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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IGNACIO RODRIGUEZ,	)	Case No. EDCV 12-0416 RNB
Plaintiff,	)	
vs.	)	ORDER AFFIRMING DECISION OF
	)	COMMISSIONER
CAROLYN W. COLVIN, Acting	)	
Commissioner of Social	)	
Security, <sup>1</sup>	)	
Defendant.	)	

Plaintiff filed a Complaint herein on March 28, 2012, seeking review of the Commissioner’s denial of his application for disability insurance and Supplemental Security Income benefits. In accordance with the Court’s Case Management Order, the parties filed a Joint Stipulation on March 4, 2013. Thus, this matter now is ready for decision.<sup>2</sup>

<sup>1</sup> The Acting Commissioner is hereby substituted as the defendant pursuant to Fed. R. Civ. P. 25(d). No further action is needed to continue this case by reason of the last sentence of 42 U.S.C. § 405(g).

<sup>2</sup> As the Court advised the parties in its Case Management Order, the decision in this case is being made on the basis of the pleadings, the administrative

1 **DISPUTED ISSUES**

2 As reflected in the Joint Stipulation, the disputed issues that plaintiff is raising  
3 as the grounds for reversal and remand are as follows:

- 4 1. Whether the Administrative Law Judge (“ALJ”) properly  
5 considered all of the relevant medical evidence.  
6 2. Whether the ALJ made proper adverse credibility  
7 determinations with respect to plaintiff and his daughter.  
8 3. Whether the ALJ made a proper vocational determination  
9 at step five of the Commissioner’s sequential evaluation process.  
10

11 **DISCUSSION**

12 Preliminary, the Court will address the Commissioner’s contention that, since  
13 there was a previous unfavorable decision by ALJ Wurzel in April 2004, the current  
14 case, adjudicated by ALJ Walters, is governed by Chavez v. Bowen, 844 F.2d 691  
15 (9th Cir. 1988). (See Jt Stip at 10-12.) In Chavez, 844 F.2d at 693, the Ninth Circuit  
16 held that principles of res judicata apply to previous administrative decisions  
17 regarding disability and impose an obligation on the claimant to come forward with  
18 new and material evidence of changed circumstances in order to overcome the  
19 presumption of continuing non-disability. Moreover, the previous ALJ’s findings  
20 concerning residual functional capacity (“RFC”), education, and work experience are  
21 entitled to some preclusive effect, and such findings cannot be reconsidered by a  
22 subsequent ALJ absent new information not presented to the first ALJ. See Stubbs-  
23 Danielson v. Astrue, 539 F.3d 1169, 1173 (9th Cir. 2008) (citing Chavez, 844 F.2d  
24 at 694).

25 \_\_\_\_\_  
26 record (“AR”), and the Joint Stipulation (“Jt Stip”) filed by the parties. In accordance  
27 with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined  
28 which party is entitled to judgment under the standards set forth in 42 U.S.C. §  
405(g).

1 Here, the Commissioner contends that a preclusive effect attaches to ALJ  
2 Wurzel’s (1) determination of non-disability and (2) determination that plaintiff had  
3 an RFC for light work without any mental limitations. (See Jt Stip at 10-12.)  
4 However, the record reflects that ALJ Walters subsequently determined that plaintiff  
5 had in fact “established a changed circumstance with new impairments” (albeit a  
6 change that was “not substantial”). (See AR 17.) Moreover, ALJ Walters considered  
7 new medical information that was not presented to ALJ Wurzel in determining  
8 plaintiff’s RFC and concluded that plaintiff’s “residual functional capacity has  
9 somewhat changed due to the resolution of some impairments and the symptoms of  
10 new impairments.” (See AR 19.) Accordingly, the Court finds that ALJ Walters  
11 implicitly concluded that plaintiff had overcome the presumption of continuing non-  
12 disability and that reconsideration of plaintiff’s RFC was not barred by ALJ Wurzel’s  
13 decision.

14 The Court therefore will now turn to the three disputed issues raised by  
15 plaintiff.

16  
17 **A. Reversal is not warranted based on the ALJ’s alleged failure to properly**  
18 **consider the relevant medical evidence (Disputed Issue No 1).**

19 Disputed Issue No. 1 is directed to the alleged failure by ALJ Walters (“ALJ”)  
20 to properly consider the relevant medical evidence. (See Jt Stip at 4-9.) Plaintiff  
21 contends that the ALJ improperly credited the opinion of the state agency physician,  
22 Dr. Ombres, because she is only an ophthalmologist. (See Jt Stip at 4-6.) Plaintiff  
23 also contends that the ALJ improperly rejected the opinion of his treating physician,  
24 Dr. Evans, who diagnosed plaintiff with fibromyalgia. (See Jt Stip at 7.) Finally,  
25 plaintiff contends that the ALJ improperly rejected the opinions of his treating  
26 physicians – Drs. Havert, Seehrai, Alfonso, and Evans – with respect to his mental  
27 impairment. (See Jt Stip at 8-9.)

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1 The Court rejects each of plaintiff's contentions. First, the fact that Dr. Ombres  
2 is an ophthalmologist did not disqualify her from rendering an opinion as to  
3 plaintiff's physical abilities. In any event, Dr. Ombres's opinion was consistent with  
4 the findings and opinions of an examining orthopedist and another state agency  
5 physician (see AR 472, 474-79, 497-98, 500), upon whose opinions the ALJ based  
6 his determination of non-disability. See Thomas v. Barnhart, 278 F.3d 947, 957 (9th  
7 Cir. 2002) ("The opinions of non-treating or non-examining physicians may also  
8 serve as substantial evidence when the opinions are consistent with independent  
9 clinical findings or other evidence in the record.")

10 Second, the ALJ properly rejected Dr. Evans's diagnosis of fibromyalgia  
11 because the record revealed no basis for that diagnosis. (See AR 14.) Specifically,  
12 no other treating or examining physician diagnosed fibromyalgia or noted positive  
13 trigger points and other symptoms and associated them with fibromyalgia. Moreover,  
14 the ALJ noted that Dr. Evans did not submit longitudinal treatment records showing  
15 regular and consistent clinical findings of fibromyalgia. See Anderson v.  
16 Commissioner of Social Sec. Admin., 2013 WL 440703, at \*6 (C.D. Cal. Feb. 5,  
17 2013) (ALJ permissibly rejected fibromyalgia diagnosis where physician made no  
18 specific findings of tender points on a 21 point evaluation); Social Security Ruling  
19 12-2p at \*2-\*3 (ALJ cannot rely on a physician's fibromyalgia diagnosis alone, but  
20 the medical evidence must meet specific diagnostic criteria, and the physician's  
21 diagnosis cannot be inconsistent with the other evidence in the case record).

22 Third, the Court finds that the ALJ properly considered the opinions of  
23 plaintiff's treating physicians with respect to his complaints of depression. With  
24 respect to Dr. Havert and Dr. Seehrai, the record indicates that they treated plaintiff  
25 primarily from 2002 to 2004 (see AR 366-69), the period of ALJ Wurzel's decision,  
26 which has not been reopened (see AR 10). With respect to Dr. Alfonso, she proffered  
27 no opinion as to any limitations in mental functioning that plaintiff might have;  
28 rather, Dr. Alfonso diagnosed plaintiff with a major depressive disorder (see AR 440),

1 an impairment that the ALJ found plaintiff to have (see AR 13). With respect to Dr.  
2 Evans, who opined that plaintiff’s mental limitations effectively rendered him  
3 disabled (see AR 534-37), the ALJ rejected the opinion for multiple reasons, one of  
4 which was that the opinion was brief and conclusory (see AR 22). The Court finds  
5 that this constituted a legally sufficient reason for not crediting Dr. Evans’s opinion.  
6 See Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) (“The ALJ need not  
7 accept the opinion of any physician, including a treating physician, if that opinion is  
8 brief, conclusory, and inadequately supported by clinical findings.”)

9 The Court therefore finds and concludes that reversal is not warranted based  
10 on the ALJ’s alleged failure to properly consider the relevant medical evidence.

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12 **B. Reversal is not warranted based on the ALJ’s alleged failure to make**  
13 **proper adverse credibility determinations with respect to plaintiff and his**  
14 **daughter (Disputed Issue No. 2).**

15 Disputed Issue No. 2 is directed to the ALJ’s adverse credibility determinations  
16 with respect to plaintiff and his daughter. (See Jt Stip at 24-30.)

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18 1. Plaintiff’s testimony

19 An ALJ’s assessment of pain severity and claimant credibility is entitled to  
20 “great weight.” Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v.  
21 Heckler, 779 F.2d 528, 531 (9th Cir. 1986). Under the “Cotton test,” where the  
22 claimant has produced objective medical evidence of an impairment which could  
23 reasonably be expected to produce some degree of pain and/or other symptoms, and  
24 the record is devoid of any affirmative evidence of malingering, the ALJ may reject  
25 the claimant’s testimony regarding the severity of the claimant’s pain and/or other  
26 symptoms only if the ALJ makes specific findings stating clear and convincing  
27 reasons for doing so. See Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see  
28 also Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12

1 F.3d 915, 918 (9th Cir. 1993); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991)  
2 (en banc).

3 Here, plaintiff testified that he could not work because of pain in his lower  
4 back and legs and because of depression. (See AR 57-59.) The ALJ determined that  
5 although plaintiff's medically determinable impairments could reasonably be  
6 expected to cause the alleged symptoms, plaintiff's symptoms concerning the  
7 intensity, persistence, and limiting effects of these symptoms were not credible to the  
8 extent they were inconsistent with the ALJ's assessment of plaintiff's RFC. (See AR  
9 23-24.)

10 In support of this adverse credibility determination, the ALJ proffered multiple  
11 reasons. For example, the ALJ noted that the objective medical evidence did not  
12 support plaintiff's assertions of disabling pain: in particular, the examining  
13 orthopedist opined that it was difficult to quantify the positive findings on  
14 examination because of plaintiff's "voluntary guarding," and the examining  
15 psychiatrist opined that there was no objective evidence of depression or anxiety.  
16 (See AR 24; see also AR 468-72, 480-85.) The ALJ similarly noted that the treatment  
17 record failed to show evidence of long-term, intractable pain and disuse, such as  
18 muscle atrophy or significant neurological dysfunction, and that entries in the record  
19 indicated that plaintiff was not in distress. (See AR 24; see also AR 423, 504, 506.)  
20 The Court finds that these constituted legally sufficient reasons on which the ALJ  
21 could properly rely in support of his adverse credibility determination. See Chaudhry  
22 v. Astrue, 688 F.3d 661, 672 (9th Cir. 2012) (ALJ may properly rely on lack of  
23 objective support for complaints of depression); Morgan, 169 F.3d at 600 (ALJ may  
24 properly consider conflict between claimant's testimony of subjective complaints and  
25 objective medical evidence in the record); Tidwell v. Apfel, 161 F.3d 599, 602 (9th  
26 Cir. 1998) (ALJ may properly rely on weak objective support for the claimant's  
27 subjective complaints); Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995) (ALJ may  
28 properly rely on lack of objective evidence to support claimant's subjective

1 complaints); Nyman, 779 F.2d at 531 (noting that “a claimant’s self-serving  
2 statements may be disregarded to the extent they are unsupported by objective  
3 findings”).

4 The ALJ also noted that, although plaintiff testified that he had medication side  
5 effects consisting of dizziness, nausea, irritability, and blurred vision (see AR 60-61),  
6 the record did not indicate that he had regularly and consistently reported any side  
7 effects (see AR 24; see also AR 438, 441, 443, 444). The Court finds that this  
8 constituted a legally sufficient reason on which the ALJ could properly rely in  
9 support of his adverse credibility determination. See Thomas, 278 F.3d at 960 (ALJ  
10 properly used ordinary techniques of credibility evaluation to reject claimant’s  
11 testimony that pain medication caused dizziness and difficulties in concentration);  
12 Orteza, 50 F.3d at 750 (ALJ may point to lack of evidence of side effects from  
13 prescribed medications to support adverse credibility determination); see also Fair v.  
14 Bowen, 885 F.2d 597, 604 n.5 (9th Cir. 1989) (ordinary techniques of credibility  
15 evaluation apply in social security cases).

16 The ALJ also noted that plaintiff made inconsistent statements about his  
17 physical and mental symptoms. (See AR 25.) Specifically, the ALJ noted that (1)  
18 although plaintiff reported depression but denied visual or auditory hallucinations to  
19 the examining psychiatrist (see AR 418), he testified that he was anxious, had  
20 memory problems, forgot the names of family members, and heard voices (see AR  
21 65-66); (2) the examining orthopedist noted that plaintiff “does not give a very  
22 coherent history” (see AR 468); and (3) although plaintiff reported pain in every  
23 location in his body to the examining orthopedist (see AR 468), he testified only as  
24 to back pain that radiated to his lower extremities (see AR 57) and did not discuss  
25 pain in other areas of his body until questioned by his attorney (see AR 75). The  
26 Court finds that this constituted a legally sufficient reason on which the ALJ could  
27 properly rely in support of his adverse credibility determination. See Tommasetti v.  
28 Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008) (ALJ properly considered evidence that

1 claimant was a “vague witness” who “was not clear or certain insofar as his self-  
2 assessed work capabilities” and not “a precise judge of his own capacities”).

3 The ALJ also noted that plaintiff’s complaints that he was disabled and unable  
4 to work were inconsistent with his stated daily activities, such as household chores,  
5 cooking easy foods, dressing and bathing, occasional driving, and attending swap  
6 meets. (See AR 25; see also AR 482.) Moreover, the ALJ clarified that although  
7 such activities might not have necessarily translated to work-related activity, the  
8 inconsistency in plaintiff’s statements militated against fully accepting his claims.  
9 (See AR 25.) The Court finds that this constituted a legally sufficient reason on  
10 which the ALJ could properly rely in support of his adverse credibility determination.  
11 See Orn v. Astrue, 495 F.3d 625, 639 (9th Cir. 2007) (daily activities may form basis  
12 for adverse credibility determination where activities contradict claimant’s other  
13 testimony, independent of whether activities meet threshold for transferable work  
14 skills); Smolen, 80 F.3d at 1283-84 (ALJ may consider claimant’s inconsistent  
15 statements in evaluating credibility).

16 The ALJ also noted that plaintiff appeared to have “worked off the books” by  
17 selling items at a swap meet for approximately 2 years without reporting the income,  
18 thereby calling into question the reliability of plaintiff’s testimony. (See AR 25-26;  
19 see also AR 169, 482.) The Court finds that this constituted a legally sufficient  
20 reason on which the ALJ could properly rely in support of his adverse credibility  
21 determination. See Smolen, 80 F.3d at 1284 (ordinary techniques of credibility  
22 determination include consideration of claimant’s reputation for lying); Gallant v.  
23 Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984) (ALJ may draw inferences logically  
24 flowing from the evidence).

25 The Court therefore finds and concludes that reversal is not warranted based  
26 on the ALJ’s alleged failure to make a proper adverse credibility determination with  
27 respect to plaintiff.

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1           2.     Lay witness testimony

2           The law is well-established in this Circuit that lay witness testimony as to how  
3 a claimant's symptoms affect the claimant's ability to work is competent evidence and  
4 cannot be disregarded without providing specific reasons germane to the testimony  
5 rejected. See, e.g., Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996); Smolen,  
6 80 F.3d at 1288-89; Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993).

7           Plaintiff's daughter, Ms. Rodriguez, completed a Third Party Function Report  
8 stating that plaintiff was unable to concentrate due to severe pain in his bones, joints,  
9 and lower back; that plaintiff did light household chores such as laundry, making  
10 beds, fixing things, and cleaning up; that plaintiff was unable to move or lift large or  
11 heavy things; that plaintiff could not really do anything due to his pain symptoms and  
12 medications; and that plaintiff had difficulty with all physical and mental abilities  
13 except for reaching and hearing. (See AR 217-24.) The ALJ did not fully accept Ms.  
14 Rodriguez's assertions. (See AR 26.)

15           In support of this adverse credibility determination, the ALJ proffered multiple  
16 reasons. For example, the ALJ noted that Ms. Rodriguez appeared to lack personal  
17 knowledge of at least some of the claims presented, exemplified by the inconsistency  
18 between Ms. Rodriguez's report of no problems with reaching (see AR 222)  
19 compared to plaintiff's allegation of impairment in his shoulders (see AR 26; see also  
20 AR 214, 470, 472). The Court finds that this was a legally sufficient reason not to  
21 fully accept Ms. Rodriguez's statements. See Lewis v. Apfel, 236 F.3d 503, 512 (9th  
22 Cir. 2001) (ALJ properly rejected mother's testimony where she testified that  
23 claimant slept through the night where claimant alleged insomnia).

24           The ALJ also noted that Ms. Rodriguez's statements failed to overcome the  
25 probative effect of the medical evidence in this case, as summarized in the ALJ's  
26 decision. (See AR 26.) The Court finds that this was a legally sufficient reason not  
27 to fully accept Ms. Rodriguez's statements. See Bayliss v. Barnhart, 427 F.3d 1211,  
28 1218 (9th Cir. 2005) (ALJ may discredit lay testimony that is inconsistent with

1 medical evidence).<sup>3</sup>

2 The Court therefore finds and concludes that reversal is not warranted based  
3 on the ALJ's alleged failure to make a proper adverse credibility determination with  
4 respect to plaintiff's daughter.

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6 **C. Reversal is not warranted based on the ALJ's alleged failure to make a**  
7 **proper vocational determination (Disputed Issue No. 3).**

8 Disputed Issue No.3 is directed to the ALJ's determination at step five of the  
9 Commissioner's sequential evaluation process, based on the testimony of a vocational  
10 expert ("VE"), that a person with plaintiff's RFC could perform the jobs of bench  
11 assembler, inspector, and product filler. (See Jt Stip at 38-41.) Specifically, plaintiff  
12 contends that the VE's testimony conflicted with the Dictionary of Occupational  
13 Titles ("DOT") because plaintiff's limitation to simple and repetitive tasks conflicted  
14 with the jobs' requirement of a reasoning level of 2.<sup>4</sup> (See Jt Stip at 38-40; see also  
15 DOT Nos. 706.684-042 (Bench Assembler), 712.684-050 (Inspector), 780.684-066  
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17 <sup>3</sup> The Court finds that the ALJ provided other reasons that were not legally  
18 sufficient to reject Ms. Rodriguez's statements, such as, for example, the fact that she  
19 did not appear at the administrative hearing, the fact that she had a financial interest  
20 in the case, and the fact that she had a desire to help plaintiff. (See AR 26.)  
21 However, these errors were harmless because the ALJ's two other reasons and  
22 ultimate credibility determination were supported by substantial evidence. See  
23 Valentine v. Commissioner of Social Sec. Admin., 574 F.3d 685, 694 (9th Cir. 2009)  
24 (ALJ's improper rejection of testimony of claimant's wife because she was an  
25 interested party was harmless error because there were other germane reasons for  
26 rejecting her testimony).

27 <sup>4</sup> The DOT describes reasoning level 2 as the ability to "[a]pply  
28 commonsense understanding to carry out detailed but uninvolved written or oral  
instructions" and "[d]eal with problems involving a few concrete variables in or from  
standardized situations."

1 (Product Filler.) Plaintiff also contends that the hypothetical questions to the VE  
2 failed to include his limitation against repetitive use of his arms, which would  
3 preclude all of the jobs cited by the VE. (See Jt Stip at 40-41.)

4 The Court rejects both of plaintiff’s contentions. First, the record does not  
5 indicate that the ALJ ever determined that plaintiff was limited to work involving  
6 simple and repetitive tasks, which is the premise of plaintiff’s contention. Instead,  
7 the ALJ determined that plaintiff was limited to unskilled work (see AR 19, 83),  
8 which plaintiff does not challenge. According to the DOT, each of the jobs identified  
9 by the VE required a Specific Vocational Preparation (“SVP”) of 2, which is entirely  
10 consistent with plaintiff’s ability to perform unskilled work.<sup>5</sup> Accordingly, the Court  
11 finds that there was no conflict between the VE’s testimony and the DOT.

12 Second, the record does not support plaintiff’s assertion that he was precluded  
13 from repetitively using his arms, particularly fine and gross manipulation. Instead,  
14 there was substantial evidence in the record to support the ALJ’s finding that plaintiff  
15 was restricted from overhead reaching (see AR 19; see also 472), a limitation that was  
16 included in the hypothetical questions to the VE (see AR 82). See Rollins v.  
17 Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (ALJ did not err in omitting limitations  
18 from hypothetical question that claimant had alleged but failed to prove).

19 The Court therefore finds and concludes that reversal is not warranted based  
20 on the ALJ’s alleged failure to make a proper vocational determination.

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25 <sup>5</sup> An SVP rating contemplates how long it generally takes to learn a job.  
26 See Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir. 1990). An SVP of 2, which  
27 contemplates “anything beyond short demonstration up to and including 1 month,”  
28 corresponds to the definition of unskilled work in the Commissioner’s regulations.  
See Terry, 903 F.2d at 1276; see also 20 C.F.R. §§ 404.1568(a), 416.968(a).

1 IT THEREFORE IS ORDERED that Judgment be entered affirming the  
2 decision of the Commissioner and dismissing this action with prejudice.

3  
4 DATED: April 4, 2013

A handwritten signature in black ink, appearing to read "R N Block", is written over a light gray rectangular background.

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7 ROBERT N. BLOCK  
UNITED STATES MAGISTRATE JUDGE

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