

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 20, 2018

SEAN F. McAVOY, CLERK

4 TERRY ALAN MULLINS,

5 Plaintiff,

7 v.

8 COMMISSIONER OF SOCIAL
9 SECURITY,

10 Defendant.

No. 2:17-CV-0117-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

12 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
13 No. 15, 19. Attorney Jeffrey Schwab represents Terry Alan Mullins (Plaintiff);
14 Special Assistant United States Attorney Daphne Banay represents the
15 Commissioner of Social Security (Defendant). The parties have consented to
16 proceed before a magistrate judge. ECF No. 8. After reviewing the administrative
17 record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for
18 Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

19 **JURISDICTION**

20 On October 1, 2012, Plaintiff filed applications for disability insurance
21 benefits and supplemental security income benefits, alleging disability since July
22 12, 2009, due to back condition, anxiety, depression, dysuria, hematuria, and joint
23 and muscle pain/weakness. Tr. 207, 209, 243. At the time of the administrative
24 hearing, Plaintiff amended the alleged onset date of disability to October 1, 2012,
25 the application date. Tr. 47. Plaintiff's applications were denied initially and upon
26 reconsideration.

27 Administrative Law Judge (ALJ) Jesse K. Shumway held a hearing on June
28 26, 2015, Tr. 38-98, and issued an unfavorable decision on July 31, 2015, Tr. 12-

1 28. The Appeals Council denied review on February 6, 2017. Tr. 1-7. The ALJ's
2 July 2015 decision thus became the final decision of the Commissioner, which is
3 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
4 action for judicial review on March 31, 2017. ECF No. 1, 3.

5 **STATEMENT OF FACTS**

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

9 Plaintiff was born on November 11, 1965, and was 46 years old on the
10 amended alleged onset date, October 1, 2012. Tr. 47, 207, 209. He completed
11 high school and one year of college. Tr. 244. Plaintiff's disability report indicates
12 he stopped working on June 1, 2011, because of his condition(s). Tr. 243.

13 Plaintiff testified at the June 26, 2015, administrative hearing that he applied for
14 work in late 2012 or 2013 at an auto parts store, in waste management, and for a
15 cleaning company, but he had not been successful in securing employment. Tr.
16 76-78. He stated he continued to look for work and believed he would be able to
17 work at an auto parts store. Tr. 78-79, 85. Plaintiff later clarified he felt he could
18 stand at a desk, answer phones, answer questions, and operate a point of sale
19 computer at an auto parts store, but would not be able to physically retrieve and
20 deliver heavy auto parts to customers. Tr. 85-87.

21 Plaintiff testified he suffered back pain "24 hours a day, seven days a week."
22 Tr. 61. He indicated it is typical he will need to lie down two to three times during
23 the day, with an icepack, for 30 minutes to an hour each time due to his back pain.
24 Tr. 66-67. He stated he also has at least three or four "bad days" per month where
25 it is difficult to even get out of bed and do basic activities. Tr. 62-63.

26 Plaintiff also testified he has diabetes and has had difficulty controlling his
27 diabetes. Tr. 64. As a result, he had neuropathy in his feet and the occurrence of
28 six or seven sebaceous cysts that he has had to have drained. Tr. 65. He stated he

1 also experienced right arm/shoulder and bilateral knee pain as well as a loss of
2 sensation/feeling in his right hand. Tr. 74-75, 80, 81, 83. There was no mention or
3 discussion of any symptoms related to mental impairments at the time of the
4 administrative hearing.

5 **STANDARD OF REVIEW**

6 The ALJ is responsible for determining credibility, resolving conflicts in
7 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
8 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with
9 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
10 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
11 only if it is not supported by substantial evidence or if it is based on legal error.
12 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
13 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
14 1098. Put another way, substantial evidence is such relevant evidence as a
15 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
16 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
17 rational interpretation, the Court may not substitute its judgment for that of the
18 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
19 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
20 administrative findings, or if conflicting evidence supports a finding of either
21 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
22 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
23 supported by substantial evidence will be set aside if the proper legal standards
24 were not applied in weighing the evidence and making the decision. *Browner v.*
25 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

26 **SEQUENTIAL EVALUATION PROCESS**

27 The Commissioner has established a five-step sequential evaluation process
28 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); see *Bowen*

1 v. Yuckert, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of
2 proof rests upon the claimant to establish a prima facie case of entitlement to
3 disability benefits. Tackett, 180 F.3d at 1098-1099. This burden is met once a
4 claimant establishes that physical or mental impairments prevent him from
5 engaging in his previous occupation. 20 C.F.R. § 416.920(a)(4). If a claimant
6 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
7 shifts to the Commissioner to show that the claimant can perform other jobs
8 present in significant numbers in the national economy. Batson v. Commissioner
9 of Social Sec. Admin., 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot
10 make an adjustment to other work in the national economy, a finding of “disabled”
11 is made. 20 C.F.R. § 416.920(a)(4)(v).

12 **ADMINISTRATIVE DECISION**

13 On July 31, 2015, the ALJ issued a decision finding Plaintiff was not
14 disabled as defined in the Social Security Act.

15 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
16 activity since the amended alleged onset date, October 1, 2012. Tr. 14. At step
17 two, the ALJ determined Plaintiff had the following severe impairments:
18 degenerative disc disease, obesity, bilateral knee degeneration, right shoulder
19 impairment, and right hand numbness. Tr. 15. At step three, the ALJ found
20 Plaintiff did not have an impairment or combination of impairments that meets or
21 medically equals the severity of one of the listed impairments. Tr. 19.

22 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and
23 determined he could perform light exertion level work with the following
24 limitations: he is able to stand and walk only four hours in an eight-hour workday;
25 he cannot use his right hand when walking because of his use of a cane; he is able
26 to sit only one hour at a time, followed by a minute or two of standing and
27 stretching; he can only occasionally reach overhead on the right and frequently
28 handle and finger with the right hand; he cannot climb ladders, ropes or scaffolds

1 and only occasionally perform other postural activities; he cannot have
2 concentrated exposure to extreme cold or heat or vibration and can have no
3 exposure to hazards such as unprotected heights and moving mechanical parts; and
4 he cannot operate a motor vehicle. Tr. 20.

5 At step four, the ALJ determined Plaintiff could not perform his past
6 relevant work as an automobile mechanic. Tr. 27. However, at step five, the ALJ
7 determined that based on the testimony of the vocational expert, and considering
8 Plaintiff's age, education, work experience and RFC, Plaintiff could perform other
9 jobs present in significant numbers in the national economy, including the jobs of
10 mail sorter, production assembler and inspector, hand packager. Tr. 27-28. The
11 ALJ thus concluded Plaintiff was not under a disability within the meaning of the
12 Social Security Act at any time from October 1, 2012, the amended alleged onset
13 date, through the date of the ALJ's decision, July 31, 2015. Tr. 28.

14 ISSUES

15 The question presented is whether substantial evidence supports the ALJ's
16 decision denying benefits and, if so, whether that decision is based on proper legal
17 standards.

18 Plaintiff contends the ALJ erred in this case by (1) failing to find Plaintiff's
19 diabetes and related skin conditions and mental health problems were severe
20 impairments at step two of the sequential evaluation process; (2) improperly
21 rejecting the medical opinion of Brent Packer, M.D.; (3) improperly rejecting
22 Plaintiff's subjective complaints; and (4) relying on vocational expert testimony
23 that was based on an incomplete hypothetical. ECF No. 15 at 10-19.

24 DISCUSSION

25 A. Brent Packer, M.D.

26 Plaintiff asserts the ALJ erred by failing to accord proper weight to the
27 opinions of Dr. Packer. ECF No. 15 at 12-13.

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1 In a disability proceeding, the courts distinguish among the opinions of three
2 types of acceptable medical sources: treating physicians, physicians who examine
3 but do not treat the claimant (examining physicians) and those who neither
4 examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81
5 F.3d 821, 830 (9th Cir. 1996). A treating physician’s opinion carries more weight
6 than an examining physician’s opinion, and an examining physician’s opinion is
7 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,
8 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. In weighing the medical
9 opinion evidence of record, the ALJ must make findings setting forth specific,
10 legitimate reasons for doing so that are based on substantial evidence in the record.
11 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). Moreover, the ALJ is
12 required to set forth the reasoning behind his or her decisions in a way that allows
13 for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015)
14 (finding a clear statement of the agency’s reasoning is necessary because the Court
15 can affirm the ALJ’s decision to deny benefits only on the grounds invoked by the
16 ALJ). “Although the ALJ’s analysis need not be extensive, the ALJ must provide
17 some reasoning in order for us to meaningfully determine whether the ALJ’s
18 conclusions were supported by substantial evidence.” *Treichler v. Comm’r of Soc.*
19 *Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014).

20 On January 13, 2013, Dr. Packer assessed Plaintiff’s functional abilities as
21 part of a review of the medical evidence for the Washington State Department of
22 Social and Health Services. Tr. 368-374. Dr. Packer was thus a reviewing,
23 nonexamining physician in this case. The ALJ accorded little weight to Dr.
24 Packer’s opinions regarding Plaintiff’s physical capacity. Tr. 22-23.

25 Dr. Packer opined that Plaintiff would be limited to “less than sedentary
26 overall activity,” Tr. 368, and noted it was reasonable to conclude that Plaintiff’s
27 combination of impairments would preclude a 40 hour sustained workweek, Tr.
28 369. However, Dr. Packer also found that Plaintiff had the ability to lift 20 pounds

1 maximum and frequently lift or carry up to 10 pounds, with no medical evidence
2 available to address Plaintiff's ability to stand, walk or sit for periods of time. Tr.
3 372. When provided a check-box selection which included categories for "light"
4 and "less than sedentary," Dr. Packer indicated Plaintiff was limited to "sedentary"
5 work. Tr. 372.

6 In according "little weight" to Dr. Packer's opinions of Plaintiff's physical
7 capacity, the ALJ first noted that Dr. Packer's January 13, 2013 opinion was issued
8 only a few months before Plaintiff's back surgery, when Plaintiff's pain was at or
9 near its worst. Tr. 22. The record reflects that two months later, on March 12,
10 2013, Plaintiff underwent a left L5-S1 revision discectomy, Tr. 454, and, on April
11 5, 2013, reported "feeling significantly better," Tr. 491. On April 18, 2013,
12 Plaintiff reported his back was doing well and he no longer had sciatica pain. Tr.
13 571. Several months later, on December 2, 2013, back pain was not mentioned in
14 a follow up appointment, nor was a back impairment diagnosed by the medical
15 provider. Tr. 625-627.

16 The ALJ next indicated Dr. Packer's opinion was internally inconsistent.
17 Dr. Packer limited Plaintiff to sedentary exertion level work, Tr. 372, which limits
18 lifting to no more than 10 pounds at a time, 20 C.F.R. §§ 404.1567(b), 416.967(b).
19 This is an inconsistency because Dr. Packer also found Plaintiff capable of lifting
20 20 pounds at a time, Tr. 372, which characterizes the more strenuous "light"
21 exertion level work.¹ Tr. 22-23. The ALJ correctly found Dr. Packer's report was
22 internally inconsistent.

23
24 ¹Light level work involves lifting no more than 20 pounds at a time with
25 frequent lifting or carrying of objects weighing up to 10 pounds. A job in the light
26 exertion level category requires a good deal of walking or standing or involves
27 sitting most of the time with some pushing and pulling of arm or leg controls. 20
28 C.F.R. §§ 404.1567(b), 416.967(b).

1 With regard to the weight of the evidence of record pertaining to Plaintiff's
2 physical capacity, Lynne Jahnke, M.D., testified as a medical expert at the June 26,
3 2015 administrative hearing and was accorded "great weight" by the ALJ. Tr. 26,
4 45-59. Plaintiff has not contested the weight accorded to Dr. Jahnke. See
5 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (the
6 Court will not ordinarily consider matters on appeal that were not specifically and
7 distinctly argued in a party's opening brief).

8 Dr. Jahnke indicated Plaintiff had degenerative disc disease in the
9 lumbosacral spine, but he had done well following two back surgeries. Tr. 48. She
10 found that the assessed limitation to the light exertional level was consistent with
11 Plaintiff's episodic, rather than chronic, back pain.² Tr. 48. Dr. Jahnke opined that
12 Plaintiff did not meet or equal Listing 1.04 (disorders of the spine) because he did
13 not have continuous nerve root compression for twelve consecutive months; rather,
14 it was episodic. Tr. 49. Dr. Jahnke testified that Plaintiff would be limited to light
15 exertion level work: lifting up to 20 pounds occasionally and 10 pounds
16 frequently; no limitations on sitting, but a sit/stand option (every hour he would be
17 allowed to stand up and stretch his low back for a minute or so); no limitation on
18 standing and walking; and some postural and environmental limitations. Tr. 54-55.
19 Christine E. Bosa, ARNP, examined Plaintiff in October 2012, Tr. 402, and
20 completed a DSHS physical functional evaluation form in October 2012 which,
21 consistent with Dr. Jahnke, opined that Plaintiff was limited to light exertion level
22 work, Tr. 355. State agency medical consultant, Dale Thuline, M.D., also opined
23 that Plaintiff was limited to light exertional level work, but with the ability to stand

24 ///

25 _____
26 ²It was noted that Plaintiff was doing well after his second back surgery,
27 reporting no sciatica, and that his recurrence of back pain occurred when he was
28 trimming hedges with a chainsaw. Tr. 48, 703.

1 and walk for only four hours and sit only six hours in an eight-hour workday. Tr.
2 26, 127, 137.

3 The record reflects that no medical professional, other than nonexamining
4 physician Packer, has assessed greater physical limitations than determined by the
5 ALJ in this case. The restriction to sedentary or less than sedentary work as opined
6 by Dr. Packer just prior to Plaintiff's second back surgery is not supported by the
7 weight of the record evidence.

8 The Court finds that the ALJ provided specific and legitimate reasons,
9 supported by substantial record evidence, for discounting Dr. Packer's report. The
10 ALJ did not err by rejecting Dr. Packer's opinions pertaining to Plaintiff's physical
11 functioning.

12 **B. Plaintiff's Symptom Testimony**

13 Plaintiff also challenges the ALJ's finding that Plaintiff was not entirely
14 credible, Tr. 25. ECF No. 15 at 13-17.

15 It is the province of the ALJ to make credibility determinations. Andrews,
16 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
17 cogent reasons. Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
18 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
19 testimony must be "specific, clear and convincing." Smolen, 80 F.3d at 1281;
20 Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are
21 insufficient: rather the ALJ must identify what testimony is not credible and what
22 evidence undermines the claimant's complaints." Lester, 81 F.3d at 834; Dodrill v.
23 Shalala, 12 F.3d 915, 918 (9th Cir. 1993).

24 In this case, the ALJ found Plaintiff's medically determinable impairments
25 could reasonably be expected to cause the alleged symptoms; however, although
26 Plaintiff was generally a sincere and believable witness, Plaintiff's statements
27 concerning the intensity, persistence and limiting effects of these symptoms were
28 not entirely credible. Tr. 25.

1 The ALJ first indicated the medical evidence of record did not support
2 Plaintiff's alleged three to four "bad days" a month, which he described as causing
3 a difficulty to even get out of bed and do basic activities, Tr. 62-63. Tr. 25.
4 A lack of supporting objective medical evidence is a factor which may be
5 considered in evaluating an individual's credibility, provided that it is not the sole
6 factor. *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991) (Once a claimant
7 produces objective medical evidence of an underlying impairment, an adjudicator
8 may not reject the claimant's subjective complaints based solely on a lack of
9 objective medical evidence to fully corroborate the alleged severity of pain.); see
10 also *Robbins v. Soc. Sec. Admin.*, 466 F3d 880, 883 (9th Cir. 2006) (An ALJ may
11 not make a negative credibility finding "solely because" the claimant's symptom
12 testimony "is not substantiated affirmatively by objective medical evidence.").

13 The Court has reviewed the medical record, and specifically the citations
14 identified in Plaintiff's brief, ECF No. 15 at 14, and finds no support for Plaintiff's
15 assertion that he experienced multiple days during a month where he found it
16 difficult to even get out of bed. The majority of the records cited by Plaintiff
17 discuss Plaintiff's uncontrolled diabetes and related scalp cysts and
18 sores/abscesses. Included in the records cited by Plaintiff for his assertion that he
19 was "in severe pain and was trying everything he could to get rid of his pain," ECF
20 No. 15 at 14, is a report which indicated Plaintiff "has been feeling pretty well,"
21 Tr. 587, and another report, the only one cited that specifically discussed Plaintiff's
22 back pain complaints, that stated Plaintiff's symptoms were relieved by pain
23 medications, Tr. 700. As indicated by the ALJ, the medical evidence of record
24 does not support Plaintiff's allegation of suffering three to four "bad days" a
25 month, which resulted in difficulty to get out of bed and do basic activities.

26 The ALJ next noted Plaintiff has consistently been limited to light exertion
27 level work. Tr. 25. In assessing a Plaintiff's subjective pain and symptom
28 testimony, an ALJ may consider whether the alleged symptoms are consistent with

1 the medical evidence. Lingenfelter, 504 F.3d at 1040. Here, as discussed in
2 Section A above, other than the properly rejected opinion of Dr. Packer, the
3 entirety of the medical evidence of record reflects that Plaintiff is limited to no
4 greater than a restricted range of light exertion level work. See supra.

5 Plaintiff contends that the limitation to light work does not account for the
6 electromyogram (EMG) study completed on June 12, 2015, Tr. 711, because it was
7 not considered by the medical expert. ECF No. 15 at 15. However, the ALJ did
8 take the EMG study into consideration, Tr. 25, and Plaintiff does not identify any
9 specific limitations based on the EMG results that the ALJ erroneously omitted or
10 failed to account for in the RFC determination. See *Valentine v. Comm’r of Social*
11 *Sec. Admin.*, 574 F.3d 685, 692 n.2 (9th Cir. 2009) (“Valentine does not detail
12 what other physical limitations follow from the evidence of his knee and should[er]
13 injuries, besides the limitations already listed in the RFC. We reject any invitation
14 to find that the ALJ failed to account for Valentine’s injuries in some unspecified
15 way.”).

16 The ALJ next indicated Plaintiff’s reported activities such as fishing and
17 working on cars were inconsistent with his assertions of totally disabling
18 symptoms. Tr. 25. It is well-established that the nature of daily activities may be
19 considered when evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir.
20 1989). While one does not need to be “utterly incapacitated” to be disabled, *id.*, it
21 was entirely proper for the ALJ to find Plaintiff’s reports of activities such as
22 working under and on a car, Tr. 548, 617, and fishing, Tr. 362, 651, were
23 inconsistent with Plaintiff’s alleged limitations and thus detracted from his overall
24 credibility. Tr. 24, 25.

25 Finally, the ALJ held that Plaintiff’s statements that he believed he was
26 capable of performing some work, Tr. 78-79, 361, diminished his credibility. See
27 *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001), as amended (Nov. 9,
28 2001) (finding that an ALJ properly discredited a claimant’s testimony because he

1 “stated at the administrative hearing and to at least one of his doctors that he left
2 his job because he was laid off, rather than because he was injured”); *Berry v.*
3 *Astrue*, 622 F.3d 1228, 1235 (9th Cir. 2010) (ALJ properly considered fact that
4 claimant “claimed disability dating from his last day of employment even though
5 he admitted at the hearing that he left his job because his employer went out of
6 business and probably would have worked longer had his employer continued to
7 operate.”). An ALJ may, in general, discount a claimant’s testimony where it is
8 internally inconsistent or inconsistent with his other statements. *Thomas v.*
9 *Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002).

10 Plaintiff testified at the administrative hearing that he continued to look for
11 work and believed he would be able to work at an auto parts store. Tr. 78-79, 85.
12 Plaintiff thereafter clarified he felt he could stand at a desk, answer phones, answer
13 questions, and operate a point of sale computer at an auto parts store, but would not
14 be able to physically retrieve and deliver heavy auto parts to customers. Tr. 85-87.
15 At a January 3, 2013 psychological evaluation, Plaintiff indicated he continued to
16 fill out job applications and search for jobs. Tr. 361. He mentioned the possibility
17 of performing work like a cashier’s job, front counter work, or as a customer
18 service agent at a Staples or Home Depot. Tr. 361. Plaintiff’s continued job
19 search and reported belief that he possessed the ability to perform some work is
20 inconsistent with his assertion of total disability.

21 The ALJ is responsible for reviewing the evidence and resolving conflicts or
22 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
23 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
24 evidence. *Richardson v. Perales*, 402 U.S. 389, 400 (1971). The Court has a
25 limited role in determining whether the ALJ’s decision is supported by substantial
26 evidence and may not substitute its own judgment for that of the ALJ even if it
27 might justifiably have reached a different result upon de novo review. 42 U.S.C. §
28 405(g). After reviewing the record, the Court finds that the ALJ provided clear

1 and convincing reasons, which are fully supported by the record, for discounting
2 Plaintiff's subjective complaints. Accordingly, the ALJ did not err by finding
3 Plaintiff's symptom allegations were not entirely credible in this case.

4 **C. Severe Impairment**

5 Plaintiff contends the ALJ also erred by failing to find Plaintiff's diabetes
6 and related skin conditions and mental impairment were severe impairments at step
7 two of the sequential evaluation process. ECF No. 15 at 10-12.

8 Plaintiff has the burden of proving he has a severe impairment. 20 C.F.R. §§
9 423(d)(1)(A), 416.912. In order to meet this burden, Plaintiff must furnish medical
10 and other evidence that shows he is disabled. 20 C.F.R. § 416.912(a). The
11 regulations, 20 C.F.R. §§ 404.1520(c), 416.920(c), provide that an impairment is
12 severe if it significantly limits one's ability to perform basic work activities. An
13 impairment is considered non-severe if it "does not significantly limit your
14 physical or mental ability to do basic work activities." 20 C.F.R. §§ 404.1521,
15 416.921. In the absence of objective evidence to verify the existence of an
16 impairment, the ALJ must reject the alleged impairment at step two of the
17 sequential evaluation process. S.S.R. 96-4p.

18 The record reflects that Plaintiff has been treated on numerous occasions for
19 uncontrolled diabetes and related skin conditions (cysts and abscesses). However,
20 the mere existence of an impairment is insufficient proof of a severe impairment.
21 See *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993). Here, Plaintiff has not
22 identified any specific limitations assessed by providers resulting from the
23 uncontrolled diabetes and related skin conditions, see *Edlund v. Massanari*, 253
24 F.3d 1152, 1159-1160 (9th Cir. 2001) (a claimant must prove an impairment
25 affects his ability to perform basic work activities), nor has he demonstrated that
26 the impairments meet the durational requirements of the Social Security Act, 42
27 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (an individual shall be considered disabled
28 if he has an impairment which can be expected to result in death or which has

1 lasted or can be expected to last for a continuous period of not less than 12
2 months). The medical evidence of record does not establish any specific work-
3 related limitations, lasting for a continuous period of not less than 12 months,
4 resulting from Plaintiff's uncontrolled diabetes and related skin conditions. Tr. 16.
5 Therefore, the ALJ correctly found Plaintiff's diabetes and related skin conditions
6 were not severe impairments.

7 With respect to Plaintiff's mental health, Plaintiff claimed anxiety and
8 depression as conditions that limited his ability to work on his disability form. Tr.
9 243. However, at the administrative hearing, Plaintiff did not mention depression
10 or anxiety and did not discuss any symptoms related to any alleged mental
11 impairments. Tr. 59-89. Moreover, Plaintiff's briefing fails to specify any
12 functional limitations stemming from any alleged mental health issue. See
13 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010).

14 Regarding the medical evidence of record, state agency psychological
15 consultants John F. Robinson, Ph.D., and Diane Fligstein, Ph.D., found Plaintiff's
16 mental impairments to be non-severe. Tr. 104-105, 113-114, 125-126, 135-137.
17 Plaintiff was diagnosed by Ms. Bosa with bipolar affective disorder on May 21,
18 2014, Tr. 653; however, as correctly determined by the ALJ, Ms. Bosa, a nurse, is
19 not an "acceptable medical source" which is required to establish the existence of a
20 medically determinable impairment. Tr. 17. In any event, Ms. Bosa did not
21 attribute any functional limitations to the diagnosed disorder that would affect
22 Plaintiff's ability to perform basic work activities. Plaintiff additionally underwent
23 a psychological evaluation with Steven J. Zimberoff, Ph.D., on January 3, 2013,
24 and was diagnosed with adjustment disorder, chronic, with mildly depressed mood.
25 Tr. 363. Dr. Zimberoff stated that while Plaintiff presented with mild depression,
26 he was able to function well cognitively. Tr. 363. He reported that Plaintiff
27 appeared to have no significant difficulties focusing on task, was very pleasant and
28 cooperative, and was able to communicate well. Tr. 364. Dr. Zimberoff opined

1 that Plaintiff was “easily able to understand, remember and follow one, two, or
2 more step instructions” and appeared to have no significant difficulties interacting
3 with the public, co-workers and supervisors. Tr. 364. Dr. Zimberoff did not assess
4 any functional limitations stemming from the diagnosed adjustment disorder.

5 Based on the foregoing, the weight of the evidence of record shows that
6 Plaintiff’s mental impairment (affective disorder) did not significantly limit his
7 ability to perform basic mental work activities. Accordingly, the Court finds the
8 ALJ also correctly determined at step two of the sequential evaluation process that
9 Plaintiff’s mental health condition was not a severe impairment. Tr. 17-19.

10 **D. Step Five**

11 Plaintiff contends that the ALJ erred by relying on the vocational expert’s
12 testimony in response to a hypothetical that was not supported by the weight of the
13 record evidence. ECF No. 15 at 17-19.

14 As determined above, the ALJ did not err by rejecting Dr. Packer’s opinions
15 pertaining to Plaintiff’s physical functioning, by finding Plaintiff’s symptom
16 allegations were not entirely credible, and by concluding at step two that Plaintiff’s
17 diabetes and related skin conditions and affective disorder were not severe
18 impairments. As such, the ALJ’s ultimate RFC determination is supported by
19 substantial evidence and free of error.

20 The ALJ’s RFC determination held that Plaintiff could perform light
21 exertion level work with certain postural and environmental limitations. Tr. 20.
22 At the administrative hearing held on June 26, 2015, the vocational expert testified
23 that with the restrictions assessed by the ALJ, Plaintiff retained the capacity to
24 perform a significant number of jobs existing in the national economy, including
25 the positions of mail sorter, production assembler and inspector, hand packager.
26 Tr. 92-94. Since the vocational expert’s testimony was based on a proper RFC
27 determination by the ALJ, Plaintiff’s step five argument is without merit.

28 ///

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court finds the
3 ALJ's decision is supported by substantial evidence and free of legal error.

4 Accordingly, **IT IS ORDERED:**

5 1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
6 **GRANTED.**

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

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

11 DATED March 20, 2018.

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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE