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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOSHUA ALLEN CALKINS,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN,  
Commissioner of Social Security,  
  
Defendant.

No. 2:13-CV-0360-JTR  
  
ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF No. 15, 16. Attorney Dana C. Madsen represents Joshua Allen Calkins (Plaintiff); Special Assistant United States Attorney Nicole A. Jabaily represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 8. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed applications for a period of disability, Disability Insurance Benefits, and Supplemental Security Income (SSI) on May 11, 2011, alleging disability since April 15, 2009, due to “Bipolar, Dyslexia, Schizophrenia, SADS – Seasonal Afflicted Depression Syndrome, ADHD, Severe Migraines, and Panic

1 Attacks.” Tr. 179-187, 199. Plaintiff indicated his conditions limited his ability to  
2 work because, “I don’t work well with others. I get frustrated easily, I can’t sit  
3 still, I see letters and numbers backwards, I get migraines about 3 times a week,  
4 and I have to stay still in a dark room when I have a migraine.” Tr. 257. The  
5 applications were denied initially and upon reconsideration. Administrative Law  
6 Judge (ALJ) James Sherry held a hearing on April 30, 2013, Tr. 37-65, and issued  
7 an unfavorable decision on May 22, 2013, Tr. 9-30. The Appeals Council denied  
8 review on August 31, 2013. Tr. 1-5. The ALJ’s May 2013 decision became the  
9 final decision of the Commissioner, which is appealable to the district court  
10 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on  
11 October 11, 2013. ECF No. 1, 5.

### 12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing transcript, the  
14 ALJ’s decision, and the briefs of the parties. They are only briefly summarized  
15 here.

16 Plaintiff was born on June 20, 1982, and was 26 years old on the alleged  
17 onset date, April 15, 2009. Tr. 179. Plaintiff went to school through the tenth  
18 grade and attended special education classes during his time in school. Tr. 261.  
19 He testified at the administrative hearing he is not able to read or write. Tr. 43.  
20 Plaintiff has two children; his youngest child, a three-year-old, resides with  
21 Plaintiff and Plaintiff’s fiancé. Tr. 42. He indicated his past relevant work consists  
22 mostly of general construction, warehouse and labor work. Tr. 44-46. He last  
23 worked in 2009 as a sign holder for a tax business. Tr. 46. Plaintiff testified he  
24 stopped working because he started having more low back pain, was irritable and  
25 had more depression. Tr. 47. He later indicated he did not really have an  
26 explanation for why he was not able to work, but stated he did not like being  
27 around a lot of people and was afraid he would get in trouble or go to jail for  
28 something that would happen at work should he lose his temper. Tr. 57-58.

1 Plaintiff testified that, as a result of back pain, he could only walk maybe a  
2 mile and a half in one stretch, stand for 15 to 20 minutes at a time, and lift/carry  
3 about 15 to 20 pounds. Tr. 48-49. He stated his driver's license was suspended,  
4 but he was able to get around by walking, taking the bus, or getting a ride from  
5 family members. Tr. 50. Plaintiff testified he gets agitated very easily and is  
6 nervous around people. Tr. 50. He thus tries to avoid taking the bus as much as  
7 possible. Tr. 50. He stated that medications for anxiety helped "to a certain  
8 extent," Tr. 51, and counseling had helped him relieve a lot of stress, Tr. 56.  
9 Plaintiff indicated he also has migraine headaches two to three times a week,  
10 lasting up to two to three days at a time. Tr. 56. He stated medication helped his  
11 migraines, but it did not work all the time. Tr. 57.

12 Plaintiff testified he watches his daughter daily while his fiancé works. Tr.  
13 51. His fiancé's sister would come over every day between 10:00 a.m. and 2:00  
14 p.m. to help with his daughter. Tr. 52. On a typical day, Plaintiff cares for his  
15 daughter, tries to clean his house, watches TV, and plays video games. Tr. 51-52.  
16 He indicated he can vacuum and is responsible for doing the laundry. Tr. 52.  
17 Plaintiff testified he quit drinking alcohol about a year and a half prior to the  
18 administrative hearing and quit smoking marijuana almost four years prior to the  
19 administrative hearing. Tr. 53.

## 20 STANDARD OF REVIEW

21 The ALJ is responsible for determining credibility, resolving conflicts in  
22 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
23 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo,  
24 although deference is owed to a reasonable construction of the applicable statutes.  
25 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ  
26 may be reversed only if it is not supported by substantial evidence or if it is based  
27 on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial  
28 evidence is defined as being more than a mere scintilla, but less than a

1 preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant  
2 evidence as a reasonable mind might accept as adequate to support a conclusion.  
3 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to  
4 more than one rational interpretation, the court may not substitute its judgment for  
5 that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec.*  
6 *Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by  
7 substantial evidence will still be set aside if the proper legal standards were not  
8 applied in weighing the evidence and making the decision. *Browner v. Secretary*  
9 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial  
10 evidence supports the administrative findings, or if conflicting evidence supports a  
11 finding of either disability or non-disability, the ALJ's determination is conclusive.  
12 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### 13 SEQUENTIAL EVALUATION PROCESS

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

28 ///

1 **ADMINISTRATIVE DECISION**

2 The ALJ found that Plaintiff had not engaged in substantial gainful activity  
3 since April 15, 2009, the alleged onset date. Tr. 11. At step two, the ALJ  
4 determined Plaintiff had the following severe impairments: bipolar  
5 disorder/depressive disorder; schizophrenia, not otherwise specified; alcohol and  
6 cannabis dependence; learning disorder/dyslexia; and borderline intellectual  
7 functioning. Tr. 11. The ALJ specifically determined Plaintiff’s migraine  
8 headaches and back pain were not severe impairments. Tr. 11-13. At step three,  
9 the ALJ found Plaintiff’s impairments, alone and in combination, did not meet or  
10 medically equal one of the listed impairments. Tr. 14.

11 The ALJ assessed Plaintiff’s RFC and determined Plaintiff could perform a  
12 full range of work at all exertional levels. Tr. 16. The ALJ, however, found  
13 Plaintiff had the following nonexertional limitations: he can perform jobs that  
14 allow him to avoid concentrated exposure to hazards such as moving machinery  
15 and unprotected heights due to his history of migraine headaches; he can perform  
16 jobs that involve three-step instructions and simple, repetitive, routine tasks; he  
17 learns best by demonstration, hands-on experience, or verbal rather than written  
18 instructions; he can perform jobs that require occasional and simple decision-  
19 making and occasional and simple changes in the work setting; he can perform  
20 jobs that allow him more time to learn procedures and jobs that do not involve fast-  
21 paced production requirements; and he can perform jobs that involve superficial  
22 contact with the public, coworkers, and supervisors. Tr. 16.

23 At step four, the ALJ found Plaintiff was able to perform his past relevant  
24 work as a warehouse worker and construction worker II. Tr. 28. Alternatively, at  
25 step five, the ALJ determined that, given Plaintiff’s age, education, work  
26 experience and RFC, there are other jobs that exist in significant numbers in the  
27 national economy, including the light exertional level, unskilled jobs of advertising  
28 material distributor, office cleaner I and electrical assembler, that Plaintiff could

1 perform. Tr. 28-29. The ALJ thus concluded Plaintiff was not under a disability  
2 within the meaning of the Social Security Act at any time from April 15, 2009, the  
3 alleged onset date, through the date of the ALJ's decision, May 22, 2013. Tr. 29.

#### 4 **ISSUES**

5 The question presented is whether substantial evidence exists to support the  
6 ALJ's decision denying benefits and, if so, whether that decision is based on  
7 proper legal standards. Plaintiff contends the ALJ erred by (1) improperly  
8 discounting his symptom testimony; (2) failing to accord appropriate weight to  
9 "other source" opinions; and (3) failing to provide specific and legitimate reasons,  
10 supported by substantial evidence, for rejecting the opinions of Dr. Pollack.

#### 11 **DISCUSSION**

##### 12 **A. Plaintiff's Credibility**

13 Plaintiff argues the ALJ erred by improperly discounting his symptom  
14 testimony. ECF No. 15 at 10-12.

15 It is the province of the ALJ to make credibility determinations. *Andrews v.*  
16 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be  
17 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231  
18 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying  
19 medical impairment, the ALJ may not discredit testimony as to the severity of an  
20 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157  
21 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the  
22 ALJ's reasons for rejecting the claimant's testimony must be "clear and  
23 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General  
24 findings are insufficient: rather the ALJ must identify what testimony is not  
25 credible and what evidence undermines the claimant's complaints." *Lester*, 81  
26 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

27 In this case, the ALJ found Plaintiff was not fully credible. Tr. 27. The ALJ  
28 specifically determined Plaintiff's medically determinable impairments could

1 reasonably be expected to cause some of the alleged symptoms; however,  
2 Plaintiff's statements concerning the intensity, persistence and limiting effects of  
3 those symptoms were not entirely credible. Tr. 17.

4 The ALJ first noted the objective medical evidence of record was not  
5 consistent with the degree of limitation Plaintiff alleged in his application. Tr. 27.  
6 A lack of supporting objective medical evidence is a factor which may be  
7 considered in evaluating a claimant's credibility, provided it is not the sole factor.  
8 *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991).

9 The ALJ discussed the evidence of record in great detail. Tr. 17-27. As to  
10 Plaintiff's physical functioning, the ALJ noted that on April 21, 2010, state agency  
11 medical consultant Howard Platter, M.D., opined that Plaintiff had no exertional  
12 limitations. Tr. 23, 370. State agency medical consultant, Wayne Hurley, M.D.,  
13 affirmed the opinion that Plaintiff had no exertional limitations on February 1,  
14 2012. Tr. 23, 115. On August 16, 2011, William Bomberger, PA-C, stated he saw  
15 no physical reason why Plaintiff could not engage in job retraining, but indicated  
16 he was not comfortable addressing Plaintiff's mental functioning because he was  
17 not a mental health provider. Tr. 23, 476. On May 4, 2012, Plaintiff informed Mr.  
18 Bomberger he felt he had no physical limitations in his ability to perform work  
19 activities, and Mr. Bomberger opined that Plaintiff was physically able to work.  
20 Tr. 12, 24, 486-487.

21 With respect to Plaintiff's mental health, state agency psychological  
22 consultant Mary Gentile, Ph.D., opined on June 11, 2010, that Plaintiff was  
23 capable of simple tasks with only superficial contact with the public and  
24 coworkers. Tr. 25, 399. On May 22, 2010, Jay M. Toews, Ed.D., opined Plaintiff  
25 was able to perform a variety of routine and repetitive tasks, learned best with  
26 demonstrated instruction, was able to maintain superficial interaction with  
27 coworkers, and was able to tolerate supervision. Tr. 25-26, 381. On August 29,  
28 2011, Samantha Chandler, Psy.D., determined Plaintiff was capable of performing

1 unskilled work; he likely had the ability to interact appropriately with supervisors,  
2 coworkers, and the public, particularly when he was compliant with medication; he  
3 had the ability to follow three-step instructions and displayed normal cognitive  
4 functioning; and he could sustain concentration and attention for an eight-hour day  
5 and a five-day work week, although he would likely have difficulty with complex  
6 concepts and would do better with minimal reading and spelling requirements. Tr.  
7 26, 472. On January 29, 2012, state agency psychological consultant Michael  
8 Brown, Ph.D., opined Plaintiff was capable of unskilled work activity with only  
9 superficial contact with the public and coworkers, but should have direct  
10 supervision and additional time to learn new tasks. Tr. 25, 116. It was appropriate  
11 for the ALJ to conclude that the weight of the objective medical evidence of record  
12 did not support allegations of total disability by Plaintiff.

13 The ALJ next indicated statements Plaintiff had made were not consistent  
14 with his allegation that physical and mental impairments prevented him from  
15 working. Tr. 27. Inconsistencies in a disability claimant's testimony support a  
16 decision by the ALJ that a claimant lacks credibility with respect to his claim of  
17 disabling pain. *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1986). The ALJ  
18 noted that although Plaintiff alleged physical and mental limitations at the  
19 administrative hearing, he testified his mental health symptoms were his biggest  
20 barrier to employment, yet repeatedly stated throughout the record that his mental  
21 health symptoms improve and he does well when he takes medication. Tr. 27.  
22 The ALJ also noted Plaintiff informed Mr. Bomberger he felt he had no physical  
23 limitations in his ability to perform work activities on May 4, 2012. Tr. 12, 486.  
24 In addition, Plaintiff informed a vocational services case manager he thought his  
25 barrier to employment was his criminal record and lack of resume, not limitations  
26 from physical and mental symptoms. Tr. 27, 404. The ALJ concluded it appeared  
27 Plaintiff's difficulty in obtaining work was due to his poor work history and  
28 criminal record, not from physical or mental symptoms. Tr. 27. The ALJ noted



1 another inconsistent statement by Plaintiff as well. The ALJ indicated Dr.  
2 Chandler observed Plaintiff's report of a history of smoking marijuana on a daily  
3 basis until age 24 was inconsistent with Plaintiff's CHAS treatment records. Tr.  
4 19, 469. Untruthfulness or inconsistencies regarding alcohol or substance abuse  
5 has been held to support an ALJ's decision that a claimant's testimony lacks  
6 credibility. *Veruzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999). It was proper  
7 for the ALJ to cite Plaintiff's inconsistent statements in support of the  
8 determination that Plaintiff was not fully credible in this case.

9 The ALJ also indicates Plaintiff expressed improvement of his mental health  
10 symptoms with medication. Tr. 27. An ALJ may rely on the effectiveness of  
11 treatment to find a claimant's testimony unpersuasive. 20 C.F.R. § 416.929(c)(3)  
12 (the effectiveness of medication in alleviating pain and other symptoms is a  
13 relevant factor to consider in evaluating the severity of a claimant's symptoms),  
14 *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) (an  
15 ALJ may properly rely on a report that a claimant's mental symptoms improved  
16 with the use of medication); *Odle v. Heckler*, 707 F.2d 439, 440 (9th Cir. 1983)  
17 (impairments controlled by treatment cannot be considered disabling). Plaintiff  
18 reported good results from mental health medications to Dr. Toews and Dr.  
19 Chandler. Tr. 380, 470. Moreover, Plaintiff testified at the administrative hearing  
20 that medications for anxiety helped "to a certain extent," Tr. 51, and counseling  
21 had helped him relieve a lot of stress, Tr. 56. It was proper for the ALJ to rely on  
22 Plaintiff's indication of improvement of symptoms as a basis to find him less than  
23 fully credible in this case.

24 The ALJ further held Plaintiff's activities of daily living were inconsistent  
25 with a finding of disability. Tr. 28. It is well-established that the nature of daily  
26 activities may be considered when evaluating credibility. *Fair v. Bowen*, 885 F.2d  
27 597, 603 (9th Cir. 1989). The ALJ indicated records from Leroy O. Miller, MS,  
28 LMHC, NCC, reflect Plaintiff was able to play video games all day and most of the

1 night, go for walks, watch television and cook. Tr. 18, 535-536. The ALJ further  
2 noted records from Dr. Toews reflect Plaintiff was fully independent in his basic  
3 self-care, was able to plan and prepare simple meals, could perform a full range of  
4 housework and laundry, could shop independently and could perform routine  
5 maintenance and repair around the house. Tr. 18, 380. The ALJ indicated records  
6 from Dr. Chandler reveal Plaintiff did not need help or encouragement to do the  
7 dishes once a day, vacuum every other day, clean the bathroom, do laundry, and  
8 pick up his daughter's toys. Tr. 19, 471. Plaintiff stated he went to the grocery  
9 store and walked to the park with his daughter once or twice a week, described his  
10 hobby as making car models, and indicated he had friends and would see his  
11 mother and brother one to three times per week. Tr. 19, 471. The ALJ also noted  
12 Plaintiff described full daily activities to Dennis R. Pollack, Ph.D., in 2013,  
13 including caring for his young daughter, playing board games, playing video  
14 games, conducting household chores, operating a computer, and operating a  
15 typewriter. Tr. 26, 562-563. This level of activity is not consistent with Plaintiff's  
16 claim of disability.

17 The ALJ's opinion additionally mentions instances of Plaintiff's tendency to  
18 exaggerate his symptoms. Tr. 13, 20, 24, 26. *Tonapetyan v. Halter*, 242 F.3d  
19 1144, 1148 (9th Cir. 2001) (finding an ALJ's decision to discredit a claimant's  
20 statements was supported by the claimant's tendency to exaggerate). The ALJ  
21 noted an August 30, 2012, report from Mr. Bomberger showed three out of three  
22 positive Waddell signs, "which suggested that the claimant might be exaggerating  
23 his symptoms." Tr. 13, 494. As indicated by the ALJ, Mr. Bomberger again  
24 observed positive Waddell signs, indicative of possible exaggeration of symptoms,  
25 on December 5, 2012. Tr. 13, 24, 502. The ALJ also noted Dr. Pollack's 2013  
26 psychological evaluation produced MMPI results suggesting Plaintiff did not  
27 understand the items, had many unusual experiences or was attempting to present  
28 himself in a most unfavorable light. Tr. 20, 564. Dr. Pollack concluded Plaintiff's

1 malingering testing suggested Plaintiff was either not making a good effort or his  
2 poor score was a result of his perceptual problems. Tr. 20, 26, 565. The fact that  
3 the record reflects incidents of possible exaggeration of symptoms by Plaintiff, as  
4 documented by the ALJ, discounts Plaintiff's assertion of disabling symptoms.

5 The ALJ is responsible for reviewing the evidence and resolving conflicts or  
6 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
7 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in  
8 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in  
9 determining whether the ALJ's decision is supported by substantial evidence and  
10 may not substitute its own judgment for that of the ALJ even if it might justifiably  
11 have reached a different result upon de novo review. 42 U.S.C. § 405(g). After  
12 reviewing the record, the Court finds the ALJ provided ample clear and convincing  
13 reasons that are fully supported by the evidence of record for discounting  
14 Plaintiff's subjective complaints. Accordingly, the ALJ did not err by concluding  
15 Plaintiff's subjective complaints regarding the extent of his symptoms and  
16 limitations were not entirely credible in this case.

## 17 **B. Other Source Opinions**

### 18 **1. William Bomberger, PA-C**

19 Plaintiff next contends the ALJ erred by failing to accord proper weight to  
20 the opinions of William Bomberger, PA-C, regarding Plaintiff's functioning in  
21 December 2012 and January 2013. ECF No. 15 at 12-13. Plaintiff argues the  
22 opinions expressed by Mr. Bomberger on those occasions demonstrate he is more  
23 limited from a physical standpoint than what was determined by the ALJ in this  
24 case. ECF No. 15 at 13.

25 Only acceptable medical sources can give medical opinions. 20 C.F.R. §  
26 416.927(a)(2). Mr. Bomberger, a certified physician assistant, is not an acceptable  
27 medical source; therefore, his opinions do not qualify as "medical evidence . . .  
28 from an acceptable medical source" as required by the Social Security Regulations.

1 20 C.F.R. §§ 404.1513, 416.913. Mr. Bomberger is an “other source.” An ALJ  
2 must provide germane reasons to reject other source evidence. *Turner v. Comm’r*  
3 *of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010).

4 As stated by the ALJ, Mr. Bomberger opined in August 2011 that there was  
5 no physical reason why Plaintiff could not engage in job retraining through Work  
6 First. Tr. 23, 476. During a May 4, 2012, examination with Mr. Bomberger,  
7 Plaintiff informed Mr. Bomberger he felt “physically able to work, lift, stand, etc.”  
8 Tr. 23, 486. Mr. Bomberger reported Plaintiff was physically able to work at that  
9 time. Tr. 23-24, 486-487. The ALJ accorded the August 2011 and May 2012  
10 reports “great weight” because they were consistent with the objective findings  
11 upon examination as well as Plaintiff’s own statements. Tr. 24. The August 2011  
12 and May 2012 opinions of Mr. Bomberger are also consistent with the April 2010  
13 medical report of Dr. Platter and February 2012 report of Dr. Hurley which held  
14 that Plaintiff had no exertional limitations. Tr. 23, 115, 376.

15 On December 5, 2012, Plaintiff complained to Mr. Bomberger of low back  
16 pain. Tr. 24, 501. Although Mr. Bomberger concluded Plaintiff’s “Lumbago”  
17 limited the work Plaintiff could perform, he noted concerns about Plaintiff’s  
18 possible symptom exaggeration as a result of Plaintiff’s two out of three positive  
19 Waddell signs. Tr. 24, 502. The ALJ accorded this December 5, 2012, report of  
20 Mr. Bomberger little weight because it was inconsistent with the objective  
21 evidence of record, including Mr. Bomberger’s treatment notes, and findings on x-  
22 ray, Tr. 516, 528, and there were concerns of possible symptom exaggeration. Tr.  
23 24. Additionally, the ALJ indicated Mr. Bomberger’s statement on December 5,  
24 2012, was not a function-by-function assessment, and it therefore provided little  
25 information regarding what exact limitations he believed Plaintiff suffered from  
26 the alleged back pain. Tr. 24. The Court finds the foregoing reasons of the ALJ  
27 are germane reasons for rejecting Mr. Bomberger’s December 5, 2012, report.

28 ///

1 On January 8, 2013, Mr. Bomberger completed Housing and Urban  
2 Development (HUD) paperwork on behalf of Plaintiff and checked boxes  
3 indicating Plaintiff had an inability to engage in any substantial activity due to a  
4 medically determinable physical or mental impairment which substantially  
5 impeded his ability to live independently and was expected to continue for a long  
6 time. Tr. 24, 530. A check-box form is entitled to little weight. *Crane v. Shalala*,  
7 76 F.3d 251, 253 (9th Cir. 1996) (stating that the ALJ's rejection of a check-off  
8 report that did not contain an explanation of the bases for the conclusions made  
9 was permissible). As noted by the ALJ, the check-box responses were not  
10 consistent with Mr. Bomberger's previous assessments of Plaintiff's capacity in  
11 narrative format and there was no correlated change in the treatment record that  
12 would explain the drastic revision of Mr. Bomberger's previous narrative opinions.  
13 Tr. 24. The ALJ additionally stated Mr. Bomberger appeared to have filled out the  
14 form in empathy with Plaintiff's attempt to have his new puppy deemed a service  
15 animal for purposes of his living situation.<sup>1</sup> Tr. 24. Finally, the ALJ noted the  
16 statement was inconsistent with the overall objective evidence of record, including  
17 Mr. Bomberger's observations of Plaintiff on examination. Tr. 25. The Court  
18 finds the ALJ gave germane reasons for rejecting Mr. Bomberger's January 2013  
19 HUD form report as well.

20 Based on the foregoing, the ALJ provided germane reasons for rejecting Mr.  
21 Bomberger's "other source" opinions from December 2012 and January 2013. The

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22  
23 <sup>1</sup>Plaintiff informed Mr. Bomberger on December 26, 2012, he had gotten a  
24 new puppy and needed a letter for his landlord in order for the puppy to be deemed  
25 a companion animal. Tr. 24, 519. On December 26, 2012, despite the fact that  
26 there is no indication in the record that a service animal had previously been  
27 recommended for Plaintiff, Mr. Bomberger wrote a letter to Plaintiff's landlord  
28 indicating that a dog would help Plaintiff function. Tr. 24, 517.

1 record does not support a finding that Plaintiff was incapable of performing work  
2 at all exertional levels. Accordingly, the Court finds the ALJ's physical RFC  
3 determination is in accord with the weight of the record evidence and free of legal  
4 error.

## 5 **2. Leroy Miller, MS, LMHC, NCC**

6 The argument portion of Plaintiff's opening brief does not present a  
7 supported contention with respect to the "other source" opinions of Mr. Miller.  
8 ECF No. 15 at 9-14. Mr. Miller is only mentioned in the last sentence of the  
9 argument section of the brief. ECF No. 15 at 14. Plaintiff's reply brief also fails to  
10 provide specific argument with respect to Mr. Miller. ECF No. 17 at 5-6.

11 The Ninth Circuit has indicated it will not "consider matters on appeal that  
12 are not specifically and distinctly argued in appellant's opening brief." *Miller v.*  
13 *Fairchild Indust., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986). Applying this standard,  
14 the Ninth Circuit has refused to address claims that were only "argue[d] in  
15 passing," *Brownfield v. City of Yakima*, 612 F.3d 1140, 1149 n. 4 (9th Cir. 2010) ,  
16 or that were "bare assertion[s] . . . with no supporting argument," *Navajo Nation v.*  
17 *U.S. Forest Serv.*, 535 F.3d 1058, 1079 n.26 (9th Cir. 2008).

18 The Court declines to address any assertion by Plaintiff with respect to Mr.  
19 Miller because Plaintiff has failed to argue any issue as to Mr. Miller with  
20 specificity. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th  
21 Cir. 2008).

## 22 **C. Psychological Limitations**

23 Plaintiff lastly asserts the ALJ erred by failing to accord proper weight to the  
24 opinions of examining medical professional Dennis R. Pollack, Ph.D., regarding  
25 Plaintiff's psychological limitations. ECF No. 15 at 13-14. Plaintiff argues the  
26 opinions expressed by Dr. Pollack demonstrate he is more limited from a  
27 psychological standpoint than what was determined by the ALJ in this case. ECF  
28 No. 15 at 14.

1           The ALJ concluded the objective medical evidence did not support the level  
2 of mental limitation alleged by Plaintiff. The ALJ found that although Plaintiff has  
3 mild restrictions in activities of daily living, moderate difficulties in social  
4 functioning and moderate difficulties in concentration, persistence and pace,  
5 Plaintiff retained the RFC to perform jobs that allow him to avoid concentrated  
6 exposure to hazards such as moving machinery and unprotected heights, involve  
7 three-step instructions and simple, repetitive, routine tasks (he learns best by  
8 demonstration, hands-on experience, or verbal rather than written instructions),  
9 require occasional and simple decision-making and occasional and simple changes  
10 in the work setting, allow him more time to learn procedures, do not involve fast-  
11 paced production requirements, and involve only superficial contact with the  
12 public, coworkers, and supervisors. Tr. 14, 16. The Court finds the ALJ’s  
13 interpretation of the medical record is supported by substantial evidence. *See*  
14 *infra*.

15           On April 23, 2013, Dr. Pollack completed a medical report which  
16 determined Plaintiff had “very serious emotional problems.” Tr. 566. Dr. Pollack  
17 filled out a Mental Medical Source Statement and checked boxes indicating  
18 Plaintiff had marked limitations in his ability to perform activities within a  
19 schedule, maintain regular attendance, and be punctual within customary  
20 tolerances and in his ability to complete a normal workday and workweek without  
21 interruptions from psychologically based symptoms and to perform at a consistent  
22 pace without an unreasonable number and length of rest periods. Tr. 568. The  
23 ALJ appropriately accorded Dr. Pollack’s marked limitation findings little weight.  
24 Tr. 26.

25           First, the ALJ indicated Dr. Pollack’s opinion was not consistent with the  
26 overall objective evidence of record. Tr. 26. As stated above, state agency  
27 psychological consultant Dr. Gentile opined on June 11, 2010, that Plaintiff was  
28 capable of simple tasks with only superficial contact with the public and

1 coworkers, Tr. 399; on January 29, 2012, state agency psychological consultant Dr.  
2 Brown opined Plaintiff was capable of unskilled work activity with only superficial  
3 contact with the public and coworkers, but should have direct supervision and  
4 additional time to learn new tasks, Tr. 116; Dr. Toews opined on May 22, 2010,  
5 that Plaintiff was able to perform a variety of routine and repetitive tasks, learned  
6 best with demonstrated instruction, was able to maintain superficial interaction  
7 with coworkers, and was able to tolerate supervision, Tr. 381; and, on August 29,  
8 2011, Dr. Chandler determined Plaintiff was capable of performing unskilled work,  
9 likely had the ability to interact appropriately with supervisors, coworkers, and the  
10 public, particularly when he was compliant with medication, had the ability to  
11 follow three-step instructions and displayed normal cognitive functioning, and  
12 could sustain concentration in attention for an eight-hour day and a five-day work  
13 week, although he would likely have difficulty with complex concepts and would  
14 do better with minimal reading and spelling requirements, Tr. 472. The  
15 conclusions of the foregoing medical professionals, which equates to the vast  
16 majority of the mental health evidence of record, conflict with the marked  
17 limitations assessed by Dr. Pollack.

18         The ALJ also noted Dr. Pollack's opinion was inconsistent with Plaintiff's  
19 own report of full daily activities. Tr. 26. Plaintiff indicated to Dr. Pollack that he  
20 cared for his young daughter, played board games, played video games, conducted  
21 household chores, operated a computer, and operated a typewriter. Tr. 26, 562-  
22 563. As noted above, other evidence of record revealed Plaintiff's daily activities  
23 included playing video games all day and most of the night, going for walks,  
24 watching television and cooking, Tr. 18, 535-536; Plaintiff was fully independent  
25 in his basic self-care, was able to plan and prepare simple meals, could perform a  
26 full range of housework and laundry, could shop independently and could perform  
27 routine maintenance and repair around the house, Tr. 18, 380; Plaintiff was able to  
28 do the dishes once a day, vacuum every other day, clean the bathroom, do laundry,



1 and pick up his daughter's toys, Tr. 19, 471; and Plaintiff stated he went to the  
2 grocery store and walked to the park with his daughter once or twice a week,  
3 described his hobby as making car models, and indicated he had friends and would  
4 see his mother and brother one to three times per week, Tr. 19, 471. This level of  
5 activity contradicts Dr. Pollack's assessment of marked limitations.

6 The ALJ further noted Dr. Pollack observed that many of Plaintiff's test  
7 results appeared invalid, as if Plaintiff were attempting to represent himself in an  
8 unfavorable light. Tr. 26. Dr. Pollack's evaluation produced MMPI results  
9 suggesting Plaintiff did not understand the items, had many unusual experiences or  
10 was attempting to present himself in a most unfavorable light. Tr. 564. Dr.  
11 Pollack concluded Plaintiff's malingering testing suggested Plaintiff was either not  
12 making a good effort or his poor score was a result of his perceptual problems. Tr.  
13 565. Dr. Pollack assessed marked limitations despite the evidence of possible  
14 symptom exaggeration on exam.

15 As noted above, it is the responsibility of the ALJ to determine credibility,  
16 resolve conflicts in medical testimony and resolve ambiguities, *Saelee*, 94 F.3d at  
17 522, and this Court may not substitute its own judgment for that of the ALJ, 42  
18 U.S.C. § 405(g). Where, as here, the ALJ has made specific findings justifying a  
19 decision, and those findings are supported by substantial evidence in the record,  
20 this Court's role is not to second-guess that decision. *Fair*, 885 F.2d at 604. Based  
21 on the foregoing, the ALJ did not err by giving little weight to Dr. Pollack's 2013  
22 opinion. The medical evidence of record does not support a more restrictive  
23 mental RFC assessment. The Court finds the ALJ's RFC determination is in  
24 accord with the weight of the record evidence and free of error.

### 25 CONCLUSION

26 Having reviewed the record and the ALJ's findings, the Court concludes the  
27 ALJ's decision is supported by substantial evidence and free of legal error.

28 Accordingly, **IT IS ORDERED:**

1           1.     Defendant's Motion for Summary Judgment, **ECF No. 16**, is  
2 **GRANTED.**

3           2.     Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED.**

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

7           DATED October 29, 2014.



A handwritten signature in black ink, appearing to be "JR", written over a horizontal line.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE