he last worked in 1995 or 1996, and he
13 was incarcerated from 1996 to 1998, 2002 to 2004, and 2006 to
14 2008, for convictions of possession of drugs for sale, possession
15 of methamphetamine for sale, and manufacturing methamphetamine.
16 (AR 42-44.)

17 Dr. Landau, the medical expert, testified that Plaintiff
18 "has liver cirrhosis and chronic hepatitis, caused by the
19 hepatitis C virus," degenerative disc disease of the lumbar
20 spine, obesity, type II diabetes mellitus with retinopathy, and
21 "psychiatric diagnoses." (AR 46-47.) Dr. Landau stated that
22 Plaintiff's liver disease was classified as "A," which is
23 considered mild and resulted in a life expectancy of 10 to 20
24 years. (AR 46, 51-52.) Dr. Landau opined that Plaintiff was
25 limited to "standing and walking four hours out of a day" but had
26

27 ⁸ He earlier testified that he could stand for "10, 12, 15
28 minutes," but he did not specify whether he meant without a cane.
(AR 45.)

1 "no limitation to sitting with normal breaks every two hours" and
2 was "mobile without a cane." (AR 47.) Dr. Landau continued:
3 Lifting and carrying would be 10 pounds frequently, 20
4 pounds occasionally. Can occasionally stoop and bend.
5 He can climb stairs, but he can't climb ladders, work at
6 heights, or balance His work environment should
7 be air-conditioned. He cannot operate motorized
8 equipment or work around unprotected machinery.
9 (AR 47-48.) Dr. Landau listed the evidence he relied upon in
10 making those findings. (AR 48-50.)

11 **VI. DISCUSSION**

12 Plaintiff raises four disputed issues: (1) whether the
13 Appeals Council properly considered the evidence he submitted
14 after the ALJ's decision (J. Stip. 3-6, 9-10), (2) whether the
15 ALJ properly discounted his credibility (*id.* at 10-13, 16-17),
16 (3) whether the ALJ's finding that Plaintiff needed a cane to
17 walk but not to stand and his resulting RFC assessment were
18 supported by substantial evidence (*id.* at 18-20, 25-26), and (4)
19 whether the ALJ appropriately accounted for the math and language
20 skills required by the jobs Plaintiff was found capable of
21 performing (*id.* at 26-27, 30-31).

22 **A. New Evidence**

23 **1. Applicable law**

24 When "new and material evidence is submitted" to the Appeals
25 Council relating "to the period on or before the date of the
26 [ALJ's] hearing decision," the Council must consider the
27 additional evidence in determining whether to grant review. See
28 20 C.F.R. § 416.1470(b). When the evidence postdates the ALJ's

1 decision, the Council must still consider it if it is "related
2 to" the period before the ALJ decision. Taylor, 659 F.3d at 1233
3 (treating physician's opinion "concerned his assessment of
4 [claimant's] mental health since his alleged disability onset
5 date" and therefore "related to" period before claimant's
6 disability insurance coverage expired and before ALJ's decision
7 (citing 20 C.F.R. § 404.970(b))).

8 The Appeals Council is not required to make any particular
9 evidentiary finding when rejecting evidence submitted after an
10 adverse administrative decision. Gomez v. Chater, 74 F.3d 967,
11 972 (9th Cir. 1996); see also Taylor, 659 F.3d at 1232. When the
12 Council considers additional evidence but denies review, the
13 additional evidence becomes part of the administrative record for
14 purposes of this Court's analysis. See Harman v. Apfel, 211 F.3d
15 1172, 1179-80 (9th Cir. 2000); Taylor, 659 F.3d at 1232. This
16 Court then engages in an "overall review" of the ALJ's decision,
17 including the new evidence, to determine whether the decision was
18 "supported by substantial evidence" and "free of legal error."⁹
19 Taylor, 659 F.3d at 1232.

20 2. Relevant facts

21 On January 19, 2010, the ALJ issued his decision denying
22

23 ⁹ Contrary to the Commissioner's arguments (J. Stip. at 7-
24 8), this review comes under "sentence four" of 42 U.S.C.
25 § 405(g), not "sentence six." See, e.g., Boucher v. Astrue, No.
26 C09-1520-JCC, 2010 WL 2635078 (W.D. Wash. June 25, 2010).
27 "Sentence six" review considers whether to compel the
28 Commissioner to accept "additional evidence" not previously
"incorporate[d] . . . into the record." § 405(g). Here, the
additional evidence was submitted to the Appeals Council, which
considered it and incorporated it into the administrative record.
(See AR 1-6.)

1 Plaintiff's claim, and soon thereafter Plaintiff retained new
2 counsel and requested review by the Appeals Council. (AR 26-34,
3 13.) On June 1, 2011, nearly 18 months after the ALJ's decision,
4 Plaintiff submitted additional evidence to the Council. (AR 187-
5 92, 420-78.) Specifically, Plaintiff submitted CDC records that
6 included, among other things, a July 2006 physical-disability
7 form stating that Plaintiff had a "mobility impairment" and
8 listing "walker" under a section titled "health care appliance"
9 (AR 421); a July 2007 record stating that Plaintiff "uses cane"
10 (AR 462); a September 2007 record stating that Plaintiff "uses
11 walker" and has a somewhat "slow and stiff" gait (AR 469); and a
12 December 2007 record noting that Plaintiff "uses walker" (AR
13 468).

14 Plaintiff also submitted records from Dr. Yu that postdated
15 the ALJ's January 19, 2010 decision. Specifically, Plaintiff
16 submitted a March 23, 2010 prescription for a four-wheeled walker
17 (AR 472); a June 1, 2010 form titled "Need for Assistive Hand-
18 Held Device for Ambulation" ("Ambulation Form") (AR 478); and a
19 June 1, 2010 "Residual Functional Capacity Questionnaire-Spine"
20 ("RFC Questionnaire") (AR 473-77). In the Ambulation Form, Dr.
21 Yu stated that Plaintiff needed to use a walker for all standing
22 and walking. (AR 478.) In the RFC Questionnaire, Dr. Yu stated
23 that Plaintiff suffered from type II diabetes, hypertension, and
24 lower-back pain because of "T11 compression fracture with
25 decrease of normal lumbar lordosis," but Dr. Yu listed "lower
26 back pain" as the only "symptom" that resulted from those
27 impairments. (AR 473.) Dr. Yu did not list any laboratory or
28 test results that showed Plaintiff's impairments, as requested by

1 the form, but he did state that Plaintiff had reduced range of
2 motion in his hip and shoulder, a positive straight-leg-raising
3 test, abnormal gait, muscle spasm, muscle weakness, and
4 tenderness. (Id.)

5 Dr. Yu opined that Plaintiff could walk a half block without
6 rest or pain, sit continuously for 30 minutes at a time, and
7 stand for five to 10 minutes at a time. (AR 474-75.) Plaintiff
8 needed to walk every 10 minutes in an eight-hour work day, and
9 each period of walking needed to be four minutes long; shift at
10 will from sitting, standing, or walking; and take unscheduled
11 five-to-10-minute breaks every 30 minutes during an eight-hour
12 workday. (AR 475.) Dr. Yu answered "yes" to the question,
13 "While engaging in occasional standing/walking, must your patient
14 use a cane or other assistive device?" (AR 476.) Dr. Yu stated
15 that Plaintiff could "rarely" lift less than 10 pounds and never
16 lift more than that; "rarely" twist or climb stairs;
17 "occasionally" use his upper extremities for reaching, handling,
18 and fingering; and "never" stoop, crouch, or climb ladders.
19 (Id.) Dr. Yu estimated that Plaintiff would miss more than four
20 days of work a month because of his impairments. (AR 477.)

21 On July 8, 2011, the Appeals Council denied review. (AR 1-
22 6.) The Council discussed examining physician Dr. Sophon's
23 findings, including his observation that Plaintiff demonstrated a
24 normal gait without using a cane. (AR 2.) The Council concluded
25 that Dr. Sophon's "specialization and his assessment, which was
26 based observations [sic] and objective findings," "provide[d]
27 substantial evidence to support the [ALJ's] decision and
28 provide[d] a sufficient basis for not adopting the earlier

1 statements that [Plaintiff's] representative pulled from
2 [Plaintiff's] records with the California State Prisons." (Id.)
3 The Council also found that Dr. Yu's March 2010 prescription for
4 a walker and June 2010 assessments were not supported by the
5 "credible evidence of record" and "would not have changed the
6 [ALJ's] analysis or assessment of [Plaintiff's] disability
7 status." (Id.) The Council noted that it had "considered the
8 arguments and updated submissions by [Plaintiff's]
9 representative." (Id.)

10 **3. Analysis**

11 Plaintiff's prison medical records predated the ALJ's
12 decision, and the Appeals Council was therefore required to
13 consider them when deciding whether to grant review. 20 C.F.R.
14 § 416.1470(b); Taylor, 659 F.3d at 1232. The Council did discuss
15 those records but observed that they would not have changed the
16 ALJ's conclusion that Plaintiff was not disabled. (AR 2.)

17 In his decision, the ALJ found that the medical evidence of
18 record at that time showed that Plaintiff "ambulates with a
19 cane," but "no medical evidence indicat[es] the [Plaintiff] is
20 unable to stand without the use of a cane for any period of
21 time":

22 [T]he consultative examiner noted that [Plaintiff]
23 actually demonstrated the ability to walk with a normal
24 gait without an assistive device. There is also evidence
25 [Plaintiff] was hospitalized for a brief two day period
26 because of cellulitis of the left foot. The records
27 indicate that at discharge there was discussion about the
28 use of a wheelchair in the home. These records, however,

1 fail to indicate [Plaintiff] is unable to stand without
2 a cane. In fact, at the same time, [Plaintiff] recorded
3 a total Morse Fall Scale score of zero; indicating there
4 was no need to implement fall prevention protocol.

5 (AR 30 (internal citations and footnotes omitted).) The ALJ also
6 noted that a Morse Fall Scale score of zero "show[ed] [Plaintiff]
7 did not use an ambulatory aid." (AR 30 n.4.) The ALJ then
8 incorporated Plaintiff's use of a cane when walking into the RFC,
9 finding that "he may need to use a cane to walk but not to
10 stand." (AR 29.)

11 The prison medical records do not render the ALJ's finding
12 unsupported by substantial evidence. Those records show only
13 that Plaintiff used or was issued an assistive device – a cane or
14 a walker – but they do not indicate that Plaintiff was unable to
15 stand without using those devices.¹⁰ (AR 421, 462, 468-69.)
16 Because the RFC accounts for Plaintiff's use of an assistive
17 device to walk, the prison medical records do not render the
18 ALJ's decision unsupported by substantial evidence.

19 Dr. Yu's prescription and assessments, meanwhile, postdate
20 the ALJ's decision, and nothing indicates that they relate to the
21 period before the ALJ's decision. Dr. Yu did not attach any of
22 his treatment reports to his assessments, and he left blank the
23

24 ¹⁰ Although Plaintiff points to the July 2006 physical-
25 disability form as proof that he was "prescribed a walker for
26 ambulation" (J. Stip. 4), that form indicates only that Plaintiff
27 had a "mobility impairment – with or without assistive device"
28 and notes that Plaintiff either used or was issued a walker (AR
421). The form does not state that Plaintiff was prescribed a
walker nor does it in any way indicate that Plaintiff required an
assistive device to walk or stand.

1 portion of the RFC questionnaire form that asks for a description
2 of the doctor's "[n]ature, frequency and length of contact" with
3 a patient. (AR 473.) The RCRMC records that were previously
4 submitted to the SSA, however, showed that Dr. Yu treated
5 Plaintiff on only a few occasions, usually for conditions that
6 were unrelated to Plaintiff's back pain. (AR 238-39, 255, 277-
7 79.) Indeed, it appears that Dr. Yu treated Plaintiff's back
8 condition only in September and October 2009, when he noted that
9 Plaintiff suffered from, among other things, "chronic low back
10 pain" and referred him to the spine clinic. (AR 408-09, 415-16.)
11 Dr. Yu apparently did not prescribe a walker or other ambulatory
12 device until March 23, 2010, which may indicate that Plaintiff's
13 condition simply worsened after the ALJ's January 19, 2010
14 decision. (AR 472.) Under such circumstances, the Court cannot
15 conclude that Dr. Yu's assessments related to the period before
16 the ALJ's decision, and thus the Appeals Council was not required
17 to consider them when deciding whether to grant review. See 20
18 C.F.R. § 416.1470(b) ("[T]he Appeals Council shall consider the
19 additional evidence only where it relates to the period on or
20 before the date of the administrative law judge hearing
21 decision."); compare Taylor, 659 F.3d at 1232 (treating doctor's
22 assessment postdated expiration of disability insurance and ALJ
23 decision but "encompassed the period from the date of disability
24 onset . . . until the date of his evaluation," during which time
25 doctor treated plaintiff twice, supervised nurse practitioner who
26 treated plaintiff, and approved nurse practitioner's
27 prescriptions).

28 Even assuming Dr. Yu's assessments pertained to Plaintiff's

1 physical state prior to the ALJ's decision, they did not render
2 the ALJ's decision unsupported by substantial evidence. As the
3 Appeals Council observed, Dr. Sophon found that Plaintiff had a
4 "normal gait" without using a cane, which directly conflicts with
5 Dr. Yu's findings; moreover, all the other doctors found that
6 Plaintiff retained a higher RFC than did Dr. Yu. Because Dr.
7 Yu's opinion is contradicted, it can be rejected for specific and
8 legitimate reasons that are based on the substantial evidence of
9 record. See, e.g., Reddick, 157 F.3d at 725. Such reasons exist
10 here.

11 As the Appeals Council observed, the "credible evidence of
12 record does not support" Dr. Yu's statements and assessments.
13 (AR 2.) Dr. Yu's findings conflicted with those of examining
14 physician Dr. Sophon, consulting physicians Drs. Jacobs and Rose,
15 and testifying physician Dr. Landau, all of whom rendered
16 opinions prior to the ALJ's decision and found that Plaintiff
17 retained a higher functional capacity than that stated by Dr. Yu.
18 (AR 47-48, 259-64, 266-70, 329-33.) And Dr. Yu's own treatment
19 notes never indicated that Plaintiff was as limited as stated in
20 his June 2010 assessments. As discussed above, it appears that
21 Dr. Yu treated Plaintiff for his back pain on only two occasions,
22 and the treatment records from those visits do not reflect any
23 limitations at all. On the check-off RFC assessment form, Dr.
24 Yu's only "objective findings" were limited ranges of motion of
25 the hip and shoulder, positive straight-leg raising, abnormal
26 gait, muscle spasm, muscle weakness, and tenderness; Dr. Yu
27 provided no further explanation for his RFC findings, nor did he
28 identify or attach any laboratory or test results, treatment

1 notes, or other records that would support his RFC assessment, as
2 the form specifically requested. (AR 473.) Dr. Yu's assessments
3 could therefore be rejected because they were inconsistent with
4 the substantial evidence of record and unsupported by his own
5 treatment notes. See Connett v. Barnhart, 340 F.3d 871, 875 (9th
6 Cir. 2003) (treating doctor's opinion properly rejected when
7 treatment notes "provide no basis for the functional restrictions
8 he opined should be imposed on [claimant]"); Valentine v. Comm'r,
9 Soc. Sec. Admin., 574 F.3d 685, 692-93 (9th Cir. 2009)
10 (contradiction between treating physician's opinion and his
11 treatment notes constitutes specific and legitimate reason for
12 rejecting treating physician's opinion); Batson v. Comm'r of Soc.
13 Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004) ("[A]n ALJ may
14 discredit treating physicians' opinions that are conclusory,
15 brief, and unsupported by the record as a whole . . . or by
16 objective medical findings."); Rollins v. Massanari, 261 F.3d
17 853, 856 (9th Cir. 2001) (ALJ permissibly rejected treating
18 physician's opinion when opinion was contradicted by or
19 inconsistent with the treatment reports). Moreover, Dr. Yu's
20 assessments, unlike the other doctors', were rendered after the
21 ALJ issued his decision and are therefore less persuasive. See
22 Macri v. Chater, 93 F.3d 540, 544 (9th Cir. 1996).

23 Also, as the Appeals Council observed (AR 2), Dr. Sophon's
24 assessment of Plaintiff's back condition was entitled to greater
25 weight because he was a board-certified orthopaedic surgeon (AR
26 263). Although Dr. Yu's area of specialization, if any, is
27 unknown, it appears that he did not specialize in orthopaedics
28 because he apparently worked in RCRMC's primary-care clinic and

1 referred Plaintiff to the "spine clinic" for follow-up on his
2 low-back pain. (AR 415.) Thus, Dr. Sophon's opinion was
3 entitled to greater weight than Dr. Yu's. See 20 C.F.R.
4 § 416.927(c)(5) ("We generally give more weight to the opinion of
5 a specialist about medical issues related to his or her area of
6 specialty than to the opinion of a source who is not a
7 specialist."); Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir.
8 1996) (same).

9 The Appeals Council also correctly noted that Dr. Sophon's
10 assessment was "based [on] observations and objective findings"
11 and therefore provided "substantial evidence to support the
12 [ALJ's] decision." (AR 2.) Dr. Sophon examined Plaintiff and
13 found, among other things, that Plaintiff had a normal gait
14 without using his cane; limited range of motion of the thoracic
15 and lumbar spine; normal pulses, sensation, and reflexes; and
16 negative straight-leg raising. (AR 260-62.) Because Dr.
17 Sophon's opinion regarding Plaintiff's limitations resulting from
18 his back condition was supported by independent clinical
19 findings, it constituted substantial evidence that supported the
20 ALJ's decision.¹¹ See Tonapetyan v. Halter, 242 F.3d 1144, 1149
21 (9th Cir. 2001) (examining doctor's opinion constituted
22 substantial evidence supporting the ALJ's findings "because it
23 rests on his own independent examination of [plaintiff]");
24 Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) ("Where
25 the opinion of the claimant's treating physician is contradicted,
26

27 ¹¹ The ALJ took some issue with Dr. Sophon's RFC findings
28 but did not question Dr. Sophon's clinical assessments related to
Plaintiff's back and lower extremities. (AR 31, 32.)

1 and the opinion of a nontreating source is based on independent
2 clinical findings that differ from those of the treating
3 physician, the opinion of the nontreating source may itself be
4 substantial evidence; it is then solely the province of the ALJ
5 to resolve the conflict.").

6 Accordingly, even considering the new evidence, substantial
7 evidence supported the ALJ's determination that Plaintiff was not
8 disabled. Remand is not warranted on this ground.¹²

9 **B. The ALJ's Credibility Determination**

10 The ALJ gave specific reasons to support his finding that
11 Plaintiff's "statements concerning the intensity, persistence and
12 limiting effects of [his] symptoms are not credible to the extent
13 they are inconsistent with" the RFC determination. (AR 31.)
14 Reversal is not warranted based on the ALJ's alleged failure to
15 make proper credibility findings or properly consider Plaintiff's

16
17 ¹² Plaintiff has not presented any reason why he did not
18 proffer the prison medical records, which presumably were
19 available at the time of the hearing, to the ALJ rather than
20 waiting to submit them to the Appeals Council. Nor has he
21 explained why he could not have obtained the assessments from Dr.
22 Yu in a more timely manner. Reviewing administrative records
23 supplemented with information the ALJ did not consider "mire[s]"
24 the federal courts "in an Alice in Wonderland exercise of
25 pretending that evidence the real ALJ didn't know existed was
26 really before him." Angst v. Astrue, 351 F. App'x 227, 229-30
27 (9th Cir. 2009) (Rymer, J., concurring). It also encourages
28 inertia by not penalizing those who, for no reason other than
lack of preparation, do not present their best evidence to the
ALJ. Taylor relies on Ramirez v. Shalala, 8 F.3d 1449, 1451-54
(9th Cir. 1993), for the proposition that review of such evidence
in these circumstances is proper, see 659 F.3d at 1232, but in
fact Ramirez did not decide the issue. See Angst, 351 F. App'x
at 229 (Rymer, J., concurring); Mayes v. Massanari, 276 F.3d 453,
461 n.3 (9th Cir. 2001). Nonetheless, because Taylor holds that
district courts must consider such evidence and review the
"overall record," the Court does so here.

1 subjective symptoms.

2 Although the medical evidence established that Plaintiff had
3 medically determinable physical impairments that were likely to
4 cause him some pain, the existence of some pain does not
5 constitute a disability if it does not prevent a plaintiff from
6 working. See Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)
7 (SSI program is "intended to provide benefits to people who are
8 unable to work; awarding benefits in cases of nondisabling pain
9 would expand the class of recipients far beyond that contemplated
10 by the statute."); Thorn v. Schweiker, 694 F.2d 170, 171 (8th
11 Cir. 1982) ("A showing that [claimant] had a back ailment alone
12 would not support a finding that she was disabled unless the
13 limitations imposed by the back ailment prevented her from
14 engaging in substantial gainful activity.").

15 An ALJ's assessment of pain severity and claimant
16 credibility is entitled to "great weight." See Weetman v.
17 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779
18 F.2d 528, 531 (9th Cir. 1986). When the ALJ finds a claimant's
19 subjective complaints not credible, the ALJ must make specific
20 findings that support the conclusion. See Bunnell v. Sullivan,
21 947 F.2d 341, 345 (9th Cir. 1991) (en banc); Varney v. Sec'y of
22 Health & Human Servs., 846 F.2d 581, 584 (9th Cir. 1988). Absent
23 affirmative evidence of malingering, the ALJ must give "clear and
24 convincing" reasons for rejecting the claimant's testimony.
25 Lester, 81 F.3d at 834. If the ALJ's credibility finding is
26 supported by substantial evidence in the record, the reviewing
27 court "may not engage in second-guessing." Thomas v. Barnhart,
28 278 F.3d 947, 959 (9th Cir. 2002).

1 Here, the ALJ made specific, convincing findings in support
2 of his adverse credibility determination. First, the ALJ
3 observed that Plaintiff's "work history and apparent illegal
4 activity reflects a lack of motivation to work in the open labor
5 market." (AR 30.) Indeed, Plaintiff testified that he last
6 worked in 1995 or 1996, which was at least 13 years before his
7 alleged disability onset date of January 2009. (AR 42, 77.)
8 Plaintiff's earnings record also showed that prior to 1996, he
9 had not earned wages for approximately 10 years.¹³ (AR 142-43.)
10 Since 1996, Plaintiff has served three prison terms for drug
11 offenses, including possession of methamphetamine for sale and
12 manufacturing methamphetamine. (AR 43-44.) Plaintiff's poor
13 work record was a valid reason for finding Plaintiff less
14 credible. See Thomas, 278 F.3d at 959 (credibility diminished
15 when claimant "had an extremely poor work history and has shown
16 little propensity to work in her lifetime" (internal quotation
17 marks omitted)).

18 The ALJ also noted that if Plaintiff's limitations were as
19 significant as he claimed, "one would expect some atrophy in the
20 lower extremities due to disuse" (AR 31), but instead Plaintiff
21 was found to have no evidence of muscle atrophy and grossly
22 normal muscle strength in his lower extremities. (AR 262.) This
23 was also a valid reason for discounting Plaintiff's credibility.
24 See Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999)
25 (credibility of claimant's claim of excruciating pain diminished
26

27 ¹³ Plaintiff's earning record showed \$2677.41 in regular
28 wages in 1996 and \$1430.14 in 1986. (AR 143.) His total
lifetime earnings were \$32,246.17. (AR 142.)

1 when she "did not exhibit muscular atrophy or any other physical
2 signs of an inactive, totally incapacitated individual").¹⁴

3 The ALJ found that Plaintiff's alleged limitations were not
4 fully corroborated by the medical evidence. (AR 30.) As the ALJ
5 observed, no treating source had delineated any functional
6 limitations arising from Plaintiff's liver cirrhosis, hepatitis
7 C, or type II diabetes mellitus. (AR 31.) Indeed, RCRMC notes
8 state that Plaintiff's hepatitis was "stable" (AR 349) and his
9 diabetes was "at goal" or "controlled" with medication (AR 349-
10 50, 353, 403). And as the ALJ observed, at least prior to the
11 date of his decision, no treating source ever found that
12 Plaintiff's back impairment resulted in functional limitations.¹⁵

14 ¹⁴ Plaintiff relies on an out-of-circuit case for the
15 proposition that "lack of atrophy" is "not enough" to support an
16 adverse credibility determination. (J. Stip. 17.) In that case,
17 the ALJ discounted a claimant's allegations of pain because
18 "doctors ha[d] not observed either muscle wasting, muscle atrophy
19 or decreased muscle strength." Miller v. Sullivan, 953 F.2d 417,
20 422 (8th Cir. 1992). The Eighth Circuit found, however, that the
21 ALJ "cannot discount [the claimant's] claim simply because she
22 d[id] not show an effect that other people suffering from
23 disabling pain may show." Id. at 422-23. But in Meanel, which
24 postdates Miller, the Ninth Circuit upheld an ALJ's reliance on
25 lack of atrophy to discredit a claimant's allegations of
26 disabling pain. 172 F.3d at 1114. In any event, even if the
27 ALJ's reliance on that factor was in error, it was harmless in
28 light of his other reasons for discounting Plaintiff's
credibility. See Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d
1155, 1162 (9th Cir. 2008) (if substantial evidence supports
ALJ's credibility determination and error "does not negate the
validity" of it, error is harmless and does not warrant
reversal).

15 Although Dr. Yu's June 2010 RFC Questionnaire states
that Plaintiff is extensively limited by his "lower back pain,"
as discussed in Section A, no evidence exists that Plaintiff had
those limitations when the ALJ issued his decision, and in any
event, Dr. Yu's findings conflict with the substantial evidence

1 (AR 31.) The ALJ noted that Plaintiff had had spinal surgery and
2 suffered from degenerative disc disease of the lumbar spine, but
3 he nevertheless had "a mostly normal physical examination." (AR
4 31.) Specifically, Plaintiff demonstrated "non-painful
5 restriction of motion of the lumbosacral spine, and a normal
6 neurological evaluation"; no tenderness or muscle spasm of the
7 lumbar spine; negative straight-leg raising; normal ranges of
8 motion of the upper and lower extremities; normal pulses; grossly
9 normal motor strength; normal sensation of the upper and lower
10 extremities; and normal reflexes. (AR 259-63.) Plaintiff
11 "brought in a cane for ambulation but demonstrated a normal gait
12 without using the cane," could not walk on his toes, and
13 performed a "25 percent squatting maneuver." (AR 260.) And in
14 August 2009, Plaintiff had a Morse Fall score of zero, indicating
15 no risk of falling. (AR 344, 372.) The ALJ was entitled to rely
16 on a lack of corroborating medical evidence when assessing
17 Plaintiff's credibility. Burch v. Barnhart, 400 F.3d 676, 681
18 (9th Cir. 2005) ("Although lack of medical evidence cannot form
19 the sole basis for discounting pain testimony, it is a factor
20 that the ALJ can consider in his credibility analysis."); see
21 also Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1161
22 (9th Cir. 2008) ("Contradiction with the medical record is a
23 sufficient basis for rejecting the claimant's subjective
24 testimony.").

25 Plaintiff argues that the ALJ committed reversible error
26 when he "failed to consider" the field office's observations of

27 _____
28 of record at the time of the ALJ's decision.

1 Plaintiff. (J. Stip. 13.) But the field office's brief notation
2 that Plaintiff "came in waking [sic] with a cane, had trouble
3 walking" (AR 145) is fully consistent with the evidence that the
4 ALJ discussed and his RFC finding that Plaintiff "may need a cane
5 to walk but not to stand" (AR 29). The ALJ discredited
6 Plaintiff's subjective complaints only "to the extent they [were]
7 inconsistent with the [RFC] assessment." (AR 31.) Because the
8 field office's observations were merely cumulative of the
9 credited evidence and did not conflict with the ALJ's credibility
10 finding, the ALJ was not required to discuss them. See Howard v.
11 Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003) (ALJ need not
12 discuss all evidence but must explain only why "significant,"
13 "probative" evidence has been rejected); Mondragon v. Astrue, 364
14 F. App'x 346, 349 (9th Cir. 2010) (ALJ not required to discuss
15 doctors' specific statements "when their substance was adequately
16 represented by the evidence the ALJ did discuss.").

17 Thus, the ALJ's credibility findings were supported by
18 substantial evidence and were free of legal error. Plaintiff is
19 not entitled to remand on this ground.

20 C. The ALJ's RFC Assessment

21 Plaintiff argues that the ALJ's finding that Plaintiff
22 required a cane for walking but not standing was unsupported by
23 substantial evidence and thus that the RFC determination was
24 erroneous. (J. Stip. 18-20.) Plaintiff also contends that the
25 ALJ "reach[ed] his conclusion that [Plaintiff] is not disabled
26 first and then concoct[ed] a [RFC] that is consistent with his
27 conclusion." (Id. at 18.) Plaintiff bases his argument on the
28 fact that the ALJ "posed a hypothetical that did not result in

1 jobs" and then "changed the hypothetical to not include a cane,"
2 which resulted in jobs. (Id.)

3 **1. Applicable law**

4 At step five of the five-step process, the Commissioner has
5 the burden to demonstrate that the claimant can perform some work
6 that exists in "significant numbers" in the national economy,
7 taking into account the claimant's RFC, age, education, and work
8 experience. Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir.
9 1999); 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1560(c). The
10 Commissioner may satisfy that burden either through the testimony
11 of a vocational expert or by reference to the Medical-Vocational
12 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix
13 2. Tackett, 180 F.3d at 1100-01.

14 **2. Relevant facts**

15 At the hearing, the ALJ asked the VE if she could identify
16 jobs that could be performed by a person whose limitations
17 included, among other things, that he "has to be able to use the
18 cane while he's on his feet as needed." (AR 71-72.) The VE
19 responded,

20 No, I can't, and that would be because of the need to use
21 a cane while standing, and standing is only half a day.
22 The types of work that would be available with this
23 hypothetical would be jobs that would require bimanual
24 dexterity, such as garment sorter, assembly, packaging
25 electronics. They would all require bimanual dexterity.
26 (AR 72.) The ALJ then questioned Plaintiff's counsel:

27 Q: . . . Counsel, tell me, in the record, is there
28 indications of the use of a cane?

1 ATTY: I didn't see that he was, I didn't see any doctor
2 say in the record that the use of the cane was mandated,
3 just that he uses it.

4 ALJ: Okay. No indication for a prescription in the
5 record. But, there was an observation that he used the
6 cane?

7 ATTY: I think that was at the consultative exam.

8 ALJ: I thought, oh, I see. But, the doctor there
9 concluded there that there's no need for the use of a
10 cane?

11 ATTY: Right.

12 (AR 73.) Later, the ALJ again questioned the VE:

13 Q: You said if there was no requirement to use a cane,
14 there would be some unskilled jobs in the light range?

15 A: Yes, there would be light, unskilled work. Examples
16 would be garment sorter, [A]nd then, electronics
17 worker And, there would be others.

18 (AR 78.) The VE clarified that those jobs could be performed if
19 the individual needed a cane to walk but could not be performed
20 if he needed a cane to stand up. (AR 78-81.)

21 3. Analysis

22 As discussed in Section A.3 above, the ALJ fully explained
23 his finding that Plaintiff required a cane to walk but not to
24 stand. Specifically, the ALJ correctly noted that there was "no
25 medical evidence indicating the [Plaintiff] is unable to stand
26 without the use of a cane for any period of time," even though
27 Plaintiff at least sometimes apparently used a cane to walk. (AR
28 30.) Indeed, at the hearing, Plaintiff's counsel confirmed that

1 he "didn't see any doctor say in the record that the use of a
2 cane was mandated, just that he uses it." (AR 73.) In fact, one
3 doctor found that Plaintiff was able to walk normally without the
4 use of a cane (AR 260), and no doctor opined that Plaintiff
5 required the use of an assistive device to stand or walk until
6 June 2010, nearly five months after the ALJ's decision (AR 478).

7 The evidence Plaintiff cites is not inconsistent with the
8 ALJ's finding that Plaintiff needed a cane to walk but not to
9 stand. Rather, those records indicate only that Plaintiff had
10 various physical symptoms and used a cane for ambulation, which
11 are limitations that the ALJ appropriately integrated into the
12 RFC determination. (See AR 350 (weakness of lower extremity,
13 uses cane with ambulation), 357 (chronic low-back pain with
14 normal motor strength, sensory intact, negative straight-leg
15 raising), 374 (pain, edema, decreased sensation of left lower
16 extremity),¹⁶ 402 (walks with cane), 408 (ambulating with cane).)

17 Plaintiff's argument that the ALJ first concluded that
18 Plaintiff was not disabled and then "concoct[ed]" an RFC to
19 support that finding is unpersuasive. In support of his claim,
20 Plaintiff cites Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir.
21 1984), but in that case the Ninth Circuit found that an ALJ could
22 not "reach a conclusion first, and then attempt to justify it by
23 ignoring competent evidence in the record that suggests an
24 opposite result." As discussed above, evidence suggesting an
25

26
27 ¹⁶ This record was created while Plaintiff was hospitalized
28 for treatment of cellulitis of the left foot, which presumably
accounted for at least some of the symptoms of his left lower
extremity. (See AR 362.)

1 opposite result does not exist here. Neither does the ALJ's
2 clarification of the hypothetical at the hearing indicate that he
3 was manipulating the record to support a finding that Plaintiff
4 was not disabled. The ALJ first included a hypothetical
5 limitation that Plaintiff used a cane "while he's on his feet as
6 needed"; then, based in part on Plaintiff's own attorney's
7 representation that no doctor had opined that Plaintiff required
8 a cane, the ALJ asked the VE to list jobs that Plaintiff could
9 perform if using a cane was not required. (AR 72-73, 78.) In
10 response, the VE provided two jobs that could be performed if
11 Plaintiff did not need a cane to stand up. (AR 78-81.) As
12 previously discussed, in his decision the ALJ fully discussed his
13 finding that Plaintiff required a cane to walk but not stand.
14 (AR 30-31.) Thus, the ALJ engaged in no wrongdoing here.

15 Plaintiff is not entitled to remand on this ground.

16 **D. The Vocational Evidence**

17 Plaintiff argues that "the VE and ALJ failed to account for
18 the reasoning, math and language skills required" when finding
19 that Plaintiff could perform the positions of garment sorter and
20 electronics worker. (J. Stip. 26-27.) Plaintiff contends that
21 those requirements exceed his intellectual abilities.

22 **1. Relevant facts**

23 After Plaintiff testified that he had a ninth-grade
24 education, the ALJ specifically questioned Plaintiff about his
25 language and math skills:

26 Q: Did you learn how to read and write okay?

27 A: Not very well.

28 Q: Just short, simple, English words?

1 A: Simple, you know.

2 Q: And you can do adding and subtracting okay?

3 A: Yeah, a little bit.

4 (AR 42-43.) When the ALJ later asked Plaintiff if he could read
5 the newspaper, Plaintiff said he could read "[s]mall words" but
6 "can't sound things out" and has "a real rough time," which was
7 why he quit high school. (AR 59.)

8 Later, in his hypothetical to the VE, the ALJ posed the
9 following limitations with regard to language and math skills:

10 [L]et's suppose someone has a ninth grade education.
11 They're not illiterate, but have very limited abilities
12 to read and write and do simple math. Reading and
13 writing would be limited to short, simple words.

14 (AR 71.) In response, the VE testified that Plaintiff could
15 perform the jobs of garment sorter, which carries the Dictionary
16 of Occupational Titles ("DOT") number of 222.687-014, and
17 electronics worker, which carries the DOT number of 726.687-010.
18 (AR 78.)

19 In his decision, the ALJ found that Plaintiff had the RFC to
20 perform less than a full range of light work with certain
21 specified limitations. (AR 29.) The ALJ also found that
22 Plaintiff had a "limited education" and was able to communicate
23 in English. (AR 29, 32.) The ALJ then concluded that
24 "[c]onsidering the [Plaintiff's] age, education, work experience,
25 and [RFC], there are jobs that exist in significant numbers in
26 the national economy that [he] can perform." (AR 33.) In so
27 finding, the ALJ specifically relied on the VE's testimony that
28 Plaintiff could perform the positions of garment sorter and

1 electronics worker. (Id.)

2 **2. Analysis**

3 All jobs listed in the DOT have general education
4 development ("GED") levels, which address "aspects of education
5 (formal and informal) which are required of the worker for
6 satisfactory job performance." See DOT, app. C – Components of
7 the Definition Trailer, 1991 WL 688702. There are GED levels for
8 language and mathematical development, which are indicated on a
9 scale of one to six, with six being the most advanced. Id.
10 According to the DOT, the garment-sorter job requires level-two
11 mathematical development, whereas the electronics-worker job
12 requires level-two language development.¹⁷ DOT 222.687-014, 1991
13 WL 672131; DOT 726.687-010, 1991 WL 679633. Plaintiff argues
14 that those GED levels are inconsistent with the ALJ's
15 hypothetical limitations to "simple math" and "short, simple
16 words." (J. Stip. 26-27.)

17 Contrary to Plaintiff's argument, no evidence exists that
18 the ALJ's reference to "simple math" indicated that Plaintiff did
19 not meet the level-two mathematical development required to
20 perform the job of garment sorter. The DOT defines level-two
21 mathematical development as the ability to

22 [a]dd, subtract, multiply, and divide all units of
23 measure. Perform the four operations with like common
24 and decimal fractions. Compute ratio, rate, and percent.
25

26 ¹⁷ The garment-sorter job requires level-one language
27 development and the electronics-worker job requires level-one
28 mathematical development. DOT 222.687-014, 1991 WL 672131; DOT
726.687-010, 1991 WL 679633.

1 Draw and interpret bar graphs. Perform arithmetic
2 operations involving all American monetary units.¹⁸
3 DOT, app. C – Components of the Definition Trailer, 1991 WL
4 688702. The DOT also indicates that the “numerical aptitude”
5 required for the garment-sorter job is “Level 5 - Bottom 10% of
6 the Population,” which is a “Markedly Low Aptitude Ability.” DOT
7 222.687-014, 1991 WL 672131.¹⁹ The only evidence that Plaintiff
8 may have had limited math abilities was his own testimony that he
9 had a ninth-grade education, could add and subtract “okay,” and
10 did not do well in school. (AR 42-43, 59.) Plaintiff never
11 claimed that he was unable to add or subtract or that he was
12 limited in his ability to perform other mathematical tasks, such
13 as multiplying and dividing. (AR 43.) Thus, nothing in the
14 record indicates that Plaintiff did not meet the criteria for
15

16 ¹⁸ Level-three mathematical development, by contrast,
17 requires the ability to

18 [c]ompute discount, interest, profit, and loss;
19 commission, markup, and selling price; ratio and
20 proportion; and percentage. Calculate surfaces, volumes,
weights, and measures.

21 Algebra: Calculate variables and formulas; monomials and
22 polynomials; ratio and proportional variables; and square
roots and radicals.

23 Geometry: Calculate plane and solid figures,
24 circumference, area, and volume. Understand kinds of
angles and properties of pairs of angles.

25 DOT, app. C – Components of the Definition Trailer, 1991 WL
26 688702.

27 ¹⁹ Plaintiff incorrectly claims that the aptitude ability
28 percentages “are not found in the DOT books.” (J. Stip. 30.)
See DOT 222.687-014, 1991 WL 672131.

1 level-two math development.

2 Moreover, the ALJ appropriately accounted for the fact that
3 Plaintiff stopped attending school after the ninth grade by
4 finding that he had a "limited education." (AR 32); see 20
5 C.F.R. 416.964(b)(3) ("We generally consider that a 7th grade
6 through the 11th grade level of formal education is a limited
7 education."). "Limited education" indicates "ability in
8 reasoning, arithmetic, and language skills, but not enough to
9 allow a person with these educational qualifications to do most
10 of the more complex job duties needed in semi-skilled or skilled
11 jobs." Id. Such a finding therefore indicates that Plaintiff
12 was in fact capable of performing the unskilled job of garment
13 sorter. See DOT 222.687-014, 1991 WL 672131 (garment worker
14 requires specific vocational preparation ("SVP") of 2); SSR
15 00-4p, 2000 WL 1898704, at *3 ("unskilled work corresponds to an
16 SVP of 1-2" in DOT).

17 On the other hand, the ALJ's limitation to "short, simple
18 words" may have been inconsistent with the level-two language
19 development required by the electronics-worker job. The DOT
20 defines level-two language development as requiring the
21 following:

22 READING: Passive vocabulary of 5,000-6,000 words. Read
23 at rate of 190-215 words per minute. Read adventure
24 stories and comic books, looking up unfamiliar words in
25 dictionary for meaning, spelling, and pronunciation.
26 Read instructions for assembling model cars and
27 airplanes.

28 WRITING: Write compound and complex sentences, using

1 cursive style, proper end punctuation, and employing
2 adjectives and adverbs.

3 SPEAKING: Speak clearly and distinctly with appropriate
4 pauses and emphasis, correct punctuation, variations in
5 word order, using present, perfect, and future tenses.

6 DOT, app. C – Components of the Definition Trailer, 1991 WL
7 688702. Level-one language development, by contrast, requires
8 substantially fewer skills:

9 READING: Recognize the meaning of 2,500 (two- or three-
10 syllable) words. Read at rate of 95-120 words per
11 minute. Compare similarities and differences between
12 words and between series of numbers.

13 WRITING: Print simple sentences containing subject, verb,
14 and object, and series of numbers, names, and addresses.

15 SPEAKING: Speak simple sentences, using normal word
16 order, and present and past tenses.

17 Id. Plaintiff's testimony that he could read only "short, simple
18 words," which the ALJ apparently relied upon in formulating his
19 hypothetical, appears to be more consistent with level-one
20 language development than level two.

21 Any error in the ALJ's finding that Plaintiff could perform
22 the electronics-worker job was harmless, however, because the
23 finding that Plaintiff could perform the garment-sorter position
24 was supported by substantial evidence and free of legal error.

25 See Carmickle, 533 F.3d at 1162 (harmless-error rule applies to
26 review of administrative decisions regarding disability); see
27 also Gallo v. Comm'r of Soc. Sec. Admin., 449 F. App'x 648, 650
28 (9th Cir. 2011) ("Because the ALJ satisfied his burden at Step 5

1 by relying on the VE's testimony about the Addresser job, any
2 error that the ALJ may have committed by relying on the testimony
3 about the 'credit checker' job was harmless" (citing Carmickle,
4 533 F.3d at 1162)). The VE testified that there were "more than
5 1,000" garment-sorter positions in the region and "more than
6 20,000 nationally." (AR 78.) This appears to be a "significant
7 number" of jobs sufficient to uphold the ALJ's decision. See
8 Thomas, 278 F.3d at 960 (1300 jobs in state sufficient); Meanel,
9 172 F.3d at 1115 (between 1000 and 1500 jobs in local area
10 sufficient); Moncada v. Chater, 60 F.3d 521, 524 (9th Cir. 1995)
11 (2300 jobs in county and 64,000 nationwide sufficient); Barker v.
12 Sec'y of Health & Human Servs., 882 F.2d 1474, 1479 (9th Cir.
13 1989) (1266 jobs regionally sufficient); compare Beltran v.
14 Astrue, 676 F.3d 1203, 1207 (9th Cir. 2012) (135 jobs regionally
15 and 1680 jobs nationally insufficient, but noting that "[w]e need
16 not decide what the floor for a 'significant number' of jobs is
17 in order to reach this conclusion").

18 Plaintiff is not entitled to remand on this ground.
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1 **VII. CONCLUSION**

2 Consistent with the foregoing, and pursuant to sentence four
3 of 42 U.S.C. § 405(g),²⁰ IT IS ORDERED that judgment be entered
4 AFFIRMING the decision of the Commissioner and dismissing this
5 action with prejudice. IT IS FURTHER ORDERED that the Clerk
6 serve copies of this Order and the Judgment on counsel for both
7 parties.

8
9 DATED: June 12, 2012



JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

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26 _____
27 ²⁰ This sentence provides: "The [district] court shall have
28 power to enter, upon the pleadings and transcript of the record,
a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."