

1
2
3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 GARY MATTHEW DECHENNE,

7 Plaintiff,

8
9 v.

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

12 Defendant.
13

No. 2:12-CV-0607-JTR

ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

14 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
15 No. 17, 23. Attorney Donald C. Bell represents Gary M. DeChenne (Plaintiff);
16 Special Assistant United States Attorney Lars J. Nelson represents the
17 Commissioner of Social Security (Defendant). The parties have consented to
18 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
19 record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for
20 Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

21 **JURISDICTION**

22 Plaintiff filed an application for Disability Insurance Benefits on November
23 12, 2009, and an application for Supplemental Security Income on November 19,
24 2009, alleging disability since October 1, 2009. Tr. 113, 117. Plaintiff alleges
25 disability due to right tibial fracture. Tr. 132. The applications were denied
26 initially and upon reconsideration. Administrative Law Judge (ALJ) Moira
27 Ausems held a hearing on April 21, 2011, Tr. 38-68, and issued an unfavorable
28 decision on August 15, 2011, Tr. 24-33. The Appeals Council denied review on

1 October 23, 2012. Tr. 1-5. The ALJ's August 2011 decision became the final
2 decision of the Commissioner, which is appealable to the district court pursuant to
3 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on November 29,
4 2012. ECF No. 1, 5.

5 **STATEMENT OF FACTS**

6 The facts of the case are set forth in the administrative hearing transcript, the
7 ALJ's decision, and the briefs of the parties. They are only briefly summarized
8 here.

9 Plaintiff was born on June 23, 1976, Tr. 117, and was thus 33 years old on
10 the October 2009 alleged onset date. Plaintiff has an eleventh grade education, Tr.
11 137, and last worked in the construction industry in 2008, Tr. 45. Plaintiff testified
12 he continues to work on a part-time basis helping at his parents' shaved ice stand.
13 Tr. 47, 57. He indicated he could work at the shaved ice stand for "probably six
14 hours" but only with a break each hour to elevate his leg. Tr. 57. Plaintiff testified
15 he needs to elevate his leg for a period of 10 minutes, once every hour or two. Tr.
16 54-55. He stated he could sit for two to four hours at a time, walk probably 30 to
17 50 yards without carrying anything, and stand for about 10 minutes at one time.
18 Tr. 49. However, Plaintiff testified he rides his bike "everywhere," and explained
19 that "all I do is ride my bike." Tr. 50. He indicated he can do all household
20 chores, but it may take him longer to complete the tasks. Tr. 60. Plaintiff attended
21 and completed drug and alcohol treatment, Tr. 51, but apparently continues to
22 drink, Tr. 59.

23 Plaintiff's girlfriend, Kristie Galloway, also testified at the administrative
24 hearing. Tr. 61-63. When asked if there were any problems or limitations she
25 would describe other than those Plaintiff had already discussed, she responded "I
26 would say the same things he has said." Tr. 62. Upon prompting by Plaintiff's
27 attorney, Ms. Galloway indicated Plaintiff's self-esteem had gone down. Tr. 62.
28 She further indicated Plaintiff had anger issues because he could no longer do what

1 he used to be able to do, and related that they would have problems when Plaintiff
2 self-medicated with beer. Tr. 62-63.

3 **ADMINISTRATIVE DECISION**

4 The ALJ found Plaintiff had not engaged in substantial gainful activity since
5 October 1, 2009, the alleged onset date. Tr. 26. The ALJ determined, at step two,
6 that Plaintiff had the following severe impairments: right tibial plateau fracture,
7 status post-surgical repair; adjustment disorder with depression; and polysubstance
8 abuse disorder in early reported remission. Tr. 26. At step three, the ALJ
9 considered Sections 1.02 (major dysfunction of a joint), 1.03 (surgical arthrodesis
10 of a major weight-bearing joint), 12.04 (affective disorders) and 12.09 (substance
11 addiction disorders) and concluded Plaintiff's impairments, alone and in
12 combination, did not meet or medically equal one of the listed impairments. Tr.
13 27-28.

14 The ALJ assessed Plaintiff's RFC and determined Plaintiff could perform
15 light work with the following limitations: he can perform tasks that involve no
16 more than 2 hours of standing/walking in an 8-hour workday (with normal breaks);
17 his ability to sit is not restricted; he can occasionally stoop, balance, or climb
18 ramps or stairs; he can perform infrequent squatting, kneeling, or crawling; he
19 must avoid climbing ladders, ropes or scaffolds; he must avoid uneven ground or
20 hills and concentrated exposure to workplace hazards, such as unprotected heights
21 and moving machinery; and he can perform no more than semi-skilled work with a
22 specific vocational preparation (SVP) level of 4 or less. Tr. 28.

23 At step four, the ALJ found Plaintiff incapable of performing his past
24 relevant work. Tr. 31. However, at step five, the ALJ concluded that, considering
25 Plaintiff's age, education, work experience and RFC, and based on the testimony
26 of the vocational expert, there are jobs that exist in significant numbers in the
27 national economy that Plaintiff can perform. Tr. 32-33. The ALJ thus determined
28 that Plaintiff was not under a disability within the meaning of the Social Security

1 Act at any time from October 1, 2009, the alleged onset date, through the date of
2 the ALJ's decision, August 15, 2011. Tr. 33.

3 **STANDARD OF REVIEW**

4 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the Court set
5 out the standard of review:

6 A district court's order upholding the Commissioner's denial of benefits is
7 reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The
8 decision of the Commissioner may be reversed only if it is not supported by
9 substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d
10 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a
11 mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way,
12 substantial evidence is such relevant evidence as a reasonable mind might accept
13 as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401
14 (1971). If the evidence is susceptible to more than one rational interpretation, the
15 Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180
16 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599
17 (9th Cir. 1999).

18 The ALJ is responsible for determining credibility, resolving conflicts in
19 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
20 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,
21 although deference is owed to a reasonable construction of the applicable statutes.
22 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

23 It is the role of the trier of fact, not this Court, to resolve conflicts in
24 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
25 rational interpretation, the Court may not substitute its judgment for that of the
26 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
27 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will
28 still be set aside if the proper legal standards were not applied in weighing the

1 evidence and making the decision. *Browner v. Secretary of Health and Human*
2 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to
3 support the administrative findings, or if conflicting evidence exists that will
4 support a finding of either disability or non-disability, the Commissioner’s
5 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
6 Cir. 1987).

7 **SEQUENTIAL EVALUATION PROCESS**

8 The Commissioner has established a five-step sequential evaluation process
9 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
10 416.920(a); *see, Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
11 through four, the burden of proof rests upon the claimant to establish a prima facie
12 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
13 burden is met once a claimant establishes that a physical or mental impairment
14 prevents him from engaging in his previous occupation. 20 C.F.R. §§
15 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
16 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
17 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist
18 in the national economy which claimant can perform. *Batson v. Commissioner of*
19 *Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make
20 an adjustment to other work in the national economy, a finding of “disabled” is
21 made. 20 C.F.R. §§ 404.1520(a)(4)(i-v), 416.920(a)(4)(i-v).

22 **ISSUES**

23 The question presented is whether substantial evidence exists to support the
24 ALJ’s decision denying benefits and, if so, whether that decision is based on
25 proper legal standards. Plaintiff contends the ALJ erred by (1) not consulting a
26 medical expert in either psychology/psychiatry or orthopedics at the administrative
27 hearing; (2) failing to account for all of Plaintiff’s mental health limitations as
28 reported by Dr. Goodwin; (3) failing to properly consider Dr. Cummings’ opinion

1 after surgery that Plaintiff was “100% disabled” as well as Dr. Cummings’ later
2 assessed physical limitations; (4) improperly rejecting Plaintiff’s testimony
3 regarding his impairments; and (5) failing to consider or address the statements of
4 the lay witness, Ms. Galloway. ECF No. 17 at 13-20.

5 **DISCUSSION**

6 **A. Physical Limitations**

7 Plaintiff asserts the ALJ erred by failing to conduct a proper step-five
8 analysis by not accounting for all of his limitations supported by the evidence of
9 record. ECF No. 17 at 15-16. Plaintiff specifically contends the ALJ did not
10 properly consider the after-surgery opinion of Dr. Cummings that Plaintiff was
11 “100 percent disabled” or the later opinions of Dr. Cummings that Plaintiff
12 continued to have numerous limitations. ECF No. 17 at 16.

13 On October 1, 2009, Joel Cummings, M.D., saw Plaintiff in the hospital
14 emergency room following Plaintiff’s bicycle accident. Tr. 206-208. Plaintiff was
15 diagnosed with right knee tibial plateau fracture, “a severe, relatively complex
16 injury,” and surgery was planned. Tr. 207. Dr. Cummings performed the surgery
17 on Plaintiff’s right knee on October 6, 2009. Tr. 211-213. It was reported that
18 Plaintiff tolerated the procedure well, and the knee appeared to be quite stable. Tr.
19 213. Dr. Cummings completed a physical evaluation form on October 12, 2009,
20 which stated that Plaintiff was severely limited and work activity limitations were
21 expected to last for three to four months. Tr. 282-285. On October 23, 2009, Dr.
22 Cummings reported Plaintiff had experienced a very severe injury to his knee that
23 would “require some time and rehabilitation.” Tr. 243. It was noted that Plaintiff
24 was doing reasonably well but would remain strictly nonweightbearing at that
25 time. Tr. 243. On October 28, 2009, Dr. Cummings indicated Plaintiff had
26 undergone four surgical procedures related to the knee injury and had required
27 hospitalization for two weeks. Tr. 240. He stated Plaintiff was “100% disabled” at
28 that time. Tr. 240.

1 On November 20, 2009, Dr. Cummings indicated Plaintiff reported minimal
2 pain and an area of Plaintiff's incision that previously had some drainage had now
3 healed. Tr. 247. Dr. Cummings advised Plaintiff to "push the knee to tolerance in
4 regard to range of motion," but still wanted Plaintiff to remain nonweightbearing.
5 Tr. 247. On December 24, 2009, Dr. Cummings advised Plaintiff to progress to
6 weight bearing activity as tolerated. Tr. 248. A physical evaluation form
7 completed by Dr. Cummings at that time indicated Plaintiff had "improved" with
8 treatment, Tr. 267, and was limited to sedentary level work at that time, Tr. 268.

9 On February 24, 2010, and again on April 9, 2010, Dr. Cummings reported
10 Plaintiff was doing "reasonably well" and recommended Plaintiff use his knee for
11 activities as tolerated. Tr. 270-271. Dr. Cummings filled out a physical evaluation
12 form on April 9, 2010, which stated Plaintiff's condition was "stable," Tr. 277, and
13 he was limited to light exertion level work activity, Tr. 278. On June 1, 2010, Dr.
14 Cummings filled out a form regarding Plaintiff's physical capacity. Tr. 274-275.
15 Dr. Cummings stated Plaintiff's condition was stable and opined Plaintiff could
16 stand for two hours in an eight hour work day, sit for eight hours in an eight hour
17 work day, lift 50 pounds occasionally and lift 20 pounds frequently. Tr. 274.

18 The ALJ determined Plaintiff had the physical RFC to perform light exertion
19 level work with the following limitations: he can perform tasks that involve no
20 more than 2 hours of standing/walking in an 8-hour workday (with normal breaks);
21 his ability to sit is not restricted; he can occasionally stoop, balance, or climb
22 ramps or stairs; he can perform infrequent squatting, kneeling, or crawling; he
23 must avoid climbing ladders, ropes or scaffolds; and he must avoid uneven ground
24 or hills and concentrated exposure to workplace hazards, such as unprotected
25 heights and moving machinery. Tr. 28. As indicated by the ALJ, Dr. Cummings'
26 treatment notes, as summarized above, include no restrictions inconsistent with the
27 ALJ's RFC assessment. Tr. 30. Although the October 2009 statement by Dr.
28 Cummings indicated Plaintiff was "100% disabled" at that time, the ALJ explained

1 that the assessment was provided less than a month following Plaintiff's severe
2 knee injury and was not an endorsement of long-term disability. Tr. 31. In fact,
3 Dr. Cummings' October 12, 2009, physical evaluation form indicated Plaintiff's
4 work activity limitations were expected to last for only three to four months. Tr.
5 282-285. As further indicated by the ALJ, the October 2009 statement that
6 Plaintiff was 100% disabled is not consistent with Dr. Cummings' subsequent
7 functional assessments. Tr. 31; *Osenbrock v. Apfel*, 240 F.3d 1157, 1165 (9th Cir.
8 2000) ("A treating physician's most recent medical reports are highly probative").
9 Dr. Cummings' medical records reveal Plaintiff progressed from nonweightbearing
10 activity immediately following surgery in October 2009, to sedentary exertion
11 level activity in December 2009, to light exertion level activity in April 2010 and
12 finally to medium exertion level activity in June 2010. Tr. 243, 268, 278, 274.

13 The ALJ appropriately accorded "significant weight" to Dr. Cummings'
14 most recent functional assessment, Tr. 30, and the record does not support a more
15 restrictive finding than Plaintiff being limited to a range of light exertion level
16 work activity. The undersigned thus finds the ALJ's physical RFC determination
17 is in accord with the weight of the record evidence and free of legal error.

18 **B. Mental Limitations**

19 Plaintiff also argues the ALJ erred by failing to properly consider the
20 severity of Plaintiff's mental health limitations. ECF No. 17 at 15. Plaintiff
21 specifically asserts the mental health deficiencies assessed by Dr. Goodwin should
22 have been credited by the ALJ in this case. ECF No. 17 at 15-17.

23 In disability proceedings, a treating physician's opinion carries more weight
24 than an examining physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592
25 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If a treating or
26 examining physician's opinion is not contradicted, they can be rejected only with
27 clear and convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the opinion
28 can only be rejected for "specific" and "legitimate" reasons that are supported by

1 substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th
2 Cir. 1995).

3 On July 6, 2010, following a one-time examination, James D. Goodwin,
4 Psy.D., completed a Psychological/Psychiatric Evaluation form. Tr. 286-291. Dr.
5 Goodwin diagnosed Major Depressive Disorder, Recurrent Moderate; ETOH
6 Abuse; Cannabis Abuse; right leg dysfunction due to accident; and front teeth
7 missing due to accident; and gave Plaintiff a GAF score of 37.¹ Tr. 288. Dr.
8 Goodwin checked a box indicating Plaintiff was chronically mentally ill and
9 opined that Plaintiff was severely limited in three areas of functioning and
10 markedly limited in two additional areas of functioning. Tr. 289-290.

11 On October 1, 2010, treating physician Kelly Gillespie, M.D., indicated
12 Plaintiff had “some mild depression” secondary to his physical symptoms, “but not
13 enough that he would want to be on medication for it.” Tr. 303. On October 29,
14 2010, Dr. Gillespie described Plaintiff as “pleasant and interactive” and did not
15 mention any psychological issues. Tr. 305. On November 15, 2010, Dr. Gillespie
16 indicated Plaintiff had been attending physical therapy for his leg pain, it had
17 helped “significantly,” he was continuing to attend physical therapy, and he was
18 happy with how it was going. Tr. 309. Plaintiff was again described as “pleasant
19 and interactive” and there is no mention of psychological issues. Tr. 309. On
20 December 28, 2010, Dr. Gillespie once again described Plaintiff as “pleasant and
21 interactive” and did not mention mental health concerns. Tr. 314.

22 The ALJ gave “no significant weight” to Dr. Goodwin’s assessment of
23 substantial mental health limitations because it was based on a one-time evaluation
24

25 ¹A GAF of 40-31 indicates “[s]ome impairment in reality testing or
26 communication OR major impairment in several areas, such as work or school,
27 family relations, judgment, thinking, or mood.” *See* Diagnostic and Statistical
28 Manual of Mental Disorders 32 (4th ed. 1994).

1 and was inconsistent with the record as a whole. The ALJ found the medical
2 reports of treating physician Dr. Gillespie more in accord with the evidence of
3 record regarding Plaintiff's mental functioning.

4 As noted by the ALJ, Dr. Gillespie did not find Plaintiff's mental symptoms
5 particularly serious, finding Plaintiff's mental symptoms included "some mild
6 depression" secondary to his lower extremity symptoms, but not enough to require
7 medication. Tr. 31. The fact that Plaintiff has no reported history of psychiatric
8 hospitalizations or mental health treatment substantiates Dr. Gillespie's finding in
9 this regard. Tr. 31. On the other hand, Dr. Goodwin's assessed limitations on the
10 form report following the one-time examination are not supported by objective
11 findings or other medical evidence of record. An ALJ may discredit physicians'
12 opinions that are conclusory, brief, and unsupported by the record as a whole,
13 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992), or by objective medical
14 findings, *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001).

15 The ALJ provided specific and legitimate reasons, supported by substantial
16 evidence, for according "no significant weight" to Dr. Goodwin's assessment. Tr.
17 31. The record does not support a more restrictive mental health functioning
18 determination than Plaintiff being limited to performing no more than semi-skilled
19 work with a specific vocational preparation (SVP) level of 4 or less. Tr. 28. The
20 undersigned finds the ALJ's mental RFC determination is in accord with the
21 weight of the record evidence and free of legal error.

22 **C. Develop the Record**

23 Plaintiff contends the ALJ erred by failing to fully and fairly develop the
24 record. ECF No. 17 at 13. Plaintiff specifically argues the ALJ should have
25 consulted a medical expert in orthopedics and/or psychology/psychiatry at the
26 administrative hearing to develop the record with respect to Plaintiff's physical
27 and/or mental limitations. ECF No. 17 at 13-15.

28 ///

1 In Social Security cases, the ALJ has a special duty to develop the record
2 fully and fairly and to ensure that the claimant's interests are considered, even
3 when the claimant is represented by counsel. *Tonapetyan v. Halter*, 242 F.3d
4 1144, 1150 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983).
5 However, it is Plaintiff's duty to prove he is disabled. 42 U.S.C. § 423(d)(5) ("An
6 individual shall not be considered to be under a disability unless he furnishes such
7 medical and other evidence of the existence thereof as the Secretary may
8 require."). The Code of Federal Regulations explains:

9
10 [y]ou have to prove to us that you are blind or disabled. Therefore, you must
11 bring to our attention everything that shows that you are blind or disabled.
12 This means that you must furnish medical and other evidence that we can
13 use to reach conclusions about your medical impairments(s) and, if material
14 to the determination of whether you are disabled, its effect on your ability to
15 work on a sustained basis. We will consider only impairment(s) you say you
16 have or about which we receive evidence.

17 20 C.F.R. § 404.1512(a); *see also*, 20 C.F.R. § 404.1512(c) ("You must provide
18 medical evidence showing that you have impairment(s) and how severe it is during
19 the time you say you are disabled.").

20 An ALJ's duty to develop the record is triggered only when there is
21 ambiguous evidence or when the record is inadequate to allow for proper
22 evaluation of the evidence. *Tonapetyan*, 242 F.3d at 1150. As discussed above,
23 the record does not support a more restrictive finding than Plaintiff being limited to
24 performing a range of light exertion level, semi-skilled work. The ALJ's RFC
25 determination is in accord with the weight of the record evidence and free of legal
26 error. The record before the ALJ was neither ambiguous nor inadequate to allow
27 for proper evaluation of the evidence. Accordingly, the ALJ did not err by failing
28 to consult a medical expert at the administrative hearing to further develop the
record with respect to Plaintiff's physical and/or mental capabilities.

1 **D. Credibility**

2 **1. Plaintiff**

3 Plaintiff also argues the ALJ erred by failing to provide specific, clear and
4 convincing reasons for rejecting Plaintiff’s testimony regarding the severity of his
5 pain. ECF No. 17 at 18-19.

6 It is the province of the ALJ to make credibility determinations. *Andrews v.*
7 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be
8 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
9 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
10 medical impairment, the ALJ may not discredit testimony as to the severity of an
11 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157
12 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the
13 ALJ’s reasons for rejecting the claimant’s testimony must be “clear and
14 convincing.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “General
15 findings are insufficient: rather the ALJ must identify what testimony is not
16 credible and what evidence undermines the claimant’s complaints.” *Lester*, 81
17 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

18 In this case, the ALJ found Plaintiff’s medically determinable impairments
19 could reasonably be expected to cause the alleged symptoms; however, Plaintiff’s
20 statements concerning the intensity, persistence and limiting effects of the
21 symptoms were not fully credible to the extent they were inconsistent with the
22 ALJ’s RFC determination. Tr. 29.

23 The ALJ first indicated the objective medical evidence did not support
24 Plaintiff’s allegations of total disability. Tr. 30. A lack of supporting objective
25 medical evidence is a factor which may be considered in evaluating a claimant’s
26 credibility, provided it is not the sole factor. *Bunnell v. Sullivan*, 947 F.2d 341,
27 345 (9th Cir. 1991). As discussed above, the ALJ properly assessed the medical
28 records in this case. Plaintiff’s complaints of disabling pain and mobility issues

1 are not entirely consistent with the objective medical findings contained within the
2 record which demonstrate Plaintiff is capable of performing a range of light
3 exertion level, semi-skilled work. *Supra*. The credible medical evidence of record
4 does not support Plaintiff's claim of disabling limitations; therefore, it was
5 appropriate for the ALJ to conclude the objective medical evidence does not
6 support the level of limitation Plaintiff has alleged in this case.

7 The ALJ next noted Plaintiff's indication that he can perform certain
8 activities of daily living was inconsistent with his assertion of total disability. Tr.
9 30. It is well-established that the nature of daily activities may be considered
10 when evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).
11 The ALJ indicated Plaintiff's allegations of disability were inconsistent with his
12 testimony that he rides his bicycle "everywhere," he is able to ride his bicycle up
13 hills without difficulty, and all he does is ride his bike. Tr. 30. Plaintiff also
14 acknowledged he was able to perform all household chores, Tr. 30, 60, and carves
15 sticks for a hobby, Tr. 30, 59. This evidence of Plaintiff's "significant physical
16 activity" and his ability to perform chores and hobbies is inconsistent with his
17 complaints of disabling pain and issues with mobility.

18 Lastly, the ALJ indicated Plaintiff's unreported part-time work was
19 inconsistent with his allegations of disability. Tr. 30, 26. The ability to perform
20 part-time work can be considered in assessing credibility. *Bray v. Comm'r Social*
21 *Security Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (finding the ALJ properly
22 discounted a plaintiff's testimony because she had recently worked as a personal
23 caregiver for two years and had since sought out other employment). It is
24 uncontested that Plaintiff has continued to work part-time at his parents' shaved ice
25 stand during the Spring/Summer months. Tr. 47, 57.

26 The ALJ is responsible for reviewing the evidence and resolving conflicts or
27 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
28 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in

1 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
2 determining whether the ALJ’s decision is supported by substantial evidence and
3 may not substitute its own judgment for that of the ALJ even if it might justifiably
4 have reached a different result upon de novo review. 42 U.S.C. § 405(g).

5 After reviewing the record, the undersigned finds the reasons provided by
6 the ALJ for discounting Plaintiff’s subjective complaints are clear, convincing, and
7 fully supported by the record. The ALJ did not err by concluding Plaintiff’s
8 assertions of disabling functional limitations were not fully credible in this case.

9 2. Lay Witness

10 Plaintiff further contends the ALJ erred by not making proper credibility
11 findings as to the testimony of the lay witness, Ms. Galloway. ECF No. 17 at 19.

12 The ALJ shall “consider observations by non-medical sources as to how an
13 impairment affects a claimant’s ability to work.” *Sprague v. Bowen*, 812 F.2d
14 1226, 1232 (9th Cir. 1987), citing 20 C.F.R. § 404.1513(e)(2). The ALJ may not
15 ignore or improperly reject the **probative** testimony of a lay witness without
16 giving reasons that are germane to each witness. *Dodrill v. Shalala*, 12 F.3d 915,
17 919 (9th Cir. 1993) (emphasis added).

18 Although the ALJ did not specifically address the statements of Ms.
19 Galloway, when Ms. Galloway was asked at the administrative hearing if Plaintiff
20 had problems or limitations other than those previously discussed during the
21 hearing, Ms. Galloway responded “I would say the same things [Plaintiff] has
22 said.” Tr. 62. Furthermore, Plaintiff’s reply brief admits Ms. Galloway merely
23 concurred with the testimony of Plaintiff, ECF No. 24 at 9, but indicates Ms.
24 Galloway, upon prompting by Plaintiff’s attorney, also indicated Plaintiff’s self-
25 esteem had decreased,² Tr. 62. The ALJ appropriately considered all of Plaintiff’s

27 ²The ALJ mentioned Plaintiff’s “poor self-esteem” when discussing the
28 mental listings in her decision. Tr. 27.

1 functional limitations in this case, and Ms. Galloway’s brief testimony does not
2 indicate Plaintiff is limited to a greater extent than that found by the ALJ in this
3 case. *Molina v. Astrue*, 674 F.3d at 1119 (9th Cir. 2012) (finding no basis to
4 determine an ALJ’s failure to discuss lay testimony is consequential to the ultimate
5 nondisability determination “where the [lay] testimony is similar to other
6 testimony that the ALJ validly discounted, or where the testimony is contradicted
7 by more reliable medical evidence that the ALJ credited”). Accordingly, the ALJ
8 did not err with regard to the lay witness’ testimony in this case.

9 **CONCLUSION**

10 Having reviewed the record and the ALJ’s findings, the Court concludes the
11 ALJ’s decision is supported by substantial evidence and free of legal error.

12 Accordingly,

13 **IT IS ORDERED:**

14 1. Defendant’s Motion for Summary Judgment, **ECF No. 23**, is
15 **GRANTED**.

16 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

17 The District Court Executive is directed to file this Order and provide a copy
18 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
19 and the file shall be **CLOSED**.

20 DATED February 19, 2014.

A handwritten signature in black ink, appearing to be "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE