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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Gregory A. Batterton,

10 Plaintiff,

11 v.

12 Carolyn W. Colvin,

13 Defendant.
14

No. CV-15-01319-PHX-GMS

ORDER

15
16 Pending before the Court is Plaintiff Gregory A. Batterton's ("Batterton") appeal
17 challenging the Social Security Administration's decision to deny benefits. (Doc. 13.)
18 For the reasons set forth below, the Court affirms that decision.

19 **BACKGROUND**

20 Batterton was injured in a car accident when he was eighteen years old. (Tr. 32.)
21 For fourteen to fifteen years, he worked primarily as a building maintenance repair man
22 and a home painter. (Tr. 51.) However, over the last few years he was forced to reduce
23 the hours he worked due to the pain from his earlier injuries. (Tr. 56.) He does not
24 currently work, and he has not been employed since February of 2013. (Tr. 49.)

25 On April 2, 2012, Batterton filed an application for supplemental security income,
26 alleging a disability onset date of April 1, 2011. (Tr. 222–31.) After Batterton's claim
27 was denied initially and on reconsideration, he requested a hearing, which the
28 Administrative Law Judge (ALJ), Thomas Cheffins, held on May 20, 2013. (Tr. 40–73.)

1 During this hearing, Batterton and a vocational expert testified. (*Id.*) On December 17,
2 2013, the ALJ issued a decision finding Batterton not disabled. (Tr. 24–34.)

3 Batterton testified that he has symptoms as a result of his impairments which
4 prevent him from sustaining full-time employment. (Tr. 50–51.) Specifically, Batterton
5 testified that he suffers from the inability to lift his arms or look up and down; shoulder
6 pain which radiates down his right arm into his fingers; back pain; neck pain, and
7 chronic, debilitating headaches. (Tr. 50–52, 54–55, 57.) He asserts that narcotic pain
8 medication causes him side effects such as dizziness, nausea, bad dreams, not being able
9 to sleep well, constipation, and addiction. (Tr. 53.) Also, Batterton testified that he is
10 unable stand for longer than ten to thirty minutes, after which he needs to lie down to get
11 relief from the resulting pain. (Tr. 57.)

12 In evaluating whether Batterton was disabled, the ALJ undertook the five-step
13 sequential evaluation for determining disability.¹ (Tr. 25–26.) At step one, the ALJ
14 determined that Batterton meets the insured status requirements of the Social Security
15 Act. (Tr. at 26.) At step two, the ALJ determined that Batterton had not engaged in
16 substantial gainful activity since the alleged onset date. (Tr. 26.) At step three, the ALJ

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18 ¹ The five-step sequential evaluation of disability is set out in 20 C.F.R. § 404.1520
19 (governing disability insurance benefits) and 20 C.F.R. § 416.920 (governing
supplemental security income). Under the test:

20 A claimant must be found disabled if she proves: (1) that she
21 is not presently engaged in a substantial gainful activity[,] (2)
22 that her disability is severe, and (3) that her impairment meets
23 or equals one of the specific impairments described in the
24 regulations. If the impairment does not meet or equal one of
25 the specific impairments described in the regulations, the
26 claimant can still establish a prima facie case of disability by
27 proving at step four that in addition to the first two
28 requirements, she is not able to perform any work that she has
done in the past. Once the claimant establishes a prima facie
case, the burden of proof shifts to the agency at step five to
demonstrate that the claimant can perform a significant
number of other jobs in the national economy. This step-five
determination is made on the basis of four factors: the
claimant’s residual functional capacity, age, work experience
and education.

28 *Hoopai v. Astrue*, 499 F.3d 1071, 1074–75 (9th Cir. 2007) (internal
citations and quotations omitted).

1 determined that Batterton suffered from the severe impairments of degenerative disk
2 disease of the cervical and lumbar spine, and chronic obstructive pulmonary disease
3 (“COPD”). (Tr. 27.) At step four, the ALJ determined that none of these impairments,
4 either alone or in combination, met or equaled any of the Social Security
5 Administration’s listed impairments. (Tr. 28.)

6 At that point, the ALJ made a determination of Batterton’s residual functional
7 capacity (“RFC”),² concluding that Batterton could “perform light work as defined in 20
8 C.F.R. 404.1567(b).” (Tr. 29.) In so finding, the ALJ found that the claimant could
9 perform work that “involves no climbing of ladders, ropes or scaffolds; no more than
10 frequent balancing; no more than occasional climbing of ramps or stairs[,]. . . stooping,
11 crouching, kneeling and crawling[,] and . . . bilateral overhead reaching.” (Tr. 29.) The
12 ALJ thus determined at step four that Batterton did not retain the RFC to perform any of
13 his past relevant work. (Tr. 32–33.) The ALJ reached step five, concluding in that
14 Batterton could perform a significant number of other jobs in the national economy
15 despite his limitations. (Tr. 33–34.) Given this analysis, the ALJ concluded that
16 Batterton was not disabled. (Tr. 34.)

17 The Appeals Council declined to review the decision. (Tr. 1–6.) Batterton filed
18 the complaint underlying this action on August 15, 2015, seeking this Court’s review of
19 the ALJ’s denial of benefits.³ (Doc. 13.) The matter is now fully briefed. (Doc. 15, 16.)

20 DISCUSSION

21 I. Standard of Review

22 A reviewing federal court will only address the issues raised by the claimant in the
23 appeal from the ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir.
24 2001). A federal court may set aside a denial of disability benefits only if that denial is

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26 ² RFC is the most a claimant can do despite the limitations caused by his impairments.
See S.S.R. 96-8p (July 2, 1996).

27 ³ Batterton has authority to file this action pursuant to 42 U.S.C. § 405(g) (“Any
28 individual, after any final decision of the Commissioner of Social Security made after a
hearing to which he was a party . . . may obtain a review of such decision by a civil
action . . .”).

1 either unsupported by substantial evidence or based on legal error. *Thomas v. Barnhart*,
2 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is “more than a scintilla but less
3 than a preponderance.” *Id.* (quotation omitted). “Substantial evidence is relevant
4 evidence which, considering the record as a whole, a reasonable person might accept as
5 adequate to support a conclusion.” *Id.* (quotation omitted).

6 The ALJ is responsible for resolving conflicts in testimony, determining
7 credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
8 Cir. 1995). “When the evidence before the ALJ is subject to more than one rational
9 interpretation, we must defer to the ALJ’s conclusion.” *Batson v. Comm’r of Soc. Sec.*
10 *Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004). This is so because “[t]he [ALJ] and not the
11 reviewing court must resolve conflicts in evidence, and if the evidence can support either
12 outcome, the court may not substitute its judgment for that of the ALJ.” *Matney v.*
13 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992) (citations omitted).

14 **II. Analysis**

15 On appeal, Mr. Batterton argues that the ALJ erred by rejecting his symptom
16 testimony in the absence of specific, clear, and convincing reasons supported by
17 substantial evidence in the record as a whole. (Doc. 13 at 10.) He also asserts that the
18 appropriate remedy in this case would be to vacate the ALJ’s ruling and to remand this
19 matter for a determination of benefits. (Doc. 13 at 17.) For the following reasons, the
20 Court affirms the ruling of the ALJ.

21 **A. The ALJ provided “Specific, Clear, and Convincing” Reasons for** 22 **Finding that Batterton’s Symptom Testimony was not Credible.**

23 The ALJ must engage in a two-step analysis when determining whether a
24 claimant’s testimony regarding his subjective pain or symptoms is credible. *Lingenfelter*
25 *v. Astrue*, 504 F.3d 1028, 1035–36 (9th Cir. 2007). The ALJ must first “determine
26 whether the claimant has presented objective medical evidence of an underlying
27 impairment which could reasonably be expected to produce the pain or other symptoms
28 alleged.” *Id.* at 1036. If he has, and the ALJ has found no evidence of malingering, then

1 the ALJ may reject the claimant’s testimony only by “specify[ing] which testimony [he]
2 finds not credible,” *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 (9th Cir. 2015), and “by
3 offering specific, clear and convincing reasons for doing so.” *Lingenfelter*, 504 F.3d at
4 1036; *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).

5 In determining whether the claimant’s testimony regarding his symptoms credible,
6 the ALJ can consider a multitude of factors, including:

- 7 (1) ordinary techniques of credibility evaluation, such as the
8 claimant's reputation for lying, prior inconsistent statements
9 concerning the symptoms, and other testimony by the
10 claimant that appears less than candid; (2) unexplained or
11 inadequately explained failure to seek treatment or to follow a
prescribed course of treatment; and (3) the claimant's daily
activities.

12 *Smolen v. Chater*, 80 F.3d at 1284. Furthermore, “[i]f the evidence can reasonably
13 support either affirming or reversing a decision, we may not substitute our judgment for
14 that of the Commissioner.” *Lingenfelter*, 504 F.3d at 1035.

15 At the first step, the ALJ found that Batterton’s medically determinable
16 impairments could reasonably be expected to cause the alleged symptoms. (Tr. at 29.)
17 However, at the second step, the ALJ found that Batterton’s “statements concerning the
18 intensity, persistence and limiting effects of these symptoms are not credible.” (*Id.*) The
19 parties concede that the ALJ specifically identified which testimony he finds not credible.
20 Thus, the issue here is whether the ALJ offered “specific, clear and convincing reasons”
21 for rejecting the testimony as not credible. *Brown-Hunter v. Colvin*, 806 F.3d 487.

22 The ALJ offered the following reasons for finding Batterton’s symptom testimony
23 not credible: (1) Batterton’s testimony was inconsistent with the notes in his medical files
24 (2) his sporadic treatment of his chronic headaches undermines the level of pain he
25 claims to experience from them, (3) Batterton’s daily activities, including work activity,
26 undermine his credibility, and (4) Batterton worked for many years with the same
27 impairment. The Court will address each of these below.

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1 **1. The ALJ established that the inconsistencies between Batterton’s**
2 **testimony and his medical files undermined his credibility.**

3 An ALJ may utilize “ordinary techniques of credibility evaluation, such as the
4 claimant's reputation for lying, prior inconsistent statements concerning the symptoms,
5 and other testimony by the claimant that appears less than candid” when determining
6 whether a claimant’s testimony is credible. *Smolen*, 80 F.3d at 1284. Furthermore, when
7 the record could lend itself to “an interpretation more favorable” to the claimant, the
8 court “must uphold the ALJ's decision where the evidence is susceptible to more than one
9 rational interpretation.” *Burch v. Barnhart*, 400 F.3d 676, 680–81 (9th Cir. 2005)
10 (internal citations and quotations omitted).

11 The ALJ determined that “[w]hile the claimant’s testimony was generally credible,
12 his self-imposed limitations are not supported by the record.” (Tr. 32.) Batterton
13 testified at his hearing that he cannot be on his feet for more than thirty minutes to an
14 hour at a time due to his neck pain. (Tr. 57.) Batterton also testified that he must lay
15 down every morning, and preferably every afternoon that he can as well. (Tr. 57–58.)
16 Batterton claimed these naps were necessary because he did not sleep at night due to the
17 pain. (Tr. 58.) However, this level of neck pain is inconsistent with the majority of the
18 medical records cited by the ALJ in his opinion. (Tr. 32.) For example, Batterton told
19 his doctors that he could not walk more than a block at a time due to his shortness of
20 breath and chest pain, not because of neck pain. (Tr. 30, 315.) Additionally, according to
21 his medical records, Batterton was sleeping well and feeling better after treatment for his
22 depression. (Tr. 31, 390.) Batterton also denied lower back pain and neck pain on
23 various occasions, including an instance where he sought treatment for his insomnia. (Tr.
24 30, 390, 435.)

25 The ALJ also noted that Batterton made inconsistent statements to his medical
26 providers regarding the nature of his various illnesses. (Tr. 30.) For example, Batterton
27 told health care providers that he was diagnosed with lung cancer by his primary care
28 physician, Dr. Fernando. (Tr. 30, 315) He also told them that he lost 50-60 pounds in a

1 time span of 5-7 months. (Tr. 30, 315) However, when staff received Batterton's
2 medical history, Dr. Fernando's notes indicated a normal chest-x-ray and no mention of
3 lung cancer or rapid weight loss. (Tr. 30, 317.) These prior inconsistent statements also
4 weigh against Batterton's credibility.

5 The ALJ's determination that Batterton's statements to his treating physicians are
6 not entirely consistent with his testimony at his hearing is supported by substantial
7 evidence. The record may also lend itself to "an interpretation more favorable" to
8 Batterton, but the ALJ's position must be upheld where there is "more than one rational
9 interpretation." *Burch v. Barnhart*, 400 F.3d at 680-81 (internal citations and quotations
10 omitted). The ALJ offered "specific, clear and convincing reasons" supporting his
11 finding that Batterton's testimony was not credible due to inconsistencies between his
12 testimony and the record, and thus the ALJ's interpretation stands. *Brown-Hunter v.*
13 *Colvin*, 806 F.3d at 487.

14 **2. The ALJ properly determined that the sporadic treatment of**
15 **Batterton's chronic headaches undermined his credibility.**

16 The ALJ noted in his analysis that while the claimant's cervical issues made it
17 plausible that he could experience chronic headache pain, his allegations regarding the
18 "frequency and intensity of these headaches is somewhat undermined by the fact that he
19 has only reported and sought treatment for these headaches sporadically." (Tr. 32.) He
20 also noted that treating physicians described Batterton as "functioning well" in 2011 and
21 2012. (Tr. 32.)

22 "[U]nexplained or inadequately explained failure to seek treatment or to follow a
23 prescribed course of treatment" may be considered by the ALJ when determining
24 credibility. *Smolen*, 80 F.3d at 1284. The treatment a claimant receives for a proposed
25 disability is an "important indicator of the intensity and persistence" of his symptoms. 20
26 C.F.R. § 404.1529(c)(3). Therefore, an ALJ may consider "all of the evidence
27 presented," including the claimant's statements about his symptoms, treatments pursued,
28 and observations by third parties. *Id.*; *see also Smolen*, 80 F.3d at 1285 (including

1 “observations by treating and examining physicians and third parties about the claimant’s
2 symptoms and their effects” as an appropriate consideration for ALJs during the
3 credibility analysis.)

4 Batterton testified that he only has one or two days a month without suffering from
5 a severe headache. (Tr. 52.) He also testified that he cannot drive for more than thirty
6 minutes without developing a headache. (Tr. 60.) However, the ALJ noted that
7 Batterton’s medical record indicates that he rarely sought relief from headache pain
8 during his numerous medical visits, and he often did not mention his headache pain at all.
9 (Tr. 32; *see also* Tr. 316, 373, 430, 434, 435.) This is inconsistent with Batterton’s
10 descriptions of daily debilitating headache pain, and the ALJ properly determined that
11 Batterton’s testimony was not credible given his failure to consistently report the severity
12 of pain described in his testimony. (Tr. 32.)

13 The ALJ also considered observations by Batterton’s treating physicians,
14 including Dr. Frevert and Dr. Bennett. (Tr. 30–31.) Dr. Bennett determined that
15 Batterton should not be prescribed opiates, and that this was a condition that that he
16 would have to live with. (Tr. 31, 373.) Dr. Bennett went on to note that Batterton was
17 smiling and in good spirits, and then prescribed him over the counter medications to treat
18 Batterton’s pain. (Tr. 31, 373.) Likewise, Dr. Frevert noted that Batterton had
19 complications from a “previous trauma,” but Batterton never mentioned headache pain or
20 neck pain during his visit. (Tr. 30, 390.) He had a complaint regarding cold feet, but it
21 did not “seem to be too bothersome a symptom to the patient.” (Tr. 30, 390.)

22 The ALJ properly supported his finding that Batterton’s headache claims were
23 undermined by sporadic treatment by outlining “specific, clear and convincing reasons”
24 for his decision. *Brown-Hunter v. Colvin*, 806 F.3d 487. Furthermore, these reasons are
25 supported by substantial evidence. Therefore, the ALJ’s reasoning is upheld.

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1 **3. The ALJ provided insufficient reasoning for finding that Batterton’s**
2 **daily activities undermined his credibility.**

3 In his analysis, the ALJ in this case determined that the “wide range of activities”
4 performed by Batterton discredited his testimony. “To determine whether the claimant’s
5 testimony regarding the severity of [his] symptoms is credible, the ALJ may consider . . .
6 the claimant’s daily activities.” *Smolen*, 80 F.3d at 1284. Where a claimant “is able to
7 spend a substantial part of his day engaged in pursuits involving the performance of
8 physical functions that are transferable to a work setting, a specific finding as to this fact
9 may be sufficient to discredit a claimant’s allegations.” *Morgan v. Comm’r of Soc. Sec.*
10 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999).

11 However, “a disability claimant need not ‘vegetate in a dark room’ in order to be
12 deemed eligible for benefits.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
13 (quoting *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987)). The ALJ should not
14 discredit pain testimony in a disability determination simply because a plaintiff can
15 engage in daily activity, “such as grocery shopping, driving a car, or limited walking for
16 exercise.” *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *see also Garrison v.*
17 *Colvin*, 759 F.3d 995, 1016 (9th Cir. 2009) (“We have repeatedly warned that ALJs must
18 be especially cautious in concluding that daily activities are inconsistent with testimony
19 about pain.”). “Only if the level of activity were inconsistent with Claimant's claimed
20 limitations would these activities have any bearing on Claimant's credibility.” *Reddick*,
21 157 F.3d at 722.

22 The ALJ cited to Batterton’s earlier function report in finding that Batterton’s
23 testimony regarding his limitations was discredited by his then-apparent ability “to
24 prepare simple meals, drive, go outside, shop, spend time with others, and perform indoor
25 and outdoor chores, but at a slower pace.” (Tr. 32.) However, the function report doesn’t
26 just claim that it takes Batterton longer to do things; the function report claims that it
27 takes Batterton longer to do these activities because they cause him constant pain. (Tr.
28 277, 278.) Furthermore, in the report cited by the ALJ, Batterton claims that “I have to

1 encourage myself to get up and do these things cause I know it's going to hurt my next
2 day or so." (Tr. 278.) This is largely consistent with Batterton's testimony at the
3 hearing that while he can do some things around the house, the pain typically leads him
4 to asking for help. (Tr. 61.)

5 The level of activity described by Batterton in the function report is not
6 "inconsistent with Claimant's claimed limitations," and therefore it should not "have any
7 bearing on Claimant's credibility." *Reddick*, 157 F.3d at 722. The ALJ did not provide
8 any further explanation for why Batterton's activities undermined his credibility. (Tr.
9 32.) Therefore, the ALJ failed to present specific, clear and convincing reasons
10 supporting his finding that Batterton's testimony was not credible due to his described
11 activity levels, and thus his reasoning is rejected. *Brown-Hunter v. Colvin*, 806 F.3d 487.

12 **4. The ALJ properly determined that Batterton's testimony was**
13 **undermined by his ability to work for several years with the same**
14 **impairment.**

15 The ALJ noted that Batterton continuously claimed that the car accident causing
16 his injuries occurred when he was eighteen years old, and yet they never interfered with
17 his ability to work until recent years. (Tr. 32.) An ALJ may "consider whether there are
18 any inconsistencies in the evidence and the extent to which there are any conflicts
19 between [claimant's] statements and the rest of the evidence, including [claimant's]
20 history." 20 C.F.R. § 404.1529(d)(3). This includes whether a claimant was capable of
21 working with the same impairment prior to filing for benefits. *See Gregory v. Bowen*,
22 844 F.2d 664, 667 (9th Cir. 1988) (noting that "substantial evidence" indicated that the
23 claimant's condition "had remained constant for a number of years and that her back
24 problems had not prevented her from working over that time.") Therefore, when there is
25 "considerable evidence. . .that claimant has suffered these problems, while working, for
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1 many years,” it may cut against his testimony’s credibility. *Goodermote v. Sec’y of*
2 *Health & Human Servs.*, 690 F.2d 5, 7 (1st Cir. 1982).

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4 Batterton consistently stated that his injuries occurred during a car accident when
5 he was eighteen years old. (Tr. 32, 371, 395, 415.) Batterton also alleged that his first
6 severe headaches occurred twenty-eight years ago, yet he was capable of earning a steady
7 wage in active professions at that time. (Tr. 32, 285, 237.) For the last fourteen to fifteen
8 years, Batterton was employed in various home maintenance roles, from window
9 washing to house painting. (Tr. 51.) The ALJ in this case noted that evidence that
10 Batterton had “suffered these problems, while working, for many years,” cut against his
11 credibility in claiming that his current pain level made it impossible for him to work at
12 all. *Goodermote*, 690 F.2d at 7. The ALJ cited to the record and to Batterton’s own
13 admissions to present specific, clear and convincing reasons supporting his finding that
14 Batterton’s longstanding injury discredited his claim that it suddenly worsened to the
15 point where he could not work at all. (Tr. 32.) Therefore, the ALJ’s finding will be
16 upheld.
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21 **B. The ALJ’s Error Was Harmless, Therefore the Ruling of the ALJ is**
22 **Affirmed.**

23 Once it has been determined that an ALJ made an error during the review of a
24 claimant’s file, the next step is to determine whether the error was harmless. *See*
25 *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (applying
26 the harmless error standard after determining that two of the ALJ’s reasons supporting his
27 adverse credibility finding were invalid). An error is harmless where it “does not negate
28 the validity of the ALJ’s ultimate conclusion that [claimant’s] testimony was not
credible.” *Batson*, 359 F.3d at 1197. Therefore, so long as “substantial evidence

1 supporting the ALJ's conclusions" regarding the claimant's credibility exists, the error
2 did not affect the ALJ's ultimate conclusion, and remand is not required. *Id.*; *see also*
3 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) ("[T]he court will not reverse
4 an ALJ's decision for harmless error, which exists when it is clear from the record that the
5 ALJ's error was inconsequential to the ultimate nondisability determination.") (internal
6 citations and quotations omitted).

7 Typically, the rejection of one rationale for discrediting a claimant's testimony is
8 insufficient for rejecting the entirety of the ALJ's analysis. *See Carmickle*, 533 F.3d at
9 1163; *Batson*, 359 F.3d at 1197 (finding that striking down one justification for
10 discrediting a claimant's testimony amounted to a harmless error where the ALJ
11 presented other reasons for discrediting the testimony that were supported by substantial
12 evidence in the record). In *Carmickle*, the Ninth Circuit rejected two of the ALJ's
13 rationales supporting his adverse credibility finding, and still found the ALJ's errors to be
14 harmless. *Carmickle*, 533 F.3d at 1163. The Ninth Circuit explained that because the
15 ALJ presented other reasons for rejecting the credibility of the claimant's testimony that
16 were supported by substantial evidence in the record, the ALJ's error was harmless. *Id.*

17 The ALJ presented three valid reasons for discrediting the claimant's testimony
18 that were supported by substantial evidence, and thus the ALJ's singular error is
19 harmless. As in *Carmickle* and *Batson*, the rejection of one rationale does not negate
20 three other specific, clear, and convincing reasons. (Tr. 32.) Therefore, the ALJ's
21 determination that Batterton's symptom testimony was not credible is affirmed.

22 CONCLUSION

23 The ALJ improperly concluded that Batterton's daily activities undermined the
24 credibility of his symptom testimony. However, the ALJ provided other substantial
25 evidence of specific, clear and convincing reasons for why Batterton's testimony was not
26 credible.

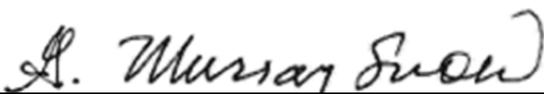
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IT IS THEREFORE ORDERED that the ALJ's decision is **AFFIRMED**. The Clerk of Court is directed to enter judgment accordingly.

Dated this 15th day of November, 2016.



Honorable G. Murray Snow
United States District Judge