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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Mike W. Morgan,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Commissioner of
13 Social Security,

14 Defendant.

No. CV12-1983 PHX DGC

ORDER

15 Plaintiff Mike W. Morgan applied for disability insurance benefits and
16 supplemental security income on May 13, 2008, claiming to have been disabled as of
17 September 15, 2006. Tr. 165. His claim was denied initially on September 18, 2009
18 (Tr. 90-93), and upon reconsideration on January 6, 2009 (Tr. 99-101). Plaintiff was
19 granted a video teleconference hearing in which he appeared in Phoenix, Arizona, before
20 an Administrative Law Judge (“ALJ”) who presided over the hearing from San Jose,
21 California, on November 9, 2010. Tr. 25, 42. The ALJ determined that Plaintiff was not
22 disabled within the meaning of the Social Security Act. Tr. 25-37. The ALJ’s decision
23 became Defendant’s final decision when the Appeals Council denied review on July 26,
24 2012. Tr. 1-3. Plaintiff then commenced this action for judicial review pursuant to
25 42 U.S.C. § 405(g). Doc. 1. The parties have not requested oral argument. For reasons
26 that follow, the Court will affirm Defendant’s decision.

27 **I. Standard of Review.**

28 Defendant’s decision to deny benefits will be vacated “only if it is not supported

1 by substantial evidence or is based on legal error.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d
2 880, 882 (9th Cir. 2006). “‘Substantial evidence’ means more than a mere scintilla, but
3 less than a preponderance, i.e., such relevant evidence as a reasonable mind might accept
4 as adequate to support a conclusion.” *Id.* In determining whether the decision is
5 supported by substantial evidence, the Court must consider the record as a whole,
6 weighing both the evidence that supports the decision and the evidence that detracts from
7 it. *Reddick v. Charter*, 157 F.3d 715, 720 (9th Cir. 1998). The Court cannot affirm the
8 decision “simply by isolating a specific quantum of supporting evidence.” *Day v.*
9 *Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975); *see Robbins*, 466 F.3d at 882.

10 **II. Analysis.**

11 For purposes of Social Security benefits determinations, a disability is “the
12 inability to do any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which has
14 lasted or can be expected to last for a continuous period of not less than 12 months.”
15 20 C.F.R. § 404.1505. Determining whether a claimant is disabled involves a five-step
16 evaluation. The claimant bears the burden in steps one through four of showing that
17 (1) he is not engaged in a substantial gainful activity, (2) he has a severe medically
18 determinable physical or mental impairment, and (3) the impairment meets or equals a
19 listed impairment or (4) his residual functional capacity (“RFC”) precludes him from
20 performing his past work.¹ If at any step the Commissioner determines that a claimant is
21 or is not disabled, the analysis ends; otherwise it proceeds to step five. The
22 Commissioner bears the burden at step five of showing that the claimant has the RFC to
23 perform other work that exists in substantial numbers in the national economy.
24 *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-(v) & 416.920(a)(4)(i)-(v).

25 The ALJ found at step one that Plaintiff had not engaged in substantial gainful

26 ¹ RFC is the most a claimant can do in light of the limitations caused by his
27 impairments. *See Rodriguez v. Bowen*, 876 F.2d 759, 762 (9th Cir. 1989);
28 20 C.F.R. § 416.945 (a); SSR 96-8p, 1996 WL 374184 (July 2, 1996).

1 activity since his alleged onset date. Tr. 27. At step two, the ALJ found that Plaintiff
2 suffered from the following severe impairments: idiopathic sensory peripheral
3 polyneuropathy and moderate lumbar degenerative disc disease. *Id.* The ALJ determined
4 at step three that none of these impairments or their combination met or equaled a listed
5 impairment. Tr. 33. The ALJ then considered the entire record and determined that
6 Plaintiff has the RFC to perform light work as defined in 20 C.F.R. §§ 404.1567(b) and
7 416.967(b) with the following restrictions: stand for no more than two hours in an eight-
8 hour workday; no more than occasionally push, pull, balance, climb stairs or ramps, and
9 operate foot controls with the lower extremities; never climb ladders, ramps, or scaffolds;
10 no more than frequently stoop, kneel, crouch, and crawl; and avoid moderate exposure to
11 environments with unprotected heights and rapidly moving machinery. Tr. 33. At step
12 four, the ALJ determined that Plaintiff was not disabled because he was capable of
13 performing his past relevant work. Tr. 37.

14 Plaintiff argues that the ALJ erred by improperly weighing medical opinions
15 (Doc. 13 at 7-17) and by improperly rejecting his symptom allegations (*id.* at 17-24).
16 Defendant contends the decision is supported by substantial evidence and free from legal
17 error. Doc. 15 at 1.

18 **A. Medical Opinion Evidence.**

19 “The ALJ must consider all medical opinion evidence.” *Tommasetti v. Astrue*,
20 533 F.3d 1035, 1041 (9th Cir. 2008); *see* 20 C.F.R. § 404.1527(d); SSR 96-5p,
21 1996 WL 374183, at *2 (July 2, 1996). Regarding the weight that an ALJ should give to
22 a particular medical opinion, the Ninth Circuit distinguishes between the opinions of
23 treating physicians, examining physicians, and non-examining physicians. *See Lester v.*
24 *Chater*, 81 F.3d 821, 830 (9th Cir. 1996). “The ALJ need not accept the opinion of any
25 physician, including a treating physician, if that opinion is brief, conclusory, and
26 inadequately supported by clinical findings.” *Thomas v. Barnhart*, 278 F.3d 947, 957
27 (9th Cir. 2002). The ALJ may reject the opinion of a treating or examining physician by
28 making “findings setting forth specific legitimate reasons for doing so that are based on

1 substantial evidence in the record.” *Id.* “The ALJ can meet this burden by setting out a
2 detailed and thorough summary of the facts and conflicting clinical evidence, stating
3 h[er] interpretation thereof, and making findings.” *Id.*

4 Opinions of examining or consulting physicians alone may constitute substantial
5 evidence supporting the ALJ’s decision when they are consistent with other evidence in
6 the record. *See Magallanes v. Bowen*, 881 F.2d 747, 752 (9th Cir. 1989) (“[T]he reports
7 of consultative physicians . . . may serve as substantial evidence.”); *Morgan v. Comm’r of*
8 *Soc. Sec. Admin*, 169 F.3d 595, 600 (9th Cir. 1999) (“Opinions of a nonexamining,
9 testifying medical advisor may serve as substantial evidence when they are supported by
10 other evidence in the record and are consistent with it.”); *Thomas*, 278 F.3d at 957 (“The
11 opinions of non-treating or non-examining physicians may . . . serve as substantial
12 evidence when the opinions are consistent with independent clinical findings or other
13 evidence in the record.”); *see also* 20 C.F.R. § 404.1527(f) (stating that the opinions of
14 non-examining physicians constitute medical evidence).

15 **1. Drs. Jose Pierrend, M.D., and Richard Tapia, M.D.**

16 Plaintiff’s treating physician, Dr. Pierrend, completed a work-related activities
17 assessment in September 2009. Tr. 516. Dr. Tapia, Plaintiff’s other treating physician,
18 completed a similar assessment in October 2010. Tr. 697. In their assessments,
19 Drs. Pierrend and Tapia both opine that Plaintiff suffers from moderate to moderately
20 severe pain and is unable to work fulltime on a regular and consistent basis.² Tr. 515-16,
21 696-97. Dr. Pierrend opined that in an eight-hour workday, Plaintiff could sit and stand
22 for less than one hour, and lift and carry between 10 and 20 pounds. Tr. 696. Dr. Tapia
23 opined that in an eight-hour workday, Plaintiff could sit and stand for less than two hours,
24 and lift and carry between 10 and 15 pounds. *Id.*

25 The ALJ gave both treating physicians’ opinions “little weight.” Tr. 36. The ALJ

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27 ² The Court addresses the opinions of Drs. Pierrend and Tapia together because the
28 ALJ did (Tr. 36) and Plaintiff’s brief does the same (Doc. 13 at 7-14).

1 found that the opinions of Drs. Pierrend and Tapia were “too restrictive” and
2 “inconsistent” with their own objective findings and the medical findings of other
3 medical specialists who found normal neurological processes as well as equal and full
4 motor strength. *Id.* The ALJ noted that Plaintiff met with Dr. Pierrend in
5 September 2009, when the medical assessment was completed, but did not follow up with
6 Dr. Pierrend again until July 2010. The ALJ therefore “question[ed] the extent of
7 [Dr. Pierrend’s] treatment with the claimant.” *Id.* The ALJ noted that Dr. Tapia’s
8 treatment notes show that he treated Plaintiff primarily for hypertension, suggesting that
9 “Dr. Tapia might not be in the best position to understand the limitations of the
10 claimant’s sensory peripheral neuropathy.” *Id.* The ALJ noted that Plaintiff visited a
11 pain clinic for foot pain, but otherwise did not seek treatment for his alleged impairments
12 from December 2009 to September 2010. The ALJ concluded that Plaintiff likely would
13 have sought “more frequent and substantial treatment” during this time if his restrictions
14 had been as severe as suggested by Drs. Pierrend and Tapia. *Id.*

15 Plaintiff argues that the ALJ did not provide clear and convincing reasons to
16 discount the opinions and, in discounting the opinions, that the ALJ did not comply with
17 20 C.F.R. § 404.1527. Doc. 13 at 9-13. The Court disagrees. Plaintiff points to
18 treatment notes allegedly indicating that his pain is consistent with objective findings (*id.*
19 at 8-9 (citing Tr. 290, 359, 362; 429, 512; 520-30, 734; 736-39)), but has not pointed to
20 the treatment notes of either Dr. Pierrend or Dr. Tapia, and thus has not shown that the
21 ALJ erred in finding their opinions inconsistent with their own objective findings. *Id.* at
22 8-10. Plaintiff argues that the ALJ erred in discounting the opinions of Drs. Pierrend and
23 Tapia by “offering a conclusion that the claimant was responding to treatment” (*id.* at
24 11), but that was not a reason the ALJ provided for discounting the opinions. *See* Tr. 36.
25 The ALJ rejected the opinions of Drs. Pierrend and Tapia by providing a lengthy
26 evaluation of the medical evidence (Tr. 27-33, 35) and pointing to clinical evidence that
27 does not comport with the restrictiveness of their opinions. This does not constitute legal
28 error. *See Thomas*, 278 F.3d at 957. The Court finds that the ALJ provided clear and

1 convincing reasons, described above, for discounting the opinions of Drs. Pierrend and
2 Tapia.

3 **2. Dr. William Allison, Ph.D., Psychology.**

4 Dr. Allison completed a psychological examination of Plaintiff on September 10,
5 2008. Tr. 372. Dr. Allison's notes from the examination indicate that Plaintiff's chief
6 complaints were "neuropathy and 'stroke.'" Tr. 373. Plaintiff reported that he drove 32
7 miles roundtrip to get to the appointment and that he had no problems driving (Tr. 372),
8 reported that he sleeps eight hours a night, that his appetite is good, and that he remains
9 interested and motivated (Tr. 373). Dr. Allison noted that Plaintiff exhibited a clear
10 sensorium, fluent speech without pressure, logical and goal-directed thinking, appropriate
11 affect, euthymic mood, intact judgment, poor insight, and no psychotic symptoms.
12 Tr. 375. On the Wechsler Adult Intelligence Scale III ("WAIS-III"), Plaintiff obtained an
13 89 full-scale IQ score, which is in the low average range. Tr. 375-76. On the Wechsler
14 Memory Scale III ("WMS-III"), Plaintiff obtained memory index scores ranging from
15 superior to low average. Tr. 377-78. Dr. Allison diagnosed Plaintiff as being status post
16 transient ischemic attack and with a Global Assessment of Functioning ("GAF") score of
17 71.³ Tr. 379. Based on the evaluation, Dr. Allison noted that Plaintiff "demonstrated no
18 loss in cognitive abilities due to his transient ischemic attack." *Id.* Additionally,
19 Dr. Allison concluded that "[t]here is no indication from the psychological testing or the
20 interview today of any cognitive difficulties which would preclude him from working.
21 He has no emotional or psychological difficulties that would require treatment." *Id.*
22 Dr. Allison further opined that Plaintiff did not have a condition that would impose any
23 limitation for 12 months. Tr. 380. The ALJ gave "significant weight" to Dr. Allison's

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25 ³ The GAF scale ranges from 1 to 100 and reflects a person's overall
26 psychological, social, and occupational functioning. *See Morgan*, 169 F.3d at 598 n.1;
27 *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998). A GAF score of 41 to 50
28 indicates severe symptoms or severe difficulty in functioning, while a GAF score of 51 to
60 indicates moderate symptoms or moderate difficulty in functioning. *See id.*

1 opinion, finding that the “opinion is consistent with his medical findings as well as [the]
2 paucity of psychiatric treatment.” Tr. 36-37.

3 Plaintiff argues that Dr. Allison failed to review Plaintiff’s medical records
4 predating his 2007 transient ischemic attack and, “[d]ue to this failure, Dr. Allison was
5 precluded from making a comparison with [Plaintiff]’s mental state pre transient
6 ischemic attack.” Doc. 13 at 14-15. Plaintiff submits that the “[t]he combined effect of
7 the impairments” resulting from his transient ischemic attack “were not addressed or
8 factored into Dr. Allison’s conclusions.” *Id.* at 15. Based on this failure, Plaintiff argues
9 that “it was error for the ALJ to interpret the opinion as demonstrating a lack of
10 exertional and non-exertional limitation.” *Id.*

11 Plaintiff’s argument is wholly unpersuasive. Dr. Allison performed a
12 psychological evaluation (Tr. 372-82) and, based on that independent evaluation, offered
13 an opinion about Plaintiff’s psychological and psychiatric limitations. Dr. Allison did not
14 provide a consultative assessment based on other physicians’ treatment notes, and did not
15 offer an opinion about Plaintiff’s exertional limitations. Plaintiff concedes that
16 “Dr. Allison’s opinion as to whether a psychiatric impairment exists was entitled to
17 significant weight.” Doc. 13 at 15. Because this was the only opinion Dr. Allison
18 provided, the ALJ’s decision to rely on it in assessing Plaintiff’s psychological and
19 psychiatric limitations did not constitute legal error.

20 **3. Dr. Teresa Pavese, M.D.**

21 Dr. Pavese, a state agency medical consultant, reviewed Plaintiff’s medical
22 records and completed a physical RFC assessment on August 19, 2008. Tr. 364-71. As
23 to Plaintiff’s exertional limitations, the assessment indicates that Plaintiff could
24 occasionally lift 20 pounds, frequently lift 10 pounds, sit for about six hours in an eight-
25 hour workday, and had a limited ability to push and pull in his lower extremities.
26 Tr. 365. The report indicates that Plaintiff has “diminished sensation in both lower
27 extremities” and, because of this, “could only occasionally use his legs for feeling, as per
28 peddling, etc.” Tr. 366. As to Plaintiff’s postural limitations, the assessment indicates

1 that Plaintiff could occasionally climb a ramp or stairs, that he could never climb a
2 ladder, rope, or scaffolds, that he could occasionally balance, and that he could frequently
3 kneel, crouch and crawl. *Id.* Dr. Pavese found no manipulative, visual, or
4 communicative limitations. Tr. 367-68. As to environmental limitations, Dr. Pavese
5 opined that Plaintiff must avoid moderate exposure to hazards like machinery and
6 heights, but was otherwise not limited. Tr. 368.

7 Plaintiff submits that Dr. Pavese “did not dispute moderate to moderately severe
8 pain” (Doc. 13 at 15) and “found [Plaintiff] to suffer a lack of sleep at night” (*id.* at 16),
9 and that these findings “are not inconsistent with treating physician opinions and
10 symptom reporting” (*id.*). Plaintiff argues that the ALJ’s failure to discuss Dr. Pavese’s
11 opinion of pain and fatigue was error. *Id.* The Court disagrees. Dr. Pavese assessed
12 Plaintiff’s RFC, and, in doing so, reviewed all the evidence in Plaintiff’s file (Tr. 364),
13 including evidence indicating that Plaintiff suffers from painful sensory peripheral
14 polyneuropathy, has chronic bilateral foot pain, and suffers from obstructive sleep apnea,
15 and uses medicines that cause daytime drowsiness. Based on this, Dr. Pavese assessed
16 Plaintiff’s RFC. Dr. Pavese did not offer an opinion about Plaintiff’s pain and fatigue;
17 she merely reviewed evidence showing that Plaintiff suffered from pain and fatigue.⁴ A
18 consultative physician’s review and description of evidence is not medical opinion
19 evidence. Accordingly, the Court cannot find that the ALJ erred in failing to evaluate the
20 portion of Dr. Pavese’s assessment that referred to evidence indicating Plaintiff suffers

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22 ⁴ Plaintiff cites to the vocational expert’s hearing testimony and argues that “such
23 pain would preclude sustained full time competitive employment.” Doc. 13 at 15 n.5
24 (citing Tr. 79, 80). The vocational expert testified that someone with an ability to do
25 work-related physical activities as opined by Dr. Tapia (Tr. 696-97) “would not be able to
26 perform any work” (Tr. 80). Dr. Tapia’s assessment indicates that Plaintiff’s moderately
27 severe pain would further limit his ability to sustain fulltime work. Tr. 697. Dr. Pavese’s
28 RFC assessment does not indicate that Plaintiff suffers from “moderate to moderately
severe pain” (Doc. 13 at 15). Accordingly, the Court cannot find that if the ALJ had
accorded any weight to the portion of Dr. Pavese’s assessment that summarizes medical
evidence that the ALJ would have been required to find Plaintiff disabled based on the
vocational expert’s testimony.

1 from pain and fatigue.

2 Although the ALJ's decision does not refer to Dr. Pavese's opinion, the ALJ does
3 appear to have afforded the opinion some weight because, as Plaintiff submits, "the
4 ALJ's [RFC] assessment is similar to that assessed by Dr. Pavese." Doc. 19 at 6;
5 *compare* Tr. 33 with Tr. 365-68. Plaintiff argues that evidence in the record does not
6 support Dr. Pavese's opinion because she completed the assessment two years before the
7 hearing and did not set forth the records she reviewed.⁵ Doc. 19 at 7. Dr. Pavese did not
8 specifically indicate which medical records she relied upon in making the RFC
9 assessment, but her explanation demonstrates that she relied upon records from 1993
10 through 2008. Tr. 365-66. Accordingly, the Court does not agree that Dr. Pavese's
11 opinion is unsupported by record evidence. Plaintiff argues that Dr. Pavese's opinion is
12 inconsistent with other medical evidence because it "is markedly different from all other
13 opinions in the file and ignores significant findings from lumbar and cervical spine
14 MRIs." Doc. 19 at 7. Dr. Pavese's opinion is not consistent with the opinions of
15 Drs. Pierrend and Tapia, but the ALJ properly discounted those opinions, and her opinion
16 is consistent with the medical evidence summarized by the ALJ. *See* Tr. 35. Plaintiff
17 attempts to discredit Dr. Pavese's opinion by stating that she is "an ophthalmologist and
18 not board certified in any specialty." Doc. 19 at 7. As a state agency medical consultant,
19 the ALJ was obligated to consider Dr. Pavese's opinion regardless of Plaintiff's
20 allegations. *See* 20 C.F.R. § 404.1527(e). Because Dr. Pavese's opinion is consistent
21 with other evidence in the record, and the ALJ's RFC assessment mirrored her RFC
22 assessment, her opinion constitutes substantial evidence supporting the ALJ's RFC
23 assessment. *See Thomas*, 278 F.3d at 957; *Magallanes*, 881 F.2d at 752. Any error in the

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26 ⁵ In his reply brief, Plaintiff argues that the ALJ erred in affording any weight to
27 Dr. Pavese's opinion. Doc. 19 at 7. Although the Court has considered and rejected the
28 argument, the Court notes that it need not consider arguments raised for the first time in a
reply brief. *Lentini v. Cal. Ctr. for Arts*, 370 F.3d 837 n.6 (9th Cir. 2004); *Gadda v. State
Bar of Cal.*, 511 F.3d 933, 937 n.2 (9th Cir. 2007).

1 ALJ's failure to refer to Dr. Pavese's opinion is harmless. *See Tommasetti*, 533 F.3d at
2 1038 ("the court will not reverse an ALJ's decision for harmless error, which exists when
3 it is clear from the record that the ALJ's error was inconsequential to the ultimate
4 nondisability determination." (quotation marks and citations omitted)).

5 **B. Plaintiff's Testimony.**

6 Plaintiff testified that he lives in a friend's house with his wife and that friend.
7 Tr. 59. Plaintiff stated that he spends his typical day watching television, that he goes
8 grocery shopping with his wife for 45 minutes to an hour each week, and that he
9 occasionally sees his grandchildren. Tr. 57-59, 71. Plaintiff stated that he has not been
10 able to work because he forgets things, has pain and numbness in his feet, pain in his
11 lower back, and numbness in his fingers and hands. Tr. 59, 61. Plaintiff described
12 having had a stroke in 2005, and stated that after the stroke he suffered from weakness,
13 numbness, a generally weaker left side, and memory problems. Tr. 63-64. Plaintiff
14 testified that he had a transient ischemic attack – a stroke like incident – in 2007. Tr. 65.
15 Plaintiff stated that after the attack he continued to have problems with the left side of his
16 body as well as memory and concentration problems. Tr. 65-66.

17 Plaintiff rated his pain as a seven on a scale of one to ten, with ten being "terrible
18 pain." Tr. 60. Plaintiff described having muscle spasms in the tops of his feet, sharp
19 pains on the sides of his feet, and numbness and weakness in his feet. Tr. 60-61.
20 Plaintiff testified that he sometimes falls because of the loss of feeling in his feet (Tr. 61)
21 and that standing too long aggravates his feet pain (Tr. 62). Plaintiff described his back
22 pain as "something slipping around," and stated that the pain is not as bad as his feet pain
23 and that it is constant and worsens at night. Tr. 61. Plaintiff testified that bending and
24 kneeling aggravates his back pain. Tr. 62. Plaintiff stated that he must sit or lie down
25 because of his back pain and that morphine helps to alleviate the pain somewhat. *Id.*
26 Plaintiff described feeling drowsy and lightheaded from the morphine. Tr. 71. Plaintiff
27 described having chronic numbness and achiness in his hands, and stated that he
28 frequently drops things and has problems grasping because of this ailment. Tr. 63.

1 Plaintiff stated that his memory problems cause him to forget things, and that he uses task
2 lists but still forgets things on his lists. Tr. 66. Plaintiff stated that he has concentration
3 problems that make it difficult for him to follow conversations. *Id.* Plaintiff stated that
4 his memory and concentration problems are constant. Tr. 66-67. Plaintiff testified that
5 he has high blood pressure that is currently under control with medication. Tr. 67.
6 Plaintiff stated that he suffers from chronic kidney disease that causes him to have to go
7 to the bathroom more frequently than normal. *Id.*

8 Plaintiff testified that he can sit for about a half hour before he needs to stand
9 because of his feet and back pain. Tr. 68. Plaintiff testified that he can stand for about a
10 half hour before he has to sit down because of his pain. *Id.* Plaintiff stated that he gets
11 shortness of breath and that he can walk for about 15 to 20 minutes before his pain
12 intensifies. Tr. 69. Plaintiff described having to lie down and elevate his legs about three
13 to four times a day. Tr. 70. Plaintiff stated that he has difficulties falling asleep and
14 waking up. Tr. 69. Plaintiff testified that he cannot return to his past work fulltime and
15 that he cannot perform any work fulltime because he cannot sit or stand for very long.
16 Tr. 71-72.

17 The ALJ concluded Plaintiff's statements concerning the intensity, persistence,
18 and limiting effects of his symptoms were not credible to the extent they are inconsistent
19 with the RFC assessment. Tr. 34. In reaching this conclusion, the ALJ evaluated
20 Plaintiff's testimony using the two-step analysis established by the Ninth Circuit.
21 *See Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Applying the test of *Cotton v.*
22 *Bowen*, 799 F.2d 1403 (9th Cir. 1986), the ALJ first determined that Plaintiff's
23 impairments could reasonably produce the symptoms alleged. Tr. 34. Given this
24 conclusion, and because there is no evidence of malingering, the ALJ was required to
25 present "specific, clear and convincing reasons" for finding Plaintiff not entirely credible.
26 *Smolen*, 80 F.3d at 1281. This clear and convincing standard "is the most demanding
27 required in Social Security cases." *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920,
28 924 (9th Cir. 2002).

1 Plaintiff argues that the ALJ improperly rejected his subjective complaints by not
2 specifying which statements are not credible and explaining why. Doc. 13 at 19. The
3 Court disagrees. The ALJ's RFC assessment indicates that the ALJ found Plaintiff's
4 statements about his ability to sit and stand not credible. In rejecting that testimony, the
5 ALJ first found the objective medical evidence inconsistent and unresponsive of
6 Plaintiff's allegations, and second, the ALJ found Plaintiff not credible due to
7 inconsistencies in his testimony and inconsistencies between his testimony and his daily
8 activities.

9 As to the first, the ALJ examined the objective evidence of record and made the
10 following findings: (1) physical therapy notes showed improved peripheral neuropathy,
11 balance, and agility; (2) evaluation notes indicated normal posture and gait with no
12 unusual motor movements; (3) a September 2010 physical examination showed no
13 edema, full and equal strength, and no neurological deficits; (4) physical examinations
14 found normal neurological processes and treatment notes indicated stable processes;
15 (5) EEGs, lumbar MRIs and some EMG testing indicated no significant abnormality as to
16 muscle atrophy, gait, and motor loss; (6) subsequent clinical findings – including normal
17 brain MRI, normal EEG, normal IQ, and normal memory function – confirmed no
18 permanent residual impact from Plaintiff's transient ischemic attack; (7) lab reports
19 showed no significant abnormalities of kidney functions; and (8) a psychological
20 examination showed a mood disorder that was nondurational and not acute. Tr. 35-36.
21 In noting the above, the ALJ found that that "the evidence as a whole does not support
22 that [Plaintiff's] impairments are as severe as alleged." Tr. 36. Plaintiff does not appear
23 to argue that the ALJ improperly rejected his subjective symptom testimony due to a lack
24 of supporting objective evidence, but, in any event, the Court finds that the ALJ did not
25 err in finding the objective medical evidence inconsistent and not supportive of Plaintiff's
26 pain allegations. See *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 (9th Cir. 2008) ("Contradiction with the medical record is a sufficient basis for rejecting
28 the claimant's subjective testimony.") (citation omitted); *Batson v. Comm'r of Soc. Sec.*

1 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (lack of objective medical evidence
2 supporting claimant’s allegations supported ALJ’s finding that claimant was not
3 credible).

4 As to the second, the ALJ noted Plaintiff’s testimony about experiencing shortness
5 of breath (Tr. 69), and found that this testimony was inconsistent with treatment notes
6 indicating that Plaintiff denied shortness of breath. Tr. 36 (citing Tr. 267). The ALJ
7 found that Plaintiff’s activities of daily living do not support his allegations of severity
8 (Tr. 36), and, as an example, noted that Plaintiff described pain in his feet, but also
9 reported driving 16 miles to an appointment and had indicated having no problems with
10 driving (*id.* (citing Tr. 372, 188)). The ALJ also found that treatment notes indicating that
11 Plaintiff had performed “some physical labor” “suggest[ed] that his back pain was not as
12 severe as alleged.” Tr. 36 (citing Tr. 432). Plaintiff argues that the ALJ did not explain
13 what alleged limitation conflicts with what daily activity (Doc. 13 at 19), and specifically
14 did “not cite any activity which demonstrates an ability to sustain a full time work pace,
15 even at a sedentary level of exertion” (*id.* at 20). The Court disagrees. The ALJ properly
16 considered inconsistencies in Plaintiff’s testimony and inconsistencies between his
17 conduct and daily activities in finding his testimony incredible. *See Thomas*, 278 F.3d at
18 958-59; *see also Curry v. Astrue*, No. 09-CV-2580-PHX-GMS, 2010 WL 3789535, at *6
19 (D. Ariz. Sept. 22, 2010); *Burch v. Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005).

20 Plaintiff argues that the ALJ improperly rejected his subjective complaints based
21 on a finding that he was non-compliant with a prescribed treatment (Doc. 13 at 21-22),
22 and that his condition was improving with a successful course of treatment (*id.* at 22-24).
23 The ALJ did note that Plaintiff “refused an EMG of his upper extremities” and “did not
24 fill out” a prescription (Tr. 35), but she did not offer this noncompliance as a reason to
25 discredit Plaintiff’s testimony. The ALJ referenced the noncompliance in her discussion
26 of the objective medical evidence only. Similarly, the ALJ did not discredit Plaintiff’s
27 symptom allegations based on a finding that Plaintiff’s condition was improving. The
28 ALJ referred to medical notes indicating that Plaintiff was feeling better (Tr. 35

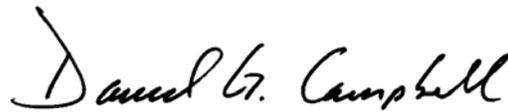
1 (citing Tr. 357, 530, 572, 698)) in her summary of medical evidence that did not comport
2 with Plaintiff's complaints.

3 The Court concludes that inconsistencies between Plaintiff's testimony and
4 objective medical evidence, as well as inconsistencies in Plaintiff's testimony itself,
5 provide clear and convincing reasons, based upon substantial evidence, for discounting
6 Plaintiff's credibility.

7 **IT IS ORDERED:**

- 8 1. Defendant's decision denying benefits is **affirmed**.
9 2. The Clerk is directed to enter judgment accordingly.

10 Dated this 12th day of August, 2013.

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15 David G. Campbell
16 United States District Judge
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