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

Sep 19, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DALE B.,
Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 4:17-cv-05130-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 18, 19

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 18, 19. The parties consented to proceed before a magistrate judge. ECF No. 9. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff's Motion, ECF No. 18, and grants Defendant's Motion, ECF No. 19.

ORDER - 1

1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g),
3 1383(c)(3).

4 **STANDARD OF REVIEW**

5 A district court’s review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
7 limited; the Commissioner’s decision will be disturbed “only if it is not supported
8 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
9 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
10 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
11 (quotation and citation omitted). Stated differently, substantial evidence equates to
12 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
13 citation omitted). In determining whether the standard has been satisfied, a
14 reviewing court must consider the entire record as a whole rather than searching
15 for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
18 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
19 rational interpretation, [the court] must uphold the ALJ’s findings if they are
20 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
2 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
3 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
4 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
5 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
6 *Sanders*, 556 U.S. 396, 409-10 (2009).

7 **FIVE-STEP EVALUATION PROCESS**

8 A claimant must satisfy two conditions to be considered “disabled” within
9 the meaning of the Social Security Act. First, the claimant must be “unable to
10 engage in any substantial gainful activity by reason of any medically determinable
11 physical or mental impairment which can be expected to result in death or which
12 has lasted or can be expected to last for a continuous period of not less than twelve
13 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
14 impairment must be “of such severity that he is not only unable to do his previous
15 work[,] but cannot, considering his age, education, and work experience, engage in
16 any other kind of substantial gainful work which exists in the national economy.”
17 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential analysis to
19 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
20 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner

1 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
2 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
3 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
4 404.1520(b), 416.920(b).

5 If the claimant is not engaged in substantial gainful activity, the analysis
6 proceeds to step two. At this step, the Commissioner considers the severity of the
7 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
8 claimant suffers from “any impairment or combination of impairments which
9 significantly limits [his or her] physical or mental ability to do basic work
10 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
11 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
12 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
13 §§ 404.1520(c), 416.920(c).

14 At step three, the Commissioner compares the claimant’s impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe as or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
8 capable of performing other work; and (2) such work “exists in significant
9 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2);
10 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On November 13, 2013, Plaintiff applied for Title II disability insurance
13 benefits, and on December 5, 2013, he applied for Title XVI supplemental security
14 income benefits, both alleging a disability onset date of January 1, 2008. Tr. 204-
15 14. The applications were denied initially, Tr. 87-114, and on reconsideration, Tr.
16 115-146. Plaintiff appeared at a hearing before an administrative law judge (ALJ)
17 on February 4, 2016. Tr. 45-86. On May 10, 2016, the ALJ denied Plaintiff’s
18 claim. Tr. 20-39.

19 At step one of the sequential evaluation process, the ALJ found Plaintiff has
20 not engaged in substantial gainful activity since January 1, 2008. Tr. 24. At step

1 two, the ALJ found Plaintiff did not have any medically determinable impairment,
2 severe or otherwise, before November 29, 2010, as there were no medical records
3 in evidence predating that date. Also at step two, the ALJ found that Plaintiff has
4 the following severe impairments after November 29, 2010: obesity, bilateral knee
5 osteoarthritis, mild cognitive impairment versus early dementia, anxiety disorder
6 not otherwise specified, major depressive disorder, and substance use disorder. Tr.
7 24-27.

8 At step three, the ALJ found Plaintiff does not have an impairment or
9 combination of impairments that meets or medically equals the severity of a listed
10 impairment. Tr. 27-28. The ALJ then concluded that Plaintiff has the RFC to
11 perform light work with the following limitations:

12 [Plaintiff] can occasionally balance, stop, kneel and crouch.
13 [Plaintiff] should not crawl or climb ladders, ropes, scaffolds, ramps
14 or stairs. He should avoid concentrated exposure to extreme cold and
15 heat, vibration, pulmonary irritants such as fumes, odors, dusts, gases
16 and poor ventilation and hazards. [Plaintiff] can perform simple,
17 routine tasks and follow short, simple instructions. He can do work
18 that needs little or no judgment and can perform simple duties that can
be learned on the job in a short period. [Plaintiff] requires a work
environment that is predictable and with few work setting changes. He
should not deal with the general public as in a sales position or where
the general public is frequently encountered as an essential element of
the work process. Incidental contact of a superficial nature with the
general public is not precluded.

19 Tr. 28.

1 At step four, the ALJ found Plaintiff is unable to perform any past relevant
2 work. Tr. 36. At step five, the ALJ found there are jobs that exist in significant
3 numbers in the national economy that Plaintiff could perform before December 25,
4 2015 (the date Plaintiff's age category changed), such as, production assembler,
5 packing line worker, cleaner housekeeping, and outside deliverer. Tr. 37.
6 Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the
7 Social Security Act, from the alleged onset date of January 1, 2008, through
8 December 24, 2015. Tr. 38. But when Plaintiff's age category changed on
9 December 25, 2015, the ALJ determined there were no jobs that exist in significant
10 numbers in the national economy that Plaintiff can perform given his age,
11 education, work experience, and residual functional capacity. *Id.* The ALJ
12 therefore determined that Plaintiff became disabled on December 25, 2015. *Id.*

13 On June 27, 2017, the Appeals Council denied review of the ALJ's decision,
14 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
15 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

16 ISSUES

17 Plaintiff seeks judicial review of the Commissioner's final decision denying
18 him disability insurance benefits under Title II and supplemental security income
19 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
20 issues for review:

- 1 1. Whether the ALJ properly evaluated the medical opinion evidence;
- 2 2. Whether the ALJ properly evaluated Plaintiff's symptom complaints; and
- 3 3. Whether the ALJ conducted a proper step five analysis.

4 ECF No. 18 at 8.

5 DISCUSSION

6 A. Medical Opinion Evidence

7 Plaintiff contends the ALJ improperly rejected the opinions of Nora Marks,
8 Ph.D., Cheryl Hipolito, M.D., Debra Bariletti, ARNP, and Courtney Hunter,
9 ARNP. ECF No. 18 at 9-15. There are three types of physicians: “(1) those who
10 treat the claimant (treating physicians); (2) those who examine but do not treat the
11 claimant (examining physicians); and (3) those who neither examine nor treat the
12 claimant but who review the claimant's file (nonexamining or reviewing
13 physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001)
14 (brackets omitted). “Generally, a treating physician's opinion carries more weight
15 than an examining physician's, and an examining physician's opinion carries more
16 weight than a reviewing physician's.” *Id.* “In addition, the regulations give more
17 weight to opinions that are explained than to those that are not, and to the opinions
18 of specialists concerning matters relating to their specialty over that of
19 nonspecialists.” *Id.* (citations omitted).

1 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
2 reject it only by offering “clear and convincing reasons that are supported by
3 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
4 “However, the ALJ need not accept the opinion of any physician, including a
5 treating physician, if that opinion is brief, conclusory, and inadequately supported
6 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
7 (internal quotation marks and brackets omitted). “If a treating or examining
8 doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only
9 reject it by providing specific and legitimate reasons that are supported by
10 substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d
11 821, 830-31 (9th Cir. 1995)).

12 The opinion of an acceptable medical source such as a physician or
13 psychologist is given more weight than that of an “other source.” 20 C.F.R. §
14 404.1527 (2012); *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). “Other
15 sources” include nurse practitioners. 20 C.F.R. §§ 404.1513(d), 404.1594.¹

17 ¹ The Court generally applies the law in effect at the time of the ALJ’s decision.

18 *See Garrett ex. rel. Moore v. Barnhart*, 366 F.3d 643, 647 (9th Cir. 2004).

19 Revised versions of these regulations took effect on March 27, 2017, and apply to
20 disability claims filed on or after that date. *See* 82 Fed. Reg. 5844 (Mar. 27,

1 However, the ALJ is required to “consider observations by non-medical sources as
2 to how an impairment affects a claimant’s ability to work.” *Sprague v. Bowen*, 812
3 F.2d 1226, 1232 (9th Cir. 1987). Non-medical testimony can never establish a
4 diagnosis or disability absent corroborating competent medical evidence. *Nguyen*
5 *v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). An ALJ is obligated to give
6 reasons germane to “other source” testimony before discounting it. *Dodrill v.*
7 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

8 *1. Dr. Marks*

9 Dr. Marks performed psychological evaluations of Plaintiff on January 30,
10 2014, Tr. 533-37, and February 12, 2014, Tr. 422-30.

11 a. January 30, 2014 opinion

12 On January 30, 2014, Dr. Marks diagnosed Plaintiff with a moderate level of
13 anxiety, severe level of depression, and failing health and opined that Plaintiff was
14 markedly limited in the following activities: performing activities within a
15 schedule, maintaining regular attendance, completing a normal work day and week

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18 2017); 20 C.F.R. § 416.920c. Because Plaintiff’s claims were filed in 2013, the
19 revised regulations do not apply.
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1 without interruptions from psychologically based symptoms, and independently
2 setting realistic goals and plans. Tr. 533-37.

3 The ALJ assigned this opinion little to no weight. Tr. 33. Because Dr.
4 Marks' opinion was contradicted by the opinions of Dr. Cynthia Collingwood, Tr.
5 122-25, and Dr. Michael Brown, Tr. 106-08, the ALJ was required to provide
6 specific and legitimate reasons for rejecting Dr. Marks' opinion. *See Bayliss*, 427
7 F.3d at 1216.²

8 First, the ALJ rejected Dr. Marks' opinion because she did not provide
9 rationale in support of the limitations she opined. Tr. 33. The Social Security
10 regulations "give more weight to opinions that are explained than to those that are
11 not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ need not accept the opinion of any
12 physician, including a treating physician, if that opinion is brief, conclusory, and
13 inadequately supported by clinical findings." *Bray*, 554 F.3d at 1228. While the
14 evaluation report lists the reasons given by Plaintiff as to why he is unable to work
15 due to his anxiety and depression, Dr. Marks failed to provide objective reasons
16 explaining why Plaintiff's anxiety and depression cause him to be markedly

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18 ² In challenging the ALJ's evaluation of the January 30, 2014 opinion, Plaintiff
19 cites to records and information from the February 12, 2014 evaluation, which did
20 not exist when the January 30, 2014 was conducted. ECF No. 18 at 10-11.

1 limited in the three identified areas. Tr. 533-37. This is a specific and legitimate
2 reason to discount Dr. Marks' opinion.

3 Second, the ALJ rejected Dr. Marks' opinion because she did not review any
4 of the treatment records. Tr. 33 (citing Tr. 533 ("Records reviewed: None")). The
5 extent to which a medical source is "familiar with the other information in [the
6 claimant's] case record" is relevant in assessing the weight of that source's medical
7 opinion. 20 C.F.R. §§ 404.1527(c)(6), 416.927(c)(6). Dr. Marks' report indicated
8 that she reviewed no records. Tr. 533. This was a specific and legitimate reason to
9 give less weight to Dr. Marks' opinion than those of the state agency physicians,
10 Dr. Brown and Dr. Collingwood, who reviewed the medical records received at the
11 time of their 2014 opinions. Tr. 89-114 (Brown, dated February 20, 2014); Tr.
12 117-46 (Collingwood, dated May 9, 2014).

13 Plaintiff asserts Dr. Marks did provide extensive support for her opined
14 limitations. ECF No. 18 at 10 (citing Tr. 423-25). However, Plaintiff cites to the
15 February 12, 2014 report, Tr. 422-30, which did not exist when the January 30,
16 2014 opinion was prepared. Dr. Marks indicated she reviewed no records
17 before preparing the January 30, 2014 opinion. Tr. 533-37. From the record, it
18 appears that Dr. Marks did not administer the Trail Making Test, Clock Drawing
19 Test, and the Wechsler Memory Scale-IV until the February 12, 2014 evaluation.
20 Tr. 422-30. As a result, those tests cannot support an opinion rendered on January

1 30, 2014. Moreover, the test results cited by Plaintiff are not mentioned in the
2 January 30, 2014 opinion.

3 Third, the ALJ rejected the opinion because other medical records indicated
4 Plaintiff endorsed milder symptoms to other treatment providers than those
5 identified by Dr. Marks. Tr. 33. An ALJ may discredit a physician's opinion that
6 is unsupported by the record as a whole. *Batson v. Comm'r of Soc. Sec. Adm.*, 359
7 F.3d 1190, 1195 (9th Cir. 2004). The ALJ noted that Plaintiff's complaint of
8 severe depression was not supported by the "therapy notes generated around the
9 same time" showing that Plaintiff had milder symptoms than he reported to Dr.
10 Marks. Tr. 33 (citing Tr. 573-84). The cited therapy notes and attendant Global
11 Assessment Functioning (GAF) scores undermine the severity of the symptoms
12 that he reported to Dr. Marks. Tr. 573-84 (noting that Plaintiff was sad and
13 depressed but that he was cooperative, rationale, calm, relaxed, and oriented
14 without any suicidal ideation, with GAF scores of 75); *see also* Tr. 457-63 (noting
15 that Plaintiff's mood was appropriate and thought process rationale).

16 However, Plaintiff contends that, because in a later section of his decision
17 the ALJ discounted the use of GAF scores when evaluating Plaintiff's disability,
18 the ALJ improperly discounted Dr. Marks' opinion on the grounds that her opinion
19 was inconsistent with GAF scores during that period. ECF Nos. 18 at 12; 20 at 2.
20 The Court does not find any inconsistency in the ALJ's use, or non-use of, GAF

1 scores. In regards to Dr. Marks, the ALJ mentioned the GAF reports merely to
2 highlight that other medical records indicated that Plaintiff endorsed milder
3 symptoms to other treatment providers than those identified by Dr. Marks. Tr. 33.
4 Whereas in assigning limited weight to Nurse Practitioner Cole’s GAF scores, the
5 ALJ recognized that, while a GAF score may help guide an ALJ’s decision, an
6 ALJ is not bound to consider a GAF score.³ The Commissioner has explicitly
7 disavowed use of GAF scores as indicators of disability. 65 Fed. Reg. 50746-01,
8 50765 (Aug. 21, 2000) (“The GAF scale . . . does not have a direct correlation to
9 the severity requirements in our mental disorder listing.”). Moreover, the GAF
10 scale is no longer included in the DSM–V. *See* Am. Psychiatric Ass’n, *Diagnostic*
11 *& Statistical Manual of Mental Disorders* at 16 (5th ed. 2013) (“It was
12 recommended that the GAF be dropped from the DSM-V for several reasons,
13 including its conceptual lack of clarity (i.e., including symptoms, suicide risk and
14 disabilities in its descriptors) and (questionable psychometrics in routine

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16 ³The GAF Scale measures “the clinician’s judgment of the individual’s overall
17 level of functioning” as to “psychological, social, and occupational functioning,”
18 but not “impairment in functioning due to physical (or environmental) limitations.”
19 Am. Psychiatric Ass’n, *Diagnostic & Statistical Manual of Mental Disorders*, at 32
20 (4th ed. Text Revision 2000); *see Morgan*, 169 F.3d at 598, n.1.

1 practice.”)). There is no inconsistency in the ALJ’s consideration of Plaintiff’s
2 GAF scores. Even if the ALJ erred in inconsistently treating Plaintiff’s GAF
3 scores, this error was harmless because the ALJ provided other specific and
4 legitimate reasons, supported by substantial evidence, to discredit Dr. Marks’
5 opinion. *See Molina*, 674 F.3d at 1115.

6 Finally, the ALJ rejected Dr. Marks’ opinion because she relied in part on
7 Plaintiff’s unreliable self-report. Tr. 33. A physician’s opinion may be rejected if
8 it is based on a claimant’s subjective complaints which were properly discounted.
9 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v. Comm’r of*
10 *Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999); *Fair v. Bowen*, 885 F.2d 597,
11 604 (9th Cir. 1989). However, when an opinion is not more heavily based on a
12 patient’s self-reports than on clinical observations, there is no evidentiary basis for
13 rejecting the opinion. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014);
14 *Ryan v. Comm’r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-200 (9th Cir. 2008).
15 Here, the Commissioner conceded that the ALJ improperly relied on this factor.
16 ECF No. 19 at 7-8. Notwithstanding this concession, any error is harmless because
17 the ALJ provided other specific and legitimate reasons, supported by substantial
18 evidence, to discredit Dr. Marks’ opinion. *See Molina*, 674 F.3d at 1115.

1 b. February 12, 2014 opinion

2 On February 12, 2014, Dr. Marks conducted a psychological evaluation and
3 diagnosed Plaintiff with moderate anxiety disorder, dementia, and recurrent severe
4 major depressive disorder without psychotic symptoms. Tr. 422-30. Dr. Marks
5 opined that Plaintiff was moderately impaired in his ability to understand and
6 remember complex instructions and make judgments on complex work-related
7 decisions and markedly impaired in the ability to carry out complex instructions.
8 Tr. 428.

9 The ALJ assigned little weight to Dr. Marks' February 12, 2014 opinion. Tr.
10 33-34. Because Dr. Marks' opinion was contradicted by the opinions of Dr.
11 Collingwood, Tr. 122-25, and Dr. Brown, Tr. 106-08, the ALJ was required to
12 provide specific and legitimate reasons for rejecting Dr. Marks' opinion. *See*
13 *Bayliss*, 427 F.3d at 1216.

14 First, the ALJ rejected Dr. Marks' opinion because she did not conduct a
15 physical examination and is not qualified, as a psychologist, to comment on
16 Plaintiff's physical medical conditions. This is a legitimate and specific reason to
17 reject Dr. Mark's opinion regarding any physical limitations. *See Brosnahan v.*
18 *Barnhart*, 336 F.3d 671, 676 (8th Cir. 2003); *Bollinger v. Barnhart*, 178 Fed.
19 App'x 745, 746 n.1 (9th Cir. 2006). Moreover, Plaintiff failed to challenge this
20 reason, thus, any challenge is waived and the Court may decline to review it. *See*

1 *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)
2 (determining the court may decline to address the merits of issues not argued with
3 specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (ruling that the court
4 may not consider on appeal issues not “specifically and distinctly argued” in the
5 party’s opening brief).

6 Second, the ALJ rejected Dr. Marks’ opinion because it was not consistent
7 with the medical record as a whole. An ALJ may discredit a physician’s opinion if
8 it is not consistent with the record or there is inadequate evidence supporting the
9 opinion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007). The ALJ
10 specifically noted that Plaintiff performed poorly on the Wechsler Memory Scale
11 tests, but the ALJ found that several other evaluations established that Plaintiff had
12 better cognitive functioning than that assessed by Dr. Marks. *See, e.g.*, Tr. 554
13 (November 25, 2014: “MMSE normal; no cognitive impairment”); Tr. 630
14 (February 24, 2015: “Memory – mildly impaired short term memory” and
15 “[o]rientated to time, place, person & situation. Appropriate mood and affect”); Tr.
16 701 (December 10, 2015: “Registers 3/3 and recalls 2/3 items, 3/3 with clue. Spells
17 WORLD backwards. Oriented to year, Month, date, copied a pattern”). Plaintiff
18 failed to challenge this reason cited by the ALJ, thus, any challenge is waived. *See*
19 *Carmickle*, 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. Here, the ALJ provided

1 specific and legitimate reasons supported by substantial evidence to discount Dr.
2 Marks' February 2014 opinion.

3 2. *Dr. Hipolito*

4 Dr. Hipolito treated Plaintiff between April and October 2015. Tr. 634-80.
5 She evaluated Plaintiff on September 23, 2015,⁴ diagnosed Plaintiff with
6 osteoarthritis in the knee joint and severe carpal tunnel syndrome in his right hand,
7 and opined that Plaintiff could not stand for more than twenty minutes due to knee
8 pain and would be unable to complete forms due to hand pain. Tr. 623-25. Dr.
9 Hipolito opined that the conditions were likely to last for months and that Plaintiff
10 was limited to sedentary work. Tr. 624.

11 On October 20, 2015, Dr. Hipolito wrote a letter to the Stage agency to
12 support Plaintiff's state-assistance application, stating that Plaintiff had significant
13 osteoarthritis on multiple joints and bilateral carpal tunnel syndrome, which greatly
14 affected his ability to work. Tr. 681.

15 The ALJ assigned little to no weight to these opinions. Tr. 35. Because Dr.
16 Hipolito's opinions were contradicted by the opinion of Dr. Robert Hoskins, Tr.

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18 ⁴ The ALJ identified Dr. Hipolito's opinion as April 23, 2015. Tr. 35. However,
19 Dr. Hipolito's opinion was issued on September 23, 2015, not April 23, 2015. Tr.
20 623-25.

1 125-27, the ALJ was required to provide specific and legitimate reasons for
2 rejecting Dr. Hipolito's opinions. *See Bayliss*, 427 F.3d at 1216.

3 First, the ALJ discounted Dr. Hipolito's opinions because they were
4 inconsistent with the medical evidence. Tr. 35. An ALJ may discredit physicians'
5 opinions that are unsupported by the record as a whole. *Batson*, 359 F.3d at 1195.
6 Relevant factors to evaluating any medical opinion include the amount of relevant
7 evidence that supports the opinion, the quality of the explanation provided in the
8 opinion, and the consistency of the medical opinion with the record as a whole.
9 *Lingenfelter*, 504 F.3d at 1042; *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007).

10 An ALJ may choose to give more weight to an opinion that is more consistent with
11 the evidence in the record. 20 C.F.R. § 416.927(c)(4) (“[T]he more consistent an
12 opinion is with the record as a whole, the more weight we will give to that
13 opinion.”).

14 As to Plaintiff's knees, the ALJ highlighted that imaging of the knees was
15 not consistent with Dr. Hipolito's sedentary-work limitation. Tr. 703-04 (showing
16 mild medial joint space narrowing and bilateral knee degenerative joint disease,
17 with recommended treatment including physical therapy, anti-inflammatory, and
18 possible injection); Tr. 707-08 (showing mild medial and moderate patellofemoral
19 joint space degenerative spurring of right knee and persistent spurring along the
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1 lateral margin of the patella). The ALJ’s conclusion regarding the medical
2 evidence related to Plaintiff’s knees is supported by substantial evidence.

3 As to Plaintiff’s carpal tunnel syndrome, the ALJ concluded that the
4 electrodiagnostic testing showed only mild carpal tunnel syndrome. Tr. 35.
5 However, while the electrodiagnostic testing reflected mild carpal tunnel
6 syndrome, the doctor conducting this testing—Dr. Fei Pan—noted it was an
7 abnormal study and recommended clinical correlation. Tr. 695. The reviewing
8 orthopedic surgeon, Dr. Joshua Bales, diagnosed Plaintiff with bilateral carpal
9 tunnel syndrome and cubital tunnel syndrome and opined that it was moderate to
10 severe. Tr. 705-06. The Court finds the ALJ erred in rejecting Dr. Hipolito’s
11 opinion in regard to Plaintiff’s carpal tunnel syndrome, as her opinion was
12 consistent with the opinions of Dr. Pan and Dr. Bales. *See Holohan*, 246 F.3d at
13 1201-02; *Murillo v. Colvin*, No. CV-11-9670-MAN, 2013 WL 1296428 (C.D. Cal.
14 March 27, 2013); *see also* 20 C.F.R. §§ 404.1527(c)(5) & 416.927(c)(5).

15 However, the ALJ’s decision to discount Dr. Hipolito’s opinion about
16 Plaintiff’s carpal tunnel syndrome constitutes harmless legal error. *See Tommasetti*
17 *v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (An error is harmless when “it is
18 clear from the record that the . . . error was inconsequential to the ultimate
19 nondisability determination.”). This is because, as the ALJ recognized, Dr.
20 Hipolito also opined that Plaintiff was limited to sedentary work for *six* months

1 because of his carpal tunnel syndrome and knee pain. Tr. 35, 624. Dr. Hipolito
2 did not consider Plaintiff's medical impairments to be of such severity as to last
3 twelve months or longer. Tr. 624. A qualifying impairment must last for a
4 continuous period of at least twelve months. 20 C.F.R. § 404.1509; *Montijo v.*
5 *Sec'y of Health & Human Servs.*, 729 F.2d 599, 601 (9th Cir. 1984). Because Dr.
6 Hipolito opined that Plaintiff's ability to work would be impacted for only six
7 months, the ALJ had a legitimate and specific reason to discount Dr. Hipolito's
8 opinions.

9 Plaintiff contends the ALJ failed to appreciate that Plaintiff's carpal tunnel
10 existed many months before Dr. Hipolito's six-month estimate in September 2015
11 and thus the combined time that Plaintiff suffered from carpal tunnel exceeded
12 twelve months. However, Dr. Bales and Dr. Pan also considered Plaintiff's carpal
13 tunnel to be not a permanent injury, as both considered Plaintiff's carpal tunnel to
14 be treatable through surgery, Tr. 699, 701, 706 (“[B]oth carpal tunnel and cubital
15 tunnel syndrome can be released surgically.”). *See Estes v. Barnhart*, 275 F.3d
16 722, 725 (8th Cir. 2002) (“An impairment which can be controlled by
17 treatment . . . is not considered disabling.”).

18 Finally, the ALJ rejected Dr. Hipolito's October 20, 2015 opinion because it
19 was inadequately explained and supported. Tr. 35. The ALJ need not accept a
20 treating physician's opinion if it is brief, conclusory and inadequately supported by

1 clinical findings. *Bray*, 554 F.3d at 1228. Dr. Hipolito's October 20, 2015 opinion
2 did not contain any explanation as to why she opined that Plaintiff had significant
3 osteoarthritis on multiple joints and bilateral carpal tunnel syndrome, which greatly
4 affected his ability to work. Tr. 681.

5 While the ALJ erred in discounting Dr. Hipolito's opinion relating to
6 Plaintiff's carpal tunnel, this error was harmless. The ALJ identified other specific
7 and legitimate reasons for discounting Dr. Hipolito's opinions, which were
8 supported by substantial evidence. *Molina*, 674 F.3d at 1115.

9 *3. Nurse Bariletti*

10 Plaintiff contends the ALJ improperly rejected Nurse Bariletti's 2010 and
11 2014 opinions.

12 a. November 29, 2010 opinion

13 Nurse Bariletti examined Plaintiff on November 29, 2010, and completed a
14 State-agency form on December 22, 2010. Tr. 290-93. Nurse Bariletti diagnosed
15 Plaintiff with a number of conditions, including, testicular pain, depression,
16 anxiety, left knee pain, and left leg venous insufficiency. *Id.* Nurse Bariletti
17 opined that Plaintiff could stand for up to two hours in an eight-hour work day,
18 could sit for up to six hours in an eight-hour work day, lift 10 pounds occasionally,
19 and lift 10 pounds frequently, Tr. 290. She further opined that Plaintiff was
20 limited, for an uncertain length of time, to sedentary work. Tr. 293.

1 The ALJ assigned no weight to this opinion. Tr. 33. An ALJ is obligated to
2 give reasons germane to “other source” testimony before discounting it. *Dodrill*,
3 12 F.3d at 918.

4 First, the ALJ rejected Nurse Bariletti’s opinion because she is not an
5 acceptable medical source as that term was defined when Plaintiff filed his claim.
6 *See* 82 Fed. Reg. 5844 (Mar. 27, 2017); 20 C.F.R. § 416.920c. The ALJ is correct
7 that Nurse Bariletti’s opinion is entitled to less weight than that of an acceptable
8 medical source. 20 C.F.R. §§ 404.1527, 416.927 (2012); *Gomez*, 74 F.3d at 970-
9 71. However, her credentials are not a germane reason for rejecting the opinion
10 because ALJs are directed to consider medical evidence from all sources. 20
11 C.F.R. §§ 404.1513(e)(2), 416.913(e)(2) (2013).

12 Second, the ALJ rejected Nurse Bariletti’s opinion because it was only the
13 first time she examined Plaintiff. Tr. 33. The number of visits a claimant has
14 made to a particular provider is a relevant factor in assigning weight to an opinion.
15 20 C.F.R. § 416.927(c). However, the fact that this evaluator examined Plaintiff
16 one time is not a legally sufficient basis for rejecting the opinion. The regulations
17 direct that all opinions, including the opinions of examining providers, should be
18 considered. 20 C.F.R. § 416.927(b), (c). Moreover, here, the ALJ rejected Nurse
19 Bariletti’s opinion in favor of the state agency reviewing physician Dr. Hoskins,

1 who did not examine Plaintiff. This was not a germane reason to reject Nurse
2 Bariletti's opinion.

3 Third, the ALJ rejected Nurse Bariletti's opinion because it was inconsistent
4 with the medical record. Inconsistency with the medical evidence is a germane
5 reason to discredit other source statements. *Bayliss*, 427 F.3d at 1218; *Batson*, 359
6 F.3d at 1195 (permitting an ALJ to discredit an opinion that is unsupported by the
7 record). For example, the ALJ concluded that the sedentary-work restriction was
8 inconsistent with imaging of Plaintiff's left leg and knee condition. Tr. 33. The
9 sedentary-work restriction is directly contradicted by the x-ray taken of Plaintiff's
10 left knee on November 30, 2010, Tr. 447-50, which showed the knee's condition
11 was within normal limits. Tr. 447. This was a germane reason to reject weight to
12 Nurse Bariletti's opinion.

13 Fourth, the ALJ rejected Nurse Bariletti's opinion because it was internally
14 inconsistent and unsupported. Tr. 33. An ALJ may reject opinions that are
15 internally inconsistent. *Nguyen*, 100 F.3d at 1464. An ALJ is not obliged to credit
16 medical opinions that are unsupported by the source's own data and/or
17 contradicted by the opinions of other examining medical sources. *Tommasetti*, 533
18 F.3d at 1041. The ALJ properly found that Nurse Bariletti's opined sedentary
19 work-restriction was inconsistent with her finding that the diagnosed left leg
20

1 venous insufficiency would only mildly or moderately limit Plaintiff. Tr. 293.

2 This was a germane reason to discount Nurse Bariletti's opinion.

3 Finally, the ALJ rejected Nurse Bariletti's opinion because the longitudinal
4 record makes little mention of peripheral edema/arterial insufficiency causing such
5 severe physical limitations. *See Batson*, 359 F.3d at 1195 (permitting an ALJ to
6 discredit a medical source's opinions that are unsupported by the record as a
7 whole). The longitudinal record makes mention of only mild edema. *See, e.g.*, Tr.
8 602 (July 26, 2013: no edema); Tr. 553 (November 25, 2014: "Mild pretibial
9 edema, R>L"); Tr. 551-52 (December 6, 2014: "Peripheral edema, probably due to
10 Gabapentin/varicose veins. Continue to use compression stockings [sic]. Diuretics
11 if necessary"); Tr. 548 (February 20, 2015: no edema); Tr. 630 (February 24, 2015:
12 no edema); Tr. 653 (June 15, 2015: no edema).

13 Any error in the ALJ's analysis was harmless because the ALJ identified
14 other germane reasons to reject Nurse Bariletti's 2010 opinion. *See Molina*, 674
15 F.3d at 1115.

16 b. February 20, 2014 opinion

17 On February 20, 2014, Nurse Bariletti conducted a physical functional
18 evaluation of Plaintiff. Tr. 437-41, 538-40. Nurse Bariletti diagnosed Plaintiff
19 with several conditions, including diabetes mellitus/diabetic neuropathy,
20 depression, anxiety, and memory loss. Tr. 441, 539. Nurse Bariletti opined that

1 Plaintiff was moderately limited due to his diabetes mellitus, neuropathy, and
2 memory loss and therefore limited Plaintiff to sedentary work. Tr. 539-40.

3 The ALJ assigned little to no weight to the opinion. Tr. 34. First, the ALJ
4 discounted this opinion because the opined limitations were inconsistent with the
5 objective symptoms and her observations. Tr. 34. The ALJ properly found that
6 Nurse Bariletti's findings on the Physical Functional Evaluation were not
7 consistent with her opined sedentary limitation. *See Tommasetti*, 533 F.3d at 1041
8 (9th Cir. 2008) (Incongruity between an opinion and treatment records or notes is a
9 specific and legitimate reason to discount an opinion—a higher standard than the
10 germane reason needed for an other source.); *Bray*, 554 F.3d at 1228 (finding that
11 the ALJ may reject an opinion that is “brief, conclusory, and inadequately
12 supported by clinical findings”). For instance, in regard to the musculoskeletal
13 examination, Nurse Bariletti indicated, “[n]ormal range of motion, muscle strength,
14 and stability in all extremities with no pain on inspection. Gait is normal.” Tr.
15 440. And while Nurse Bariletti commented that Plaintiff had diabetes-mellitus
16 neuropathy affecting his lower legs and feet bilat[eral], she noted in regard to
17 Plaintiff's knees and feet, “no joint deformity, heat, swelling, erythema, or
18 effusion. Full range of motion.” *Id.* The incongruity between Nurse Bariletti's
19 observations and opinions served as a germane basis for the ALJ to discredit her
20 opinion.

1 Plaintiff submits that Nurse Bariletti's opined limitations were also based on
2 Plaintiff's diagnosed memory loss. ECF No. 18 at 13. However, as the ALJ
3 recognized, Nurse Bariletti's opined sedentary-work restriction was predicated on
4 Plaintiff's diabetes mellitus and neuropathy—not memory loss. Tr. 34 (relying on
5 Tr. 539). Plus, memory loss does not pertain to a sedentary-work restriction. 20
6 C.F.R. § 404.1567(a).

7 The ALJ provided germane reasons for discounting both of Nurse Bariletti's
8 opinions.

9 *4. Nurse Courtney Hunter*

10 Nurse Hunter completed a medical form on November 25, 2014. Tr. 614-
11 16. Nurse Hunter diagnosed Plaintiff, in part, with arterial insufficiency, neuralgia,
12 obesity, and knee pain, noting that the knee pain was chronic since 2008 and that
13 Plaintiff needed to elevate his legs 3-4 times per day for 15-20 minutes. Tr. 614.
14 She opined that Plaintiff could perform less than sedentary work and would miss
15 four or more days of work per month. Tr. 615.

16 The ALJ discounted Nurse Hunter's opinion. Tr. 35. An ALJ is required to
17 provide a germane reason for discounting a nurse's opinion. *Dodrill*, 12 F.3d at
18 918.

19 First, the ALJ discounted Nurse Hunter's opinion because it was based
20 solely on Plaintiff's self-reported limitations. Tr. 35. A medical source's opinion

1 may be rejected if it based on a claimant's subjective complaints which were
2 properly discounted. *Tonapetyan*, 242 F.3d at 1149; *Morgan*, 169 F.3d at 602;
3 *Fair*, 885 F.2d at 604. "[W]hen an opinion is not more heavily based on a patient's
4 self-reports than on clinical observations, [this] is no evidentiary basis for rejecting
5 the opinion." *Ghanim*, 763 F.3d at 1162. There are no objective medical findings
6 in Nurse Hunter's clinical observations to support these opined severe physical
7 limitations. Tr. 614-16. The ALJ properly concluded Nurse Hunter relied on
8 Plaintiff's self-reports, which as discussed *infra*, were properly discounted. This
9 was a germane reason to reject her assessed limitations.

10 Second, the ALJ rejected Nurse Hunter's opinion because she failed to
11 explain why she opined that Plaintiff would miss work for four or more days per
12 month. Tr. 35. The Social Security regulations "give more weight to opinions that
13 are explained than to those that are not." *Holohan*, 246 F.3d at 1202. "[T]he ALJ
14 need not accept the opinion of any physician, including a treating physician, if that
15 opinion is brief, conclusory, and inadequately supported by clinical findings."
16 *Bray*, 554 at 1228. Because Nurse Hunter did not explain why Plaintiff would
17 miss more than four days per month, this was a germane reason to discount her
18 opinion.

19 The ALJ identified germane reasons for assigning little to no weight to
20 Nurse Hunter's opinion that Plaintiff was limited to less than sedentary work.

1 **B. Plaintiff’s Symptom Complaints**

2 Plaintiff contends the ALJ improperly evaluated his symptom complaints.
3 ECF No. 18 at 16. An ALJ engages in a two-step analysis to determine whether to
4 discount a claimant’s testimony regarding subjective pain or symptoms.⁵ “First,
5 the ALJ must determine whether there is objective medical evidence of an
6 underlying impairment which could reasonably be expected to produce the pain or
7 other symptoms alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks
8 omitted). “The claimant is not required to show that [his] impairment could
9 reasonably be expected to cause the severity of the symptom [he] has alleged; [he]
10 need only show that it could reasonably have caused some degree of the

14 ⁵ SSR 96-7p, the regulation that governed credibility determinations at the time of
15 this decision, was superseded by SSR 16-3p in March 2016. SSR 16-3p
16 “eliminat[es] the use of the term ‘credibility’ . . . [to] clarify that subjective
17 symptom evaluation is not an examination of an individual’s character.” SSR 16-
18 3p, 2016 WL 1119029, at *1 (Mar. 16, 2016). However, both regulations require
19 an ALJ to consider the same factors in evaluating the intensity, persistence, and
20 limiting effects of an individual’s symptoms. *See id.* at *7; SSR 96-7p, 1996 WL
374186, at *3 (July 2, 1996).

1 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal
2 quotation marks omitted).

3 Second, “[i]f the claimant meets the first test and there is no evidence of
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
6 rejection.” *Ghanim*, 763 F.3d at 1163 (internal citations and quotations omitted).
7 General findings are insufficient; rather, the ALJ must identify what symptom
8 complaints are being discounted and what evidence undermines these complaints.
9 *Id.* (citing *Lester*, 81 F.3d at 834; *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.
10 2002) (requiring the ALJ to sufficiently explain why it discounted Plaintiff’s
11 symptom claims)). “The clear and convincing [evidence] standard is the most
12 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
13 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
14 924 (9th Cir. 2002)).

15 In evaluating Plaintiff’s symptom complaints, the ALJ may consider, among
16 other items, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
17 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s
18 daily living activities; (4) the claimant’s work record; and (5) testimony from
19 physicians or third parties concerning the nature, severity, and effect of the
20 claimant’s condition. *Thomas*, 278 F.3d at 958-59

1 This Court finds that the ALJ provided specific, clear, and convincing
2 reasons for finding Plaintiff's statements concerning the intensity, persistence, and
3 limiting effects of his symptoms not fully supported. Tr. 29-32.

4 *1. Inconsistent with Medical Evidence Regarding Physical Impairments*

5 The ALJ found that Plaintiff's subjective symptom complaints regarding his
6 physical impairments were not supported by the medical evidence. Tr. 30. An
7 ALJ may not discredit a claimant's pain testimony and deny benefits solely
8 because the degree of pain alleged is not supported by objective medical evidence.
9 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Bunnell v. Sullivan*, 947
10 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601. Medical evidence is a
11 relevant factor, however, in determining the severity of a claimant's pain and its
12 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2). Minimal
13 objective evidence is a factor that may be relied upon in discrediting a claimant's
14 testimony, although it may not be the only factor. *Burch v. Barnhart*, 400 F.3d
15 676, 680 (9th Cir. 2005).

16 Regarding physical impairments, Plaintiff alleged that his knee pain and leg
17 conditions caused significant pain and severely limited his ability to walk and
18 stand. The ALJ found that x-rays of Plaintiff's knees showed mostly mild to
19 moderate results, which would not physically limit or cause the pain to the extent
20 complained of by Plaintiff. See Tr. 380 (January 27, 2012 x-ray finding mild

1 osteoarthritis of the bilateral knees, somewhat prominent enthesophyte inferiority
2 of the right patella, and moderate-sized bilateral joint effusions); Tr. 460 (March
3 17, 2014 x-ray showing no acute fracture or malignment but a small suprapatellar
4 effusion, with treatment being ice and a knee immobilizer); Tr. 707 (September 22,
5 2015 x-ray of the right knee showing mild medial and moderate patellofemoral
6 joint degenerative spurring); Tr. 708 (September 22, 2015 x-ray of the left knee
7 showing a moderate spurring along the margin of the left patella, minimal spurring
8 along the quadriceps tendon, and no evidence of joint effusion or further
9 degenerative spurring, with the joint spaces preserved and condition unchanged
10 since March 10, 2015). To the extent the evidence could be interpreted differently,
11 it is the role of the ALJ to resolve conflicts and ambiguity in the evidence.

12 *Morgan*, 169 F.3d at 599-600. Where evidence is subject to more than one rational
13 interpretation, the ALJ's conclusion will be upheld. *Burch*, 400 F.3d at 679. Here,
14 the ALJ properly weighed the evidence and determined the x-ray findings and
15 doctors' readings of them did not support Plaintiff's subjective symptom
16 complaints. *See Hill*, 698 F.3d at 1158 (recognizing that courts will not disturb
17 ALJ findings supported by substantial evidence).

18 The ALJ also found that Plaintiff's physical examinations did not
19 substantiate Plaintiff's testimony about his leg pain and other symptoms. A
20 determination that a claimant's complaints are "inconsistent with clinical

1 observations” can satisfy the clear and convincing requirement. *Regennitter v.*
2 *Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1998). *See, e.g.*, Tr.
3 369 (“normal gait” on October 14, 2011); Tr. 376 (normal gait on November 18,
4 2011); Tr. 305 (On April 3, 2012, Plaintiff complained of bilateral knee pain, even
5 when active for prolonged periods of time; pain improved with Naproxen; and
6 treated with ice at night and physical therapy); Tr. 513 (On January 16, 2014,
7 Plaintiff complained of pain in legs at night, which is relieved by walking; gait
8 normal); Tr. 440 (On February 20, 2014, Plaintiff complained of pain in his legs
9 but observed gait is normal with full range of motion in both knees); Tr. 551 (On
10 December 6, 2014, Plaintiff complained of sudden buckling at the right knee;
11 however, only small amount of edema observed over the right knee, and no
12 crepitus or patellar tenderness and the ligaments were strong). The ALJ reasonably
13 concluded that the physical examinations did not corroborate Plaintiff’s subjective
14 symptom reports. *See Tommasetti*, 533 F.3d at 1038 (“[W]hen the evidence is
15 susceptible to more than one rational interpretation” the court will not reverse the
16 ALJ’s decision.).

17 *2. Inconsistent with Medical Evidence Regarding Mental Impairments*

18 Similarly, the ALJ concluded that the medical evidence did not support the
19 severity of the mental impairments alleged by Plaintiff. The ALJ determined the
20 record supports Plaintiff’s claim that he has depression, anxiety, and memory

1 issues but that these conditions do not impair him to such degree that he is unable
2 to perform simple, routine tasks and follow short, simple instructions. Tr. 32.
3 Here, the record contains a combination of positive and negative clinical findings
4 and diagnostic imaging results regarding Plaintiff's depression and memory loss.
5 Tr. 311 (normal mood); Tr. 369 (appropriate affect); Tr. 376 (appropriate affect);
6 Tr. 422-29 (opining that Plaintiff showed severe overall memory deficits in all
7 areas and that his memory abilities will likely continue to decline); Tr. 440-41
8 (noting that he is oriented to time, place, person, and situation, and assessing
9 depression, anxiety, and memory loss); Tr. 461 (Plaintiff is alert and oriented to
10 person, place, and time, with appropriate mood, rational thought process, normal
11 perceptions, and ability to understand discharge instructions.); Tr. 637 (Plaintiff is
12 orientated to time, place, person, and situation, with appropriate mood and affect.);
13 Tr. 692, 699 (testing suggests mild Alzheimer's disease). However, the Court may
14 not reverse the ALJ's decision based on Plaintiff's disagreement with the ALJ's
15 interpretation of the record. *See Tommasetti*, 533 F.3d at 1038 (“[W]hen the
16 evidence is susceptible to more than one rational interpretation” the court will not
17 reverse the ALJ's decision). It is the ALJ's responsibility to resolve conflicts in
18 the medical evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
19 The ALJ's interpretation of the record—that the record does not support Plaintiff's
20 subjective complaints regarding his mental limitations—is reasonable.

1 3. *Plaintiff's Efforts to Seek Work*

2 The ALJ commented upon Plaintiff's efforts to look for work in 2011 and
3 2012. Tr. 31. Plaintiff's efforts to seek employment since the alleged disability
4 onset date may be considered by the ALJ when evaluating Plaintiff's symptom
5 complaints. *Bray*, 554 F.3d at 1227. This was a proper factor for the ALJ to
6 consider when discounting Plaintiff's symptom complaints.

7 4. *Daily Activities*

8 Next, the ALJ found Plaintiff's daily activities were inconsistent with the
9 level of impairment Plaintiff alleged. Tr. 30-31. A claimant's reported daily
10 activities can form the basis for discounting a claimant's symptom complaints if
11 they consist of activities that contradict the claimant's "other testimony" or if those
12 activities are transferable to a work setting. *Orn*, 495 F.3d at 639; *see also Fair*,
13 885 F.2d at 603 (recognizing that daily activities may be grounds for discounting a
14 plaintiff's symptom complaints "if a claimant is able to spend a substantial part of
15 his day engaged in pursuits involving the performance of physical functions that
16 are transferable to a work setting"). "While a claimant need not vegetate in a dark
17 room in order to be eligible for benefits, the ALJ may discredit a claimant's
18 testimony when the claimant reports participation in everyday activities indicating
19 capacities that are transferable to a work setting" or when activities "contradict

1 claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1112-13 (internal
2 quotation marks and citations omitted).

3 Here, the ALJ noted that Plaintiff cared for his mother between 2007 and
4 2015. The ability to care for others without help has been considered an activity
5 that may undermine claims of totally disabling pain. *Rollins*, 261 F.3d at 857.

6 However, if the care activities are to serve as a basis for the ALJ to discredit the
7 Plaintiff’s symptom claims, the record must identify the nature, scope, and
8 duration of the care involved and this care must be “hands on” rather than a “one-
9 off” care activity. *Trevizo v. Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017).

10 Here, Plaintiff cared for his wheelchair-bound mother on a daily basis until he
11 began caring for his daughter in 2015. Tr. 57 (testifying that Plaintiff cared for his
12 mother); Tr. 397 (noting that Plaintiff provides day-to-day care for mother); Tr.
13 422 (identifying that Plaintiff cares for his elderly mother who is in a wheelchair
14 and has dementia); Tr. 626 (noting that Plaintiff will move into an apartment with
15 his minor daughter in March 2015). When providing daily care for his mother,
16 Plaintiff cooked, performed light housekeeping, did the laundry, and helped his

1 mom to her bed and the bathroom. Tr. 235-42, 424, 534. The ALJ properly found
2 that Plaintiff's daily activities did not support his subjective symptom complaints.

3 The ALJ provided clear and convincing reasons for rejecting Plaintiff's
4 statements concerning the intensity, persistence, and limiting effects of his
5 symptoms.

6 **C. Step Five: Identified Available Jobs**

7 Plaintiff contends the ALJ erroneously relied on the vocational expert's
8 identified available jobs because the presented hypothetical failed to account for
9 Plaintiff's physical and mental limitations. ECF No. 18 at 19-20. This argument is
10 based entirely on the assumption that the ALJ erred in considering the medical
11 opinion evidence, the other source evidence, and Plaintiff's symptom claims. For
12 the reasons discussed in this decision, the ALJ's consideration of the record was
13 legally sufficient and supported by substantial evidence. The ALJ did not err in
14 assessing the residential functional capacity and finding Plaintiff capable of
15 performing work existing in the national economy before December 25, 2015.

16 **CONCLUSION**

17 Having reviewed the record and the ALJ's findings, this Court concludes the
18 ALJ's decision is supported by substantial evidence and free of harmful legal error.
19 Accordingly, **IT IS HEREBY ORDERED:**

20 1. Plaintiff's Motion for Summary Judgment, ECF No. 18, is **DENIED**.

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

2 3. **JUDGMENT** is to be entered in favor of Defendant.

3 The District Court Executive is directed to file this Order, provide copies to
4 counsel, and **CLOSE THE FILE**.

5 DATED September 19, 2018.

6 *s/Mary K. Dimke*
7 MARY K. DIMKE
8 UNITED STATES MAGISTRATE JUDGE
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