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5
6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
8

9 SHAWN D. PATTERSON,

10 Plaintiff,

11 v.
12

13 CAROLYN W. COLVIN,
14 Commissioner of Social Security,

15 Defendant.
16

No. 2:14-CV-0182-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
18 No. 14, 16. Attorney Joseph Linehan represents Shawn D. Patterson (Plaintiff);
19 Special Assistant United States Attorney Daphne Banay represents the
20 Commissioner of Social Security (Defendant). The parties have consented to
21 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
22 record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for
23 Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

24 **JURISDICTION**

25 Plaintiff filed an application for a period of disability and Disability
26 Insurance Benefits (DIB) on June 8, 2010, alleging disability since October 30,
27 2004, due to depression, anxiety, chronic pain and insomnia. Tr. 165-168, 181.
28 Plaintiff indicates, however, that he stopped working because of his condition on

1 April 26, 2008. Tr. 181. Nevertheless, the relevant period in question begins
2 March 17, 2010, one day after Plaintiff's previously filed claim for disability
3 benefits was denied at the hearing level. Tr. 18.

4 The DIB application was denied initially and upon reconsideration.
5 Administrative Law Judge (ALJ) Caroline Siderius held a hearing on October 11,
6 2012, Tr. 34-81, and issued an unfavorable decision on October 22, 2012, Tr. 18-
7 29. The Appeals Council denied review on April 23, 2014. Tr. 1-6. The ALJ's
8 October 2012 decision became the final decision of the Commissioner, which is
9 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
10 action for judicial review on June 12, 2014. ECF No. 1, 4.

11 **STATEMENT OF FACTS**

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

15 Plaintiff was born on October 2, 1972, and was 37 years old on the March
16 17, 2010, relevant period start date. Tr. 40. Plaintiff is a high school graduate and
17 completed one year of college in 1999. Tr. 182. He last worked in 2008. Tr. 40.
18 Plaintiff reported he stopped working because of his condition. Tr. 181.

19 At the administrative hearing, Plaintiff described his bilateral thoracic outlet
20 syndrome as affecting the nerves in his arms: running down the back of his neck,
21 through his shoulders, into his arms and ending in the pinky and ring fingers in
22 both of his hands. Tr. 42. He testified the syndrome made it difficult to squeeze
23 with his hands and lift, Tr. 43, and that, since 2005, using vibrating machinery
24 causes his hands to swell and throb, Tr. 45. Plaintiff indicated his grip strength has
25 gotten considerably worse over time. Tr. 46. He stated he is able to lift his arms
26 overhead, but it will quickly cause his fingers to go numb. Tr. 55. He also stated
27 that symptoms from the syndrome made sleep difficult, and he was only able to
28 sleep maybe three or four hours each night. Tr. 43.

1 Plaintiff testified he also experiences migraine headaches “at least three days
2 a week” which can last all day. Tr. 53-54. He indicated he also has problems with
3 concentration and short and long term memory. Tr. 58.

4 Plaintiff testified his two grandchildren, ages two and one, currently lived
5 with him, and he was able to pick them up and have them sit on his lap for a few
6 minutes. Tr. 60, 64. However, he was not able to get down on the ground and play
7 with the grandchildren. Tr. 60. Plaintiff stated he spends his days picking up after
8 the children, keeping an eye on the children and paying the bills. Tr. 48. He
9 indicated he would also mow the lawn, vacuum, sweep the floor, and cook with the
10 help of his teenage children, and would putter in his shop. Tr. 50-51, 59. He
11 stated he can sit in a chair for 10 to 15 minutes before needing to change positions,
12 stand in one place for only five minutes at a time, and walk about half a mile in one
13 stretch. Tr. 56, 60.

14 With respect to medication, Plaintiff stated he is “anti-drugs” and did not
15 want to take hydrocodone because of the side effects. Tr. 53. He was taking
16 medical marijuana in pill form at the time of the administrative hearing. Tr. 52-53.

17 **STANDARD OF REVIEW**

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 Court reviews the ALJ’s determinations of law de novo,
21 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
22 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
23 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
24 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
25 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
26 another way, substantial evidence is such relevant evidence as a reasonable mind
27 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
28 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational

1 interpretation, the court may not substitute its judgment for that of the ALJ.
2 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169
3 F.3d 595, 599 (9th Cir. 1999). Nevertheless, a decision supported by substantial
4 evidence will still be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Secretary of Health*
6 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
7 supports the administrative findings, or if substantial conflicting evidence supports
8 a finding of either disability or non-disability, the ALJ's determination is
9 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

10 **SEQUENTIAL EVALUATION PROCESS**

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

25 **ADMINISTRATIVE DECISION**

26 On October 22, 2012, the ALJ issued a decision finding Plaintiff was not
27 disabled as defined in the Social Security Act. At step one, the ALJ found Plaintiff
28 had not engaged in substantial gainful activity since March 17, 2010, the relevant

1 period beginning date. Tr. 20. At step two, the ALJ determined Plaintiff had the
2 severe impairment of bilateral thoracic outlet syndrome. Tr. 20. At step three, the
3 ALJ found Plaintiff did not have an impairment or combination of impairments
4 that met or medically equaled the severity of one of the listed impairments. Tr. 22.

5 The ALJ assessed Plaintiff's residual function capacity (RFC) and
6 determined he could perform a range of light exertion level work (lift and carry 20
7 pounds occasionally and 10 pounds frequently, stand and/or walk up to 6 hours a
8 day, and sit for 6 hours a day, with the option of changing positions once an hour),
9 except that he can only frequently climb ramps or stairs; can never climb ladders,
10 ropes, or scaffolds; can frequently kneel, crawl, stoop, crouch, and balance; can
11 frequently, but not constantly, finger, feel and handle; can perform simple, routine
12 and repetitive tasks; is not able to perform fast-paced production requirements; can
13 have frequent, but not constant, contact with the general public; can cope with
14 occasional changes in the work setting; can occasionally push/pull with both arms;
15 and can occasionally overheard reach with both arms. Tr. 23. The ALJ concluded
16 at step four that Plaintiff was not able to perform his past relevant work. Tr. 28.
17 However, at step five, the ALJ determined that, considering Plaintiff's age,
18 education, work experience and RFC, and based on the testimony of the vocational
19 expert, there were other jobs that exist in significant numbers in the national
20 economy Plaintiff could perform, including the jobs of mailroom sorter/worker and
21 routine office worker. Tr. 28-29. The ALJ thus concluded Plaintiff was not under
22 a disability within the meaning of the Social Security Act at any time from March
23 17, 2010, through the date of the ALJ's decision, October 22, 2012. Tr. 29.

24 **ISSUES**

25 The question presented is whether substantial evidence supports the ALJ's
26 decision denying benefits and, if so, whether that decision is based on proper legal
27 standards. Plaintiff contends the ALJ erred by (1) failing to accord weight to the
28 October 21, 2010, opinion of treating physician Jeffrey J. Emery, DO; and

1 (2) failing to properly consider Plaintiff’s testimony about the severity of his
2 symptoms.

3 DISCUSSION

4 A. Plaintiff’s Credibility

5 Plaintiff contests the ALJ’s adverse credibility determination in this case.
6 ECF No. 14 at 13-14.

7 It is the province of the ALJ to make credibility determinations. *Andrews v.*
8 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be
9 supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
10 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying
11 medical impairment, the ALJ may not discredit testimony as to the severity of an
12 impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157
13 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering, the
14 ALJ’s reasons for rejecting the claimant’s testimony must be “specific, clear and
15 convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
16 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “General findings are insufficient:
17 rather the ALJ must identify what testimony is not credible and what evidence
18 undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,
19 12 F.3d 915, 918 (9th Cir. 1993).

20 In this case, the ALJ found Plaintiff’s medically determinable impairments
21 could reasonably be expected to cause the alleged symptoms; however, Plaintiff’s
22 statements concerning the intensity, persistence and limiting effects of these
23 symptoms were not credible to the extent they were inconsistent with the ALJ’s
24 RFC determination. Tr. 25.

25 Although Plaintiff asserts “the ALJ failed to properly consider his testimony
26 regarding the severity of his symptoms,” ECF No. 14 at 13, Plaintiff has not
27 specifically and distinctly challenged the ALJ’s finding that Plaintiff is not fully
28 credible. *See Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (“We review

1 only issues which are argued specifically and distinctly in a party's opening brief.
2 We will not manufacture arguments for an appellant, and a bare assertion does not
3 preserve a claim." (citations omitted)); *Brownfield v. City of Yakima*, 612 F.3d
4 1140, 1149 (9th Cir. 2010) (refusing to address claims that were only "argue[d] in
5 passing"); *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th
6 Cir. 2008) ("issues not argued with specificity in briefing will not be addressed").
7 Plaintiff's opening brief does not raise specific legal arguments which specifically
8 address the rationale provided by the ALJ for finding Plaintiff less than fully
9 credible. ECF No. 14 at 13-14. Nevertheless, the rationale provided by the ALJ
10 for finding Plaintiff's subjective complaints were not entirely credible, Tr. 25-27,
11 is fully supported by the record. *See infra*.

12 The ALJ first determined that while Plaintiff has physical impairments, the
13 evidence fails to demonstrate he is totally disabled as a result. Tr. 25. The ALJ
14 stated that the objective medical evidence did not support the level of impairment
15 Plaintiff has alleged, Tr. 25-26, and a lack of supporting objective medical
16 evidence is a factor which may be considered in evaluating a claimant's credibility,
17 provided it is not the sole factor, *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir.
18 1991).

19 The ALJ noted that Plaintiff presented to Jeffrey J. Emery, D.O., on January
20 5, 2009, complaining of exacerbation of left shoulder pain after shoveling snow.
21 Tr. 25, 319. X-rays at that time revealed a normal shoulder. Tr. 25, 323. A
22 November 4, 2009, examination with Dr. Emery revealed Plaintiff was
23 neurologically intact with no edema, and Plaintiff was described as alert and
24 cooperative with mild dysthymic mood with appropriate affect and normal
25 attention and concentration. Tr. 25, 309-310. Dr. Emery noted that Plaintiff was
26 well developed, well-nourished and in no acute distress. Tr. 309. The ALJ
27 indicated that Dr. Emery recommended regular exercise at that time. Tr. 25, 310.
28 The ALJ further noted an April 28, 2011, emergency room evaluation found

1 Plaintiff's motor examination at 5/5, normal sensory exam, normal finger to nose
2 testing, no pronator drift, and good grips and pedal pushes. Tr. 25, 347. The ALJ
3 also noted Jonathan D. Carlson, M.D., examined Plaintiff on January 10, 2011, and
4 found Plaintiff had intact cognition and full strength in grasp, biceps, triceps,
5 brachioradialis, hip flexors, quadriceps, and dorsal plantar flexion. Tr. 25, 296.
6 Finally, the ALJ indicated Plaintiff had x-ray and MRI scans of the cervical spine
7 in January 2010 that were found to be normal and underwent a brain MRI/MRA in
8 April 2011 which revealed no acute intracranial findings and was an unremarkable
9 scan. Tr. 26, 375-380. It was appropriate for the ALJ to conclude that the
10 objective medical evidence did not support allegations by Plaintiff that he was
11 limited to a greater extent than determined by the ALJ in this case.

12 The ALJ also indicated Plaintiff has failed to follow up with
13 recommendations made by his treating doctor, which suggests his symptoms may
14 not have been as serious as he has alleged. Tr. 25. Noncompliance with medical
15 care or unexplained or inadequately explained reasons for failing to seek medical
16 treatment cast doubt on a claimant's subjective complaints. 20 C.F.R. §§
17 404.1530, 426.930; *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Macri v.*
18 *Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (finding the ALJ's decision to reject the
19 claimant's subjective pain testimony was supported by the fact that claimant was
20 not taking pain medication).

21 On November 18, 2008, Dr. Emery offered Plaintiff a neuropsychology
22 consultation due to Plaintiff's complaints of memory loss, but Plaintiff declined.
23 Tr. 25, 326. On January 5, 2009, a psychiatry consult with Dr. Goodman was
24 recommended by Dr. Emery. Tr. 25, 321. On June 1, 2009, Dr. Emery stated that
25 Plaintiff did not follow up with Dr. Goodman as planned. Tr. 25, 315. On July 14,
26 2009, Dr. Emery recommended Plaintiff increase his medication dosage and return
27 in one month. Tr. 25, 314. Plaintiff did not follow up with Dr. Emery until nearly
28 four months later, on November 4, 2009. Tr. 25, 308-311. The ALJ additionally

1 noted Plaintiff has been reported to be “not terribly compliant with medical
2 management [due to] his aversion to taking daily medication.” Tr. 25-26, 354. It
3 was proper for the ALJ to find that Plaintiff’s failure to follow up and comply with
4 his treating doctor’s recommendations suggest his symptoms may not have been as
5 serious as he has alleged.

6 The ALJ next determined that inconsistencies between Plaintiff’s statements
7 and the objective medical evidence undermined Plaintiff’s credibility. Tr. 26.
8 Inconsistencies in a disability claimant’s testimony support a decision by the ALJ
9 that a claimant lacks credibility. *Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir.
10 1986).

11 The ALJ noted that despite Plaintiff’s complaints to his primary care
12 physician regarding depression and chronic insomnia, he reported to Spokane
13 Mental Health that “it’s going ok today” and reported his sleep was fine and his
14 appetite was ok. Tr. 26, 396. The ALJ further noted that although Plaintiff
15 indicates he has daily headaches, Dr. Emery’s May 2, 2012, report revealed
16 Plaintiff only had intermittent migraines. Tr. 26, 333. Plaintiff also denied any
17 incoordination, numbness, seizures, syncope, depression, disorientation and
18 hallucinations to Dr. Carlson, Tr. 295, which is inconsistent with his reports to his
19 primary care physician. Tr. 26. The ALJ additionally noted Samantha Chandler,
20 Psy.D., referenced in her Psychological Diagnostic Evaluation report that “there
21 were some inconsistencies noted between the claimant’s and his wife’s Function
22 Report as well as between his current reported information and the information he
23 noted on his Function Report.” Tr. 26, 271. Lastly, the ALJ indicated Plaintiff
24 testified at the October 11, 2012, administrative hearing that he had not worked as
25 a volunteer firefighter in over three years; yet in the Job Performance and
26 Productivity Questionnaire completed on March 28, 2011, by Randy Johnson,
27 Deputy Chief of Spokane County Fire District 4, Plaintiff is reported to be
28 employed as a volunteer firefighter from May 22, 2003, to present. Tr. 26, 215.

1 Consequently, there are several inconsistencies in the record which are properly
2 noted by the ALJ.

3 The ALJ also held that the daily activities described by Plaintiff were not
4 limited to the extent one would expect, given the complaints of disabling
5 symptoms and limitations. Tr. 26. It is well-established that the nature of daily
6 activities may be considered when evaluating credibility. *Fair*, 885 F.2d at 603.

7 The ALJ indicated Plaintiff testified he spends time in his garage and
8 picking up after his kids and spends his day looking after the kids and paying bills
9 online; Dr. Chandler reported Plaintiff cares for his youngest daughter, prepares
10 meals, runs errands, helps the kids with homework, and tries to do the chores,
11 doing the dishes once or twice a week, vacuuming twice a week and doing the
12 laundry three times a week; Plaintiff was reported to have painted “almost the
13 entire inside” of the house; Plaintiff testified he is tired all day, yet he states he
14 does not take any naps and tries to keep active; Plaintiff’s wife testified Plaintiff is
15 currently working on a remote control car; and there is indication in the record that
16 Plaintiff has continued to volunteer as a firefighter. Tr. 26. While one does not
17 need to be “utterly incapacitated” to be disabled, *Fair*, 885 F.2d at 603, the ALJ
18 appropriately determined Plaintiff’s level of activity has been somewhat greater
19 than he has alleged in this case.

20 The rationale provided by the ALJ for finding Plaintiff not entirely credible
21 is fully supported by the evidence of record, and the ALJ’s determination that
22 Plaintiff’s statements were not fully credible is not adequately contested by
23 Plaintiff. *See Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th
24 Cir. 2003) (issues not specifically and distinctly contested in a party’s opening
25 brief are considered waived). The ALJ’s adverse credibility determination is not
26 erroneous. Moreover, since Plaintiff was properly found by the ALJ to be not
27 entirely credible, it was appropriate for the ALJ to accord little weight to any
28 medical reports based primarily on Plaintiff’s subjective complaints. *See*

1 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (a physician’s opinion
2 premised primarily on a claimant’s subjective complaints may be discounted where
3 the record supports the ALJ’s discounting of the claimant’s credibility).

4 **B. Dr. Emery’s Letter**

5 Plaintiff argues the ALJ failed to properly consider and weigh the medical
6 opinion expressed by treating physician Emery in a letter dated October 21, 2010.
7 ECF No. 14 at 10-13.

8 In disability proceedings, a treating physician’s opinion carries more weight
9 than an examining physician’s opinion, and an examining physician’s opinion is
10 given more weight than that of a non-examining physician. *Benecke v. Barnhart*,
11 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. The Ninth Circuit has
12 held that “[t]he opinion of a nonexamining physician cannot by itself constitute
13 substantial evidence that justifies the rejection of the opinion of either an
14 examining physician or a treating physician.” *Lester*, 81 F.3d at 830 (citations
15 omitted). Rather, an ALJ’s decision to reject the opinion of a treating or
16 examining physician, may be based in part on the testimony of a non-examining
17 medical advisor. *Magallanes v. Bowen*, 881 F.2d 747, 751-755 (9th Cir. 1989);
18 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Roberts v. Shalala*, 66
19 F.3d 179 (9th Cir. 1995). The ALJ must also have other evidence to support the
20 decision. *Magallanes*, 881 F.2d at 751-752; *Andrews*, 53 F.3d 1042-1043.

21 Historically, the courts have recognized conflicting medical evidence, the absence
22 of regular medical treatment during the alleged period of disability, and the lack of
23 medical support for doctors’ reports based substantially on a claimant’s subjective
24 complaints of pain as specific, legitimate reasons for disregarding a treating or
25 examining physician’s opinion. *Flaten v. Secretary of Health and Human Servs.*,
26 44 F.3d 1453, 1463-1464 (9th Cir. 1995); *Fair*, 885 F.2d at 604.

27 On October 21, 2010, Dr. Emery provided a letter on Plaintiff’s behalf
28 which stated that Plaintiff suffered from “a number of medical conditions which

1 have left him physically unable to maintain any degree of gainful employment.”
2 Tr. 267. The Court finds the ALJ appropriately accorded “little weight” to this
3 October 2010 opinion of Dr. Emery. *See infra*.

4 First, Dr. Emery’s October 2010 letter is contradicted by the opinion of
5 nonexamining state agency physician Norman Staley, M.D. Tr. 27, 125-127. On
6 August 24, 2011, Dr. Staley reviewed the record and opined that Plaintiff could lift
7 and carry 20 pounds occasionally and 10 pounds frequently; stand or walk for
8 about six hours in an eight-hour workday; sit for about six hours in an eight-hour
9 workday; was limited to occasionally in his ability to push and/or pull with his
10 bilateral upper extremities; could frequently climb ramps and stairs balance and
11 stoop; could occasionally climb ladders, ropes, and scaffolds, crawl, and reach in
12 any direction, including overhead; and was unlimited in handling, fingering and
13 feeling. Tr. 27, 125-127. Dr. Emery’s October 2010 opinion that Plaintiff was
14 unable to perform any degree of gainful employment is not consistent with Dr.
15 Staley’s August 2011 report.

16 Next, the ALJ indicated Dr. Emery only listed Plaintiff’s diagnosis in the
17 letter and did not indicate shoulder limitations other than “with limited mobility,”
18 Tr. 267, which contradicts Dr. Emery’s office notes, Tr. 341-342, 361, 372, that
19 describe Plaintiff “with no focal deficits observed or elicited, well developed, well
20 nourished, in no acute distress, alert and cooperative, mild dysthymic mood with
21 appropriate affect, normal attention span and concentration.” Tr. 27. An ALJ may
22 discredit a treating physician’s opinion that is unsupported by objective medical
23 findings. *Tonapetyan*, 242 F.3d at 1149. Here, Dr. Emery’s opinion in the letter is
24 unsupported by objective evidence and inconsistent with his own notes.

25 The ALJ also noted Dr. Emery appears to have “relied heavily on the
26 subjective report of symptoms and limitations provided by the claimant, and
27 seemed to uncritically accept as true most, if not all, of what the claimant reported,
28 as he even indicated ‘would really need to do more objective testing in order to

1 quantify objective worsening’ regarding his thoracic outlet syndrome.” Tr. 27,
2 354. As discussed above, the ALJ’s credibility finding is supported by the
3 evidence of record and free of error, and a physician’s opinion may be disregarded
4 when it is premised on the properly rejected subjective complaints of a claimant.
5 *Tonapetyan*, 242 F.3d at 1149; *see also Morgan v. Comm’r. of Soc. Sec. Admin.*,
6 169 F.3d 595, 602 (9th Cir. 1999) (the opinion of a physician premised to a large
7 extent on a claimant’s own account of symptoms and limitations may be
8 disregarded where they have been properly discounted). Since Plaintiff was
9 properly found by the ALJ to be not entirely credible, *see supra*, the ALJ
10 appropriately accorded little weight to Dr. Emery’s October 2010 letter which
11 appears to have been based primarily on Plaintiff’s subjective complaints.

12 Based on the foregoing, the Court finds the ALJ provided specific,
13 legitimate reasons for giving little weight to Dr. Emery’s October 2010 letter, and
14 those reasons are supported by substantial record evidence. The Court finds it
15 significant to note that Dr. Emery’s statement that Plaintiff is “unable to maintain
16 any degree of gainful employment” is, in any event, not the equivalent to a finding
17 of “disability” under the Social Security Act. *See* 42 U.S.C. §§ 423(d)(1)(A),
18 1382c(a)(3)(A). It is the role of the ALJ to determine whether a claimant is
19 “disabled” within the meaning of the Social Security Act, and that determination is
20 based on both medical and vocational components. *Edlund v. Massanari*, 253 F.3d
21 1152, 1156 (9th Cir. 2001). The ALJ did not err by according Dr. Emery’s
22 October 21, 2010, letter little weight.

23 CONCLUSION

24 Having reviewed the record and the ALJ’s findings, the Court finds the
25 ALJ’s decision is supported by substantial evidence and free of legal error.

26 Accordingly, **IT IS ORDERED:**

27 1. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is
28 **GRANTED.**

1 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

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

5 DATED April 27, 2015.



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

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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE