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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

STEPHEN HUMPHREY PACIOS,	}	No. 2:12-CV-05111-LRS
Plaintiff,		<b>ORDER GRANTING DEFENDANT’S MOTION FOR JUDGMENT, <i>INTER ALIA</i></b>
vs.		
CAROLYN W. COLVIN, Acting Commissioner of Social Security,		}
Defendant.		

**BEFORE THE COURT** are the Plaintiff's Motion For Summary Judgment (ECF No. 15) and the Defendant's Motion For Summary Judgment (ECF No. 16).

**JURISDICTION**

Stephen Humphrey Pacios, Plaintiff, applied for Title II Disability Insurance benefits (DIB) and Title XVI Supplemental Security Income benefits (SSI) on June 4 and July 29, 2009, respectively. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing and one was held on June 15, 2011, before Administrative Law Judge (ALJ) Moira Ausems via video. Plaintiff, represented by counsel, testified at this hearing. Thomas Polsin testified as a Vocational Expert (VE). On December 2, 2011, the ALJ issued a decision denying benefits. The Appeals Council denied a request for review and the ALJ's decision became the final decision of the Commissioner. This decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

**STATEMENT OF FACTS**

The facts have been presented in the administrative transcript, the ALJ's decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. At

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1 the time of the administrative hearing, Plaintiff was 47 years old. He has a high  
2 school education and past relevant work experience as a shipping clerk and as a  
3 warehouse laborer. Plaintiff alleges disability since February 2, 2009, and his date  
4 last insured for DIB was March 31, 2014.

## 6 STANDARD OF REVIEW

7 "The [Commissioner's] determination that a claimant is not disabled will be  
8 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*  
9 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere  
10 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less  
11 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);  
12 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.  
13 1988). "It means such relevant evidence as a reasonable mind might accept as  
14 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91  
15 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may  
16 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457  
17 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).  
18 On review, the court considers the record as a whole, not just the evidence supporting  
19 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.  
20 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

21 It is the role of the trier of fact, not this court to resolve conflicts in evidence.  
22 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
23 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749  
24 F.2d 577, 579 (9th Cir. 1984).

25 A decision supported by substantial evidence will still be set aside if the proper  
26 legal standards were not applied in weighing the evidence and making the decision.  
27 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.  
28 1987).

1 **ISSUES**

2 Plaintiff argues the ALJ erred by: 1) omitting his trochanteric bursitis and  
3 sacroilitis as “severe” impairments at step two of the sequential evaluation process;  
4 2) improperly discounting his credibility regarding his subjective pain complaints and  
5 claimed physical limitations; 3) improperly rejecting the opinions of his treating nurse  
6 practitioner regarding his physical limitations; 4) improperly rejecting lay witness  
7 opinion regarding his physical limitations; 5) arriving at a determination regarding  
8 his residual functional capacity (RFC) which was at odds with his testimony and the  
9 opinions of his treating nurse practitioner; and 5) failing to present a hypothetical to  
10 the VE which included the full extent of his physical limitations.

11 **DISCUSSION**

12 **SEQUENTIAL EVALUATION PROCESS**

13 The Social Security Act defines "disability" as the "inability to engage in any  
14 substantial gainful activity by reason of any medically determinable physical or  
15 mental impairment which can be expected to result in death or which has lasted or can  
16 be expected to last for a continuous period of not less than twelve months." 42  
17 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). The Act also provides that a claimant  
18 shall be determined to be under a disability only if her impairments are of such  
19 severity that the claimant is not only unable to do her previous work but cannot,  
20 considering her age, education and work experiences, engage in any other substantial  
21 gainful work which exists in the national economy. *Id.*

22 The Commissioner has established a five-step sequential evaluation process for  
23 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;  
24 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines  
25 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20  
26 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker  
27 proceeds to step two, which determines whether the claimant has a medically severe  
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1 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and  
2 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination  
3 of impairments, the disability claim is denied. If the impairment is severe, the  
4 evaluation proceeds to the third step, which compares the claimant's impairment with  
5 a number of listed impairments acknowledged by the Commissioner to be so severe  
6 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and  
7 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or  
8 equals one of the listed impairments, the claimant is conclusively presumed to be  
9 disabled. If the impairment is not one conclusively presumed to be disabling, the  
10 evaluation proceeds to the fourth step which determines whether the impairment  
11 prevents the claimant from performing work she has performed in the past. If the  
12 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§  
13 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,  
14 the fifth and final step in the process determines whether she is able to perform other  
15 work in the national economy in view of her age, education and work experience. 20  
16 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

17 The initial burden of proof rests upon the claimant to establish a prima facie  
18 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
19 Cir. 1971). The initial burden is met once a claimant establishes that a physical or  
20 mental impairment prevents her from engaging in her previous occupation. The  
21 burden then shifts to the Commissioner to show (1) that the claimant can perform  
22 other substantial gainful activity and (2) that a "significant number of jobs exist in the  
23 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
24 1498 (9th Cir. 1984).

## 25 **ALJ'S FINDINGS**

26 The ALJ found the following: 1) Plaintiff has severe impairments which  
27 include history of left femur fibroma that resulted in a spontaneous femur fracture  
28 in 1980; history of right patellar fracture; mild left hip degenerative joint disease;

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1 diffuse osteopenia; minute lumbar osteophyte formations and degenerative changes  
2 of the apophyseal joint; and a seizure disorder; 2) Plaintiff does not have an  
3 impairment or combination of impairments that meets or equals any of the  
4 impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff has the residual  
5 functional capacity (RFC) to perform sedentary work that does not require more than  
6 occasional postural or manipulative activities or involve any climbing of ladders,  
7 ropes, or scaffolds, or any exposure to hazards; 4) Plaintiff's RFC prevents him from  
8 performing his past relevant work; and 5) Plaintiff's RFC allows him to perform other  
9 jobs that exist in significant numbers in the national economy, including hand  
10 packager, telephone solicitor, and cashier. Accordingly, the ALJ concluded the  
11 Plaintiff is not disabled.

### 12 13 **SEVERE IMPAIRMENT**

14 A "severe" impairment is one which significantly limits physical or mental  
15 ability to do basic work-related activities. 20 C.F.R. §§ 404.1520(c) and 416.920(c).  
16 It must result from anatomical, physiological, or psychological abnormalities which  
17 can be shown by medically acceptable clinical and laboratory diagnostic techniques.  
18 It must be established by medical evidence consisting of signs, symptoms, and  
19 laboratory findings, not just the claimant's statement of symptoms. 20 C.F.R. §§  
20 404.1508 and 416.908.

21 Step two is a *de minimis* inquiry designed to weed out nonmeritorious claims  
22 at an early stage in the sequential evaluation process. *Smolen v. Chater*, 80 F.3d  
23 1273, 1290 (9<sup>th</sup> Cir. 1996), citing *Bowen*, 482 U.S. at 153-54 ("[S]tep two inquiry is  
24 a *de minimis* screening device to dispose of groundless claims"). "[O]nly those  
25 claimants with slight abnormalities that do not significantly limit any basic work  
26 activity can be denied benefits" at step two. *Bowen*, 482 U.S. at 158 (concurring  
27 opinion). "Basic work activities" are the abilities and aptitudes to do most jobs,  
28 including: 1) physical functions such as walking, standing, sitting, lifting, pushing,

1 pulling, reaching, carrying, or handling; 2) capacities for seeing, hearing, and  
2 speaking; 3) understanding, carrying out, and remembering simple instructions; 4) use  
3 of judgment; 5) responding appropriately to supervision, co-workers and usual work  
4 situations; and 6) dealing with changes in a routine work setting. 20 C.F.R. §§  
5 404.1521(b) and 416.921(b).

6 The ALJ's omission of trochanteric bursitis in Plaintiff's left hip (Tr. at p. 248)  
7 and "left sacroilitis" (Tr. at p. 253) as "severe" impairments is of no consequence.<sup>1</sup>  
8 These conditions relate to, and are not independent of, the severe impairments found  
9 by the ALJ concerning Plaintiff's back (minute lumbar osteophyte formations and  
10 degenerative changes of the apophyseal joint) and left leg and left hip (history of left  
11 femur fibroma that resulted in a spontaneous femur fracture in 1980; history of right  
12 patellar fracture; mild left hip degenerative joint disease; diffuse osteopenia). There  
13 is nothing in the record suggesting that the trochanteric bursitis and sacroilitis  
14 exacerbated Plaintiff's physical limitations or gave rise to separate additional  
15 limitations not considered by the ALJ. Accordingly, the ALJ did not err in omitting  
16 these as severe impairments. Furthermore, if there was any error, it was harmless.  
17

### 18 **CREDIBILITY/RFC**

19 An ALJ can only reject a plaintiff's statement about limitations based upon a  
20 finding of "affirmative evidence" of malingering or "expressing clear and convincing  
21 reasons" for doing so. *Smolen*, 80 F.3d at 1283-84. "In assessing the claimant's  
22 credibility, the ALJ may use ordinary techniques of credibility evaluation, such as  
23 considering the claimant's reputation for truthfulness and any inconsistent statements  
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25 <sup>1</sup> "Sacroilitis" is used to describe any inflammation in the sacroiliac joint  
26 which is located on either side of the sacrum (lower spine) that connects to the  
27 iliac bone of the hip. See [http://www.spine-health.com/conditions/sacroiliac-joint-](http://www.spine-health.com/conditions/sacroiliac-joint-dysfunction/all-about-sacroilitis)  
28 [dysfunction/all-about-sacroilitis](http://www.spine-health.com/conditions/sacroiliac-joint-dysfunction/all-about-sacroilitis)

1 in her testimony." *Tonapeytan v. Halter*, 242 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2001). See  
2 also *Thomas v. Barnhart*, 278 F.3d 947, 958 (9<sup>th</sup> Cir.2002)(following factors may be  
3 considered: 1) claimant's reputation for truthfulness; 2) inconsistencies in the  
4 claimant's testimony or between her testimony and her conduct; 3) claimant's daily  
5 living activities; 4) claimant's work record; and 5) testimony from physicians or third  
6 parties concerning the nature, severity, and effect of claimant's condition).

7 In January 2009, Jeffrey C. Cleven, M.D., noted the “[m]ost obvious  
8 deficiency” was that Plaintiff’s left leg was slightly shorter than his right leg. (Tr. at  
9 pp. 149-50). Dr. Cleven opined that some of Plaintiff’s “standing and walking  
10 symptoms may relate to the hip and lumbar stresses from the discrepancy which can  
11 be corrected with a heel lift, starting [at] about one-half inch.” (Tr. at p. 150). Dr.  
12 Cleven referred Plaintiff to “Hangar Ortho” for a heel lift. (*Id.*). As noted by the  
13 ALJ, subsequent medical records suggest he did not follow through with obtaining  
14 the recommended heel lift. (Tr. at pp. 188, 194, 216, 228 and 257). The same is  
15 suggested by Plaintiff’s own hearing testimony. (Tr. at p. 302).

16 There are, however, other medical records suggesting Plaintiff did use a heel  
17 lift at times and that it was beneficial to him. Plaintiff saw John Staeheli, M.D., of  
18 Northwest Orthopaedic, on September 30, 2010, and told him he had seen a doctor  
19 in Portland, Oregon (Dr. Cleven) who recommended a heel lift, but “[t]his did not  
20 seem to help and in fact he says it made the pain a little worse.” (Tr. at p. 234). A  
21 November 10, 2010 chart note from Dr. Staeheli states “heel lift left shoe Stephen  
22 reported decreased pain and increased ability to walk/stand without as noticeable  
23 symptoms,” (Tr. at p. 223), and a November 15, 2010 chart note states “[h]ave been  
24 using lift in shoe which helps when standing but walking having pain.” (Tr. at p.  
25 222). And yet, a May 3, 2011 report from Dr. Staeheli indicates Plaintiff never used  
26 a heel lift as the doctor had recommended:

27 I felt that his symptoms might well be relieved just using a  
28 shoe lift. He did not get this when I recommended [it] to him  
last fall as he felt the state should have paid for this and

1 they did not do [so because of] the budget cutbacks. I  
2 told him that his insurance company will not pay for this  
3 type of device. I cut him three heel lifts out of felt that  
4 he can use in his shoe and suggested that he talk to a  
5 shoe repairman who can typically put a lift belt onto the  
6 bottom of his shoe for about \$30 or so. We put him on  
7 a block test and found that about a 0.5-inch lift seemed  
8 to feel better. I think his symptoms are probably referred  
9 from his back and are aggravated by the leg-length  
10 discrepancy. I do not see anything that needs to be done  
11 in terms of any orthopedic surgery.

12 (Tr. at p. 228).

13 At his administrative hearing, Plaintiff testified about his visits to Dr. Staeheli  
14 and that he had recommended Plaintiff “go to the shoe repair guy . . . and the shoe  
15 mall.” According to Plaintiff, however, “that didn’t seem quite . . . right to me.” (Tr.  
16 at p. 302). The record shows, however, that all of the medical professionals  
17 recognized and concurred that use of a heel lift would be appropriate. In November  
18 2010, a physical therapist at Therapeutic Associates recommended that Plaintiff be  
19 discharged from physical therapy, noting as follows: “In therapy use of shims under  
20 foot/LE did correct standing posture and ease discomfort while upright. Stephen may  
21 benefit from consult and set up of 3/4 inch to 1 inch build up/lift on shoes.  
22 Recommend he be referred to appropriate specialist that can provide this service.”  
23 (Tr. at p. 216). In January 2011, Aaron Thomason, the Plaintiff’s treating nurse  
24 practitioner, indicated that “participation in training or employment activities was  
25 appropriate at this time” for the Plaintiff, based on the “notes and recommendations”  
26 from the orthopedist (Dr. Staeheli) who had evaluated him. (Tr. at p. 194). In March  
27 2012, Plaintiff saw Janmeet S. Sahota, M.D., at the Tri-City Orthopaedic Clinic who  
28 told Plaintiff “mostly his symptoms are likely due to his SI [sacroiliac] joint and  
bursitis and the limb length discrepancy and he elected to proceed with getting his  
shoes adjusted.” (Tr. at p. 264). Subsequent medical records suggest Plaintiff was  
following up with getting his shoes adjusted. On March 15, 2012, Wing C. Chau,  
M.D., of Tri-Cities Physical Medicine and Rehabilitation, P.C., noted Plaintiff “is  
being followed by orthopedist and is getting lifts,” (Tr. at p. 254), and a March 28,



1 2012 note from Jourdan C. Nicholls, D.P.M., indicated the plan was to add a half-inch  
2 to Plaintiff's left shoe."<sup>2</sup>

3 The foregoing indicates Plaintiff failed to follow a specified course of  
4 treatment (left heel lift) recommended from the very outset of his alleged disability  
5 and repeatedly recommended thereafter. This constitutes a "clear and convincing"  
6 reason to discount his credibility. An ALJ may consider an "unexplained or  
7 inadequately explained failure to seek treatment or follow a prescribed course of  
8 treatment" in evaluating the credibility of a claimant's testimony. *Smolen*, 80 F.3d  
9 at 1284.<sup>3</sup>

10 Mr. Thomason, a nurse practitioner with Tri-Cities Community Health, began  
11 seeing the Plaintiff in approximately July 2010, after the Plaintiff's move from  
12 Portland, Oregon to Kennewick, Washington.<sup>4</sup> In August 2010, he completed a  
13 "Physical Evaluation" form for the Washington Department Social and Health  
14 Services (DSHS) in conjunction with Plaintiff's application for and receipt of general  
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16 <sup>2</sup> Records from Tri-City Orthopaedic Clinic and Tri-Cities Physical  
17 Medicine and Rehabilitation were made part of the record by the Appeals Council  
18 and considered by it in denying review. (Tr. at pp. 6-9).

19 <sup>3</sup> Plaintiff's briefing does not challenge this reason cited by the ALJ for  
20 discounting his credibility.

21 <sup>4</sup> As a nurse practitioner, Mr. Thomason is not a medically acceptable  
22 treating source within the meaning of Social Security regulations. 20 C.F.R.  
23 §404.1513(a) and 20 C.F.R. §416.913(a). Although his opinion cannot be  
24 considered a medical opinion, it can still be considered to show the severity of the  
25 Plaintiff's impairments and how they affected his ability to work. 20 C.F.R.  
26 §404.1513(d) and 20 C.F.R. §416.913(d). An ALJ can reject an opinion from an  
27 "other source," such as a nurse practitioner, by providing "germane" reasons for  
28 doing so. *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1224 (9<sup>th</sup> Cir. 2010).

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1 assistance benefits. In that evaluation, Mr. Thomason indicated Plaintiff's left hip  
2 impairment was of moderate to marked severity and affected his abilities to sit, stand,  
3 walk, lift and carry. He further indicated that Plaintiff had restricted mobility, agility  
4 or flexibility in terms of balancing, bending, climbing, crouching, sitting and  
5 stooping.<sup>5</sup> He opined that Plaintiff's overall work level was "sedentary," defined as  
6 "the ability to lift 10 pounds maximum and frequently lift and/or carry such articles  
7 as files and small tools," and "may require sitting, walking and standing for brief  
8 periods." (Tr. at p. 205).<sup>6</sup> Mr. Thomason indicated that Plaintiff was "able to  
9 participate in pre-employment activities such as job search or employment classes."  
10 (Tr. at p. 206). In January 2011, Mr. Thomason indicated that Plaintiff was capable  
11 of standing for 20 minutes before he needed to change positions; was capable of  
12 sitting for 20 minutes before he needed to change positions; and could lift 10 pounds  
13 frequently and greater than 5 pounds frequently. He acknowledged, however, that  
14 this was "mostly based on [plaintiff's] subjective history." (Tr. at p. 193). And, as  
15 noted above, he indicated that it was appropriate at that time for Plaintiff to  
16 participate in training or employment activities. (Tr. at p. 194).

17 In her decision, the ALJ commented on Mr. Thomason's January 2011  
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19 <sup>5</sup> Contrary to Plaintiff's assertion, however, this evaluation made no  
20 representation regarding the extent of the restrictions and more specifically,  
21 whether the Plaintiff could do these things less than "occasionally" throughout an  
22 eight hour workday.

23 <sup>6</sup> This is consistent with the definition of "sedentary" work found in the  
24 Social Security regulations. Per those regulations, such work involves lifting 10  
25 pounds maximum and occasionally lifting and/or carrying articles such as docket  
26 files, ledgers, and small tools. It involves sitting, although a certain amount of  
27 walking and standing is often necessary in carrying out job duties. 20 C.F.R.  
28 §404.1567(a) and §416.967(a)).

1 assessment as follows:

2 In the questionnaire of January 6, 2011, ARNP Thompson (sic)  
3 described the claimant as able to stand/sit for 20 minutes  
4 before needing a change of position and as able to lift 10  
5 pounds occasionally. Even these subjectively-reported  
6 limitations are generally consistent with the ability to perform  
7 sedentary work, although it is noted for the purpose of this  
8 decision that the record provides no support for a conclusion  
9 that the claimant requires an opportunity to alternate  
10 the position of sitting after a mere 20 minutes.

11 (Tr. at pp. 23-24). As indicated above, Mr. Thomason expressly noted that this  
12 assessment was mostly based on the Plaintiff's subjective history. In a questionnaire  
13 Mr. Thomason completed in July 2010, he reported that Plaintiff could stand two  
14 hours before needing to change positions, and sit one hour before needing to change  
15 positions. (Tr. at p. 209).<sup>7</sup>

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28 <sup>7</sup> The ALJ questioned the Plaintiff's credibility because of an April 13,  
29 2011 chart note of Mr. Thomason which, according to the ALJ, indicated the  
30 Plaintiff told Mr. Thomason he had "no pain" when sitting. (Tr. at p. 187). The  
31 note appears to read, however, that "when stands still- no pain . . . when sits, picks  
32 things up, walks, pain starts again in hip."

1           The ALJ’s RFC determination is largely consistent with Mr. Thomason’s  
2 assessment of Plaintiff’s physical limitations and, as such, constitutes another “clear  
3 and convincing” reason offered by the ALJ to discount Plaintiff’s assertion that his  
4 limitations are greater than those found by the ALJ.<sup>8</sup> To the extent, if any, the RFC  
5 determination is not consistent with Mr. Thomason’s assessment that Plaintiff needed  
6 to alternate sitting and standing every twenty minutes, the ALJ provided a “germane”  
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8           <sup>8</sup> It is unnecessary to analyze the other reasons offered by ALJ for  
9 discounting Plaintiff’s credibility. That said, in assessing the degree of pain the  
10 Plaintiff claimed to be experiencing, it was appropriate for the ALJ to also  
11 consider the fact Plaintiff was taking no prescription medication. *Orteza v.*  
12 *Shalala*, 50 F.3d 748, 750 (9<sup>th</sup> Cir. 1995). In July 2010, Plaintiff informed the Tri-  
13 Cities Community Health Center that his current medications were aspirin and  
14 ibuprofen (Tr. at p. 207), and in September 2010, he apparently informed Dr.  
15 Staeheli that he was “not taking anything for [pain] at the present time.” (Tr. at p.  
16 234).

17           In her decision, the ALJ observed that “[s]ubsequent to January 5, 2009, the  
18 claimant did not seek medical care from any source other than a brief period of  
19 chiropractic therapy . . . , until July 15, 2010, a gap in treatment of one and one-  
20 half years that does not provide support for his allegation of total disability under  
21 the Social Security Act during that period.” (Tr. at p. 21). In a “Disability Report”  
22 he completed for the Social Security Administration in July 2009, Plaintiff  
23 explained that once he was laid off in January 2009, he lost his health insurance  
24 and so he was unable to afford additional medical treatment, and his  
25 unemployment income appeared too high to qualify for public assistance or  
26 Medicaid. (Tr. at p. 107). This does not explain, however, how he was able to  
27 afford chiropractic treatment for neck and shoulder pain between August 10, 2009  
28 and September 22, 2009 (Tr. at pp. 151-175).

1 reason for discounting the same, that being the assessment was based on Plaintiff's  
2 subjective statements.

3 Plaintiff testified he uses a cane to ambulate so he can put as much weight as  
4 possible on his right side so his left hip does not hurt. (Tr. at p. 289). The ALJ did  
5 not include this in her RFC determination and therefore, did not present it to the VE  
6 in hypothetical questioning. While treating and examining medical sources noted  
7 Plaintiff's use of a cane, none of them stated it was necessary and/or prescribed its  
8 use. A reasonable explanation is these sources believed the use of a left heel lift  
9 would resolve the problem in Plaintiff's left hip. The ALJ did not err in failing to  
10 include Plaintiff's use of a cane as part of her RFC determination. Therefore, she did  
11 not err in failing to present such a limitation to the VE in the hypothetical questions  
12 she presented to him.

#### 13 14 **LAY TESTIMONY**

15 Lay testimony as to a claimant's symptoms or how an impairment affects the  
16 claimant's ability to work is competent evidence that must be considered by an ALJ.  
17 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996). In order to discount  
18 competent lay witness testimony, the ALJ "must give reasons that are germane to  
19 each witness." *Dodrill v. Shalala*, 12 F.3d 915, 919 (9<sup>th</sup> Cir. 1993).

20 The "clear and convincing" reasons the ALJ offered for discounting Plaintiff's  
21 testimony as to his pain and functional limitations constitute "germane" reasons for  
22 discounting the statement of his mother (Tr. at pp. 116-23) regarding Plaintiff's  
23 functional limitations. *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9<sup>th</sup>  
24 Cir. 2009)(because "the ALJ provided clear and convincing reasons for rejecting [the  
25 claimant's] own subjective complaints, and because [the lay witness's] testimony was  
26 similar to such complaints, it follows that the ALJ also gave germane reasons for  
27 rejecting [the lay witness's] testimony").

1 **VE HYPOTHETICALS/STEP FIVE**

2 The ALJ's ultimate RFC determination was presented to the VE in the form of  
3 a hypothetical question and the VE identified several jobs existing in the national  
4 economy which the Plaintiff would be capable of performing. (Tr. at pp. 308-311).  
5 The ALJ, however, also presented a second hypothetical question asking the VE to  
6 assume the Plaintiff required the option to sit or stand at will throughout an eight hour  
7 workday. The VE testified the telephone solicitor position (6,700 jobs in Washington  
8 State; 404,000 jobs in the United States) would allow for this option. On the other  
9 hand, a sit/stand option would diminish by 50% the number of hand packager jobs  
10 available. Accordingly, instead of 1,200 such jobs available in Washington, there  
11 would be 600; and instead of 71,000 such jobs available in the United States, there  
12 would be 35,500. (Tr. at pp. 311-12). Even with the reduced number of hand  
13 packager jobs, however, there was still a significant number of jobs in the national  
14 economy which Plaintiff would be capable of performing, considering the 404,000  
15 available telephone solicitor jobs.

16 The VE testified the cashier position would allow a person to sit or stand at  
17 will, but if a person chose to stand, that might require some bending at the waist  
18 which could reduce the number of positions if the person was limited to less than  
19 occasional bending. More specifically, according to the VE, if an individual stood  
20 for 50% of the day to perform the cashier position, he would be bending more than  
21 occasionally (more than 33% of the time). Accordingly, if he could not bend more  
22 than occasionally, the cashier position would be eliminated. (Tr. at pp. 315-16). As  
23 noted above, the ALJ determined that Plaintiff was limited to occasional bending.  
24 The VE, however, also pointed out that the amount of bending depended on the  
25 particular work station and the height of the individual: "I would expect a person that  
26 was 5'10 to six feet tall, for example, is going to be - - if they're standing and bending  
27 over a desk 50 percent of the day - - that's going to cause some other issues." (Tr. at  
28 p. 320). The record indicates Plaintiff is only 5'5 and 1/2" tall (Tr. at 192) and

1 therefore, it is unclear whether performing the cashier position while standing would  
2 present a problem for the Plaintiff in terms of bending. In the end, however, even if  
3 the cashier position were disregarded, the VE still identified a significant numbers of  
4 jobs (telephone solicitor and hand packager) in the national economy available to an  
5 individual with Plaintiff's RFC, even if it was also necessary for that individual to  
6 have the option of sitting or standing at will throughout the workday.

7  
8 **CONCLUSION**

9 Defendant's Motion For Summary Judgment (ECF No. 16) is **GRANTED** and  
10 Plaintiff's Motion For Summary Judgment (ECF No. 15) is **DENIED**. The  
11 Commissioner's decision denying benefits is **AFFIRMED**.

12 **IT IS SO ORDERED.** The District Executive shall enter judgment  
13 accordingly and forward copies of the judgment and this order to counsel of record.

14 **DATED** this 24th of February, 2014.

15  
16 *s/Lonny R. Suko*

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18 LONNY R. SUKO  
19 Senior United States District Judge  
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