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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

GILBERT ANGULO,	)	No. ED CV 12-01426-VBK
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	AND ORDER
v.	)	
	)	(Social Security Case)
MICHAEL J. ASTRUE,	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
_____	)	

This matter is before the Court for review of the decision by the Commissioner of Social Security denying Plaintiff's application for a Period of Disability and Disability Insurance Benefits. Pursuant to 28 U.S.C. §636(c), the parties have consented that the case may be handled by the Magistrate Judge. The action arises under 42 U.S.C. §405(g), which authorizes the Court to enter judgment upon the pleadings and transcript of the record before the Commissioner. The parties have filed the Joint Stipulation ("JS"), and the Commissioner has filed the certified Administrative Record ("AR").

Plaintiff raises the following issues:

1. Whether the Administrative Law Judge ("ALJ") properly

1 considered the opinions of medical expert Dr. Sparks (JS at  
2 7-14);

3 2. Whether the ALJ properly found medical improvement after  
4 April 6, 2006 (JS at 18-23); and

5 3. Whether the ALJ gave proper consideration to Plaintiff's  
6 testimony (JS at 27-33).

7  
8 This Memorandum Opinion will constitute the Court's findings of  
9 fact and conclusions of law. After reviewing the matter, the Court  
10 concludes that the decision of the Commissioner must be reversed, and  
11 the matter remanded for a new hearing.

12  
13 **I**

14 **BACKGROUND**

15 On November 28, 2005, Plaintiff filed for a Period of Disability  
16 and Disability Insurance Benefits for back pain and spinal injury.  
17 (AR 54, 116.) Plaintiff claimed an alleged onset date of September  
18 13, 1999, and the Date Last Insured ("DLI") was December 31, 2004.  
19 (AR 54, 104.) After the agency rejected Plaintiff's application  
20 initially and upon reconsideration, a hearing was held before ALJ  
21 Belcher on October 16, 2007. (AR 54.) On November 28, 2007, ALJ  
22 Belcher issued an opinion finding that Plaintiff was not disabled  
23 through the DLI. (AR 60.) Plaintiff appealed the decision to this  
24 Court, and the Court remanded on the grounds that ALJ Belcher did not  
25 address an inherent contradiction in medical expert Dr. Sparks'  
26 testimony that Plaintiff both met a listing for disorders of the spine

1 and had a sedentary Residual Functional Capacity ("RFC").<sup>1</sup> (AR 57,  
2 503-09.) See also Angulo v. Astrue, No. CV 08-05149-VBK, 2009 WL  
3 1160080 at \*2-3 (C.D. Cal. April 24, 2009) ("Angulo I").<sup>2</sup> In its  
4 memorandum opinion and order, the Court detailed what the ALJ had to  
5 do on remand:

6 There is a clear and obvious contradiction between [Dr.  
7 Sparks]'s testimony that Plaintiff meets a Listing, and his  
8 later testimony that Plaintiff has an RFC which would negate  
9 a finding of disability. . . .In the case of an obvious and  
10 fundamental contradiction, such as is presented by this  
11 testimony, the Court finds that the ALJ was under a duty to  
12 clarify the contradiction, in order to determine the ME's  
13 ultimate opinion, and the basis for it. The failure to do  
14 that constitutes reversible error, and this matter will be  
15 remanded for further hearing consistent with this decision.

16 (AR 508.)

17  
18 The Court also noted that since, on remand, the entire medical  
19 record should be considered, Plaintiff's credibility needed to be  
20 reevaluated based on de novo review, so it need not reach Plaintiff's

21 \_\_\_\_\_  
22 <sup>1</sup> A RFC is what a claimant can still do despite existing  
23 exertional and nonexertional limitations. See 20 C.F.R. §  
404.1545(a)(1).

24 <sup>2</sup> For purposes of brevity, the Court will not reiterate  
25 Plaintiff's extensive medical treatment history, as that has been  
26 sufficiently summarized in Angulo I. The Court only adds that since  
27 then, Plaintiff has continued to see Dr. Haider, his treating  
28 physician, and his complaints of back pain remain. (AR 414, 615, 609,  
604, 602-03, 598, 596). In addition, Dr. Haider has reported  
restricted motion, spasms, difficulty changing positions, difficulty  
walking, among other symptoms. (See, e.g., AR 410, 414, 607, 600).

1 second issue, which asserted that the ALJ gave improper consideration  
2 to Plaintiff's testimony. (AR 504, 508.)

3 On remand, newly assigned ALJ Radensky held a hearing on November  
4 23, 2009 at which another medical expert, Dr. Lorber, testified over  
5 the telephone. (AR 458.) Dr. Lorber summarized Plaintiff's treatment  
6 record, and he concluded that Plaintiff met the listing during two  
7 periods of time: September 13, 1999 to May 4, 2002, and April 6, 2005  
8 to April 6, 2006. (AR 462-64.) Otherwise, he opined that Plaintiff  
9 had a sedentary RFC. (AR 464.)

10 On January 21, 2010, ALJ Radensky issued a decision finding that  
11 Plaintiff was disabled from September 14, 1999 to May 4, 2002 and from  
12 November 4, 2004 to April 6, 2006. (AR 451.) The ALJ also concluded  
13 that between May 5, 2002 to November 3, 2004 and from April 7, 2006  
14 onward, Plaintiff's condition improved with respect to his ability to  
15 work, and he was not disabled during those periods. (AR 451.) He  
16 explicitly adopted Dr. Lorber's finding that outside of the periods of  
17 disability, Plaintiff had what amounts to a sedentary RFC. (AR 447.)

## 18 19 DISCUSSION

### 20 I

#### 21 THE ALJ PROPERLY CONSIDERED THE OPINIONS

#### 22 OF MEDICAL EXPERT DR. SPARKS

23 Plaintiff's first claim is that on remand, ALJ Radensky did not  
24 properly consider the opinions of Dr. Sparks, the medical expert from  
25 the first administrative hearing, as required under Angulo I. (See JS  
26 at 7-13.) Specifically, Plaintiff asserts that the decision violates  
27 the rule of mandate because ALJ Radensky failed to mention, much less  
28 synthesize, Dr. Sparks's testimony into his decision. (JS at 13.) In

1 response, the Commissioner argues that Dr. Lorber, the medical expert  
2 on remand, came up with a reasonable rationale that detailed two  
3 discrete periods of Plaintiff's medical history that coincided with  
4 Dr. Sparks's assessments, while also supporting a closed period of  
5 disability. (JS at 16.) Furthermore, the Commissioner claims that  
6 ALJ Radensky's decision is supported by substantial evidence.

7 A federal district court may disturb the ALJ's decision only if  
8 it contains legal error or if it is not supported by substantial  
9 evidence.<sup>3</sup> 42 U.S.C. § 405(g). Therefore, the ultimate question is  
10 whether ALJ Radensky's decision is supported by substantial evidence  
11 or whether it contains legal error. This Court finds that although  
12 ALJ Ralenksy failed to mention Dr. Sparks's opinions from the first  
13 hearing in his decision, his reliance on Dr. Lorber's testimony is  
14 free of legal error.

15 Plaintiff seems to argue that ALJ Radensky committed legal error  
16 and cites to Quern v. Jordan, 440 U.S. 332, 347 n. 18 (1979) for the  
17 rule of mandate doctrine, which requires that, on remand, the lower  
18 court's actions must be consistent with both the letter and the spirit  
19 of the higher court's decision. See also Ischay v. Barnhart, 383  
20 F.Supp.2d 1199, 1215-1219 (C.D. Cal. July 25, 2005) (explicitly  
21 applying the doctrine to the social security context when a district  
22 court remands a case back to the ALJ). Plaintiff contends, then, that  
23 ALJ Radensky's failure to cite to Dr. Sparks's opinions or grapple  
24 with the contradictions in his testimony violates the rule of mandate  
25 based on this Court's remand order. (See JS at 13, AR 507-08.)

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26  
27 <sup>3</sup> Substantial evidence is defined as "relevant evidence which,  
28 considering the record as a whole, a reasonable person might accept as  
adequate to support a conclusion." Thomas v. Barnhart, 278 F.3d 947,  
954 (9th Cir. 2002).

1           When it remanded the case, this Court found that "the ALJ was  
2 under a duty to clarify the contradiction, in order to determine [Dr.  
3 Sparks's] ultimate opinion, and the basis for it." (AR 508.)  
4 However, deeper analysis reveals at least two reasons why Plaintiff's  
5 rule of mandate argument fails.

6           First, a proper reading of Angulo I is that when an ALJ *adopts* an  
7 medical expert ("ME")'s inherently contradictory opinions to support  
8 his findings, he cannot parse the doctor's testimony "so as to accept  
9 part of the testimony, and reject the contradictory part, without an  
10 appropriate explanation." (AR 508.) Here, however, there is no  
11 indication that ALJ Radensky relied upon Dr. Sparks's opinion in  
12 reaching his decision. In fact, he does not mention Dr. Sparks at all  
13 and instead relies on Dr. Lorber's testimony to make his findings.  
14 (See AR 447.) A fair reading of Angulo I is counterintuitive to the  
15 notion that an ALJ must determine the ultimate opinion of an ME who  
16 did not testify at his hearing and upon whose opinion he did not rely.  
17 This is especially true when the ALJ found the testimony of the ME who  
18 did testify at the hearing over which he presided more persuasive.  
19 The ALJ is responsible for resolving ambiguities in the medical  
20 evidence. Tommasetti v. Astrue, 533 F.3d 1035, 1041-42 (9th Cir.  
21 2008). Furthermore, the ALJ need not accept any medical opinion that  
22 contains inconsistencies and ambiguities. Bunnell v. Sullivan, 947  
23 F.2d 341, 348 (9th Cir. 1991). Here, ALJ Radensky's opinion can  
24 reasonably be read as a rejection, albeit silent, of Dr. Sparks's  
25 opinions in favor of Dr. Lorber's testimony. An ALJ is "not required  
26 to discuss every piece of evidence," and "is not required to discuss  
27 evidence that is neither significant nor probative." Hiler v. Astrue,  
28 687 F.3d 1208, 1212 (9th Cir. 2012) (quoting Howard ex rel. Wolff v.

1 Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)).

2 The leading rule of mandate case in the Social Security context  
3 is easily distinguishable from this instant case. In Ischay, 383  
4 F.Supp.2d 1199, to which Plaintiff cites (see JS at 13), the court  
5 found that the ALJ violated the rule of mandate on remand by taking  
6 evidence on matters beyond the single issue identified in the court's  
7 order, which was solely to re-determine whether the claimant was  
8 disabled at step five of the sequential evaluation. Ischay, 383  
9 F.Supp.2d at 1219, 1223. Subsequent Social Security cases applying  
10 Ischay and the rule of mandate doctrine have done so under similar  
11 circumstances. See, e.g., Coto v. Astrue, 2008 WL 4642965 at \*5 (C.D.  
12 Cal. Oct. 20, 2008) ("[T]he ALJ's decision to reconsider plaintiff's  
13 RFC in this regard, and ultimately find that plaintiff has a greater  
14 capacity for standing and walking, was not related to the issues on  
15 remand."); Sanchez v. Astrue, 2012 WL 3704756 at \*13 (C.D. Cal. Aug.  
16 27, 2012) (ALJ's decision exceeded scope of remand because ALJ was  
17 only to explain step five discrepancy and impermissibly revisited  
18 claimant's RFC at step four). Here, the Court's remand order was not  
19 as narrowly written as those in cases where Ischay has been applied.  
20 In fact, the Court included broad language in the order, indicating  
21 that "on remand, the entire medical record should be considered." (AR  
22 508.) This language cannot be read so narrowly as to require ALJ  
23 Radensky to interpret Dr. Sparks's testimony when ALJ Radensky did not  
24 use it in reaching his opinion.<sup>4</sup> Therefore, the Court finds that ALJ

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26 <sup>4</sup> To the extent that Plaintiff argues ALJ Radensky engaged in  
27 impermissible "expert shopping" by holding hearings until he found an  
28 expert who agreed with his conclusions (see JS at 17-18), this  
argument is unavailing. In cases where an ALJ is found to have  
engaged in expert shopping, there tend to be a series of hearings.

(continued...)

1 Radensky did not violate the rule of mandate and that there was no  
2 legal error.

3 Second, Plaintiff's argument is unconvincing because Dr. Lorber's  
4 and Dr. Sparks's opinions are actually similar and reconcilable. As  
5 the Commissioner persuasively argues, Dr. Lorber's testimony  
6 reasonably served to reconcile the ambiguous and conflicting evidence  
7 presented by Dr. Sparks because both Dr. Sparks and Dr. Lorber found  
8 Plaintiff met Listing 1.04, and Dr. Lorber was able to place into  
9 context Dr. Sparks's seemingly contradictory opinions that, despite  
10 meeting the Listing, Plaintiff could perform a limited range of light  
11 work prior to December 2004 and sedentary work after December 2004.  
12 (JS at 16.)

13 Dr. Sparks testified that Plaintiff met a Listing as of December  
14 13, 2004 and continued to meet it as of the hearing date on October  
15 16, 2007. (AR 20-21.) He also opined that Plaintiff had a light RFC  
16 before December 2004 and a sedentary RFC after December 2004. (AR 25-  
17 26.) Dr. Lorber testified that from September 13, 1999 to May 4, 2002  
18 and from April 6, 2005 to April 6, 2006, Plaintiff met the Listing.<sup>5</sup>  
19 (AR 462-64.) For periods during which Plaintiff did not meet the  
20 Listing, Dr. Lorber found that he had a sedentary RFC. (AR 464.)  
21 Essentially, Dr. Lorber's opinions included periods in Plaintiff's  
22

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23 <sup>4</sup>(...continued)

24 See, e.g., Ischay, 383 F.Supp.2d at 1210 (four hearings). The present  
25 case presents only two.

26 <sup>5</sup> The Court notes that ALJ Radensky actually did not adopt Dr.  
27 Lorber's findings in their entirety. He explicitly credited  
28 Plaintiff's allegations of pain beginning November 4, 2004 in light of  
supporting medical records, so he found that Plaintiff's second period  
of disability began on November 4, 2004 and ran until April 6, 2006,  
beginning about five months earlier than Dr. Lorber's assessment. (AR  
448, 451.)



1 medical history that satisfied Dr. Sparks's sedentary RFC finding (May  
2 5, 2002 to April 6, 2005, and April 6, 2006 to the present) and  
3 periods during which Dr. Sparks's finding that Plaintiff met a Listing  
4 applied (September 13, 1999 to May 4, 2002, and April 6, 2005 to April  
5 6, 2006).<sup>6</sup>

6 In conclusion, the Court finds that ALJ Radensky's decision does  
7 not violate the rule of mandate and is free of legal error.

8  
9 **II**

10 **THE ALJ IMPROPERLY FOUND MEDICAL IMPROVEMENT AFTER APRIL 5, 2006**

11 Plaintiff argues that ALJ Radensky improperly found medical  
12 improvement after April 2006 and summarizes Plaintiff's extensive  
13 treatment record from 2006 to 2010. (See JS at 18-21.) In response,  
14 the Commissioner contends that Plaintiff merely offers a contrary  
15 interpretation of the evidence and that under such circumstances, this  
16 Court must uphold the agency's decisions. (See JS at 26.)

17 As the Court explained earlier, the ALJ's decision can only be  
18 disturbed if it contains legal error or it is not supported by  
19 substantial evidence. 42 U.S.C. § 405(g). The Court is convinced  
20 that the ALJ's finding that Plaintiff improved after April 6, 2006  
21 does not rest on substantial evidence.

22 In order to find that disability ceased, there must be a finding  
23 of medical improvement related to the ability to engage in work  
24 activity. 20 C.F.R. § 404.1579(a)(2). When finding that Plaintiff's

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25  
26 <sup>6</sup> The Court also finds that the two experts' opinions are not  
27 necessarily as different as Plaintiff characterizes. For example,  
28 both found the same RFC, and they agree that Plaintiff at the very  
least met the Listing from April 6, 2005 to April 6, 2006. In  
addition, both testified that Plaintiff experienced improvement after  
surgery. (AR 23, 463-64.)

1 condition had improved since April 2006, ALJ Radensky wrote:

2 More recently, Dr. Haider noted a pleasant affect,  
3 [Plaintiff] in no distress and remaining permanent and  
4 stationary. Medications were admittedly beneficial and no  
5 assistive device was required for ambulation. [cite to  
6 exhibit] Reflexes are intact, strength full, and treatment  
7 conservative. [Plaintiff]'s condition has again stabilized  
8 and he tolerates his medications. [cite to exhibit]

9 (AR 449.)

10  
11 However, ALJ Radensky misstated the record. See Gallant v.  
12 Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) (ALJ cannot attempt to  
13 justify decision by ignoring competent evidence in the record that  
14 suggests an opposite result). For example, he noted that Plaintiff  
15 required no assistive device for ambulation and cited to Dr. Haider's  
16 reports dated October 2, 2006 and November 28, 2006. (AR 417, 420.)  
17 The same report indicated that Plaintiff had difficulty walking,  
18 changing position, and getting onto the examining table. It also  
19 indicated that Plaintiff had tenderness in the lumbar region,  
20 restricted motion, antalgic gait, muscle spasm, and painful symptoms.  
21 (AR 417, 420.) In addition, one later report by Dr. Haider shows  
22 that Plaintiff required the assistance of a walker on January 23,  
23 2007 (AR 414), and the same report and others dated March 6, 2007 and  
24 May 1, 2007 find the same symptoms and pain complaints. (AR 410-414.)  
25 Finally, Dr. Haider prescribed Plaintiff a walking cane on February

1 10, 2010.<sup>7</sup> (AR 436-37.)

2 Further, ALJ Radensky incorrectly concluded that Plaintiff's  
3 condition had stabilized and that he tolerated his medications. Even  
4 on first glance, these reasons do not necessarily relate to medical  
5 improvement related to Plaintiff's ability to work. Second, ALJ  
6 Radensky's support for this conclusion comes from Dr. Haider's reports  
7 dated September 12, 2007 to September 9, 2009, but after reviewing  
8 these reports, the Court finds that there is no indication Plaintiff's  
9 condition improved in relation to his ability to do work. These  
10 reports continue to indicate that Plaintiff demonstrated an antalgic  
11 gait, experienced difficulty walking and changing positions, and  
12 presented restricted motion, tenderness in the spine, and muscle  
13 spasms. (AR 596, 598, 604, 607, 615.) One report dated November 18,  
14 2008 indicated that Plaintiff tested positive for straight leg raising  
15 in both a sitting and supine position to the right and the left, and  
16 the same report noted "significant deterioration of function" and  
17 "active neurological deficits." (AR 602-03.) Given the continued  
18 persistence of Plaintiff's symptoms and restrictions as documented by  
19 these records, they cannot reasonably be interpreted as constituting  
20 substantial evidence to support the conclusion that Plaintiff was no  
21 longer disabled after April 2006. The Court also finds that ALJ  
22 Radensky's conclusion that Plaintiff's treatment was conservative is  
23 not supported by substantial evidence. (AR 449.) Plaintiff's

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24 <sup>7</sup> The Commissioner claims that the cane was prescribed "at  
25 Plaintiff's request, due to Plaintiff's uncorroborated claims of right  
26 leg weakness." (JS at 25.) There is no indication in the report that  
27 Plaintiff himself requested the cane. The report simply reads, "The  
28 patient indicates that occasionally he feels like his right leg is  
giving out, causing him some near falls. We need to prevent any falls  
or further problems. Therefore, it's felt that he would benefit from  
use of a cane for ambulation." (AR 436.)

1 treatment includes taking Norco, Orudis, Prilosec, Zanaflex, Lyrica,  
2 and using Lidoderm patches. (AR 478.) At the hearing, even Dr.  
3 Lorber agreed that the prescriptions could be a sign that the treating  
4 physician believes Plaintiff suffers from significant pain, and  
5 conceded that the drugs are generally used for more than moderate  
6 pain. (AR 477-78.) The record indicates that throughout September  
7 2007 to September 2009, Plaintiff's medication largely stayed the  
8 same; there is no indication, however, that the treatment was  
9 necessarily conservative.<sup>8</sup> (See AR 596-616.)

10 The Commissioner argues that any deterioration in Plaintiff's  
11 condition after April 6, 2006 was brought on by his own failure to  
12 attend physical therapy. (JS at 24.) Although Plaintiff failed to  
13 attend physical therapy in the fall of 2006, Plaintiff cannot be  
14 faulted for this because the record establishes that he did not attend  
15 because he did not have any transportation. (AR 421.) In fact, once  
16 a transportation authorization was issued, Plaintiff did attend  
17 physical therapy, noting that it improved his symptoms. (AR 412.)  
18 However, even with the help of physical therapy, Dr. Haider's notes  
19 continue to detail persistent pain, limited movement, and antalgic  
20 gait, among other symptoms. (See AR 596-616.) The record clearly  
21 shows that Plaintiff's condition persisted in spite of physical  
22 therapy and medication. Again, although Plaintiff may have obtained  
23 some relief from physical therapy and medication (see, e.g., AR 412,

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24  
25 <sup>8</sup> The Court notes that Dr. Haider did call the prescription of  
26 medications "conservative" in one report. (AR 598.) The Court does  
27 not find this dispositive given Dr. Lorber's testimony about the  
28 health circumstances under which these drugs are prescribed, and the  
fact that Dr. Haider ordered an MRI after significant deterioration in  
function. (AR 600.) The Court also adds to its analysis of whether  
Plaintiff's treatment was conservative in analyzing Plaintiff's third  
claim below.

1 596), this fails to answer the requisite question of whether  
2 Plaintiff's condition improved with respect to his ability to work.

3 In conclusion, the Court finds that ALJ Radensky erred by  
4 concluding that Plaintiff was not disabled after April 6, 2006, as  
5 this conclusion is not supported by substantial evidence.

6  
7 **III**

8 **THE ALJ IMPROPERLY CONSIDERED PLAINTIFF'S TESTIMONY**

9 Plaintiff's third argument takes issue with the ALJ's conclusion  
10 that Plaintiff's testimony at the hearing was not entirely credible.  
11 (See JS at 27-33.) In particular, Plaintiff argues that ALJ  
12 Radensky's summary of Plaintiff's daily activities does not rise to  
13 the level of full time activity at any level of exertion, so his  
14 reasoning is legally insufficient. (JS at 33.) In response, the  
15 Commissioner asserts that the ALJ properly devalued Plaintiff's  
16 credibility based on a lack of objective medical evidence, Plaintiff's  
17 activities of daily living, inconsistencies between Plaintiff's  
18 testimony and his conduct, and Plaintiff's conservative treatment.<sup>9</sup>  
19 (JS at 35-37.)

20 The Court finds that although ALJ Radensky used seemingly  
21 permissible factors to explain why he devaluated Plaintiff's  
22 credibility, he did so without considering the record as a whole.

23  
24 <sup>9</sup> ALJ Radensky's other reasons for devaluing Plaintiff's  
25 credibility are unavailing because they are not probative of  
26 disability. Some of them fall outside of the post-April 2006 time  
27 period, including the fact that Plaintiff reported progress after his  
28 first surgery, that he underwent vocational rehabilitation, and that  
he was cleared for light work. (See AR 449.) It is immaterial, too,  
that Dr. Haider found Plaintiff "permanent and stationary" (AR 449),  
because all this means is maximal medical improvement without  
substantial change expected. 8 C.C.R. § 10116.9.

1 Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998).

2 Subjective complaints of pain in excess of what an impairment  
3 would normally be expected to produce are subject to credibility  
4 assessment by an ALJ. Rollins v. Massanari, 261 F.3d 853, 856-57 (9th  
5 Cir. 2001). In order to find that a claimant's subjective complaints  
6 are not credible, an ALJ "must specifically make findings that support  
7 this conclusion," Bunnell, 947 F.2d at 345, and provide "clear and  
8 convincing reasons." Rollins, 261 F.3d at 857.

9 First, ALJ Radensky devalued Plaintiff's credibility because he  
10 found the objective medical evidence did not comport with Plaintiff's  
11 testimony regarding his pain and limitations. Although a lack of  
12 objective evidence, standing alone, is insufficient to reject  
13 subjective complaints, it is, nevertheless, one of the considerations.  
14 Bunnell, 947 F.2d at 345. Objective medical evidence, particularly  
15 Dr. Haider's finding on November 18, 2008 of active neurological  
16 deficits and his finding of radicular symptoms on May 5, 2009,  
17 actually helps substantiate Plaintiff's pain testimony. (See AR 602,  
18 598.)

19 Second, the ALJ depreciated Plaintiff's testimony because he felt  
20 that Plaintiff's daily activities demonstrated an ability to work.  
21 (AR 15). Daily activities are a permissible factor in considering a  
22 claimant's credibility. See, e.g., Fair v. Bowen, 885 F.2d 597, 603  
23 (9th Cir. 1989). ALJ Radensky noted that Plaintiff drove to doctor's  
24 appointments, was able to microwave meals, and cleaned up after  
25 himself. (AR 449.) He also cited to Plaintiff's capacity to sit for  
26 an hour at one time and for several hours in one day, to stand for  
27 thirty minutes, to and lift a gallon of milk. (AR 449.) However, as  
28 Plaintiff persuasively argues, ALJ Radensky failed to explain how

1 driving what potentially is a short distance, microwaving meals, and  
2 cleaning up after oneself translates into the ability to work full-  
3 time at a sedentary range of exertion. (JS at 30.) In addition,  
4 Plaintiff's capacity to sit for an hour comes from his testimony that  
5 he watched television for that time range, but he also testified that  
6 he watched television in a recliner because he got "tired just like  
7 this or just sitting down straight up." (AR 489.) Standing for  
8 thirty minutes and carrying a gallon of milk are also not necessarily  
9 dispositive on the issue of disability. See, e.g., Fair, 885 F.2d at  
10 603 (noting that "many home activities are not easily transferable to  
11 what may be the more grueling environment of the workplace").<sup>10</sup>

12 Third, ALJ Radensky gave weight to a seeming inconsistency: that  
13 Plaintiff testified to using an ambulatory device but did not bring  
14 one to the hearing. (AR 449.) While an ALJ can consider  
15 inconsistencies when evaluating a claimant's credibility, ALJ Radensky  
16 took these statements out of context. Molina v. Astrue, 674 F.3d  
17 1104, 1112 (9th Cir. 2012) (including inconsistencies as an ordinary  
18 technique of credibility evaluation). Plaintiff explained that he  
19 used the walker for longer distances, usually more than five blocks,  
20 or when he was going to exercise. (AR 479-80.)

21 Finally, the ALJ characterized Plaintiff's treatment history as  
22 conservative. Conservative or infrequent treatment may be used by the  
23 ALJ to refute allegations of disabling pain. See Johnson v. Shalala,  
24 60 F.3d 1428, 1434 (9th Cir. 1995). Here, the Court explicitly notes  
25 that Plaintiff's full treatment history includes multiple

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27 <sup>10</sup> The Court also finds persuasive the daily activities that  
28 Plaintiff testified he did not engage in, including grocery shopping,  
laundry, and attending religious services. (AR 485-88.)

