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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Craig Allen Carlson,

Plaintiff,

v.

Acting Commissioner of the Social Security Administration,

Defendant.

No. CV-16-02430-PHX-ESW

ORDER

Pending before the Court is Craig Allen Carlson's ("Plaintiff") appeal of the Social Security Administration's ("Social Security") denial of his application for disability insurance benefits. The Court has jurisdiction to decide Plaintiff's appeal pursuant to 42 U.S.C. § 405(g). Under 42 U.S.C. § 405(g), the Court has the power to enter, based upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the case for a rehearing. Both parties have consented to the exercise of U.S. Magistrate Judge jurisdiction. (Doc. 17).

After reviewing the Administrative Record ("A.R.") and the parties' briefing (Docs. 20, 24), the Court finds that the Administrative Law Judge's ("ALJ") decision is supported by substantial evidence and is free of harmful legal error. The decision is therefore affirmed.

I. LEGAL STANDARDS

A. Disability Analysis: Five-Step Evaluation

The Social Security Act provides for disability insurance benefits to those who have contributed to the Social Security program and who suffer from a physical or mental disability. 42 U.S.C. § 423(a)(1). To be eligible for benefits, the claimant must show that he or she suffers from a medically determinable physical or mental impairment that prohibits him or her from engaging in any substantial gainful activity. The claimant must also show that the impairment is expected to cause death or last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A).

To decide if a claimant is entitled to Social Security benefits, an ALJ conducts an analysis consisting of five questions, which are considered in sequential steps. 20 C.F.R. § 404.1520(a). The claimant has the burden of proof regarding the first four steps:[1]

> **Step One**: Is the claimant engaged in "substantial gainful activity"? If so, the analysis ends and disability benefits are denied. Otherwise, the ALJ proceeds to Step Two.
>
> **Step Two:** Does the claimant have a medically severe impairment or combination of impairments? A severe impairment is one which significantly limits the claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c). If the claimant does not have a severe impairment or combination of impairments, disability benefits are denied at this step. Otherwise, the ALJ proceeds to Step Three.
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> **Step Three:** Is the impairment equivalent to one of a number of listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity? 20 C.F.R. § 404.1520(d). If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. If the impairment is not one that is presumed to be disabling, the ALJ proceeds to the fourth step of the analysis.

[1] *Parra v. Astrue*, 481 F.3d 742,746 (9th Cir. 2007).

> **Step Four:** Does the impairment prevent the claimant from performing work which the claimant performed in the past? If not, the claimant is "not disabled" and disability benefits are denied without continuing the analysis. 20 C.F.R. § 404.1520(f). Otherwise, the ALJ proceeds to the last step.

If the analysis proceeds to the final question, the burden of proof shifts to the Commissioner:[2]

> **Step Five:** Can the claimant perform other work in the national economy in light of his or her age, education, and work experience? The claimant is entitled to disability benefits only if he or she is unable to perform other work. 20 C.F.R. § 404.1520(g). Social Security is responsible for providing evidence that demonstrates that other work exists in significant numbers in the national economy that the claimant can do, given the claimant's residual functional capacity, age, education, and work experience. *Id*.

B. Standard of Review Applicable to ALJ's Determination

The Court must affirm an ALJ's decision if it is supported by substantial evidence and is based on correct legal standards. *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th Cir. 1990). Although "substantial evidence" is less than a preponderance, it is more than a "mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938)). It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id*.

In determining whether substantial evidence supports the ALJ's decision, the Court considers the record as a whole, weighing both the evidence that supports and detracts from the ALJ's conclusions. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir. 1993). If there is sufficient evidence to support the ALJ's determination, the Court cannot substitute its own determination. *See Morgan v. Comm'r of the Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999) ("Where the evidence is susceptible to more than one rational interpretation, it

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[2] *Parra*, 481 F.3d at 746.

is the ALJ's conclusion that must be upheld."); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). This is because the ALJ, not the Court, is responsible for resolving conflicts, ambiguity, and determining credibility. *Magallanes*, 881 F.2d at 750; *see also Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

The Court also considers the harmless error doctrine when reviewing an ALJ's decision. This doctrine provides that an ALJ's decision need not be remanded or reversed if it is clear from the record that the error is "inconsequential to the ultimate nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (citations omitted); *Molina*, 674 F.3d at 1115 (an error is harmless so long as there remains substantial evidence supporting the ALJ's decision and the error "does not negate the validity of the ALJ's ultimate conclusion") (citations omitted).

II. PLAINTIFF'S APPEAL

A. Procedural Background

Plaintiff, who was born in 1966, has been employed as a storage facility rental clerk, motorcycle salesman, warehouse manager, piano mover, and telemarketer. (A.R. 94, 95, 100). In 2012, Plaintiff filed an application for disability insurance benefits. (A.R. 216-17). Plaintiff's application alleged that on October 1, 2007, he became unable to work due to the following conditions: sciatica, gastric sleeve surgery, Type II diabetes with neuropathy, "pain in legs," "too much tissue pressing on spine/hereditary," high blood pressure, depression, tinnitus, "limited mobility," deafness in the left ear, and "poor hearing in right ear." (A.R. 100-01). Social Security denied the applications in February 2013. (A.R. 143-45). In November 2013, upon Plaintiff's request for reconsideration, Social Security affirmed the denial of benefits. (A.R. 146-49). Plaintiff sought further review by an ALJ, who conducted a hearing in September 2014. (A.R. 44-98, 150-51). On the date of the hearing, Plaintiff amended his alleged disability onset date to October 29, 2010. (A.R. 230).

In his February 25, 2015 decision, the ALJ found that Plaintiff has not been under a disability from October 29, 2010 through December 31, 2012, the date last insured. (A.R. 25-37). The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the final decision of the Social Security Commissioner. (A.R. 4-9). On July 20, 2016, Plaintiff filed a Complaint (Doc. 1) pursuant to 42 U.S.C. § 405(g) requesting judicial review and reversal of the ALJ's decision.

B. The ALJ's Application of the Five-Step Disability Analysis

1. Step One: Engagement in "Substantial Gainful Activity"

The ALJ determined that Plaintiff has not engaged in substantial gainful activity from October 29, 2010, the amended alleged disability onset date, through the date last insured of December 31, 2012. (A.R. 27). Neither party disputes this determination.

2. Step Two: Presence of Medically Severe Impairment/Combination of Impairments

The ALJ found that Plaintiff has the following severe impairments: (i) degenerative disc disease of the lumbar spine, thoracic spine, and cervical spine; (ii) obstructive sleep apnea; (iii) degenerative joint disease; (iv) bilateral hand/wrist tenosynovitis; (v) trigger finger; (vi) Type II diabetes mellitus; (vii) chronic pain syndrome; and (ix) obesity. (A.R. 27). This determination is unchallenged.

3. Step Three: Presence of Listed Impairment(s)

The ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 of the Social Security regulations. (A.R. 29-30). Neither party disputes the ALJ's determination at this step.

4. Step Four: Capacity to Perform Past Relevant Work

The ALJ found that Plaintiff has retained the residual functional capacity ("RFC") to perform light work as defined in 20 C.F.R. § 404.1567(b), except that Plaintiff

> could frequently push and pull with the upper and lower extremities; he could occasionally climb ramps, stairs, and ladders; he could occasionally balance, stoop, kneel, and crouch; he was precluded from climbing ropes or scaffolds;

> he was precluded from crawling; he could frequently reach, handle, finger, and feel; he had to avoid moderate exposure to loud noise intensity environments; and he had to avoid hazardous environments including unprotected heights and moving machinery.

(A.R. 30).

Based on the testimony of a vocational expert ("VE") and Plaintiff's RFC, the ALJ determined at Step Four that Plaintiff can perform his past relevant work as a storage facility rental clerk, motorcycle salesman, warehouse manager, and telemarketer. (A.R. 36).

Plaintiff challenges the ALJ's RFC and Step Four determinations. Plaintiff asserts that the ALJ erroneously identified the motorcycle salesperson and telemarketer positions as past relevant work. (Doc. 20 at 11-12). In addition, Plaintiff argues that the ALJ committed harmful error in assessing Plaintiff's RFC by improperly rejecting (i) Plaintiff's testimony regarding his symptoms; (ii) the opinions of Plaintiff's mother regarding Plaintiff's symptoms; and (iii) the opinions of Plaintiff's treating physicians. (*Id.* at 12-20). Finally, Plaintiff contends that the ALJ posited a deficient hypothetical to the VE at the administrative hearing. (*Id.* at 21).

5. Step Five: Capacity to Perform Other Work

The ALJ's analysis did not proceed to the fifth step as the ALJ found at Step Four that Plaintiff is not disabled.

C. Plaintiff's Challenge to the ALJ's Step Four Determination

1. Plaintiff's Argument that the ALJ Erroneously Identified "Motorcycle Salesperson" and "Telemarketer" as Past Relevant Work

An ALJ may find at Step Four that a claimant is not disabled if the ALJ determines that the claimant can perform his or her past relevant work[3] as it (i) was actually performed or (ii) is generally performed in the national economy. Social

[3] "Past relevant work" is work (i) performed within the past fifteen years, (ii) constituting substantial gainful activity, and (iii) lasting long enough for the individual to have learned how to perform the work. 20 C.F.R. §§ 404.1560(b)(1), 404.1565(a).

Security Ruling ("SSR") 82–61, 1982 WL 31387, at *1-2 (1982). The law does not require an ALJ to make "explicit findings at step four regarding a claimant's past relevant work both as generally performed *and* as actually performed." *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (emphasis in original). An ALJ, however, must make specific findings as to (i) the claimant's RFC; (ii) the physical and mental demands of the past relevant work; and (iii) the relation of the RFC to the past work. *Id.* at 845 (citing SSR 82-62). A claimant has the burden of establishing that he or she is incapable of performing his or her past relevant work. 20 C.F.R. § 404.1512; *Barnhart v. Thomas*, 540 U.S. 20, 25 (2003).

As discussed, the ALJ found that Plaintiff's past relevant work included the positions of piano mover, storage facility rental clerk, motorcycle salesman, warehouse manager, and telemarketer. (A.R. 36). The ALJ found that Plaintiff could perform all of those positions except for the piano mover position. (*Id.*).

Plaintiff argues that the ALJ erred by including the motorcycle salesperson and telemarketer positions in the list of past relevant work. (Doc. 20 at 11-12). Plaintiff argues that he did not perform those jobs at the substantial gainful activity level. (*Id.* at 12). However, where a disability claimant argues that an ALJ has erred, the claimant must also show that the asserted error resulted in actual harm. *See Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) ("The burden is on the party claiming error to demonstrate not only the error, but also that it affected his "substantial rights," which is to say, not merely his procedural rights.") (citing *Shinseki v. Sanders*, 556 U.S. 396, 407–09 (2009)). Plaintiff does not assert, and the Court does not find, that the ALJ erred by finding that Plaintiff's past relevant work also includes the storage facility rental clerk and warehouse manager positions. For the reasons discussed herein, the Court does not find that the ALJ erroneously determined Plaintiff is capable of working as a storage facility rental clerk or warehouse manager. Therefore, any error in finding that the motorcycle salesperson and telemarketer positions constitute past relevant work is harmless. *See Lind v. Astrue*, 370 F. App'x 814, 817 (9th Cir. 2010) ("Any error by the

ALJ in considering jobs that did not qualify as past relevant work was harmless because the ALJ found that Lind could perform her past relevant work as a customer service representative, and the ability to perform one of her past jobs is sufficient to meet the standard."). Plaintiff's first challenge to the ALJ's decision fails to show error warranting reversal or remand.

2. Plaintiff's Argument that the ALJ Improperly Weighed Medical Source Opinions

In weighing medical source opinions in Social Security cases, there are three categories of physicians: (i) treating physicians, who actually treat the claimant; (ii) examining physicians, who examine but do not treat the claimant; and (iii) non-examining physicians, who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). An ALJ must provide clear and convincing reasons that are supported by substantial evidence for rejecting the uncontradicted opinion of a treating or examining doctor. *Id*. at 830-31; *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). An ALJ cannot reject a treating or examining physician's opinion in favor of another physician's opinion without first providing specific and legitimate reasons that are supported by substantial evidence, such as finding that the physician's opinion is inconsistent with and not supported by the record as a whole. *Bayliss*, 427 F.3d at 1216; 20 C.F.R. § 404.1527(c)(4) (an ALJ must consider whether an opinion is consistent with the record as a whole); *see also Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tommasetti*, 533 F.3d at 1041 (finding it not improper for an ALJ to reject a treating physician's opinion that is inconsistent with the record).

i. Plaintiff's Treating Physician Eric Feldman, M.D.

On July 16, 2012, Plaintiff's treating physician, Eric Feldman, M.D., completed a Residual Functional Capacity Questionnaire. (A.R. 423-24). Dr. Feldman opined that Plaintiff's symptoms associated with his impairments are severe enough to frequently interfere with Plaintiff's attention and concentration. (A.R. 423). Dr. Feldman also

opined that Plaintiff would need to recline or lie down in excess of normal breaks during an eight-hour workday and can only sit and stand/walk for fifteen minutes at a time. (*Id.*). In response to the question inquiring as to "the total number of hours your patient can sit and stand/walk in an 8-hour workday," Dr. Feldman indicated "0." (*Id.*). In addition, Dr. Feldman opined that Plaintiff cannot lift or carry anything. (A.R. 424). The ALJ gave Dr. Feldman's assessment little weight. (A.R. 35). As Dr. Feldman's opinions are contradicted by another acceptable medical source,[4] the Court must determine whether the ALJ offered specific and legitimate reasons for discounting Dr. Feldman's assessment.

The ALJ found that Dr. Feldman's assessment "is conclusory and unsupported by the record." (A.R. 35). The ALJ stated that "Dr. Feldman's notes do no[t] support the extreme limitations he assessed (*see* Ex. 16F). His notes consistently showed normal muscle strength in the lower extremities, and normal gait and station (*id.*)." (A.R. 35). Finding that a physician's opinion is conclusory or inconsistent with his or her treatment notes are valid reasons for discounting the opinion. *See Thomas*, 278 F.3d at 957 ("The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings."); *Valentine v. Comm'r, Soc. Sec. Admin.*, 574 F.3d 685, 692–93 (9th Cir. 2009); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (ALJ permissibly rejected treating physician's opinion when opinion was contradicted by or inconsistent with treatment reports); *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014) (a conflict between treatment notes and a treating provider's opinions may constitute an adequate reason to

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[4] Dr. Feldman's opinions are contradicted by the opinions of the non-examining State agency physicians. (A.R. 108-12, 130-35); *see Moore v. Comm'r of Soc. Sec.*, 278 F.3d 920, 924 (9th Cir. 2002) ("The ALJ could reject the opinions of Moore's examining physicians, contradicted by a nonexamining physician, only for "specific and legitimate reasons that are supported by substantial evidence in the record."); *Mendoza v. Astrue*, 371 F. App'x 829, 831 (9th Cir. 2010) ("An ALJ may reject an opinion of an examining physician, if contradicted by a non-examining physician, as long as the ALJ gives 'specific and legitimate reasons that are supported by substantial evidence in the record.'").

discredit the opinions of a treating physician); *Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003) (treating doctor's opinion properly rejected when treatment notes "provide no basis for the functional restrictions he opined should be imposed on [claimant]").

Moreover, the Court finds that the ALJ's conclusion that Dr. Feldman's assessment is unsupported by treatment notes is a reasonable interpretation of the record. For instance, in an October 5, 2011 treatment record, Dr. Feldman stated that Plaintiff "did have an EMG/nerve conduction study which was reportedly normal." (A.R. 698). In addition, Dr. Feldman observed in a number of treatment notes that Plaintiff had "[f]ull range of motion in the hips knees and ankles" and had "[n]o focal strength deficits in the lower extremities." (A.R. 698, 716, 721). On April 25, 2012, Dr. Feldman assessed that Plaintiff had no weakness. (A.R. 722). Dr. Feldman also stated that Plaintiff could sit for thirty minutes, which contradicts the statement in Dr. Feldman's Residual Functional Capacity Questionnaire that Plaintiff could sit for only fifteen minutes at a time. (A.R. 423, 723).

Based on the foregoing, the Court finds that the ALJ provided specific and legitimate reasons supported by substantial evidence for giving Dr. Feldman's assessment little weight.

ii. Plaintiff's Treating Physician Atul Syal, M.D.

Another one of Plaintiff's treating physicians, Atul Syal, M.D., also completed a Residual Functional Capacity Questionnaire. (A.R. 960-61). The Residual Functional Capacity Questionnaire is dated June 16, 2014, which is after Plaintiff's last insured date of December 31, 2012. (A.R. 961). Dr. Syal opined that Plaintiff can sit and stand/walk for ten minutes at a time, can sit for one hour out of an eight-hour workday, but cannot stand/walk for any period of time in a workday. (A.R. 960). Dr. Syal assessed that Plaintiff can frequently lift/carry less than ten pounds, can occasionally lift/carry ten pounds, but can never lift/carry twenty or fifty pounds. (A.R. 961).

In explaining why he gave Dr. Syal's opinions little weight, the ALJ observed that Dr. Syal began treating Plaintiff seven months after the date last insured. (A.R. 35). "In order to obtain disability benefits, [a claimant] must demonstrate he was disabled prior to his last insured date." *Morgan v. Sullivan*, 945 F.2d 1079, 1080 (9th Cir. 1991) (citing 42 U.S.C. § 423(c); 20 C.F.R. § 404.1520). However, "medical evaluations made after the expiration of a claimant's insured status are relevant to an evaluation of the pre-expiration condition." *Sampson v. Chater*, 103 F.3d 918, 922 (9th Cir. 1996) (quoting *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988)). It is error to reject a physician's opinion solely because the physician rendered an opinion after the claimant's date last insured. *See Wakefield v. Astrue*, 267 F. App'x 682, 683 (9th Cir. 2008) (finding that the fact that a physician began treating the claimant after the claimant's date last insured was not a specific and legitimate reason for rejecting the physician's opinion). Accordingly, Dr. Syal's opinion may not be discounted for the sole reason that Dr. Syal evaluated Plaintiff after Plaintiff's date last insured.

However, the ALJ also discounted Dr. Syal's opinion on the ground that "the evidence of record does not support the limitations he assessed." (A.R. 35). This finding is a reasonable interpretation of the record. For instance, on May 30, 2014, Dr. Syal noted that a "[n]eedle exam of the muscles of the bilateral lower extremities and the Lumbosacral paraspinal muscles did not reveal any abnormalities." (A.R. 928). Dr. Syal found that the results of an electromyogram (EMG) are "consistent with the diagnosis of a mild sensory type of polyneuropathy. There is no evidence of radiculopathy based on this exam." (*Id.*). At a July 31, 2013 exam, Dr. Syal found "strength of 5 out of 5 bilaterally and symmetrical except for weakness of the left hip flexion and left knee extension at about 4+ out of 5." (A.R. 931). The Court finds that the ALJ provided a specific and legitimate reason supported by substantial evidence for giving Dr. Syal's assessment little weight.

iii. Non-Examining State Agency Physicians

The ALJ gave great weight to the opinions of the non-examining state agency physicians who reviewed Plaintiff's medical records. (A.R. 36, 100-39). Plaintiff argues that the ALJ erred by "basing his entire RFC finding" on those opinions. (Doc. 20 at 15).

The opinion of a non-examining source cannot alone constitute substantial evidence that justifies rejecting the opinion of either an examining or a treating source. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (citing *Magallanes*, 881 F.2d at 752). However, the opinion of a non-examining source may constitute substantial evidence when it is consistent with other independent evidence in the record. *Id.* (citing *Magallanes*, 881 F.2d at 752). Since the opinions of the state agency physicians are consistent with other evidence in the record, the ALJ did not err in giving the opinions substantial weight. *Thomas*, 278 F.3d at 957 ("The opinions of non-treating or non-examining physicians may also serve as substantial evidence when the opinions are consistent with independent clinical findings or other evidence in the record."); *Magallanes*, 881 F.2d at 753 (upholding an ALJ's reliance on the opinion of a non-examining physician where the opinion was supported by objective medical evidence).

3. Plaintiff's Challenge to the ALJ's Credibility Determination of Plaintiff's Symptom Testimony

When evaluating the credibility of a plaintiff's testimony regarding subjective pain or symptoms, the ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). In the first step, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment "which could reasonably be expected to produce the pain or other symptoms alleged." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The plaintiff does not have to show that the impairment could reasonably be expected to cause the severity of the symptoms. Rather, a plaintiff must only show that it could have caused some degree of the symptoms. *Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996).

If a plaintiff meets the first step, and there is no evidence of malingering, the ALJ can only reject a plaintiff's testimony about the severity of his or her symptoms by offering specific, clear, and convincing reasons. *Lingenfelter*, 504 F.3d at 1036. The ALJ cannot rely on general findings. The ALJ must identify specifically what testimony is not credible and what evidence undermines the plaintiff's complaints. *Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir. 2010). In weighing a plaintiff's credibility, the ALJ can consider many factors including: a plaintiff's reputation for truthfulness, prior inconsistent statements concerning the symptoms, unexplained or inadequately explained failure to seek treatment, and the plaintiff's daily activities. *Smolen*, 80 F.3d at 1284; *see also* 20 C.F.R. § 404.1529(c)(4) (Social Security must consider whether there are conflicts between a claimant's statements and the rest of the evidence). In addition, although the lack of medical evidence cannot form the sole basis for discounting pain testimony, it is a factor that the ALJ can consider in his or her credibility analysis. *See* 20 C.F.R. § 404.1529(c)(2); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Burch v. Barnhart*, 400 F.3d 676 (9th Cir. 2005).

In March 2016, the Social Security Administration issued Social Security Ruling 16-3p, 2016 WL 1119029 (March 16, 2016) ("SSR 16-3p"), which provides new guidance for ALJs to follow when evaluating a disability claimant's statements regarding the intensity, persistence, and limiting effects of symptoms. SSR 16-3p replaces Social Security Ruling 96-7p, 1996 WL 374186 (July 2, 1996) ("SSR 96-7p"). SSR 16-3p eliminates the term "credibility" used in SSR 96-7p in order to "clarify that subjective symptom evaluation is not an examination of the individual's character." SSR 16-3p, 2016 WL 1119029, at *1. That is, "[t]he change in wording is meant to clarify that administrative law judges aren't in the business of impeaching claimants' character," but "obviously administrative law judges will continue to assess the credibility of pain *assertions* by applicants, especially as such assertions often cannot be either credited or rejected on the basis of medical evidence." *Cole v. Colvin*, 831 F.3d 411, 412 (7th Cir. 2016) (emphasis in original).

Although SSR 16-3p was issued after the ALJ's February 2015 decision, it is consistent with Social Security's prior policies and with prior Ninth Circuit case law. *Compare* SSR 16-3p with SSR 96-7p (both policies set forth a two-step process to be followed in evaluating a claimant's testimony and contain the same factors to be considered in determining the intensity and persistence of a claimant's symptoms). Because 16-3p clarifies rather than changes existing law,[5] the Court will consider the ALJ's evaluation of Plaintiff's subjective complaints in light of SSR 16-3p.

Plaintiff argues that the ALJ erred in discrediting Plaintiff's testimony regarding his subjective symptoms. As detailed below, the Court finds that the ALJ has provided clear and convincing reasons supported by substantial evidence for discounting Plaintiff's testimony.

i. Lack of Objective Evidence

In explaining why he found Plaintiff's testimony concerning his symptoms less than fully credible, the ALJ stated that "[d]espite the claimant's allegations of severe and debilitating back pain and leg pain, the treatment notes documented minimal objective findings . . . ." (A.R. 31). This conclusion is supported by substantial evidence in the record. The ALJ correctly noted that electrodiagnostic testing performed on Plaintiff in June 2013 did not reveal any evidence of peripheral polyneuropathy or lumbosacral radiculopathy.[6] (A.R. 674). Further, the ALJ did not rely solely on the lack of

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[5]Administrative rules will not have retroactive effect unless (i) Congress expressly authorized the administrative agency to enact retroactive rules and (ii) the new agency rule states that it is retroactive. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). A clarification of a regulation, however, does not raise issues about retroactivity. *See Clay v. Johnson*, 264 F.3d 744, 749 (7th Cir. 2001) (stating that a clarifying rule "can be applied to the case at hand just as a judicial determination construing a statute can be applied to the case at hand," and does not raise issues of retroactivity); *see also Smolen*, 80 F.3d at 1281 n.1 ("We need not decide the issue of retroactivity [as to revised regulations] because the new regulations are consistent with the Commissioner's prior policies and with prior Ninth Circuit case law . . . .").

[6] Evidence that post-dates a claimant's date last insured may be probative of whether a claimant had any impairments prior to his or her date last insured. *See, e.g., Turner v. Comm'r of Social Security*, 613 F.3d 1217, 1228-29 (9th Cir. 2010) ("While the ALJ must consider only impairments (and limitations and restrictions therefrom) that [the claimant] had prior to the DLI, evidence post-dating the DLI is

supporting medical evidence in making his credibility determination. As discussed below, the ALJ gave other clear and convincing reasons to discount Plaintiff's credibility concerning the severity and limiting effects of his pain. Thus, the ALJ properly considered the lack of objective medical evidence supporting Plaintiff's claimed limitations as one of the factors in weighing Plaintiff's credibility. *Rollins*, 261 F.3d at 857 ("While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects.") (citing 20 C.F.R. § 404.1529(c)(2)).

ii. Conservative Treatment

In discounting Plaintiff's testimony, the ALJ observed that Plaintiff has received routine, conservative treatment. (A.R. 31, 32). Generally, "[e]vidence of 'conservative treatment' is sufficient to discount a claimant's testimony regarding severity of an impairment." *Parra*, 481 F.3d at 751; *see also Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007) ("Our case law is clear that if a claimant complains about disabling pain but fails to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ may use such failure as a basis for finding the complaint unjustified or exaggerated."); *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (the ALJ properly considered the physician's failure to prescribe, and the claimant's failure to request, medical treatment commensurate with the "supposedly excruciating pain" alleged). However, "[d]isability benefits may not be denied because of the claimant's failure to obtain treatment he cannot obtain for lack of funds." *Orn*, 495 F.3d at 638 (quoting *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995)) (alteration in original).

Plaintiff implicitly concedes that his treatment has been conservative, asserting that the ALJ "improperly relied on the history of conservative treatment for his impairments in assessing credibility." (Doc. 20 at 18). Plaintiff asserts that the record shows that his insurance declined to cover certain medications and procedures that his

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probative of [the claimant's] pre-DLI disability.").

physicians have recommended. (*Id.*). To support this assertion, Plaintiff cites the following three pages from the administrative record: A.R. 85, 654, and 819. (*Id.*). None of these pages show that Plaintiff's conservative treatment was a result of lack of insurance coverage during the relevant period (October 29, 2010 through December 31, 2012).

A.R. 85 is an excerpt from Plaintiff's testimony at the hearing. Plaintiff's attorney asked Plaintiff "what is [Dr. Syal] telling you about the future of your condition?" (A.R. 85). Plaintiff stated "Nothing he can do. I was told once that I could try the pain stimulator, but I have to have failed back surgery before the insurance covers it." (*Id.*). Plaintiff asserts that his "doctors decided surgery was possible for the thoracic spine condition, but was likely too risky as far as potentially resulting in complications, so they declined to perform surgery. (Tr. 641.)" (Doc. 20 at 18). This assertion is not supported by the record. The record cited by Plaintiff above (A.R. 641) is an October 25, 2013 treatment note by a physician at the Core Institute. The physician stated that there is not a "neurologically [sic] imperative to surgical intervention" and there "[i]s no evidence of any ongoing cord compression or neural lesion that would be improved with surgical intervention." (*Id.*). The physician also stated that "[t]he patient has an extremely complex pain portfolio with components of anger and frustration lability of symptoms that would not predictably be improved by any surgical intervention familiar to the examining surgeon." (*Id.*).

A.R. 654 and 819 are treatment notes that post-date Plaintiff's last insured date of December 31, 2012. A.R. 654 is an April 4, 2013 treatment note that states that Plaintiff's "insurance company denied his MRI and he is here for a re-evaluation." A.R. 819 is a September 18, 2013 treatment record that indicates that Plaintiff's insurance company did not approve Cymbalta for his low back pain, but that the doctor provided Plaintiff with a sample.

The Court finds that the record does not reflect that Plaintiff's impairments required more than conservative treatment during the relevant time period. Plaintiff is

ultimately responsible for providing the evidence to be used in making the RFC finding. *Andrews*, 53 F.3d at 1040 (a claimant bears the burden of proving entitlement to disability benefits); *Meanel*, 172 F.3d at 1113 (claimant carries burden to present "complete and detailed objective medical reports" of his or her condition from licensed medical professionals). Because an ALJ may infer that pain is not disabling if a claimant seeks only minimal, conservative treatment, the ALJ did not err in concluding that the conservative treatment Plaintiff has received is inconsistent with Plaintiff's allegations regarding the severity of his symptoms.

iii. Daily Activities

As another reason for discounting Plaintiff's symptom testimony, the ALJ stated that Plaintiff

> described every day activities that included going to the movies, taking his dog to the park, using a computer, going target shooting, riding a motorcycle, driving a utility terrain vehicle for off-roading, repairing his motorcycles, doing some light household chores, preparing meals, and taking care of his finances.

(A.R. 31-32). The ALJ found that "[t]he physical and mental capabilities requisite to performing many of the tasks described above as well as the social interactions replicate those necessary for obtaining and maintaining employment." (A.R. 32). This a clear and convincing reason supported by substantial evidence for discounting Plaintiff's symptom testimony. *See Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990) (upholding denial of disability benefits where claimant could "take care of her personal needs, prepare easy meals, do light housework, and shop for some groceries"); *see also Molina*, 674 F.3d at 1113 ("Even where [daily] activities suggest some difficulty functioning, they may be grounds for discrediting the claimant's testimony to the extent that they contradict claims of a totally debilitating impairment.").

The ALJ's credibility finding in this case is unlike the brief and conclusory credibility findings that the Ninth Circuit has deemed insufficient in other cases. For example, in *Treichler v. Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1102-03

(9th Cir. 2014), an ALJ stated in a single sentence that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment." The Court of Appeals held that stopping after this introductory remark "falls short of meeting the ALJ's responsibility to provide a discussion of the evidence and the reason or reasons upon which his adverse determination is based." *Id*. at 1103 (internal quotation marks omitted). The Court further stated that an ALJ's "vague allegation that a claimant's testimony is not consistent with the objective medical evidence, without any specific findings in support of that conclusion is insufficient for our review." *Id*. (quoting *Vasquez v. Astrue*, 572 F.3d 586, 592 (9th Cir. 2009).

In *Robbins v. Astrue*, 466 F.3d 880, 883-84 (9th Cir. 2006), the Ninth Circuit found the ALJ's "fleeting credibility finding" insufficient. In *Robbins*, the ALJ simply stated that (i) the claimant's testimony was "not consistent with or supported by the overall medical evidence of record" and (ii) "[claimant's] testimony regarding his alcohol dependence and abuse problem remains equivocal." *Id*. In discussing why the ALJ's finding was insufficient, the Court explained that the ALJ did not provide a "narrative discussion" containing "specific reasons for the finding . . .supported by the evidence in the record." *Id*. at 884-85.

Similarly, in *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995), an ALJ simply concluded that the claimant's complaints were "not credible" and "exaggerated." The Court held that the finding was insufficient as the ALJ did not provide any specific reasons for disbelieving the claimant other than a lack of objective evidence. *Id*. at 834.

Here, unlike in *Treichler*, *Robbins*, and *Lester*, the ALJ's decision goes beyond making a "fleeting" and conclusory remark that Plaintiff's testimony is not credible. The decision discusses the evidence and explains the inconsistencies in the record that the ALJ found discredited Plaintiff's testimony. The ALJ's conclusion is supported by substantial evidence in the record.

It is possible that a different ALJ would find Plaintiff's symptom testimony credible. But it is not the Court's role to second guess an ALJ's decision to disbelieve a Plaintiff's allegations if the ALJ has articulated specific, clear, and convincing reasons that are supported by substantial evidence in the record. *Fair*, 885 F.2d at 603 ("An ALJ cannot be required to believe every allegation of disabling pain, or else disability benefits would be available for the asking. . . ."). The Court finds that the reasons provided by the ALJ for discrediting Plaintiff's testimony are specific, clear, convincing, and are supported by substantial evidence in the record. The Court therefore finds that the ALJ did not err in discrediting Plaintiff's subjective testimony.

4. The ALJ Did Not Improperly Discount the Statements of Plaintiff's Mother Regarding Plaintiff's Symptoms

A source that is not an acceptable medical source is considered to be an "other source." 20 C.F.R. 404.1513(d). "Other sources" include physician's assistants, nurse practitioners, and lay witnesses. 20 C.F.R. § 404.1513. Information from these "other sources" must still be considered even though the information cannot establish the existence of a medically determinable impairment. *Id.* An other source's opinion can be rejected as long as the ALJ provides "germane" reasons, such as finding that the opinion is inconsistent with medical evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).

Plaintiff's mother completed two third party function reports on Plaintiff's behalf. (A.R. 249-58, 297-306). After reviewing the reports, the Court concludes that the ALJ correctly found that "[t]he statements in these reports are of the same general nature as the subjective complaints from the claimant's testimony." (A.R. 32). In explaining why he found Plaintiff's mother's statement unpersuasive, the ALJ noted that Plaintiff's mother is not a medical professional. (*Id.*). This is an invalid reason for rejecting the statements. *See* SSR 06–3P, 2006 WL 2329939, at *3 (Aug. 9, 2006) (stating that opinions from other sources "are important and should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the

file"); *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (holding that friends and family members are in a position to observe a claimant's symptoms and daily activities and are competent to testify as to the claimant's condition); *Tobeler v. Colvin*, 749 F.3d 830, 834 (9th Cir. 2014) (**"**lay witness testimony *as to a claimant's symptoms or how an impairment affects ability to work* is competent evidence that *cannot* be disregarded without comment") (emphasis in original).

However, the ALJ also found that "the clinical and diagnostic medical evidence" discussed in the decision does not support the statements of Plaintiff's mother. (A.R. 32). This is a germane reason supported by substantial evidence in the record for discounting the statements. Therefore, although the ALJ's first reason for discounting the opinion of Plaintiff's mother is invalid, the error is harmless. *See Molina*, 674 F.3d at 1115 (where some reasons supporting an ALJ's credibility analysis are found invalid, the error is harmless if the remaining valid reasons provide substantial evidence to support the ALJ's credibility determination and "the error does not negate the validity of the ALJ's ultimate conclusion.").

In addition, any error in failing to provide proper reasons for discounting the third party function reports is harmless as the statements of Plaintiff's mother duplicate Plaintiff's testimony, which the ALJ properly discredited. *See Valentine v. Comm'r of Soc. Sec.*, 574 F.3d 685, 694 (9th Cir. 2009) (holding that because "the ALJ provided clear and convincing reasons for rejecting [the claimant's] own subjective complaints, and because [the lay witness'] testimony was similar to such complaints, it follows that the ALJ also gave germane reasons for rejecting [the lay witness'] testimony"); *Molina*, 674 F.3d at 1117 ("Where lay witness testimony does not describe any limitations not already described by the claimant, and the ALJ's well-supported reasons for rejecting the claimant's testimony apply equally well to the lay witness testimony, it would be inconsistent with our prior harmless error precedent to deem the ALJ's failure to discuss the lay witness testimony to be prejudicial per se.").

5. Plaintiff's Challenge to the ALJ's Hypothetical to the VE

In establishing that a claimant can perform other work, an ALJ may rely on a VE's testimony. A hypothetical presented to a VE, however, must reflect all of the claimant's limitations. *DeLorme v. Sullivan*, 924 F.2d 841, 850 (9th Cir. 1991) (holding that if a VE's hypothetical does not reflect all the claimant's limitations, then the VE's testimony does not support a finding that the claimant can perform jobs in the national economy); *Osenbrock v. Apfel*, 240 F.3d 1157 (an ALJ must propose a hypothetical to VE that is based on medical assumptions supported by substantial evidence in the record that reflects each of the claimant's limitations).

Plaintiff argues that "in posing his hypothetical questions to the vocational expert, the ALJ omitted Plaintiff's credible allegations, those of the lay witness, and the limitations assessed by treating doctors . . . ." (Doc. 20 at 21). The Court, however, has determined that the ALJ did not improperly discount Plaintiff's symptom testimony, the opinions of Plaintiff's mother, and the opinions of Plaintiff's treating physicians. The hypothetical that the ALJ posited to the VE included all limitations that the ALJ found credible. Accordingly, Plaintiff's final challenge to the ALJ's decision fails to show harmful error. *See Roy v. Colvin*, 656 F. App'x 816, 819 (9th Cir. 2016) ("The ALJ's question to the vocational expert was not incomplete because the ALJ properly discounted or construed the limitations Roy claims should have been included in the ALJ's question.").

III. CONCLUSION

Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial evidence and is free from reversible error. Accordingly, the decision of the Commissioner of Social Security is affirmed.

IT IS THEREFORE ORDERED affirming the decision of the Commissioner of Social Security. The Clerk of Court shall enter judgment accordingly.

Dated this 14th day of July, 2017.

Eileen S. Willett
United States Magistrate Judge