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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ISMAEL GOMEZ ZELAYA,  
Plaintiff,  
v.  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
Defendant.



NO. EDCV 13-333 AGR  
  
MEMORANDUM OPINION AND  
ORDER

Plaintiff Ismael Gomez Zelaya filed this action on March 1, 2013. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the magistrate judge. (Dkt. Nos. 6, 8.) On September 20, 2013, the parties filed a Joint Stipulation ("JS") that addressed the disputed issues. The court has taken the matter under submission without oral argument.

Having reviewed the entire file, the court affirms the decision of the Commissioner.

1 I.

2 **PROCEDURAL BACKGROUND**

3 On April 14, 2010, Zelaya filed an application for disability insurance  
4 benefits, alleging an onset date of January 26, 2009. Administrative Record  
5 (“AR”) 12. The application was denied initially and upon reconsideration. AR 12,  
6 68-69. Zelaya requested a hearing before an Administrative Law Judge (“ALJ”).  
7 On January 24, 2012, the ALJ conducted a hearing at which Zelaya and a  
8 vocational expert (“VE”) testified. AR 35-67. On February 23, 2012, the ALJ  
9 issued a revised decision denying benefits.<sup>1</sup> AR 9-20. On January 10, 2013, the  
10 Appeals Council denied the request for review. AR 1-3. This action followed.

11 II.

12 **STANDARD OF REVIEW**

13 Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner’s  
14 decision to deny benefits. The decision will be disturbed only if it is not supported  
15 by substantial evidence, or if it is based upon the application of improper legal  
16 standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam);  
17 *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

18 “Substantial evidence” means “more than a mere scintilla but less than a  
19 preponderance – it is such relevant evidence that a reasonable mind might  
20 accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In  
21 determining whether substantial evidence exists to support the Commissioner’s  
22 decision, the court examines the administrative record as a whole, considering  
23 adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the  
24 evidence is susceptible to more than one rational interpretation, the court must  
25 defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

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28 <sup>1</sup> A revised decision was issued to address recently submitted evidence.  
AR 12.

1 III.

2 **DISCUSSION**

3 **A. Disability**

4 A person qualifies as disabled, and thereby eligible for such benefits, “only  
5 if his physical or mental impairment or impairments are of such severity that he is  
6 not only unable to do his previous work but cannot, considering his age,  
7 education, and work experience, engage in any other kind of substantial gainful  
8 work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20,  
9 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003) (citation and quotation marks  
10 omitted).

11 **B. The ALJ’s Findings**

12 The ALJ found that Zelaya met the insured status requirements through  
13 March 31, 2014. AR 14. Zelaya had the severe impairments of cervical  
14 myofascial strain and sequelae of right ankle fracture. *Id.* He had the residual  
15 functional capacity (“RFC”) to perform medium work<sup>2</sup> except he could frequently  
16 climb, stoop, kneel and crouch. AR 17. The ALJ found that Zelaya could perform  
17 his past relevant work as a light truck driver as it is generally performed. AR 19.  
18 Alternatively, the ALJ found there were other jobs that existed in significant  
19 numbers that Zelaya could perform. *Id.*

20 **C. Treating Physicians**

21 Zelaya contends the ALJ improperly considered his medical record.

22 An opinion of a treating physician is given more weight than the opinions of  
23 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To  
24 reject an uncontradicted opinion of a treating physician, an ALJ must state clear  
25 and convincing reasons that are supported by substantial evidence. *Bayliss v.*

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27 <sup>2</sup> “Medium work involves lifting no more than 50 pounds at a time with  
28 frequent lifting or carrying of objects weighing up to 25 pounds.” 20 C.F.R. §  
404.1567(c).

1 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When a treating physician's  
2 opinion is contradicted by another doctor, "the ALJ may not reject this opinion  
3 without providing specific and legitimate reasons supported by substantial  
4 evidence in the record. This can be done by setting out a detailed and thorough  
5 summary of the facts and conflicting clinical evidence, stating his interpretation  
6 thereof, and making findings." *Orn*, 495 F.3d at 632 (citations and quotation  
7 marks omitted). "When there is conflicting medical evidence, the Secretary must  
8 determine credibility and resolve the conflict." *Thomas v. Barnhart*, 278 F.3d 947,  
9 956-57 (9th Cir. 2002) (citation and quotation marks omitted).

10 The medical records consist primarily of records from Zelaya's workers'  
11 compensation proceedings. An ALJ "may not disregard a physician's medical  
12 opinion simply because it was initially elicited in a state workers' compensation  
13 proceeding, or because it is couched in the terminology used in such  
14 proceedings." *Booth v. Barnhart*, 181 F. Supp. 2d 1099, 1105 (C.D. Cal. 2002).  
15 "Instead, the ALJ must evaluate medical opinions couched in state workers'  
16 compensation terminology just as he or she would evaluate any other medical  
17 opinion." *Id.*

18 In that regard, "it is important to distinguish between those portions of the  
19 physicians' reports that represent the physicians' medical findings and those  
20 portions of the reports that represent conclusions as to the claimant's disability for  
21 purposes of worker's compensation." *Coria v. Heckler*, 750 F.2d 245, 247 (9th  
22 Cir. 1984). Because the tests for Social Security disability and workers'  
23 compensation are different, "the ALJ could reasonably disregard so much of the  
24 physicians' reports as set forth their conclusions as to [the claimant's] disability  
25 for worker's compensation purposes." *Id.* "On the other hand, the physicians'  
26 findings, *qua* findings, do not necessarily suffer from similar defects." *Id.* at 248.  
27 "[T]he ALJ should evaluate the objective medical findings set forth in the medical  
28 reports for submission with the worker's compensation claim by the same

1 standards that s/he uses to evaluate medical findings in reports made in the first  
2 instance for the Social Security claim, unless there is some reasonable basis to  
3 believe a particular report or finding is not entitled to comparable weight.” *Id.*

4 Zelaya worked as a truck driver and delivery person. In 2007, while  
5 unloading stoves from the truck, the stoves slipped and fractured his right foot.  
6 He had surgery on his right foot and ankle. AR 301, 302. He returned to work  
7 with restrictions and worked until January 26, 2009, the alleged onset date. AR  
8 302. Zelaya explained that when he was required to go up three or four floors to  
9 make deliveries, his pain increased, became more persistent and radiated to the  
10 sole of his foot. *Id.*

11 In October 2008, Dr. Schiffman noted that Zelaya recently had epidural  
12 injections in the cervical spine with good results. AR 292. An EMG report  
13 indicated bilateral moderate to severe carpal tunnel syndrome and an early  
14 bilateral canal of Guyon entrapment. AR 293. Examination of the wrists revealed  
15 a positive Tinel sign of the median and ulnar nerves on the right, and negative  
16 Tinel sign on the left. *Id.* Dr. Schiffman diagnosed post traumatic cervical  
17 sprain/strain with multi-level disc bulges per MRI, and moderate to severe  
18 bilateral carpal tunnel syndrome. *Id.*

19 Progress reports from Zelaya’s treating chiropractor indicate that Zelaya  
20 could return to work in October 2008, with the following restrictions: walking no  
21 more than one hour at a time with 15 minutes rest; driving no more than four  
22 hours at a time with 30 minutes rest; and no lifting, pushing, or pulling 30 pounds  
23 or more. AR 260, 272-80. Zelaya continued with epidural injections in the  
24 cervical spine in December 2008 and February 2009. AR 298-99, 330-31.

25 Zelaya returned to work with restrictions until January 26, 2009, the  
26 alleged onset date. AR 302. In February 2009, Zelaya complained of throbbing  
27 pain in his right foot and ankle radiating up to his right knee. Because he was  
28 supporting himself on his left foot to walk, Zelaya had low back pain with more

1 than one hour of walking, prolonged driving and standing. AR 303. Dr. Jarminski  
2 observed, however, that Zelaya walked with a normal gait. *Id.* Zelaya clarified  
3 that he began to have pain with prolonged standing or walking. AR 304. Dr.  
4 Jarminski noted that the hardware caused a slight palpable deformity on the  
5 fracture site with some pain and guarding. *Id.* Dr. Jarminski prescribed orthotics  
6 and medication, and referred Zelaya for consultation as to possible removal of the  
7 fixation screws in the right ankle. AR 304, 336.

8 In August 2009, Dr. Rahman asked the workers' compensation carrier for  
9 authorization to remove the screws from the ankle. AR 333-34. Dr. Rahman  
10 noted tenderness over the incision area where the screws were located, as well  
11 as limited flexion. AR 333. Dr. Rahman stated that conservative treatment would  
12 continue until surgical removal of the hardware was authorized. AR 334. During  
13 the time frame of April 2009-January 2010, Dr. Jarminski noted Zelaya's reports  
14 of moderate right ankle pain with prolonged driving, walking and standing, and  
15 moderate low back pain with prolonged standing.<sup>3</sup> AR 336-41.

16 Apparently, the insurer twice denied requests for surgical removal of the  
17 hardware in the right ankle on October 22, 2009 and January 8, 2010. Dr. Jung  
18 responded that the head of the screw was palpable under the skin, rubbed  
19 against the shoe and caused pain. AR 379. In March 2010, the hardware from  
20 the right ankle was surgically removed. AR 388. Two weeks later, Zelaya healed  
21 well, had range of motion without pain, and reported minimal pain to the surgical  
22 site. AR 390. The next follow-up visit indicated possible superficial infection with  
23 slight redness and swelling. AR 391. Dr. Jung recommended that Zelaya be  
24 temporarily totally disabled until May 10, 2010. *Id.*

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27 <sup>3</sup> On July 28, 2009, Zelaya also reported pain in the left knee due to  
28 overuse in compensating for the right ankle. AR 338. Zelaya did not repeat this  
complaint in subsequent visits. AR 339-41.

1 On May 14, 2010, Zelaya reported a significant decrease in pain after the  
2 right ankle surgery. He denied pain with walking or standing, and denied  
3 instability. The incision was well healed and range of motion was without pain.  
4 Dr. Jung did not recommend further treatment and advised Zelaya to walk and  
5 perform activities to tolerance. AR 393.

6 In April 2010, MRIs of the lumbar spine revealed a 2 to 3 mm central disc  
7 protrusion at the L4-L5 disc level and a 3 mm posterior disc protrusion at the L5-  
8 S1 disc level. Disc dessication was present at both levels. Moderate to severe  
9 hypertrophic facet changes were present at L4-L5, and moderate hypertrophic  
10 facet changes were present at L5-S1. Lateral recess stenosis was present  
11 bilaterally. AR 366.

12 The ALJ gave great weight to the opinion of the examining physician, Dr.  
13 Flanagan, who examined Zelaya on June 14, 2010.<sup>4</sup> AR 30, 223-29. Dr.  
14 Flanagan reviewed Zelaya's subjective complaints, which included neck pain;  
15 lower back pain; wrist and hand pain; hip, knee and ankle pain; right foot pain;  
16 and chest pain.<sup>5</sup> AR 223-24. Dr. Flanagan noted the two right ankle surgeries in  
17 2007 and 2010. AR 224. Dr. Flanagan observed that Zelaya sat and stood with  
18 normal posture, rose from a chair without difficulty, had a normal gait, and got on  
19 and off the examining table without difficulty. AR 225. Neck examination  
20 revealed tenderness upon palpation of the cervical paraspinal muscles bilaterally  
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22 <sup>4</sup> Contrary to Zelaya's argument, the ALJ discounted the opinions of the  
23 state agency physicians as to Zelaya's physical impairments. AR 30. The ALJ  
24 discounted the chiropractor because he is not an acceptable medical source. AR  
14.

25 <sup>5</sup> Zelaya argues that the ALJ erred at step two of the sequential analysis  
26 by failing to find that he had severe impairments of low back pain and carpal  
27 tunnel syndrome. However, any error at step two would be harmless. *Burch v.*  
28 *Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). The RFC takes into account  
limitations imposed by all impairments, even those that are not severe. *Id.* at 683  
(citing SSR 96-8p). Moreover, Zelaya was returned to work with restrictions after  
being diagnosed with neck strain and carpal tunnel syndrome, and after  
complaining of low back pain. AR 260, 272-80, 292-93.

1 as well as over the spinous process. There was full range of motion, no swelling  
2 or inflammation, and no muscle atrophy or spasm. *Id.* Examination of the back  
3 revealed no tenderness, no muscle spasm, no pain with axial rotation of the trunk  
4 and axial loading of the spine at the head, and full range of motion. *Id.*  
5 Examination of the upper extremities was normal, and examination of the lower  
6 extremities was normal except for pain upon palpation of the medial aspect of the  
7 right ankle. AR 225-26. Dr. Flanagan found smooth range of motion in all joints  
8 except the neck. AR 226. Motor strength, sensation and reflexes were within  
9 normal limits, and straight leg raising was negative bilaterally. AR 226-27.

10 Dr. Flanagan diagnosed cervical myofascial strain and sequelae of the  
11 right ankle fracture. Despite Zelaya's subjective complaints of pain in other  
12 areas, Dr. Flanagan noted that there was nothing that suggested pathology in  
13 other areas. Dr. Flanagan questioned Zelaya as to why he did not have pain in  
14 other areas, and Zelaya responded that his pain was intermittent. AR 227. Dr.  
15 Flanagan opined that Zelaya was capable of medium work except for frequent  
16 climbing, stooping, kneeling and crouching. *Id.*

17 Zelaya argues that Dr. Flanagan did not have an opportunity to review his  
18 medical records, which were submitted later. An examining physician's opinion  
19 constitutes substantial evidence when, as here, it is based on independent  
20 clinical findings. *Orn*, 495 F.3d at 632. Zelaya does not cite any authority that  
21 would preclude reliance on an examining physician's opinion based on the  
22 absence of medical records.<sup>6</sup> The ALJ reviewed the treatment records and  
23 concluded that Dr. Flanagan's report was consistent with them. AR 16-17.

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26 <sup>6</sup> Indeed, the regulations provide that the Commissioner may order a  
27 consultative examination when it does not obtain the information needed from a  
28 claimant's medical sources. 20 C.F.R. § 404.1519a. The regulations appear to  
require that the examining physician take a medical history from the claimant. *Id.*  
§ 404.1519n(a). Dr. Flanagan did so and reviewed Zelaya's Adult Disability  
Report. AR 223-24; see AR 150-58.



1           Zelaya testified that he can lift about 30 pounds. AR 54. Medium work  
2 requires lifting up to 50 pounds at a time with frequent lifting or carrying of objects  
3 weighing up to 25 pounds. 20 C.F.R. § 404.1567(c). Even assuming the ALJ  
4 should have included a limitation to lifting up to 30 pounds occasionally and  
5 frequently, any error would be harmless. *See McLeod v. Astrue*, 640 F.3d 881,  
6 887-88 (9th Cir. 2011) (party challenging agency determination has burden to  
7 show prejudice from alleged error). The ALJ alternatively found, based on the  
8 VE's testimony, that there were other medium jobs that existed in significant  
9 numbers that Zelaya could perform. AR 19. The VE testified that a limitation to  
10 lifting 30 pounds would erode the job base by 80%. AR 64. The VE identified  
11 representative occupations of hand packager (6,000 jobs regionally and 80,000  
12 jobs nationally), machine feeder (3,000 jobs regionally and 50,000 jobs nationally)  
13 and industrial cleaner (2000 jobs regionally and 30,000 jobs nationally). AR 62-  
14 63. Even assuming erosion of the job base by 80%, the ALJ's finding at step five  
15 of the sequential analysis would remain valid. *See Beltran v. Astrue*, 700 F.3d  
16 386, 389 (9th Cir. 2012) (whereas 135 regional jobs and 1,680 national jobs are  
17 not "significant", 1,266 regional jobs is a significant number); *Thomas*, 278 F.3d at  
18 960 (1,300 jobs in Oregon is significant number). An ALJ may rely on a VE's  
19 testimony regarding the number of jobs. *Bayliss*, 427 F.3d at 1218.

20           This court is not free to re-weigh the medical evidence. When the  
21 evidence is susceptible to more than one rational interpretation, the court must  
22 defer to the Commissioner's decision. *Moncada*, 60 F.3d at 523.

23           **E. Credibility**

24           Zelaya contends the ALJ failed to properly assess his credibility.

25           “To determine whether a claimant's testimony regarding subjective pain or  
26 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*  
27 *v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, “the ALJ must  
28 determine whether the claimant has presented objective medical evidence of an

1 underlying impairment ‘which could reasonably be expected to produce the pain  
2 or other symptoms alleged.’” *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344  
3 (9th Cir. 1991) (en banc)). The ALJ found that Zelaya’s medically determinable  
4 impairments could reasonably be expected to produce the alleged symptoms.  
5 AR 18.

6 “Second, if the claimant meets this first test, and there is no evidence of  
7 malingering, the ALJ can reject the claimant’s testimony about the severity of her  
8 symptoms only by offering specific, clear and convincing reasons for doing so.”  
9 *Lingenfelter*, 504 F.3d at 1036 (citation and quotation marks omitted). “In making  
10 a credibility determination, the ALJ ‘must specifically identify what testimony is  
11 credible and what testimony undermines the claimant’s complaints[.]’” *Greger v.*  
12 *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (citation omitted).

13 In weighing credibility, the ALJ may consider factors including: the nature,  
14 location, onset, duration, frequency, radiation, and intensity of any pain;  
15 precipitating and aggravating factors (e.g., movement, activity, environmental  
16 conditions); type, dosage, effectiveness, and adverse side effects of any pain  
17 medication; treatment, other than medication, for relief of pain; functional  
18 restrictions; the claimant’s daily activities; and “ordinary techniques of credibility  
19 evaluation.” *Bunnell*, 947 F.2d at 346 (citing SSR 88-13) (quotation marks  
20 omitted). The ALJ may consider (a) inconsistencies or discrepancies in a  
21 claimant’s statements; (b) inconsistencies between a claimant’s statements and  
22 activities; (c) exaggerated complaints; and (d) an unexplained failure to seek  
23 treatment. *Thomas*, 278 F.3d at 958-59.

24 The ALJ found that Zelaya’s statements concerning the intensity,  
25 persistence and limiting effects of his symptoms were not credible to the extent  
26 they were inconsistent with the RFC. AR 18. The ALJ discounted Zelaya’s  
27 credibility based on four reasons: (1) Zelaya stopped working when his job  
28 activities exceeded his work restrictions; (2) Zelaya did not seek therapy or

1 medications for his alleged mental impairments; (3) Zelaya's activities of daily  
2 living were inconsistent with his subjective allegations of physical impairments;  
3 and (4) the objective evidence did not support the severity of the symptoms. AR  
4 18-19.

5 The ALJ concluded from the record that Zelaya stopped working because  
6 his work activities exceeded his work restrictions and not because he was  
7 incapable of medium work or prolonged driving, standing or walking. AR 18-19,  
8 56; see AR 185 (delivery of heavy stoves, refrigerators, washing machines,  
9 dryers), 302 (after returning to work with restrictions, he was required to climb  
10 three or four floors to make deliveries). The VE acknowledged that Zelaya could  
11 not return to his past relevant work as it was actually performed at the heavy or  
12 very heavy level. AR 60, 62. The ALJ found that Zelaya could perform his past  
13 relevant work only as it was generally performed. AR 19.

14 Zelaya admitted he was not receiving therapy for depression or anxiety,  
15 and was not taking psychiatric medications. AR 18, 48, 53. An unexplained or  
16 inadequately explained failure to obtain treatment is a valid consideration in  
17 determining credibility. See *Orn*, 495 F.3d at 636.

18 With respect to activities of daily living, Zelaya testified he drove his wife  
19 to work 30 miles away and picked her up, cleaned the yard (including trimming  
20 trees and grass), cleaned the house (including sweeping and mopping), did  
21 laundry and did grocery shopping. AR 18, 54-55. Contrary to Zelaya's  
22 arguments, this evidence is relevant to the question of whether Zelaya could  
23 perform the work of industrial cleaner, DOT 381.687-018, which includes duties  
24 such as cleaning, maintaining grounds, and transporting materials by truck or  
25 hand truck. An ALJ may consider activities of daily living. See *Tommasetti v.*  
26 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

27 "Although lack of medical evidence cannot form the sole basis for  
28 discounting pain testimony, it is a factor that the ALJ can consider in his credibility

1 analysis.” *Burch*, 400 F.3d at 681. Here, the objective medical evidence does  
2 not completely support the severity of Zelaya’s subjective symptoms.

3 When, as in this case, there is conflicting evidence, the ALJ must resolve  
4 the conflicts. “If the ALJ’s credibility finding is supported by substantial evidence  
5 in the record, we may not engage in second-guessing.” *Thomas*, 278 F.3d at 959  
6 (citing *Morgan v. Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.  
7 1999)).

8 **IV.**

9 **ORDER**

10 IT IS HEREBY ORDERED that the decision of the Commissioner is  
11 affirmed.

12 IT IS FURTHER ORDERED that the Clerk serve copies of this Order and  
13 the Judgment herein on all parties or their counsel.

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16 DATED: October 7, 2013



17 ALICIA G. ROSENBERG  
18 United States Magistrate Judge  
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