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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MARC WILLIAM SCHMIDT, ) Case No. EDCV 13-1331-JPR  
)  
Plaintiff, )  
) **MEMORANDUM OPINION AND ORDER**  
vs. ) **AFFIRMING COMMISSIONER**  
)  
CAROLYN W. COLVIN, Acting )  
Commissioner of Social )  
Security, )  
)  
Defendant. )  
)

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**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security Disability Insurance benefits ("DIB"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed April 25, 2014, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner's decision is affirmed and judgment is entered in her favor.

1 **II. BACKGROUND**

2 Plaintiff was born December 21, 1963. (Administrative  
3 Record ("AR") 47.) He completed the 11th grade and has his GED.  
4 (AR 48.) He previously worked as a plumber and plumbing  
5 supervisor. (AR 49, 66, 153.)

6 Plaintiff filed an application for DIB on April 27, 2009.  
7 (AR 79, 83, 144-45.) He alleged that he had been unable to work  
8 since July 1, 2006, because of depression and low-back, right-  
9 hip, and right-leg pain. (AR 166.) After his application was  
10 denied, he requested a hearing before an Administrative Law  
11 Judge. (AR 99-100.) A hearing was held on September 16, 2011,  
12 at which Plaintiff, who was represented by counsel, and a  
13 vocational expert ("VE") testified. (AR 44-78.) In a written  
14 decision issued November 21, 2011, the ALJ determined that  
15 Plaintiff was not disabled. (AR 25-40.) On June 6, 2013, the  
16 Appeals Council denied Plaintiff's request for review. (AR 2-5.)  
17 This action followed.

18 **III. STANDARD OF REVIEW**

19 Under 42 U.S.C. § 405(g), a district court may review the  
20 Commissioner's decision to deny benefits. The ALJ's findings and  
21 decision should be upheld if they are free of legal error and  
22 supported by substantial evidence based on the record as a whole.  
23 Id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra v.  
24 Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence  
25 means such evidence as a reasonable person might accept as  
26 adequate to support a conclusion. Richardson, 402 U.S. at 401;  
27 Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It  
28 is more than a scintilla but less than a preponderance.

1 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.  
2 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether  
3 substantial evidence supports a finding, the reviewing court  
4 "must review the administrative record as a whole, weighing both  
5 the evidence that supports and the evidence that detracts from  
6 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,  
7 720 (9th Cir. 1996). "If the evidence can reasonably support  
8 either affirming or reversing," the reviewing court "may not  
9 substitute its judgment" for that of the Commissioner. Id. at  
10 720-21.

#### 11 **IV. THE EVALUATION OF DISABILITY**

12 People are "disabled" for purposes of receiving Social  
13 Security benefits if they are unable to engage in any substantial  
14 gainful activity owing to a physical or mental impairment that is  
15 expected to result in death or which has lasted, or is expected  
16 to last, for a continuous period of at least 12 months. 42  
17 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257  
18 (9th Cir. 1992).

##### 19 A. The Five-Step Evaluation Process

20 The ALJ follows a five-step sequential evaluation process in  
21 assessing whether a claimant is disabled. 20 C.F.R.  
22 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th  
23 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the  
24 Commissioner must determine whether the claimant is currently  
25 engaged in substantial gainful activity; if so, the claimant is  
26 not disabled and the claim must be denied. § 404.1520(a)(4)(i).  
27 If the claimant is not engaged in substantial gainful activity,  
28 the second step requires the Commissioner to determine whether

1 the claimant has a "severe" impairment or combination of  
2 impairments significantly limiting his ability to do basic work  
3 activities; if not, a finding of not disabled is made and the  
4 claim must be denied. § 404.1520(a)(4)(ii). If the claimant has  
5 a "severe" impairment or combination of impairments, the third  
6 step requires the Commissioner to determine whether the  
7 impairment or combination of impairments meets or equals an  
8 impairment in the Listing of Impairments ("Listing") set forth at  
9 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is  
10 conclusively presumed and benefits are awarded.

11 § 404.1520(a)(4)(iii).

12 If the claimant's impairment or combination of impairments  
13 does not meet or equal an impairment in the Listing, the fourth  
14 step requires the Commissioner to determine whether the claimant  
15 has sufficient residual functional capacity ("RFC")<sup>1</sup> to perform  
16 his past work; if so, the claimant is not disabled and the claim  
17 must be denied. § 404.1520(a)(4)(iv). The claimant has the  
18 burden of proving he is unable to perform past relevant work.  
19 Drouin, 966 F.2d at 1257. If the claimant meets that burden, a  
20 prima facie case of disability is established. Id. If that  
21 happens or if the claimant has no past relevant work, the  
22 Commissioner then bears the burden of establishing that the  
23 claimant is not disabled because he can perform other substantial  
24 gainful work available in the national economy.

25 § 404.1520(a)(4)(v). That determination comprises the fifth and  
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27 <sup>1</sup> RFC is what a claimant can do despite existing exertional  
28 and nonexertional limitations. § 404.1545; see Cooper v. Sullivan,  
880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 final step in the sequential analysis. § 404.1520; Lester, 81  
2 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

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

4 At step one, the ALJ found that Plaintiff alleged an onset  
5 date of July 1, 2006, but had engaged in substantial gainful  
6 activity by working as a plumber from July 1 to July 31, 2006.

7 (AR 27.) The ALJ further found that Plaintiff had worked for a  
8 short period in 2009 but concluded it was an unsuccessful work  
9 attempt that did not constitute substantial gainful activity.

10 (Id.) Finally, the ALJ noted that Plaintiff "admitted at the  
11 hearing that he had self-employment earnings in 2010 in the  
12 amount of \$11,262.00 from acting as a broker for plumbing  
13 equipment," but she gave him the "benefit of the doubt" and  
14 concluded that they did not arise from substantial gainful  
15 activity, either. (Id.)

16 At step two, the ALJ concluded that Plaintiff had severe  
17 impairments of "degenerative disc disease, lumbar spine;  
18 herniated disc, L5-S1; lumbar radiculitis;<sup>2</sup> insomnia; avascular  
19 necrosis of the hip;<sup>3</sup> and alcohol dependence syndrome." (AR 28.)  
20 The ALJ found that Plaintiff's obesity, hypertension,

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21  
22 <sup>2</sup>Radiculitis is inflammation of a spinal nerve root.  
23 Radiculitis, The Free Dictionary, <http://medical-dictionary.thefreedictionary.com/radiculitis> (last visited Aug. 20, 2014).

24 <sup>3</sup>Avascular necrosis is the death of bone tissue from a lack of  
25 blood supply. Avascular necrosis, Mayo Clinic, <http://www.mayoclinic.org/diseases-conditions/avascular-necrosis/basics/definition/con-20025517> (last updated May 4, 2012). Avascular  
26 necrosis can lead to tiny breaks in the bone and the bone's  
27 eventual collapse. Id. It can be caused by bone fracture or joint  
28 dislocation, and it is also associated with long-term use of high-  
dose steroids and excessive alcohol intake. Id.

1   hypothyroidism, and depression were nonsevere (AR 28-30),  
2   findings that Plaintiff does not challenge. At step three, the  
3   ALJ determined that Plaintiff's impairments did not meet or equal  
4   a Listing. (AR 30-31.) At step four, she found that Plaintiff  
5   retained the RFC to perform a limited range of light work.<sup>4</sup> (AR  
6   31-38.) Based on the VE's testimony, the ALJ concluded that  
7   Plaintiff was unable to perform his past work as a plumber or  
8   plumbing supervisor but could perform other jobs existing in  
9   sufficient numbers in the national and regional economies. (AR  
10  38-39.) The ALJ therefore concluded that Plaintiff was not  
11  disabled. (AR 40.)

## 12  **V.   DISCUSSION**

13       Plaintiff argues that the ALJ erred in (1) discounting the  
14  opinion of his physician assistant, Chad Sweetnam and (2) failing  
15  to properly consider Plaintiff's cervical-spine impairment  
16  "individually and in combination with the other impairments in  
17  assessing his [RFC]".<sup>5</sup> (J. Stip. at 4.)

### 18       A.   Applicable Law

19       A district court must uphold an ALJ's RFC assessment when  
20  the ALJ has applied the proper legal standard and substantial  
21  \_\_\_\_\_

22       <sup>4</sup>"Light work" involves "lifting no more than 20 pounds at a  
23  time with frequent lifting or carrying of objects weighing up to 10  
24  pounds." § 404.1567(b). "Even though the weight lifted may be  
25  very little, a job is in this category when it requires a good deal  
26  of walking or standing, or when it involves sitting most of the  
27  time with some pushing and pulling of arm or leg controls." Id.  
28  A person who can do light work can generally also do sedentary  
29  work. Id.

30       <sup>5</sup>The Court addresses the issues in an order different from  
31  that followed by the parties, in order to avoid repetition and for  
32  other reasons.

1 evidence in the record as a whole supports the decision. Bayliss  
2 v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005). The ALJ must  
3 consider all the medical evidence in the record and "explain in  
4 [her] decision the weight given to . . . [the] opinions from  
5 treating sources, nontreating sources, and other nonexamining  
6 sources." 20 C.F.R. § 404.1527(e)(2)(ii); see also  
7 § 404.1545(a)(1) ("We will assess your residual functional  
8 capacity based on all the relevant evidence in your case  
9 record."); SSR 96-8p, 1996 WL 374184, at \*2 (July 2, 1996) (RFC  
10 must be "based on all of the relevant evidence in the case  
11 record"). In making an RFC determination, the ALJ may consider  
12 those limitations for which there is support in the record and  
13 need not consider properly rejected evidence or subjective  
14 complaints. See Bayliss, 427 F.3d at 1217 (upholding ALJ's RFC  
15 determination because "the ALJ took into account those  
16 limitations for which there was record support that did not  
17 depend on [claimant's] subjective complaints"); Batson v. Comm'r  
18 of Soc. Sec. Admin., 359 F.3d 1190, 1197 (9th Cir. 2004) (ALJ not  
19 required to incorporate into RFC findings from treating-physician  
20 opinions that were "permissibly discounted").

21 Three types of physicians may offer opinions in Social  
22 Security cases: (1) those who directly treated the plaintiff, (2)  
23 those who examined but did not treat the plaintiff, and (3) those  
24 who did not treat or examine the plaintiff. Lester, 81 F.3d at  
25 830. A treating physician's opinion is generally entitled to  
26 more weight than that of an examining physician, and an examining  
27 physician's opinion is generally entitled to more weight than  
28 that of a nonexamining physician. Id. Moreover, an ALJ may

1 accord less weight to opinions from "other sources," such as  
2 physician assistants, Gomez v. Chater, 74 F.3d 967, 970-71 (9th  
3 Cir. 1996), superseded by regulation on other grounds as noted in  
4 Hudson v. Astrue, No. CV-11-0025-CI, 2012 WL 5328786, at \*4 n.4  
5 (E.D. Wash. Oct. 29, 2012), and may discount their testimony by  
6 giving "reasons germane to each witness for doing so." Molina v.  
7 Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) (internal quotation  
8 marks omitted).

9 B. Background<sup>6</sup>

10 On May 19, 2009, Dr. Isaac Schmidt, who treated Plaintiff  
11 and specialized in orthopedic surgery, completed a "permanent and  
12 stationary" report in connection with Plaintiff's worker's  
13 compensation case. (AR 273-82.) He diagnosed "lumbar  
14 sprain/strain"; lumbar facet syndrome; herniated disc at L5-S1;  
15 avascular necrosis, bilateral hips; and trochanteric bursitis,  
16 bilateral hips.<sup>7</sup> (AR 278.) Dr. Schmidt noted that Plaintiff's  
17 previous job as a plumber had required "frequent lifting up to  
18 100 pounds, with pushing and pulling of 100 pounds." (AR 274.)  
19 He opined that "[p]ertaining to his lumbar spine," Plaintiff  
20 "would be precluded from heavy work," which was "a 50 percent  
21 loss of his pre-injury capacity for bending, stooping, lifting,  
22 pushing, pulling and climbing or other activities involving

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23  
24 <sup>6</sup>Because the parties are familiar with the facts, the Court  
25 summarizes them only to the extent they are relevant to the  
disputed issues.

26 <sup>7</sup>Bursitis occurs when bursae become inflamed. Bursitis, Mayo  
27 Clinic, [http://www.mayoclinic.org/diseases-conditions/bursitis/  
basics/definition/con-20015102](http://www.mayoclinic.org/diseases-conditions/bursitis/basics/definition/con-20015102) (last updated Aug. 20, 2014).  
28 Bursae are the small, fluid-filled sacs that cushion the bones,  
tendons, and muscles near joints. Id.



1 comparable physical effort." (AR 280.) He opined that  
2 "[p]ertaining to his right hip," Plaintiff was "precluded from  
3 prolonged standing and/or walking." (Id.)

4 On October 20, 2009, Dr. William C. Boeck, Jr., a board-  
5 certified orthopedic surgeon, performed a comprehensive  
6 orthopedic evaluation of Plaintiff at the Social Security  
7 Administration's request. (AR 238-42.) Dr. Boeck noted that  
8 Plaintiff complained of daily low-back pain with radiation into  
9 the right-hip area and down to the knee. (AR 238.) After  
10 performing a physical examination, Dr. Boeck found that "[t]he  
11 positive findings noted objectively in examination of this  
12 individual are the limited motions in the lumbar spine." (AR  
13 242.) He opined that "[i]n view of the lack of any other  
14 corroborating positive signs," Plaintiff could lift and carry 50  
15 pounds occasionally and 25 pounds frequently, stand or walk six  
16 hours in an eight-hour day, and sit six hours in an eight-hour  
17 workday. (Id.) He had no postural or manipulative limitations.  
18 (Id.)

19 On November 3, 2009, Dr. Leonard H. Naiman, who specialized  
20 in internal medicine,<sup>8</sup> reviewed Plaintiff's medical records and  
21 completed a physical-residual-functional-capacity assessment.  
22 (AR 245-52.) Dr. Naiman opined that Plaintiff suffered from  
23 "back pain" and could lift and carry 50 pounds occasionally and  
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25 <sup>8</sup>Dr. Naiman's electronic signature includes a medical  
26 specialty code of 19, indicating internal medicine. (AR 252); see  
27 Program Operations Manual System (POMS) DI 26510.089, U.S. Soc.  
28 Sec. Admin. (Oct. 25, 2011), <http://policy.ssa.gov/poms.nsf/lnx/0426510089>; POMS DI 26510.090, U.S. Soc. Sec. Admin. (Aug. 29, 2012), <http://policy.ssa.gov/poms.nsf/lnx/0426510090>.

1 25 pounds frequently, stand and walk about six hours in an eight-  
2 hour day, sit for about six hours in an eight-hour day, perform  
3 unlimited pushing and pulling, and frequently climb, balance,  
4 stoop, kneel, crouch, and crawl. (AR 246-47.) On June 3, 2010,  
5 Dr. E. Cooper, who also specialized in internal medicine,<sup>9</sup>  
6 reviewed the medical evidence and affirmed Dr. Naiman's opinion.  
7 (AR 313.)

8 On August 20, 2010, Plaintiff reported to physician's  
9 assistant Lewis<sup>10</sup> that he had experienced neck pain radiating  
10 into the right arm for the preceding two months. (AR 323.) In  
11 September 2010, Lewis noted that Plaintiff complained of neck  
12 pain radiating to his right arm and causing right-arm numbness,  
13 tingling, and diminished strength. (AR 319.) In October 2010, a  
14 cervical-spine MRI revealed a "moderately sized herniated disc"  
15 at C6-7 and a "peripheral disc protrusion bilaterally at C5-6."  
16 (AR 327.) A doctor advised Plaintiff to continue his pain  
17 medication and referred him to a spine clinic. (AR 317.)

18 In January 2011, Dr. Rahul Basho at the Orthopedic Surgical  
19 Spine Clinic noted that Plaintiff complained of "cervical pain  
20 for over a year" that radiated to his right shoulder, arm, and  
21 hand. (AR 337.) Plaintiff reported that he had "difficulty with  
22 day to day activities" and had numbness in his thumb and two  
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24 <sup>9</sup>Dr. Cooper's electronic signature includes a medical  
25 specialty code of 19, indicating internal medicine. (AR 313); see  
26 Program Operations Manual System (POMS) DI 26510.089, U.S. Soc.  
27 Sec. Admin. (Oct. 25, 2011), <http://policy.ssa.gov/poms.nsf/lnx/0426510089>;  
28 POMS DI 26510.090, U.S. Soc. Sec. Admin. (Aug. 29,  
2012), <http://policy.ssa.gov/poms.nsf/lnx/0426510090>.

<sup>10</sup>The record does not reflect Lewis's other name.

1 fingers. (Id.) Plaintiff also reported low-back pain that  
2 radiated to his lower extremities, but he was "not receiving any  
3 active treatment for his low back at this time." (Id.) Upon  
4 examination, Dr. Basho noted decreased range of motion and  
5 tenderness of the lumbar spine, decreased range of motion of the  
6 neck, and tenderness to palpation of the cervical region. (Id.)  
7 In the upper extremities, Plaintiff had motor strength of four on  
8 a scale of five "in the C6 distribution bilaterally" and  
9 decreased sensation in the right C6 nerve distribution. (Id.)  
10 After noting Plaintiff's x-ray and MRI results, Dr. Basho  
11 diagnosed C5-7 disc herniation with central foraminal stenosis,  
12 C6 radiculopathy to the right,<sup>11</sup> and lumbago.<sup>12</sup> (Id.) He  
13 prescribed physical therapy and noted that Plaintiff would "most  
14 likely benefit from surgical intervention with respect to the  
15 neck" but wanted "conservative treatment at this time." (AR 337-  
16 38.)

17 In March 2011, Dr. Basho noted that Plaintiff complained of  
18 pain starting at the base of his neck and shooting into the right  
19 shoulder. (AR 335.) He denied any gait imbalance or difficulty  
20 with fine motor movements of the hands. (Id.) Upon examination,  
21

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22 <sup>11</sup>Cervical radiculopathy is a disease process marked by nerve  
23 compression from herniated disk material or arthritic bone spurs.  
24 Jason David Eubanks, Cervical Radiculopathy: Nonoperative  
25 Management of Neck Pain and Radicular Symptoms, Am. Family  
26 Physician (Jan. 1, 2010), available at <http://www.aafp.org/afp/2010/0101/p33.html>. Cervical radiculopathy leads to neck and radiating arm pain or numbness in the distribution of a specific nerve root. Id.

27 <sup>12</sup>Lumbago is pain in the lower back. Lumbago, Merriam-Webster,  
28 <http://www.merriam-webster.com/dictionary/lumbago> (last visited Aug. 21, 2014).

1 Plaintiff had five out of five strength and intact sensation in  
2 the lower extremities (id.); in the upper extremities, he had  
3 four out of five strength in some muscles and five out of five in  
4 others (AR 335). Sensation in the right upper extremity was  
5 diminished along the C6 nerve distribution. (Id.) Plaintiff's  
6 shoulders were nontender and he had negative Hawkin's and Neer's  
7 tests bilaterally.<sup>13</sup> (AR 335-36.) Dr. Basho diagnosed cervical  
8 radiculopathy, prescribed physical therapy and Medrol,<sup>14</sup> and  
9 noted that if that treatment did not work, he would consider  
10 epidural steroid injections. (AR 336.) On September 2, 2011,  
11 physician's assistant Chad Sweetnam noted that Plaintiff had  
12 cervical radiculopathy and prescribed physical therapy. (AR  
13 334.)

14 On September 6, 2011, Sweetnam completed a lumbar-spine RFC  
15 questionnaire. (AR 329-33.) Under "diagnosis," Sweetnam noted  
16 only "cervical radiculopathy."<sup>15</sup> (AR 329.) He noted Plaintiff's  
17 cervical-spine x-rays and MRI results and listed the "positive  
18

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19 <sup>13</sup>A positive Hawkin's test can reveal possible subacromial  
20 impingement or rotator-cuff tendonitis of the shoulder; a positive  
21 Neer's test can indicate impingement of the rotator-cuff tendons of  
22 the shoulder. Thomas W. Woodward, M.D. et al., The Painful  
23 Shoulder: Part 1. Clinical Evaluation, Am. Family Physician (May  
24 15, 2000), available at [http://www.aafp.org/afp/2000/0515/  
25 p3079.html](http://www.aafp.org/afp/2000/0515/p3079.html).

26 <sup>14</sup>Medrol, or methylprednisolone, is a corticosteroid used to  
27 relieve inflammation. Methylprednisolone Oral, MedlinePlus,  
28 <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682795.html> (last  
updated Sept. 1, 2010).

<sup>15</sup>Sweetnam did not mention Plaintiff's lumbar-spine or hip  
conditions anywhere on the form. Thus, all of the asserted  
limitations presumably stemmed from Plaintiff's cervical-spine  
conditions.

1 objective signs" as "4/5 motor strength right arm," decreased  
2 sensation, and a positive Hawkin's test. (AR 330.) Sweetnam  
3 opined that Plaintiff could walk for three to four blocks without  
4 rest, sit for 45 minutes and stand for 45 minutes at a time,  
5 stand and walk a total of two hours in an eight-hour day, and sit  
6 about four hours in an eight-hour day. (AR 331.) He could  
7 occasionally lift and carry 10 pounds but never more than that.  
8 (AR 332.) Plaintiff needed to walk for 15 minutes every hour,  
9 take unscheduled 15-minute breaks two or three times a day, and  
10 be able to shift positions at will from sitting, standing, or  
11 walking. (Id.) Sweetnam opined that Plaintiff had "significant"  
12 limitations in doing repetitive reaching, handling, or fingering;  
13 could bend and twist at the waist each for only 20 percent of an  
14 eight-hour workday; and would be absent from work about three  
15 times a month as a result of his impairments or treatment. (AR  
16 333.)

17 In her decision, the ALJ gave "great weight, but not full  
18 weight," to the opinions of examining physician Boeck and  
19 reviewing physicians Naiman and Cooper. (AR 37.) She noted that  
20 their opinions were "generally consistent" in that they all found  
21 that Plaintiff could perform a range of medium-exertion work.<sup>16</sup>  
22 (Id.) The ALJ noted, however, that "[i]n order to give  
23 [Plaintiff] the benefit of the doubt," she had "adopted those  
24 specific restrictions on a function-by-function basis that are  
25 best supported by the objective evidence as a whole." (Id.)

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27 <sup>16</sup>"Medium work" involves "lifting no more than 50 pounds at a  
28 time with frequent lifting or carrying of objects weighing up to 25  
pounds." § 404.1567(c).

1           The ALJ also accorded "great weight" to Dr. Schmidt's  
2 opinion but gave Plaintiff "the benefit of the doubt and assessed  
3 additional limitations to account for [his] allegations of  
4 shoulder pain, insomnia and neck pain." (Id.) Finally, the ALJ  
5 "considered the opinion of Chad Sweetman [sic], a physician  
6 assistant," but gave it "less weight than other qualifying  
7 medical source opinions" because it was not from an "acceptable  
8 medical source" and was "inconsistent with the medical records as  
9 a whole, which indicated a conservative course of treatment,  
10 including physical therapy." (Id.) The ALJ therefore concluded  
11 that Plaintiff retained the RFC to perform a limited range of  
12 light work, specifically,

13           [he] can lift and/or carry twenty pounds occasionally,  
14           ten pounds frequently. [Plaintiff] can sit, stand or  
15           walk for about six hours each in an eight-hour workday,  
16           taking normal breaks. [He] must be able to alternate  
17           positions every forty-five minutes for one to five  
18           minutes at the workstation. [He] can occasionally kneel,  
19           stoop, crouch and crawl. [He] can occasionally climb  
20           ramps, stairs and never climb ladders, ropes or  
21           scaffolds. [He] can push and/or pull twenty pounds  
22           occasionally and ten pounds frequently with his lower  
23           extremity. [He] can occasionally reach overhead with his  
24           non-dominant upper right extremity. [He] can frequently  
25           use his right hand for gross and fine manipulation and  
26           has no limitations on use of his left hand. [He] can  
27           occasionally fully rotate his neck from side to side.  
28           [He] must avoid hazards such as unprotected heights and

1 dangerous moving machinery and avoid concentrated  
2 exposure to extremely cold weather.

3 (AR 31.)

4 C. Analysis

5 For the reasons discussed below, the ALJ did not err in  
6 discounting Sweetnam's opinion or assessing Plaintiff's cervical-  
7 spine impairment.

8 1. The ALJ did not err in discounting Sweetnam's  
9 opinion

10 The ALJ did not err in rejecting the opinion of physician's  
11 assistant Sweetnam. As the ALJ noted (AR 36), Sweetnam is not an  
12 "acceptable medical source" under Social Security regulations.  
13 See 20 C.F.R. § 404.1513(a) ("[a]cceptable medical sources"  
14 include only licensed physicians, psychologists, optometrists,  
15 podiatrists, and speech pathologists). Rather, the regulations  
16 treat physician's assistants as "other sources," see  
17 § 404.1513(d), and the ALJ may reject opinions from "other  
18 sources" by giving "reasons germane to each witness for doing  
19 so," Molina, 674 F.3d at 1111 (internal quotation marks omitted);  
20 Turner v. Comm'r of Soc. Sec., 613 F.3d 1217, 1224 (9th Cir.  
21 2010) (internal quotation marks omitted).

22 Moreover, as the ALJ noted, Sweetnam's opinion was  
23 "inconsistent with the medical records as a whole" and  
24 Plaintiff's conservative course of treatment. (AR 37.) Indeed,  
25 Sweetnam opined that Plaintiff's cervical-spine impairment,  
26 alone, resulted in significant limitations, including an  
27 inability to sit or stand for more than 45 minutes at a time,  
28 walk for more than three or four blocks before resting, or lift

1 more than 10 pounds (AR 331-32); but in March 2011, Dr. Basho  
2 noted that Plaintiff could walk on his heels and toes, perform a  
3 tandem gait, and had normal strength and sensation in his lower  
4 extremities (AR 335-36). Indeed, a physical exam revealed  
5 reduced sensation only along the C6 nerve in the right arm and  
6 slightly reduced strength in some of the muscles of his upper  
7 extremities. (AR 335.) Moreover, Plaintiff's cervical-spine  
8 condition was treated with only medication and physical therapy  
9 (see AR 334-38); although Dr. Basho noted that Plaintiff might  
10 benefit from epidural injections or surgery if his symptoms did  
11 not improve (id.), nothing indicates that any physician  
12 administered such treatment or found that it was actually  
13 warranted. These were therefore sufficient reasons for  
14 discounting Sweetnam's opinion. See Bayliss, 427 F.3d at 1218  
15 ("inconsistency with medical evidence" is germane reason for  
16 discounting laywitness testimony); Carter v. Astrue, 472 F. App'x  
17 550, 553 (9th Cir. 2012) ("We have held that inconsistency with  
18 medical evidence is a germane reason to reject lay testimony.");  
19 see also 20 C.F.R. § 404.1527(c)(4) ("Generally, the more  
20 consistent an opinion is with the record as a whole, the more  
21 weight we will give to that opinion.").

22 Plaintiff acknowledges that Sweetnam is not a "valid medical  
23 source" but argues that under Social Security Ruling 06-03p, 2006  
24 WL 2329939 (Aug. 9, 2006), "his opinions nevertheless may rise to  
25 the level of treating opinion status depending on the degree of  
26 treatment" he provided. (J. Stip. at 20.) But SSR 06-03p merely  
27 states that depending on the relevant facts and circumstances,  
28 the opinion of an "other" medical source may be entitled to more



1 weight than the opinion of an "acceptable" medical source,  
2 stating, "[f]or example, it may be appropriate to give more  
3 weight to the opinion of a medical source who is not an  
4 'acceptable medical source' if he or she has seen the individual  
5 more often than the treating source and has provided better  
6 supporting evidence and a better explanation for his or her  
7 opinion." See 2006 WL 2329939, at \*5. But Sweetnam apparently  
8 treated Plaintiff only once, on September 2, 2011, and he made no  
9 clinical findings in that note other than stating that Plaintiff  
10 had cervical radiculopathy and should undergo physical therapy.<sup>17</sup>  
11 (AR 334.) And as discussed above, Sweetnam's opinion regarding  
12 Plaintiff's RFC was inconsistent with the medical record, which  
13 reflected only conservative treatment. The ALJ therefore was not  
14 obligated to treat Sweetnam's assessment as a "treating opinion."

15 Remand is not warranted on this ground.

16 2. The ALJ did not err in assessing Plaintiff's  
17 cervical-spine impairment

18 Plaintiff concedes that if he "had only suffered from lumbar  
19 spine and hip impairments, the ALJ's [RFC] assessment perhaps  
20 would be supported by substantial evidence" because "a reasonable  
21 person may accept the opinions of Drs. Boeck, Naiman and Schmidt  
22 to determine that [Plaintiff] is limited to the [assessed] range  
23 of light work." (J. Stip. at 7.) Plaintiff argues, however,  
24 that "[s]ince the onset of [his] cervical spine impairment as of  
25

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26  
27 <sup>17</sup>Sweetnam also dictated the January 2011 evaluation note,  
28 which was signed by Dr. Basho, but nothing indicates that Sweetnam,  
rather than the doctor, treated Plaintiff that day. (See AR 337-  
38.)

1 approximately June 2010, a reasonable person could not accept the  
2 opinions of Drs. Boeck, Naiman, Cooper and Schmidt because they  
3 did not have an opportunity to consider the impact that  
4 [Plaintiff's] cervical radiculopathy had on his ability to work."  
5 (J. Stip. at 9 (citation omitted).)

6 Plaintiff would perhaps be correct if the ALJ had relied  
7 solely on those doctors' opinions in formulating the RFC  
8 assessment. But after crediting those opinions, all of which  
9 stated that Plaintiff could perform a range of medium work, the  
10 ALJ in fact gave Plaintiff the "benefit of the doubt" and  
11 assessed significant additional limitations based on his  
12 cervical-spine impairment and reported symptoms. (See AR 37.)  
13 Plaintiff's medical records reflect that he had a moderately  
14 sized herniated disc at the left C6-7 and a peripheral disc  
15 protrusion bilaterally at C5-6 (AR 327); upon examination, Dr.  
16 Basho noted that Plaintiff had slightly diminished strength in  
17 some of his right-arm muscles and diminished sensation in the  
18 right C6 nerve distribution (AR 335; see also AR 330 (Sweetnam's  
19 RFC assessment noting "4/5 motor strength right arm" and  
20 decreased sensation along right C6 distribution)). Moreover, in  
21 a September 2010 disability report, Plaintiff reported that he  
22 had developed neck, shoulder, and right-arm conditions in June  
23 2010, which resulted in "neck and shoulder numbness down [his]  
24 right arm." (AR 189.) At the September 2011 hearing, Plaintiff  
25 testified that he had pain in his neck and shoulders (AR 62), and  
26 because of his cervical-spine problems, he could "probably get  
27 [his] elbow about even with [his] shoulder" but if he lifted it  
28 "any further than that, it's like electric shock going up [his]

1 arm." (AR 54.) He said he had numbness and tingling in some of  
2 his fingers (AR 62, 65), and as a result he had trouble grasping  
3 objects with his right hand (AR 65).<sup>18</sup> Plaintiff asserted that  
4 he had trouble lifting things with his right arm (AR 57); he  
5 could carry less than five pounds with his right hand before  
6 experiencing pain or discomfort (AR 63) and used his left hand -  
7 which was his dominant hand (AR 48, 65) - to carry a gallon of  
8 milk (AR 63). At the hearing and in his disability reports,  
9 moreover, Plaintiff attributed his standing and sitting  
10 limitations to his low-back condition, not his later cervical-  
11 spine problems. (See AR 54, 60-62, 166, 177.) The ALJ  
12 accommodated those medical findings and many of Plaintiff's  
13 subjective complaints by, for example, limiting Plaintiff to  
14 lifting and carrying 20 pounds occasionally and 10 pounds  
15 frequently, only occasional reaching overhead with his right arm,  
16 only frequently using his right hand for manipulation, only  
17 occasionally rotating his neck from side to side, and only  
18 occasionally kneeling, stooping, crouching, and crawling.<sup>19</sup> (AR  
19 31.)

20 To the extent Plaintiff contends the ALJ should have  
21

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22 <sup>18</sup>Plaintiff's allegations that he had trouble grasping with his  
23 right hand appear to conflict with Dr. Basho's observation in March  
24 2010 that Plaintiff denied any difficulty with fine motor movements  
of the hands. (AR 335.)

25 <sup>19</sup>To the extent Plaintiff alleged limitations exceeding the  
26 RFC, moreover, the ALJ properly discredited them because, among  
27 other things, he had received only conservative treatment for his  
28 allegedly debilitating conditions and made inconsistent statements  
about his alcohol use and how he first injured his back. (AR 33.)  
Plaintiff has not challenged the ALJ's credibility determination.

1 assessed additional limitations based on physician's assistant  
2 Sweetnam's RFC assessment (J. Stip. at 8-10), that argument  
3 fails. As previously discussed in Section V.C.1, the ALJ  
4 permissibly rejected Sweetnam's opinion because it was  
5 inconsistent with the evidence and Plaintiff's conservative  
6 treatment. As such, she was not obligated to include his  
7 assessed limitations in the RFC assessment. See Batson, 359 F.3d  
8 at 1197. Plaintiff also contends that the ALJ erroneously  
9 determined that Plaintiff's "cervical spine impairment would only  
10 result in a limitation against side-to-side rotation and not  
11 other limitations such as lifting, carrying, reaching, handling  
12 and fingering because of radiculopathy." (J. Stip. at 10.) But  
13 as previously discussed, the ALJ in fact included several  
14 additional RFC limitations in order to accommodate Plaintiff's  
15 cervical-spine impairment, such as limitations on lifting and  
16 carrying, overhead reaching, stooping, crouching, and use of his  
17 right hand for manipulation. (AR 31.)

18 Plaintiff also contends that "as a lay person, 'an ALJ is  
19 simply not qualified to interpret raw medical data in functional  
20 terms.'" (J. Stip. at 10 (some internal quotation marks omitted)  
21 (quoting Padilla v. Astrue, 541 F. Supp. 2d 1102, 1106 (C.D. Cal.  
22 2008)).) It is true that an ALJ may not simply substitute her  
23 own opinion for a doctor's professional interpretation of  
24 clinical testing. See Day v. Weinberger, 522 F.2d 1154, 1156  
25 (9th Cir. 1975) (noting that hearing examiner erred by failing to  
26 "set forth any specific reasons for rejecting the . . . doctors'  
27 uncontroverted conclusions" and instead "go[ing] outside the  
28 record to medical textbooks for the purpose of making his own

1 exploration and assessment as to claimant's physical condition"  
2 even though he "was not qualified as a medical expert"). Here,  
3 however, the ALJ gave legally sufficient reasons for discounting  
4 the opinion of Sweetnam, an "other source" under the regulations;  
5 she also appropriately considered all the medical evidence and  
6 Plaintiff's subjective complaints and formulated an RFC that was  
7 consistent with them. (See AR 31-38 (summarizing evidence and  
8 Plaintiff's subjective complaints)); SSR 96-8p, 1996 WL 374184,  
9 at \*5 (RFC assessment "must be based on all of the relevant  
10 evidence in the case record," such as medical history, laboratory  
11 findings, effects of treatment, medical-source statements,  
12 effects of symptoms, and recorded observations (emphasis in  
13 original)); cf. id. at \*7 ("If the RFC assessment conflicts with  
14 an opinion from a medical source, the adjudicator must explain  
15 why the opinion was not adopted."). Plaintiff also relied on the  
16 opinions of Drs. Schmidt, Boeck, Naiman, and Cooper. The ALJ  
17 therefore acted within her authority. See Vertigan v. Halter,  
18 260 F.3d 1044, 1049 (9th Cir. 2001) ("It is clear that it is the  
19 responsibility of the ALJ, not the claimant's physician, to  
20 determine residual functional capacity."); 20 C.F.R.  
21 § 404.1546(c) ("[T]he administrative law judge . . . is  
22 responsible for assessing your residual functional capacity.");  
23 see also 20 C.F.R. § 404.1545(a)(1) ("We will assess your  
24 residual functional capacity based on all the relevant evidence  
25 in your case record."); SSR 96-5p, 1996 WL 374183, at \*5 (July 2,  
26 1996) (RFC determination is reserved to ALJ and "is based upon  
27 consideration of all relevant evidence in the case record,  
28 including medical evidence and relevant nonmedical evidence, such

1 as observations of lay witnesses of an individual's apparent  
2 symptomatology, an individual's own statement of what he or she  
3 is able or unable to do, and many other factors that could help  
4 the adjudicator determine the most reasonable findings in light  
5 of all the evidence." ).

6 To the extent Plaintiff argues that he is entitled to remand  
7 based on the ALJ's failure to list his cervical-spine condition  
8 as a severe impairment at step two of the sequential disability  
9 analysis (see J. Stip. at 11), that claim fails. Even if the ALJ  
10 erred, it was harmless because she adequately considered that  
11 condition and its resulting limitations when formulating  
12 Plaintiff's RFC at step four. See Lewis v. Astrue, 498 F.3d 909,  
13 911 (9th Cir. 2007) (failure to list bursitis at step two  
14 harmless when ALJ "extensively discussed" condition and  
15 "considered any limitations posed by [it]" at step four).

16 Finally, any error in the ALJ's assessment of Plaintiff's  
17 limitations from his cervical-spine impairment is harmless for  
18 the additional reason that even accounting for more such  
19 limitations, Plaintiff remained able to perform one of the jobs  
20 identified by the VE. See Stout v. Comm'r, Soc. Sec. Admin., 454  
21 F.3d 1050, 1055 (9th Cir. 2006) (finding error harmless when  
22 "mistake was nonprejudicial to the claimant or irrelevant to the  
23 ALJ's ultimate disability conclusion"). The VE originally  
24 testified that based on the ALJ's RFC determination, Plaintiff  
25 would be able to perform three positions. (AR 74-76.)  
26 Plaintiff's counsel then asked whether Plaintiff would be able to  
27 work with the additional limitation of "use of his right hand  
28 less than occasionally" because of his cervical-spine problems,

1 and the VE testified that he could still do the rental-clerk job.  
2 (AR 76-77.)

3 Plaintiff is not entitled to remand on this ground.

4 **VI. CONCLUSION**

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

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13 DATED: August 26, 2014

  
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JEAN ROSENBLUTH  
U.S. Magistrate Judge

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27 <sup>20</sup> 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."