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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON  
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7 DENNIS PATRICK OYARZO,

8 Plaintiff,

9 vs.

10 CAROLYN W. COLVIN, Acting  
11 Commissioner of Social Security,

12 Defendant.

No. CV- 14-3149-JPH

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

13 BEFORE THE COURT are cross-motions for summary judgment. ECF No.  
14 13, 14. The parties have consented to proceed before a magistrate judge. ECF No.  
15 7. After reviewing the administrative record and the parties' briefs, the court  
16 **grants** defendant's motion for summary judgment, **ECF No. 14**.

17 **JURISDICTION**

18 Oyarzo applied for supplemental security income (SSI) benefits on January  
19 10, 2010, alleging onset (as amended) beginning May 11, 2010 (Tr. 29, 156-61).

1 Benefits were denied initially and on reconsideration (Tr. 84-92, 96-102). ALJ  
2 Kimberly Boyce held a hearing July 19, 2014. Oyarzo, represented by counsel, and  
3 a vocational expert testified (Tr. 27-57). The ALJ issued an unfavorable decision  
4 date May 16, 2012 (Tr. 11-21). The Appeals Council denied review September 4,  
5 2014 (Tr. 1-6). The matter is now before the Court pursuant to 42 U.S.C. § 405(g).  
6 Plaintiff filed this action for judicial review on October 14, 2014. ECF No. 1,4.

### 7 **STATEMENT OF FACTS**

8 The facts have been presented in the administrative hearing transcript, the  
9 ALJ's decision and the parties' briefs. They are briefly summarized here and as  
10 necessary to explain the court's decision.

11 Oyarzo was 52 years old when he applied for benefits. He has a tenth grade  
12 education and has not earned a GED. He has worked as an electrician, construction  
13 worker and building maintenance worker. He testified he cannot work due to pain  
14 in his back, shoulders, hands and right knee. He can walk or stand two hours out of  
15 eight and lift five to eight pounds. He drinks with friends even though he lives in a  
16 clean and sober house. He takes prescribed pain medication and watches television.  
17 In January 2013 he said he had been incarcerated for two months after "being  
18 involved in a riot at the fairgrounds" (Tr. 33-38, 42-44, 46-49, 339).

### 18 **SEQUENTIAL EVALUATION PROCESS**

19 The Social Security Act (the Act) defines disability as the "inability to

1 engage in any substantial gainful activity by reason of any medically determinable  
2 physical or mental impairment which can be expected to result in death or which  
3 has lasted or can be expected to last for a continuous period of not less than twelve  
4 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c(a)(3)(A). The Act also provides that a  
5 plaintiff shall be determined to be under a disability only if any impairments are of  
6 such severity that a plaintiff is not only unable to do previous work but cannot,  
7 considering plaintiff’s age, education and work experiences, engage in any other  
8 substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423  
9 (d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both  
10 medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
11 (9<sup>th</sup> Cir. 2001).

12 The Commissioner has established a five-step sequential evaluation process  
13 or determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step  
14 one determines if the person is engaged in substantial gainful activities. If so,  
15 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the  
16 decision maker proceeds to step two, which determines whether plaintiff has a  
17 medically severe impairment or combination of impairments. 20 C.F.R. §§  
18 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If plaintiff does not have a severe impairment  
19 or combination of impairments, the disability claim is denied.

If the impairment is severe, the evaluation proceeds to the third step, which

1 compares plaintiff's impairment with a number of listed impairments  
2 acknowledged by the Commissioner to be so severe as to preclude substantial  
3 gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R.  
4 §404 Subpt. P App. 1. If the impairment meets or equals one of the listed  
5 impairments, plaintiff is conclusively presumed to be disabled. If the impairment is  
6 not one conclusively presumed to be disabling, the evaluation proceeds to the  
7 fourth step, which determines whether the impairment prevents plaintiff from  
8 performing work which was performed in the past. If a plaintiff is able to perform  
9 previous work, that plaintiff is deemed not disabled. 20 C.F.R. §§  
10 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's residual capacity  
11 (RFC) is considered. If plaintiff cannot perform past relevant work, the fifth and  
12 final step in the process determines whether plaintiff is able to perform other work  
13 in the national economy in view of plaintiff's residual functional capacity, age,  
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
15 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

16 The initial burden of proof rests upon plaintiff to establish a *prima facie* case  
17 of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir.  
18 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
19 met once plaintiff establishes that a physical or mental impairment prevents the  
performance of previous work. The burden then shifts, at step five, to the

1 Commissioner to show that (1) plaintiff can perform other substantial gainful  
2 activity and (2) a “significant number of jobs exist in the national economy” which  
3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

#### 4 **STANDARD OF REVIEW**

5 Congress has provided a limited scope of judicial review of a  
6 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold the  
7 Commissioner’s decision, made through an ALJ, when the determination is not  
8 based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,  
9 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.  
10 1999). “The [Commissioner’s] determination that a plaintiff is not disabled will be  
11 upheld if the findings of fact are supported by substantial evidence.” *Delgado v.*  
12 *Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial  
13 evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
14 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,  
15 888 F.2d 599, 601-02 (9<sup>th</sup> Cir. 1989). Substantial evidence “means such evidence  
16 as a reasonable mind might accept as adequate to support a conclusion.”  
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations omitted). “[S]uch  
18 inferences and conclusions as the [Commissioner] may reasonably draw from the  
19 evidence” will also be upheld. *Mark v. Celebreeze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir.  
1965). On review, the Court considers the record as a whole, not just the evidence

1 supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,  
2 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980).

3 It is the role of the trier of fact, not this Court, to resolve conflicts in  
4 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
5 interpretation, the Court may not substitute its judgment for that of the  
6 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup>  
7 Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be  
8 set aside if the proper legal standards were not applied in weighing the evidence  
9 and making the decision. *Brawner v. Secretary of Health and Human Services*, 839  
10 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to support the  
11 administrative findings, or if there is conflicting evidence that will support a  
12 finding of either disability or nondisability, the finding of the Commissioner is  
13 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

### 14 **ALJ'S FINDINGS**

15 At step one ALJ Boyce found Oyarzo did not work at SGA levels after onset  
16 (Tr. 13). At steps two and three, she found he suffers from right shoulder  
17 degenerative joint disease (DJD), degenerative disc disease, right knee  
18 osteoarthritis and scoliosis, impairments that are severe but do not meet or  
19 medically equal a listed impairment (Tr. 13-15). The ALJ found Oyarzo less than  
fully credible (Tr. 16). She assessed an RFC for a range of light work Tr. 15). ALJ

1 Boyce relied on a vocational expert when she found at step four Oyarzo is unable  
2 to perform past relevant work (Tr. 19, 51). At step five, again relying on a  
3 vocational expert's testimony, the ALJ found Oyarzo can perform other jobs such  
4 as production assembler, hand packager and housekeeper (Tr. 20-21, 51-52). The  
5 ALJ concluded Oyarzo was not disabled from onset through date of the decision  
6 (Tr. 21).

### 7 **ISSUES**

8 Oyarzo alleges the ALJ erred when she weighed the medical evidence and  
9 at step five. ECF No. 13 at 4, 7-13. The Commissioner asks the court to affirm,  
10 alleging the ALJ applied the correct legal standards, the decision is supported by  
11 substantial evidence and any error is harmless requiring at most remand for further  
12 proceedings. ECF No. 14 at 1-2.

### 13 **DISCUSSION**

#### 14 *A. Nurse practitioner's opinion*

15 Oyarzo alleges the ALJ erred when she failed to properly credit the opinion  
16 of treatment provider Jody Gray, a nurse practitioner. ECF No. 13 at 7-10. The  
17 Commissioner responds that the ALJ gave germane reasons for rejecting this  
18 opinion, as is appropriate when an ALJ weighs the opinion of a non-acceptable  
19 medical source. ECF No. 14 at 4-8.

To aid in weighing the conflicting medical evidence, the ALJ evaluated

1 Oyarzo's credibility. Credibility determinations bear on evaluations of medical  
2 evidence when an ALJ is presented with conflicting medical opinions or  
3 inconsistency between a claimant's subjective complaints and diagnosed condition.  
4 *See Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005). It is the province of the  
5 ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039  
6 (9<sup>th</sup> Cir. 1995). However, the ALJ's findings must be supported by specific cogent  
7 reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Absent  
8 affirmative evidence of malingering, the ALJ's reason for rejecting the claimant's  
9 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup>  
10 Cir. 1995).

11 The ALJ's reasons for the credibility determination are clear and convincing.

12 The ALJ notes Oyarzo's allegations exceed objective findings during  
13 examinations (Tr. 16-17, referring to Tr. 246-50; *see also* Tr. 239, 244, 299-300,  
14 344-45, 336). Oyarzo inconsistently reports alcohol use, as the ALJ points out. Tr.  
15 18, referring to Tr. 317 (admits drinks socially on May 3, 2011); Tr. 241 (reports  
16 on May 11, 2011 no history of alcohol use); Tr. 339 (in January 2013 says is  
17 drinking alcohol but not "all of the time" ) and Tr. 216 and 353 (notes in June 2012  
18 show no history of alcohol use). *See also* Tr. 299 (August 2012 tells provider he  
19 "had some beers yesterday"). Oyarzo has a poor work history, including no income  
from 1979 through 1993, indicating low motivation (Tr. 18). His activities,



1 including riding a bicycle for transportation, are inconsistent with allegedly  
2 disabling limitations (Tr. 18, referring to Tr. 39, 48-49, 299). Treatment has been  
3 infrequent and conservative (Tr. 18). Most telling, Oyarzo “appeared to falsify  
4 crepitation sounds during abduction testing” by making a sound with his jaw while  
5 his shoulder was being tested (Tr. 14, referring to Tr. 249).

6 The ALJ’s reasons are clear, convincing and supported by the record. *Burch*  
7 *v. Barnhart*, 400 F.3d 676, 680 (9<sup>th</sup> Cir. 2005)(lack of medical evidence is properly  
8 considered as long as it is not the sole basis for discounting pain testimony, daily  
9 activities are properly considered); *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9<sup>th</sup>  
10 Cir. 2002)(proper factors include inconsistencies in claimant’s statements and  
11 inconsistencies between statements and conduct); *Fair v. Bowen*, 885 F.2d 597,  
12 603 (9<sup>th</sup> Cir. 1989)(unexplained noncompliance with medical treatment is properly  
13 considered). Evidence of conservative treatment is sufficient to discount a  
14 claimant’s testimony regarding the severity of an impairment. *Parra v. Astrue*, 481  
15 F.3d 742, 750-51 (9<sup>th</sup> Cir. 2007). A tendency to exaggerate complaints of pain may  
16 be considered when weighing credibility. *See Edlund v. Massanari*, 253 F.3d 1152,  
17 1157 (9<sup>th</sup> Cir. 2001).

18 In July 2013 treating nurse practitioner Jody Gray opined Oyarzo was unable  
19 to work (Tr. 357). The ALJ rejected this opinion because it is inconsistent with  
medical findings and with Oyarzo’s demonstrated abilities (Tr. 19). It is also

1 unsupported by accompanying findings.

2 The ALJ is correct. The ALJ may properly reject a physician's contradicted  
3 opinion that is inconsistent with the record as a whole. *Orn v. Astrue*, 495 F.3d  
4 625, 631 (9<sup>th</sup> Cir. 2007)(citation omitted). The ALJ may reject any opinion that is  
5 brief, conclusory and inadequately supported by clinical findings. *Bayliss v.*  
6 *Barnhart*, 427 F.3d 1211, 1216 99<sup>th</sup> Cir. 2005). A check-box form, such as the one  
7 signed by Ms. Gray, is entitled to little weight. *Crane v. Shalala*, 76 F.3d 251, 253  
8 (9<sup>th</sup> Cir. 1996)(ALJ's rejection of a check-off report that did not contain an  
9 explanation of the bases for the conclusions was permissible). Here, the record  
10 does not show that Nurse Gray relied on objective findings when she rendered her  
11 opinion, contrary to Plaintiff's assertion at ECF No. 15, page 4.

12 In addition, the Commissioner is correct that Ms. Gray is not an acceptable  
13 medical source as defined by 20 C.F.R. § 416.913(a). Here, even if she was an  
14 acceptable medical source, the ALJ's reasons for rejecting her opinion are specific,  
15 legitimate and supported by substantial evidence.

16 *B. Step five*

17 Oyarzo alleges the ALJ erred at step five because she failed to include  
18 standing and walking limitations in her hypothetical to the vocational expert. ECF  
19 No. 13 at 10-13. The Commissioner answers that the ALJ's hypothetical included  
all of the limitations established by the evidence, and the ALJ properly relied on

1 the VE's opinion. ECF No. 14 at 8-13.

2 Treating physician Anna Espiritu, M.D., opined on June 6, 2012 Oyarzo  
3 could perform a range of sedentary to light work. She opined he could sit most of  
4 the day and walk or stand for brief periods. She assessed postural and fine motor  
5 skill restrictions. She opined Oyarzo may improve "if problems can be fixed  
6 through ortho" (Tr. 203, 354).

7 The ALJ found Oyarzo can perform a range of light work. To the extent she  
8 rejected Dr. Espiritu's opinion that plaintiff is more limited, the ALJ is correct.  
9 More dire limitations are contradicted by the medical evidence, by Oyarzo's  
10 activities, and by his diminished credibility. Multiple exams showed that objective  
11 findings were largely benign, with no range of motion limitations, no motor  
12 strength deficits, no gait impairment and normal straight leg raises when tested. In  
13 June 2010, a month after onset, a treatment provider at Yakima Health (signature  
14 illegible) opined Oyarzo could sit, stand and walk for six hours out of eight, lift 50  
15 pounds occasionally and 25 frequently and limitations were expected to last six  
16 months (Tr. 207).

16 Opinions premised on Plaintiff's subjective complaints and testing within  
17 Plaintiff's control are properly given the same weight as Plaintiff's own credibility.  
18 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2001). The ALJ's residual  
19 functional capacity assessment is fully supported by the record.



1 counsel, enter judgment in favor of defendant, and **CLOSE** the file.

2 DATED this 21<sup>st</sup> day of May, 2015.

3  
4 *s/James P. Hutton*

5 JAMES P. HUTTON

6 UNITED STATES MAGISTRATE JUDGE