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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Raymond Laws,

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No. CV-12-0697-TUC-BGM

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Plaintiff,

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vs.

)

ORDER

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Carolyn W. Colvin,
Acting Commissioner of Social Security,

)

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Defendant.

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Currently pending before the Court is Plaintiff’s Opening Brief (Doc. 29). Defendant filed her response (Doc. 30), and Plaintiff did not reply. Also pending is Plaintiff’s Motion to Allow Plaintiff’s Opening Brief to Exceed Page Length filed with his Opening Brief (Doc. 29). Plaintiff brings this cause of action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. § 405(g). The United States Magistrate Judge has received the written consent of both parties, and presides over this case pursuant to 28 U.S.C. § 636(c) and Rule 73, Federal Rules of Civil Procedure. The Court takes judicial notice that Michael J. Astrue is no longer Commissioner of the Social Security Administration (“SSA”). The Court will substitute the new Acting Commissioner of the SSA, Carolyn W. Colvin, as Defendant pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

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1 **I. BACKGROUND**

2 **A. Procedural History**

3 On July 28, 2008, Plaintiff filed an application for Social Security Disability
4 Insurance Benefits (“DIB”) alleging disability as of June 7, 2006 due to degenerative joint
5 disease of the lumbar and cervical spine and fracture of the left upper extremity.¹ See
6 Administrative Record (“AR”) at 24, 26, 102, 104, 117, 124, 167. The Social Security
7 Administration (“SSA”) denied this application on October 16, 2008. *Id.* at 79. On
8 December 7, 2008, Plaintiff filed a request for reconsideration, and SSA subsequently denied
9 Plaintiff’s request. *Id.* at 83-86. On June 22, 2009, Plaintiff filed his request for hearing.
10 *Id.* at 94. On August 25, 2010, a hearing was held before Administrative Law Judge (“ALJ”)
11 Norman R. Buls. *Id.* at 65. The ALJ issued an unfavorable decision on December 15, 2010.
12 AR at 21-33. Plaintiff requested review of the ALJ’s decision by the Appeals Council, and
13 on July 18, 2012, review was denied. *Id.* at 1-3. On September 21, 2012, Plaintiff filed this
14 cause of action. Compl. (Doc. 1).

15 **B. Factual History**

16 Plaintiff was forty-four (44) years old at the time of the administrative hearing, and
17 forty (40) at the time of the alleged onset of his disability. AR at 69, 104, 124, 132, 147, 167.
18 Plaintiff earned high school equivalency by passing his GED exam. *Id.* at 70, 167. Prior to
19 his alleged disability, was a truck driver in the military. *Id.* at 72, 118, 150, 167. Plaintiff
20 also worked for Waste Management Resources as a truck driver and trash collector. *Id.* at
21 72-73, 118, 128. Plaintiff left Waste Management, because he was recalled to active duty.
22 *Id.* at 73.

23 At the administrative hearing, Plaintiff testified that he currently lives with his
24 daughter and her boyfriend, and his two grandchildren. AR at 70. Additionally, Plaintiff has
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26 ¹Plaintiff describes the causes of his alleged disability as “[b]ack problems/left shoulder and
27 arm problems[.]” AR at 117.

1 two (2) minor children aged eight (8) and twelve (12). *Id.* at 70. Plaintiff further testified
2 that he had been dropped off at the hearing by a friend, although he does have a driver's
3 licence and owns a vehicle. *Id.* at 70-71. Plaintiff testified that he no longer has his
4 commercial driver's licence. *Id.*

5 Plaintiff testified that he last worked in August 2004, when he "returned to the
6 military." *Id.* at 71. Plaintiff further testified that he retired from the military in April or
7 May of 2006. AR at 71-72. Plaintiff testified that while in the military he was a truck driver.
8 *Id.* at 72. His retirement from the military resulted from a fall "out of a military vehicle on
9 a training mission." *Id.* at 72. Plaintiff testified that after the fall, he "started dropping my
10 rifle, and I actually had incidents of passing out[.]" *Id.* Plaintiff further testified that "from
11 there things kind of went downhill for [him]. [He] started having a lot of problems on my left
12 shoulder[,] [including a] bent [] clavicle plate[,] [and] . . . a lot of problem[s] on [his] left
13 hand." *Id.*

14 Plaintiff testified that since retirement he has "a lot of trouble sleeping." AR at 73.
15 Plaintiff further testified that his sleep pattern is very "erratic" and that he is only able to
16 sleep "two or three hours at a time." *Id.* Additionally, Plaintiff testified that he has a lot of
17 trouble with his left hand, and cannot lift anything. *Id.* at 73. Plaintiff also testified that he
18 has been falling a lot, and now walks with a cane. *Id.* Plaintiff further testified that "they"
19 are looking into why he falls, and that "[t]hey don't know whether I pass out, or whether my
20 legs give out on me[.]" *Id.* Plaintiff testified that he cannot work at a table height, because
21 it causes his arms to go numb, and he develops severe headaches. AR at 73-74. Plaintiff also
22 testified that he is "on high levels of morphine, and other medications." *Id.* at 74.

23 Plaintiff described his usually morning, stating that he usually wakes up between four
24 (4) and six (6) in the morning. *Id.* at 74. "Before [he] get[s] out of bed, [he] start[s] some
25 stretches that the doctor has put [him] on to relieve the tension." *Id.* Once up, Plaintiff
26 testified that he has a cup of coffee, watches a little bit of television, "and then plan[s] [his]
27 day from there." *Id.*

1 Plaintiff testified that his daughter does his laundry, and either his ex-girlfriend does
2 his grocery shopping or he has groceries delivered. AR at 74. Plaintiff further testified that
3 he does not cook anymore, because it is “too dangerous in the kitchen.” *Id.* at 75. He
4 previously “dropped a whole pan of pinto beans in [sic] the kitchen floor, and [] actually
5 burnt [his] feet really bad[.]” *Id.* Plaintiff testified that he tries to go on the computer, but
6 that “it gives [him] a lot of eyestrain, and [he] can’t seem to find a real comfortable position.”
7 *Id.* Plaintiff further testified that he does not have hobbies “any more.” *Id.* at 75.

8 On November 30, 2005, Plaintiff was seen by Donna R. Rojas, case manager/medical
9 holdover liaison, at Lackland Air Force Base. AR at 322. Plaintiff was being seen “for
10 further medical evaluation for possible MEB.”² *Id.* Plaintiff stated that he had been in an
11 accident in September 2004, and this his primary concern is his pain which he rates a six (6)
12 out of ten (10). *Id.* Plaintiff indicated that the pain was from the middle of his back up to
13 his neck, as well as his lower back and tailbone. *Id.* Plaintiff further stated that he has a wife
14 and six (6) children in Arizona. *Id.* Ms. Rojas scheduled Plaintiff for a consult with Dr.
15 Unser. *Id.* Plaintiff’s active medications included two Cyclobenzaprine HCl prescriptions,
16 Nortriptyline HCl, Ibuprofen, and Gabapentin. AR at 322.

17 On December 1, 2005, Plaintiff was seen by Stanley H. Unser, M.D. regarding his
18 lower back pain and left cervical radiculopathy since his fall from a truck at on September
19 16, 2004. *Id.* at 321. Dr. Unser also noted Plaintiff had “[c]hronic CP since pleural adhesion
20 procedure for pneumothorax in 1995 with mild restrictive disease on PFT no duty limiting[,]
21 . . . [m]ild pericardial effusion Sep 05 without follow up[,] [and] . . . small lesion [sic] on
22 Spleen[.]” *Id.* Plaintiff was scheduled for neurology and cardiology consults. *Id.* Plaintiff
23 was seen on this same date by Cynthia Krueger, RN for a check of his vital signs for the
24 medical board. *Id.* at 320. Plaintiff’s listed problems were pericarditis effusive, cervical
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27 ²MEB is the Medical Evaluation Board. This refers to the process for military retirement due
28 to physical disability. *See* 10 U.S.C., Chapter 61.

1 radiculopathy C5, and lumbago.³ AR at 320. On December 2, 2005, Plaintiff was seen by
2 Huong-Trinh Nguyen, a staff optometrist, for a “vision examination as part of a military
3 physical.” *Id.* at 319. Plaintiff was seen by Eduardo J. Perez on the same date for magnetic
4 resonance imaging (“MRI”) of his spine. *Id.* at 317-18. Dr. Perez documented that
5 Plaintiff’s primary complaint was “[u]pper thoracic cervical pain with left shoulder
6 weakness” after a fall off of a military truck. *Id.* at 317. Dr. Perez noted “progressive
7 symptomatology inspite [sic] of physical therapy.” *Id.* Plaintiff “also complain[ed] of left
8 arm numbness in ulnar distribution with dropping [sic] of object but that is slowly improving.”
9 AR at 317. Plaintiff rated his pain six (6) out of ten (10). *Id.* Dr. Perez noted that Plaintiff’s
10 cervical spine motion, including flexion and extension were abnormal. *Id.* at 318. Further,
11 cervical spine pain was elicited by motion. *Id.* Dr. Perez did not note any tenderness on
12 palpation or instability. *Id.* “A distraction test of the cervical spine was negative.” AR at
13 318. Foraminal compression test did not cause pain to radiate. *Id.* The cervical MRI did not
14 show “acute herniation or spinal or foraminal stenosis related to his symptoms[,] [and] . . .
15 disk height [was] well conserved.” *Id.* at 318. Dr. Perez stated that Plaintiff’s “presentation
16 is a combination of cervicgia and upper back musculoskeletal complaints.” *Id.* Plaintiff’s
17 lumbar spine MRI showed “deseccation [sic] of L5S1 with conservation of height and no
18 compressive lesions.” *Id.* Dr. Perez stated that Plaintiff’s presentation “favors” a diagnosis
19 of cubital tunnel syndrome on the left side; “however[,] this is masked by the severity of his
20 other complaints.” AR at 318. Plaintiff was released with work/duty limitations. *Id.* On
21 December 5, 2005, Plaintiff received his flu shot. *Id.* at 315-16. On December 6, 2005,
22 Plaintiff received a hearing test for the MEB. *Id.* at 314. The test was given, and Plaintiff
23 was released without limitations. *Id.* On December 7, 2005, Plaintiff was seen by Family
24 Nurse Practitioner (“FNP”) Thomas S. Clark, F.N.P. regarding his neck and back pain for
25 the MEB. AR at 310. Plaintiff also needed refills of his prescriptions. *Id.* at 310, 311.

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27 ³Patient counseling was also included in this list. AR at 320.

1 Plaintiff reported his pain as a four (4) out of ten (10). *Id.* at 310. Further, his upper back
2 pain was “well control[led] with medication.” *Id.* at 310. FNP Clark noted “[n]ormal
3 movement of all extremities[,]” but “[c]ervical spine showed abnormalities[,] [p]ain when
4 moving in any direction.” *Id.* at 313. Further, Plaintiff’s “motor exam demonstrated no
5 dysfunction” and his balance was “normal.” AR at 313. FNP Clark noted severe cervicalgia,
6 and refilled Plaintiff’s Oxycodone and Flexeril prescriptions; benign essential hypertension,
7 which is stable and controlled; and chronic constipation, induced by narcotic therapy. *Id.*
8 Plaintiff was released without limitations. *Id.* Later the same date, Plaintiff called for a
9 telephone consultation, stating that FNP Clark believed the “EJP note” was incomplete, and
10 that Plaintiff “need[ed] to get more information added per Dr. Clark.” *Id.* at 308. Dr. Perez
11 reviewed the note and confirmed that it was complete. *Id.* at 309.

12 On January 3, 2006, Plaintiff called for a prescription refill on his Oxycontin,
13 Oxycodone, and Flexeril. AR at 306. FNP Michael F. Daley reviewed the prescriptions and
14 instructed staff to determine if Plaintiff had a “sole prescriber.” *Id.* at 307. A refill was
15 ordered for the Oxycodone (Oxycontin) as it was previously written; however, FNP Daley
16 noted that Plaintiff was given a ninety (90) day supply of Flexeril, and if he is out he is taking
17 it incorrectly. *Id.* On the same date, Plaintiff had a consultation with Case Manager Rojas,
18 regarding medication and treatment. *Id.* at 304. Consultations with general surgery, pain
19 clinic and cardiology were also scheduled for Plaintiff. *Id.* at 305. On January 10, 2006,
20 Plaintiff was seen by Garrett Shawn Lynchard, M.D. for a cardiology consult. AR at 300.
21 Dr. Lynchard noted “chronic daily chest pain increased with exertion.” *Id.* A Transthoracic
22 Echocardiogram (“ECG”) was performed. *Id.* at 302. Plaintiff’s “[l]eft ventricular systolic
23 function was at the lower limits of normal.” *Id.* Additionally, Plaintiff’s lab results indicated
24 high total cholesterol, high LDL cholesterol, and low potassium. *Id.* at 302. Dr. Lynchard
25 noted Plaintiff’s “abnormal ECG and significant [coronary artery disease] [(“]CAD[”)] risk
26 factors. AR at 303. Dr. Lynchard recommended further evaluation, and beginning statin
27 therapy. *Id.* On January 11, 2006 Plaintiff was seen by FNP Daley regarding his high
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1 cholesterol, chronic abdominal pain, and claustrophobia and upcoming MRI. *Id.* at 296-98.
2 Plaintiff reported that “he is being followed in the pain clinic and is getting injections” for
3 his chronic back pain. *Id.* at 297. Plaintiff further reported abdominal pain on the left side,
4 which FNP Daley also noted on palpation. *Id.* at 298. Plaintiff was given a prescription for
5 Valium to take prior to his scheduled MRI. AR at 299. On the same date, Plaintiff reported
6 to Case Manager Rojas that he had been seen at the Pain Management clinic and received “7
7 shots.” *Id.* at 295. Plaintiff further stated that the injections made him sore. *Id.* Plaintiff
8 also stated that Percocet, a new medication, makes him nauseated. *Id.* at 295. On January
9 12, 2006, Plaintiff was seen by Nhat C. Nguyen-Minh, M.D. regarding left abdominal pain,
10 and evaluation for MEB. *Id.* at 291-93. Plaintiff reported his abdominal pain as present for
11 nine (9) months, and constant, dull and mild in quality. AR at 292. Dr. Nguyen-Minh notes
12 that “[p]atient is a poor historian, does not remember the circumstances of his many
13 surgeries, and has no medical records with him.” *Id.* Plaintiff underwent an MRI which
14 showed a rounded lesion in the upper tip of the spleen. *Id.* at 293. Ernesto Torres, M.D.
15 stated that the “[d]ifferential diagnosis include[d] epithelial vs. post traumatic cyst.” *Id.*
16 Further, “[t]he spleen is not enlarged and otherwise demonstrates homogeneous signal
17 intensity in all sequences.” *Id.* Accordingly, Steven J. Hudak, M.D. stated that Plaintiff’s
18 “[s]pleen finding [was] benign, and unrelated to pain.” AR at 293. Further, there were “[n]o
19 surgical indications.” *Id.* Plaintiff was released without limitations. *Id.* On January 13,
20 2006, Plaintiff was seen by Elizabeth A. Grossart, M.D. on referral from neurosurgery for
21 his cervicalgia and left arm cubital tunnel syndrome. *Id.* at 285-90. Plaintiff complained of
22 “tenderness at ‘funny bone’, [sic] [and] constant tingling at L[eft] hand digits 4, 5.” *Id.* at
23 286. Plaintiff also complained of “L[eft] hand ‘opening up’ and dropping things.” *Id.* at 286.
24 Plaintiff reports that this began occurring after his fall from a military truck. *Id.* Plaintiff had
25 his first cervical injection on January 6, 2006 and reported it “made [his] L[eft] thumb go
26 numb[,] but that is now resolved.” *Id.* Dr. Grossart noted that pain was elicited on flexion
27 and extension of the elbow. The left elbow had “[t]enderness on palpation of the olecranon
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1 bursa with no swelling[,] and [n]o tenderness on palpation over the ulnar nerve.” *Id.* No
2 other tenderness was noted. *Id.* No weakness or muscle atrophy was found. *Id.* Dr.
3 Grossart performed nerve conduction studies. AR at 286-89. Dr. Grossart reported a normal
4 study with “[n]o electrodiagnositc evidence of ulnar neuropathy at the elbow, forearm, or
5 wrist.” *Id.* at 286. Accordingly, Dr. Grossart found “[n]o electrodiagnostic evidence of ulnar
6 neuropathy . . . or cervical radiculopathy.” *Id.* She recommended an orthopedics consult for
7 possible low-grade bursitis. *Id.* On January 17, 2006, Case Manager Rojas saw Plaintiff,
8 who reported that he was “in a lot of pain today” and that it was “off the charts.” *Id.* at 283-
9 84. Plaintiff was released with work/duty limitations. AR at 284. Later the same date,
10 Plaintiff was seen by Patricia S. Manship, RD/LD regarding his hyperlipidemia. *Id.* at 280-
11 82. Ms. Manship reported Plaintiff could benefit from nutritional counseling, and released
12 him without limitation. *Id.* at 281-82.

13 On February 9, 2006, Plaintiff was seen by Connie A. Patterson, FNP regarding his
14 blood pressure. *Id.* at 275-79. Plaintiff reported having profuse sweating, headaches and hot
15 flashes for a week, and having “run out of pain meds[.]” *Id.* at 276-77. Plaintiff requested
16 refills of his Flexeril and Oxycodone. AR at 276-77. FNP Patterson noted “[t]enderness on
17 palpation of both trapezius muscles[,]” as well as “[t]enderness on palpation of the rhomboid
18 muscles on both sides[,]” with muscle spasms. *Id.* at 278. FNP Patterson further reported
19 cervical pain elicited by bilateral motion, including flexion and extension, although the
20 “[c]ervical spine showed full range of motion.” *Id.* FNP Patterson also noted spasms in the
21 sternocleidomastoid and paraspinal muscles bilaterally. *Id.* at 278. FNP Patterson refilled
22 Plaintiff’s pain medication, and noted that his blood pressure elevation was “probably
23 secondary to pain.” *Id.* at 279. Plaintiff was instructed to follow up with his primary care
24 manager. AR at 279. On February 28, 2006, Plaintiff requested that Case Manager Rojas
25 schedule an appointment for him regarding his acid reflux. *Id.* at 273-74.

26 On March 2, 2006, Plaintiff was seen by Paul Lewis, F.N.P., for his acid reflux. *Id.*
27 at 269-72. Plaintiff complained of gastroesophageal reflux disease (“GERD”), which he was
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1 treating with Prilosec; however, this was no longer effective. *Id.* at 270. Plaintiff further
2 reported having had an esophagogastroduodenoscopy (“EGD”) which showed esophageal
3 ulcers and a hiatal hernia. *Id.* Plaintiff further reported that he had “regular nausea with
4 about weekly vomiting[.]” AR at 278. After evaluation, Plaintiff was referred to
5 Gastroenterology for follow-up, and prescribed Aciphex. *Id.* at 272. On March 6, 2006, Dr.
6 Lynchard called Plaintiff to inform him of his abnormal MIBI stress test results. *Id.* at 267-
7 68. Dr. Lynchard offered cardiac catheterization testing, which Plaintiff wished to think
8 about. *Id.* at 268. On March 7, 2006, Plaintiff contacted Case Manager Rojas regarding
9 scheduling the cardiac catheterization. *Id.* at 265-66. On March 21, 2006, Plaintiff met with
10 Case Manager Rojas. AR at 263-64. Plaintiff stated that “he is doing well.” *Id.* Plaintiff
11 also reported that the “cold weather has caused his back to be a bit more painful and ‘act
12 up[.]’” *Id.* at 264. Plaintiff and Case Manager Rojas discussed his upcoming appointment
13 with the pain management clinic. *Id.* Plaintiff stated that if “the next [epidural steroid
14 injection] [(“ESI”)] does not help he probably will not have additional ESI’s [sic].” *Id.* On
15 March 28, 2006, Plaintiff saw Dr. Lynchard for a follow-up and cardiac catheterization. AR
16 at 258-62. Plaintiff reported being pain free. *Id.* at 259. Dr. Lynchard performed a
17 myocardial perfusion scan which showed a “small, mild fixed anterior wall defect” and
18 “medium, mild lateral wall defect extending from the base to the mid slices.” *Id.* at 261-62.
19 Dr. Lynchard reported “[l]ateral wall ischemia” and “[n]ormal LV function on resting gated
20 analysis[.]” *Id.* Dr. Lynchard further discussed cardiac catheterization with Plaintiff. *Id.* at
21 262.

22 On April 4, 2006, Plaintiff met with Case Manager Rojas, and discussed “getting
23 restless waiting here as near the end of MEB.” AR at 256-57. Plaintiff confirmed
24 appointment for cardiac catheterization. *Id.* at 257. On April 5, 2006, Plaintiff underwent
25 a left heart catheterization and coronary angiography. *Id.* at 227-28; *see also* AR at 200-15,
26 219-22. “there were no left ventricular regional wall motion abnormalities [and] . . . no
27 angiographic evidence for coronary artery disease.” AR at 227-28. Plaintiff’s
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1 electrocardiograms performed on April 4 and 5, 2006 both indicated normal sinus rhythm.
2 *Id.* at 217-18. On April 11, 2006, Plaintiff again met with Case Manager Rojas. *Id.* at 254-
3 55. Plaintiff reported that he was “doing well” and they discussed pending appointments
4 with Gastroenterology and Cardiology. *Id.* at 255. On April 13, 2006, Plaintiff met with
5 Carlos E. Angueira, M.D. regarding his GERD. *Id.* at 252-53. Dr. Angueira switched
6 Plaintiff to Prilosec and instructed him to return in one month. AR at 253. “If patient is still
7 symptomatic at that time, we will proceed with repeat EGD.” *Id.* On April 17, 2006,
8 Plaintiff was seen by Terris M. Thompson, F.N.P. for a follow-up regarding his cardiac
9 catheterization incision. *Id.* at 248-51. Plaintiff also reported needing a refill of his
10 medications for hyperlipidemia, chronic pain, hypertension and constipation. *Id.* at 249, 251.
11 Plaintiff reported being pain free. *Id.* at 249. No abnormalities with the incision were found.
12 AR at 250. On April 18, 2006, Plaintiff was seen by Nurse Krueger for a blood pressure
13 check, scheduled to be the first for three (3). *Id.* at 246-47. Plaintiff reported being pain free.
14 *Id.* at 247. Plaintiff’s blood pressure was 134/83 in the right arm, and 137/83 in the left. *Id.*
15 On April 21, 2006, Plaintiff saw Nurse Krueger for his third day blood pressure check. *Id.*
16 at 244-45. Plaintiff’s left arm blood pressure was 149/95, and right arm 135/89. AR at 245.
17 On April 24, 2006, Plaintiff was seen by Norton A. Stuart, M.D. in the Pain Management
18 Clinic. *Id.* at 242-43. Dr. Stuart noted “[p]rogressive symptomology inspite [sic] of physical
19 therapy.” *Id.* at 242. Dr. Stuart further noted that Plaintiff “continue[d] to have significant
20 L[eft] subscapular pain despite [trigger point injections] [(“]TPI[”)]] x 5 with
21 local/steroids/botox.” *Id.* Plaintiff “decline[d] any more TPI and would like alternative pain
22 management modalities.” *Id.* Plaintiff rated his pain as four (4) out of ten (10). AR at 242.
23 Upon examination, Dr. Stuart noted that Plaintiff’s neck “[d]emonstrated a decrease in
24 suppleness.” *Id.* Dr. Stuart further noted “[f]lexion produced tingling down the spine/arms.”
25 *Id.* Additionally, cervical spine flexion, extension, and bilateral motion produced pain.” *Id.*
26 Dr. Stuart noted that the cervical spine “showed a full range of motion” and “no instability.”
27 *Id.* Neck and cervical spine strength was reduced, and “[s]houlder weakness was observed.”

1 AR at 243. “A foraminal compression test did not cause pain to radiate to the arm” either on
2 the same or opposite side to which the head was rotated. *Id.* at 242. On April 25, 2006,
3 Plaintiff met with Case Manager Rojas and “denie[d] any issues at this time.” *Id.* at 240-41.

4 On May 1, 2006, Plaintiff was seen by Curtis W. House, P.A., for back pain and
5 edema in feet. *Id.* at 236-39. Plaintiff reported the pain in his mid or upper back as six(6)
6 out of ten (10), with ten (10) being the worst possible pain. *Id.* at 237. Plaintiff further
7 reported that the edema in his lower extremities had been occurring two (2) to three (3) times
8 per year “for the last few years.” AR at 237. Additionally, Plaintiff had “some tingling” and
9 complained that pain management had recently changed his medications to a sustained
10 release form, which did not work as well. *Id.* at 237. Plaintiff did not have any pain or
11 tenderness either on palpation or movement of his ankles. *Id.* at 238. An ECG was
12 performed with “[n]onspecific T wave abnormality.” *Id.* Plaintiff was directed to follow up
13 with either the pain management clinic or his primary care manager for medication
14 adjustment. *Id.* On May 2, 2006, Plaintiff was seen by Andrew S. Fletcher, M.D. regarding
15 his mid to low back pain. AR at 231-35. Dr. Fletcher reported that Plaintiff was seeking
16 pain medication for his low back pain. *Id.* at 233. Dr. Fletcher further noted that Plaintiff’s
17 hypertension was not well controlled. *Id.* This has resulted in “mild dependent edema lately,
18 which resolved with elevation of lower extremities.” *Id.* Dr. Fletcher reported that Plaintiff’s
19 cervical spine was tender to palpation bilaterally, and the paraspinal muscles were in mild
20 spasm. *Id.* at 234. Dr. Fletcher further reported “[p]ain with movement in all directions” and
21 that he was “unable to elicit radicular” signs and symptoms to Plaintiff’s upper extremity.
22 AR at 234. Dr. Fletcher noted that Plaintiff’s lumbosacral spine exhibited a limited range
23 of motion on flexion and twisting at the waist. *Id.* “No facet load pain [was] noted.” *Id.*
24 Plaintiff stated that “pain with motion radiates down legs in sciatic distribution.” *Id.* Dr.
25 Fletcher advised Plaintiff to follow up with the pain management clinic regarding his
26 medication. *Id.* at 235. Dr. Fletcher also offered Toradol IM, which Plaintiff refused. *Id.*
27 Dr. Fletcher prescribed Hydrochlorothiazide (“HCTZ”) for Plaintiff’s hypertension and
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1 edema. AR at 235. On May 9, 2006, Plaintiff met with Case Manager Rojas. *Id.* at 229-30.
2 Plaintiff was scheduled for an appointment in the MEB office regarding his Physical
3 Evaluation Board (“PEB”) appeal. *Id.* at 230. On May 16, 2006, Plaintiff was seen by Dr.
4 Lynchard. *Id.* at 225-28. The record indicates that Plaintiff’s “case manager scheduled
5 another follow up for unclear reasons.” *Id.* at 226. Further, “Plaintiff [was] without
6 significat [sic] complaint today[.]” AR at 226. Plaintiff was determined to be non-cardiac,
7 with no further cardiology follow up required. *Id.* at 228. On May 18, 2006, Plaintiff was
8 seen by FNP Daley for a medication request. *Id.* at 223-24. Plaintiff reported that he was
9 “getting out of the military and moving to Arizona and does not want to have an interruption
10 in medications.” *Id.* at 223. Plaintiff’s active list of medications indicated refills available,
11 so no additional prescriptions were necessary. *Id.* at 223-24.

12 On June 19, 2006, Plaintiff was seen by Vera M. Stauth, L.P.N. at Southern Arizona
13 Veterans Affairs Health Care System (“SAVAHCS”) in Tucson, Arizona. AR at 617-18.
14 Plaintiff was screened for depression, which was negative. *Id.* at 617. Plaintiff indicated that
15 he was “a lifetime non-tobacco user[;]” however, his records from Brooke Army Medical
16 Center consistently indicate that he was nicotine dependent. *Id.* at 225, 229, 231, 236, 240,
17 244, 246, 248, 252, 254, 256, 258, 262, 263, 265, 267, 269, 273, 275, 279, 280, 283, 285,
18 291, 296, 300, 303, 304, 306, 308, 313. On the same date, Plaintiff was seen by Denise M.
19 Rhoads, M.S.N., F.N.P.-C for a primary care intake examination. *Id.* at 608-17. Plaintiff had
20 been medically discharged from the military, and wished to establish primary care at
21 SAVAHCS. *Id.* at 608. FNP Rhoads noted that Plaintiff “[c]ontinues with neck, and lumbar
22 pain.” AR at 608. Additionally, she reported that Plaintiff had daily “[h]eadaches, secondary
23 to spinal injury.” *Id.* FNP Rhoads further noted Plaintiff’s “[s]evere, chronic neck, low back
24 pain with radicular symptoms to bilateral arms, left leg entire length.” *Id.* at 610. Upon
25 examination, FNP Rhoads noted diminished sensation in Plaintiff’s left hand, with grip
26 strength 3/5 on the left and 4/5 on the right. *Id.* at 611. Regarding leg strength, FNP Rhoads
27 reported 3/5 on the left and 4/5 on the right. *Id.* Additionally, she noted that Plaintiff’s neck
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1 range of motion was diminished with pain, and that his cervical and lumbar spine were tender
2 to palpation. AR at 611. FNP Rhoads further noted that the range of motion of all other
3 joints were grossly within normal limits, and that Plaintiff “change[d] position on [the] table
4 slowly and with apparent discomfort.” *Id.* FNP Rhoads changed Plaintiff’s medication list
5 by removing Atenolol and adding Lisinopril, changing Oxycontin to Oramorph,
6 discontinuing Nortriptyline, increasing Gabapentin, and replacing Albuterol with
7 Levalbuterol. *Id.* at 612-13. Plaintiff was also counseled regarding prescriptions and
8 procedures on refills. *Id.* at 606-08. On June 20, 2006, Plaintiff was seen in the pain clinic.
9 *Id.* at 604-06. Plaintiff reported that he is not currently married, but had met a new girlfriend,
10 whom he is still with, prior to reactivation. AR at 604. Plaintiff further reported that he had
11 sole custody of seven (7) children, five (5) natural and two (2) adopted. *Id.* Plaintiff reported
12 his pain level as a four (4) out of ten (10), with ten (10) being the worst pain. *Id.* at 605.
13 Plaintiff reported that trigger point injections “helped some” and that he had Botox injections
14 once a month for three (3) months, which “would last 2 weeks[,]” but that he “stopped
15 because shots 4-6 did not work.” *Id.* Plaintiff further reported that he had not tried epidural
16 steroid injections, because they had not been offered. *Id.* at 605. On the same date, FNP
17 Rhoads reported that Plaintiff’s laboratory work were normal with a small elevation in one
18 of his liver enzymes, as well as blood glucose level. AR at 603-04. On June 27, 2006,
19 Plaintiff was seen by Gifford Hoyer, R.Ph. for a review of his past pain medications. *Id.* at
20 595-600. Dr. Hoyer noted that Plaintiff’s “[d]escription of pain indicates possible muscle
21 involvement from sub scapula that progresses to arm and neck[;] [however,] Patient[‘s]
22 descriptions of regions involved do not specifically [sic] follow dermatome patterns and seem
23 to primarily start with muscle pain below scapula.” *Id.* at 598. Plaintiff further reported “low
24 back pain that also seems to have involvement of muscles across low back.” *Id.* Dr. Hoyer
25 noted that Plaintiff was “not doing any consistent exercises, stretching or strengthening.” *Id.*
26 Dr. Hoyer also counseled Plaintiff “regarding taking medications as prescribed[,]” as Plaintiff
27 was increasing doses of various pain medications. AR at 599. On June 29, 2006, FNP
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1 Rhoads added Salsalate to Plaintiff's medications. *Id.* at 602.

2 On July 21, 2006, Plaintiff was seen by Gabriele-Monika Koschorke, M.D. regarding
3 his chronic pain. *Id.* 587-95. Dr. Koschorke noted that Plaintiff was "in no acute distress."
4 *Id.* at 590. Dr. Koschorke noted Plaintiff's upper and lower extremity strength "5/5 except
5 for distal left upper extreemity [sic] 4/5" and "4/5 on left" lower extremity. *Id.* at 591. Dr.
6 Koschorke further noted decreased sensation "over posterior aspect of left forearm and digit
7 1 and 5." *Id.* Additionally, she reported "some tightness in neck muscles on left side only[,]
8 very painful to palpation over area of hyperalgesia nd [sic] allodynia, otherwise [within
9 normal limits], except for some pain on left elbow." AR at 591. Dr. Koschorke observed
10 pain in Plaintiff's cervical spine during flexion and extension, with midback pain in all
11 ranges of the lumbar spine. *Id.* Plaintiff also showed increased pain in his thoracic spine on
12 rotation to the right. *Id.* Dr. Koschorke also noted increased pain in chestwall with left
13 shoulder motion. *Id.* Plaintiff's gait was reported as "very slow using cane[.]" *Id.* On July
14 31, 2006, Plaintiff did not appear for his neurology appointment with Amir Akhter, M.D.
15 *Id.* at 586.

16 On August 28, 2006, a female caller requested the delivery status of medications,
17 "stating [Patient] is in severe pain, unable to get out of bed." AR at 586. On August 29,
18 2006, Plaintiff "presented initially for 'out of pain medication/unable to walk (secondary to
19 pain)." *Id.* at 582. The record indicates that "after wait of appro[ximately] 30 minutes while
20 more acutely ill [patients] were being triaged, wife informed [the administrator on duty] that
21 now [Patient] was experiencing chest pain." *Id.* Christopher J. Taras, R.N. noted that
22 Plaintiff was "somewhat withdrawn and makes no eye contact during speech[,] and state[d]
23 he has had chest pain now, in addition to chronic back pain, for which he was taking
24 morphine[.]" *Id.* Plaintiff reported his pain as an eight (8) out of ten (10), with ten (10) being
25 the worst pain. AR at 581. Plaintiff further reported that "he exhausted his morphine supply
26 a few days ago[,] [and] this morning he developed anterior chest pain which is in constant."
27 *Id.* at 579. Plaintiff's pain was "nonpleuritic and not influenced by movement." *Id.* Further,
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1 Plaintiff “remember[ed] a similar episode while in active duty prompting a coring angiogram
2 but he does not remember the results of that study.” *Id.* Plaintiff’s “[l]ecture cardiogram
3 shows sinus rhythm with diffuse T-wave inversions across precordium and inferiorly” and
4 laboratory results are noted as unremarkable. *Id.* at 580. Plaintiff “received nitroglycerine
5 without improvement, followed by morphine for his back pain.” AR at 580-81. Plaintiff was
6 admitted for further evaluation. *Id.* at 353-55, 568-81. Plaintiff described his pain as a four
7 (4) out of ten (10), with ten (10) as the worst pain. *Id.* at 569. Plaintiff later reported that his
8 chest pain has ranged from four (4) to six (6) out of ten (10), with ten (10) as the worst pain,
9 for approximately one (1) week, but that he “felt that it was stable and would resolve until
10 this [morning] when the pain was worse and he brought himself into the LSU.” *Id.* at 565.
11 Plaintiff further reported headaches and blurry vision for approximately one (1) week. *Id.*
12 at 566. Ron K. Lord, M.D. noted “[s]ome EKG changes” and a clean cardiac catheterization
13 three (3) months prior. AR at 567. Plaintiff also had a single view chest x-ray which
14 indicated “[b]lunting of the left costophrenic angle . . . of indeterminate chronicity.” *Id.* at
15 335. On August 30, 2006, Margo Nugent, LCSW spoke with Plaintiff, who reported that he
16 lived “with his [significant other] and 7 children (ranging in age from 7 months to 19) in a
17 mobile home in Tucson.” *Id.* at 559. “Prior to this admission, vet reports he was able to
18 manage his [activities of daily living] . . . without assistance, though he has trouble driving.
19 *Id.* William G. Ziarnik, M.D. noted Plaintiff’s “prior [history of] ‘idiopathic pericarditis’ and
20 recurrent L[eft] pleural effusion/pleurodesis” with current “diffuse EKG changes[.]” *Id.* at
21 556. Plaintiff had another chest x-ray with both posteroanterior and lateral views. *Id.* at 334-
22 35. Kim Wilson, M.D. reviewed Plaintiff’s films and reported that “[t]he cardiac silhouette
23 does have a rounded appearance, [but] is within normal limits in size.” *Id.* at 335. Plaintiff
24 was treated with Tylenol for his headache and morphine for his right shoulder pain, which
25 he described as seven (7) out of ten (10), with ten (10) as the worst pain. AR at 552-53.
26 Plaintiff’s cardiac rhythm was reported as “normal.” *Id.* at 554. On August 31, 2006,
27 Charles D. Deakins, M.D. noted that Plaintiff “report[ed] episode of chest pain at 02:00
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1 today, but says it then moved to his abdomen so he decided it was gas.” *Id.* at 541. Plaintiff
2 “also report[ed] pain in multiple other areas primarily his neck and shoulders.” *Id.*
3 Pericarditis was suspected, and a myocardial infarction ruled out. *Id.* at 544. On this same
4 date, Kyaw K. Swe, M.D. evaluated Plaintiff for a rheumatology consult. AR at 389-91,
5 538-41. Dr. Swe stated that Plaintiff “does not have symptoms and signs to suggest
6 autoimmune rheumatic diseases like RA/lupus/scleroderma/vasculitis.” *Id.* at 391, 541. Dr.
7 Swe opined that “[c]linical suspicion of autoimmune rheumatic diseases is low at present.”
8 *Id.* Accordingly a “full rheumatological work up is not needed at this time[.]” *Id.* On this
9 same date, Plaintiff described his pain to hospital staff as a five (5) out of ten (10), with ten
10 (10) as the worst pain. *Id.* at 535. Plaintiff was also eating normally. AR at 534. Also on
11 this date, Mark W. Sharon, M.D. analyzed Plaintiff’s ECG which showed “[n]ormal sinus
12 rhythm” and “[n]o pericardial effusion[.]” *Id.* at 393, 533. Dr. Sharon noted that “[t]here is
13 equivocal thickening of the mitral and aortic valve leaflets, but otherwise the study is
14 unremarkable.” *Id.* Further, there was “no aortic insufficiency” and unremarkable Doppler
15 study, “except for trivial mitral regurgitation and a normal mitral valve inflow pattern[.]” *Id.*
16 at 393, 533. Dr. Sharon concluded that the was “[n]ormal LV/RV systolic function and [n]o
17 pericardial effusion.” *Id.* at 393, 534; *see* AR at 512.

18 On September 1, 2006, Plaintiff described his pain as four (4) out of ten (10), with ten
19 (10) as the worst pain. AR at 529. Later this same date, Plaintiff’s pain was noted as five
20 (5) out of ten (10). *Id.* at 526. Plaintiff again reported some chest pain, which decreased to
21 zero (0) in approximately an hour without palpitations or shortness of breath. *Id.* at 515.
22 Plaintiff was discharged from the hospital. *Id.* at 515-25. On September 3, 2006, Troy L.
23 Allen, RN read Plaintiff’s TB test, which was negative. *Id.* at 515. On September 5, 2006,
24 Plaintiff called to follow-up after his inpatient stay. AR at 514-15. On September 8, 2006,
25 Plaintiff had a follow-up consultation with Deborah M. Lindsly, M.D., as well as a
26 Pharmacology consult. *Id.* at 510-14. Dr. Lindsly noted that Plaintiff was “sitting stiffly in
27 chair, moves carefully protecting back[.]” *Id.* at 512. On September 12, 2006, Dr. Lindsly
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1 notified Plaintiff that his laboratory results “show[ed] a mild anemia with no apparent cause.”
2 *Id.* at 510. On September 19, Plaintiff was seen in the Pain Clinic. *Id.* at 508-10. Plaintiff
3 reported that “[h]e enjoys completing stretches and providing care for his children.” AR at
4 508. Plaintiff described his pain as “[r]adiating neck pain, shoulder pain and low back pain.”
5 *Id.* He stated that his pain ranges from three (3) to ten (10) on a scale of one (1) to ten (10),
6 with ten (10) as the worst pain. *Id.* at 509. Plaintiff’s posture was described as “slighting
7 [sic] kyphotic[,] [m]oves with guarded posture[.]” *Id.* Plaintiff was “inhibited with range of
8 motion[,]” but with normal gait. *Id.* Manual muscle testing was reported as 4+-5/5. *Id.* On
9 September 21, 2006, Plaintiff was seen by Julian Ballesteros, M.D. for trigger point
10 injections. AR at 507. Dr. Ballesteros reported that “Patient had prompt relief[,] pain relief.”
11 *Id.* at 508. Dr. Ballesteros further reported that “Patient walked out with not [sic] problems.”
12 *Id.* On November 30, 2006, Dr. Ballesteros noted that Plaintiff’s previous trigger point
13 injections “allowed him to have pain relief for 3 weeks after had pain back but last week has
14 had not [sic] pain, patient prefers to have no [sic] TPIs today, he will call when really ned
15 [sic] the TPIs.” *Id.* at 501.

16 On December 29, 2006, Plaintiff was seen by Sharon Farrish, A.N.P. for a
17 Compensation and Pension general medical examination. *Id.* at 487-500. Plaintiff reported
18 unemployment since May 2006. AR at 488. NP Farrish noted that Plaintiff was not using
19 an assistive device. *Id.* at 490. Regarding his lumbar and cervical spine pain, Plaintiff
20 reported “[p]ain in both neck and back with radiation to left shoulder[,] [and] [n]o radiation
21 to legs.” *Id.* Plaintiff further reported that its effects on usual daily activities were severe for
22 chores, shopping exercise, sports, recreation, traveling, and bathing; moderate for dressing,
23 toileting, and grooming; and none for feeding. *Id.* Further, Plaintiff reported that this pain
24 has resulted in his unemployment. *Id.* Regarding his left elbow pain, Plaintiff reports that
25 its effects on usual daily activities is severe for sports; moderate for chores, shopping,
26 exercise, recreation, traveling, bathing, dressing, toileting, and grooming; and none for
27 feeding. *Id.* at 491. Plaintiff also attributes his unemployment to this pain. AR at 491.

1 Regarding his left shoulder pain, Plaintiff reports its effects on his usual daily activities is
2 severe for exercise, sports, and recreation; moderate for chores, shopping, traveling, bathing,
3 dressing, toileting, and grooming; and mild for feeding. *Id.* Plaintiff reports that his left
4 shoulder pain has also contributed to his unemployment. *Id.* Upon examination of Plaintiff's
5 cervical spine NP Farrish reported his gait as abnormal, but without an assistive device;
6 flexion 45 degrees; extension 0 degrees; lateral flexion 15 degrees on both the left and right;
7 rotation 70 degrees to the right and 50 degrees to the left; tenderness and crepitus, and
8 paraspinal tension present; radiation present to finger tips in the left hand; sensation normal
9 to light touch; strength 3/5 in the left hand; and upper extremity deep tendon reflexes 2+ on
10 the right, but Plaintiff did not allow testing of the left side upper extremity. *Id.* at 494. Upon
11 examination of Plaintiff lumbar and thoracic spine, NP Farrish reported Plaintiff's gait as
12 slow, mild forward flexion with pain and no assistive device; flexion 10 degrees; extension
13 0 degrees; lateral flexion 15 degrees to the right and left; rotation 15 degrees to the right and
14 left; positive straight leg raises on the left and right; normal curvature of the spine; pelvic tilt
15 with forward flexion 5 degrees; no paraspinal tenderness, but tension present; able to stand
16 on toes and heels; left extremity reflexes 2+/4; strength 5/5; and intact sensory to light touch
17 to lower extremities. *Id.* at 494-95. Upon examination of Plaintiff's left shoulder, NP Farrish
18 reported significant atrophy of the deltoid muscle; 120 degrees flexion; 40 degrees extension;
19 140 degrees abduction; internal rotation 60 degrees; external rotation 60 degrees; crepitus;
20 no effusion; impingement; and muscle strength 3/5. AR at 495-96. NP Farrish also noted
21 that she was "[u]nable to do repetitive overhead testing due to pain." *Id.* at 496. On this
22 same date, Plaintiff had an x-rays of his left elbow, left shoulder, and clavicle. *Id.* at 331-34.
23 "No significant abnormality [was] identified" in his left elbow. *Id.* at 334. The x-ray of
24 Plaintiff's left shoulder indicated "[p]ost-surgical and post-traumatic deformity of the left
25 clavicle with mild degenerative changes[.]" *Id.* at 333. Plaintiff's "[l]eft clavicle films
26 show[ed] superior bowing presumably on a post traumatic basis involving the mid-distal
27 shaft of the clavicle." AR at 332. Further, "[t]here appear[ed] to be disruption of the plate
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1 at the apex of the bowing.” *Id.*

2 On January 16, 2007, Plaintiff was seen at SAVAHCS for a “CP Pulmonary function
3 test,” which was performed with normal results. *Id.* at 619. On January 22, 2007, Plaintiff
4 called regarding his medications and reported that he had “used all the medications I have
5 available. I need more morphine today.” *Id.* at 483. Plaintiff also had questions about the
6 discontinuation of Gabapentin. *Id.* Dr. Hoyer noted that the Gabapentin was discontinued
7 due to patient reporting adverse effects, and replaced with Zonisamide. AR at 484. On
8 January 29, 2007, Plaintiff saw Dr. Lindsly for a routine appointment. *Id.* at 478-82. Dr.
9 Lindsly re-prescribed Gabapentin, as Plaintiff reported that he was not taking Zonisamide.
10 *Id.* at 479. Dr. Lindsly noted Plaintiff as a “chronically ill appearing 40yo male[.]” *Id.* at 481.
11 On this same date, Plaintiff met with Rosemary Valenzuela, LPN and received a preventative
12 medicine handout. *Id.* at 477.

13 On June 19, 2007, Plaintiff requested a referral for trigger point injections. AR at 467.
14 On July 9, 2007, Plaintiff was seen by Marie Angeli Adamczyk, M.D. for primary care
15 treatment. *Id.* at 462. Plaintiff again requested to return to Dr. Ballesteros’s clinic for trigger
16 point injections. *Id.* Plaintiff also reported frequent falls, because his legs give out –
17 Plaintiff denied lightheadedness. *Id.* Dr. Adamczyk reported Plaintiff appeared “healthy”
18 and ambulated “slowly.” *Id.* at 464. Dr. Adamczyk further noted cervical stenosis with
19 weakness of arm and leg on the left side. AR at 465. Dr. Adamczyk also expressed concern
20 regarding Plaintiff’s care of his eighteen (18) month old and four (4) year old children in
21 light of his left side muscle weakness. *Id.* at 461.

22 On July 9, 2007, Plaintiff had x-rays of his cervical spine. *Id.* at 330-31. “Frontal,
23 lateral, swimmer’s lateral, odontoid, and bilateral oblique views” were obtained. *Id.* at 331.
24 Early disc disease at C5-C6 was reported with a “slight disc height loss” and “slight spurring
25 on the right[.]” *Id.* “Neural foramina appear[ed] patent[,] and [p]osterior facet joints [were]
26 unremarkable.” AR at 331. On July 10, 2007, the Department of Veterans Affairs issued its
27 “Rating Decision” regarding Plaintiff. *Id.* at 734-45. Plaintiff was granted, effective May
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1 27, 2006, an evaluation of forty (40) percent for degenerative joint disease of the lumbar
2 spine; thirty (30) percent for asthma; ten (10) percent for degenerative joint disease of the left
3 shoulder; ten (10) percent for degenerative joint disease of the cervical spine; ten (10) percent
4 for left cubital tunnel syndrome; ten (10) percent for hypertension; ten (10) percent for
5 tinnitus; zero (0) percent for hiatal hernia with ulcerative esophagitis; and zero (0) percent
6 for hearing loss. *Id.* at 734-43. Additionally, Plaintiff was denied for hearing loss, left ear;
7 atypical chest pain; splenic cyst; and headaches. *Id.* at 735, 743-45. As such, Plaintiff's
8 overall or combined rating was determined to be eighty (80) percent. *Id.* at 748. On July 27,
9 2007 Plaintiff went to the emergency department complaining of chest pain. AR at 454-60.
10 A single frontal view chest x-ray indicated "[n]o acute cardiopulmonary abnormality." *Id.*
11 at 330. As such, Harut Panossian, M.D. reported that the pain was non-cardiac, and Plaintiff
12 was given a GI cocktail, and 30 mg of Toradol. *Id.* at 460.

13 On September 18, 2007, Plaintiff followed up with Dr. Adamczyk. *Id.* at 444-46.
14 Plaintiff reported that the "cane really has helped prevent falls when his leg buckles[.]" *Id.*
15 at 444. Additionally, "insomnia better with cyclobenzaprine[.]" *Id.* Dr. Adamczyk noted
16 that she had certified that "he is on opiates and cannot drive while on them, [and] cannot be
17 employed in any capacity that requires driving, non-sedated state[.]" AR at 444.
18 Additionally, she certified "that he is less than 100% disabled for hunting[.]" *Id.* Dr.
19 Adamczyk reported that Plaintiff exhibited "slow[,] difficult walking," but was "not in
20 distress[.]" *Id.* at 445. Dr. Adamczyk reviewed Plaintiff's cervical spine MRI from August
21 8, 2007, which indicated "[m]ild degenerative changes at C5-C6[,] [but] [o]therwise
22 essentially unremarkable study." *Id.* at 329, 443, 446. On September 26, 2007, Plaintiff was
23 seen for a neurology consultation. *Id.* at 372-82, 439-43. Wendi I. Kulin, M.D. noted
24 Plaintiff's neck range of motion was "limited by significant tremulousness and give-way
25 weakness in [flexion and extension] – strength graded 4/5. AR at 374, 380, 442. Further,
26 Dr. Kulin noted that Plaintiff's sternocleidomastoid muscles exhibited "similar tremulousness
27 with effort[.]" *Id.* Plaintiff "denied pain with Neck [range of motion]/exam." *Id.* Dr. Kulin

1 found Plaintiff's upper extremities grip 4/5 on the left, as well as throughout all left upper
2 extremity muscle groups. *Id.* at 374, 380, 442. Additionally, Dr. Kulin noted "significant
3 give-way weakness." *Id.* The right upper extremity was 5/5 throughout. *Id.* Plaintiff's
4 lower extremity strength test was generally 4/5 on the left, and 5/5 on the right. AR at 374,
5 380, 442. Dr. Kulin noted that all left sided "motor strength testing was accompanied by
6 significant tremulousness." *Id.* Dr. Kulin did question whether Plaintiff embellished some
7 weakness, because he was "able to lift up leg, cross heel over opposite knee to put on
8 socks/shoes." *Id.* at 375, 381, 442.

9 On October 4, 2007, Plaintiff had an MRI of his thoracic spine without contrast. *Id.*
10 at 327-28. The MRI showed a "[n]ormal thoracic spine exam." *Id.* at 328. On October 11,
11 2007, Plaintiff underwent an electromyography ("EMG") and nerve conduction study. AR
12 at 369-70, 432-33, 437-38. The nerve conduction study was performed on the left median,
13 ulnar, peroneal, and tibial motor nerves, and the left median, ulnar, superficial peroneal
14 nerve, and sural sensory nerves. *Id.* at 369, 432. The EMG was performed on the left
15 deltoid, biceps, triceps, abductor pollicis brevis, first dorsal interosseus, tibialis anterior,
16 gastrocnemius, rectus femoris, and gluteus maximus. *Id.* Dr. Akhter noted that "[t]his
17 electrodiagnostic study [was] [within normal limits], indicating no evidence of peripheral
18 neuropathy, nor cervical radiculopathy." *Id.* at 370, 433. Dr. Akhter initially noted that
19 "there is the possibility of left L4/L5 radiculopathy[.]" *Id.* On follow up, however, he
20 determined that this was a "[t]echnical artifact secundary [sic] to pain resulting in poor
21 volitional activity in the left lower extremity EMG testing." AR at 370, 433. On November
22 30, 2007, Dr. Kulin reviewed Plaintiff's thoracic spine MRI and noted a "normal study." *Id.*
23 at 432. She further stated that "[n]o further Neurology [follow up] needed." *Id.*

24 As of December 11, 2007, Plaintiff was "rated as unemployable due to service
25 connected disabilities[,] [and] he receives disability compensation at the 100% rate." *Id.* at
26 158. On December 13, 2007, Dr. Ballesteros reported that Plaintiff stated his "pain has been
27 managing well[.]" although he "has intermittent [low back pain recurrences and use of
28

1 thermo/cryo help to minimize his discomfort and to continue functional [sic].” *Id.* at 431.
2 Dr. Ballesteros noted that “today patient is feeling quite well and said that [he] does not need
3 [trigger point injections].” AR at 431. Upon examination, Dr. Ballesteros reported that
4 Plaintiff “appears healthy [and] in no distress.” *Id.* Plaintiff was “ambulatory [and] uses [a]
5 cane.” *Id.* Dr. Ballesteros further reported Plaintiff’s neck active range of motion was within
6 normal limits, as was the active range of motion of his left upper extremity. *Id.* Strength was
7 5/5, and there was minimal tenderness in upper trapezius, rhomboids major and minor and
8 iliolumbar areas. *Id.* Dr. Ballesteros further reported that stability and vascular were both
9 within normal limits, and that Plaintiff was functionally independent in activities of daily
10 living. AR at 431.

11 On January 10, 2008, Plaintiff was seen by Huey-Fen Song, O.D. for blurred vision,
12 and eye pain. *Id.* at 365-68, 425-28. Dr. Song assessed “very mild hypertensive associated
13 retinopathy[,]” refractive error, and dry eye syndrome. *Id.* at 368, 428.

14 On March 14, 2008, Plaintiff saw Dr. Ballesteros and reported that his pain had
15 “reactivated in the last few weeks.” *Id.* at 418. Dr. Ballesteros found that Plaintiff’s active
16 range of motion in his neck and left upper extremity were within normal limits, his strength
17 5/5, and “exquisite tenderness in [left] upper [trapezius]” on palpation. *Id.* No trigger point
18 injections were given, however, “they were postponed when patient really need [sic] them.”
19 *Id.* On March 19, 2008, the Department of Veterans Affairs wrote a letter certifying that
20 Plaintiff “has a service connected disability rating of 80% and receiving VA benefits at the
21 100% rate due to individual unemployability.” AR at 198. Plaintiff “is considered 100%
22 permanent and total.” *Id.* On September 9, 2008, Plaintiff completed an Exertional Daily
23 Activities Questionnaire. *Id.* at 127. Plaintiff indicated that he had four (4) sons under ten
24 (10) “that take up most of my day.” *Id.* Additionally, Plaintiff stated that he napped each
25 day for one (1) to three (3) hours, and watched television, walk or stretched to fill the rest of
26 his day. *Id.* at 127-28. Plaintiff estimated that the farthest he could walk is just under a
27 block. AR at 127. Plaintiff noted that he did not do his own grocery shopping or clean his
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1 own home, cook, laundry, yard work or other household chores. *Id.* at 128. Plaintiff
2 indicated that he did drive a care, but had to be careful due to his medication. *Id.* Prior to
3 his disability, Plaintiff was a single parent raising his children and taking care of the house,
4 as well as working for Waste Management. *Id.* Plaintiff notes that he “just started using a
5 cane to help me walk and keep me from falling with the spine disorder I have[,] I will be
6 back in a wheelchair to soon.” *Id.* at 129.

7 On May 5, 2008, Plaintiff saw Dr. Adamczyk and presented as “uncomfortable
8 appearing[,]” and “walking with cane slowly[.]” AR at 412. Dr. Adamczyk reviewed
9 Plaintiff’s medications, and Nurse Cain screened Plaintiff for abuse and neglect, depression,
10 and post traumatic stress disorder, all of which were had negative results. *Id.* at 412-14. On
11 May 15, 2008, Dr. Ballesteros performed a trigger point injection into Plaintiff’s left
12 rhomboids, major and minor. *Id.* at 406-09. Dr. Ballesteros reported that Plaintiff “had
13 prompt pain relief.” *Id.* at 408. Dr. Ballesteros also provided Plaintiff with back stretching
14 and aquatic exercises. *Id.*

15 On June 3, 2008, Plaintiff saw Robert D. Spruance, O.D. regarding photophobia. AR
16 at 359-61, 402-05. Dr. Spruance reported “no ocular findings[,] [and] . . . refractive error.”
17 *Id.* at 361, 405. Plaintiff was given a prescription for tinted glasses. *Id.* On June 24, 2008,
18 Plaintiff saw Dr. Ballesteros. *Id.* at 399. Dr. Ballesteros reported that Plaintiff is “noticing
19 positive pain improvement[,] [and] . . . does his exercises daily obtaining good results.”
20 Plaintiff reported that he did not need trigger point injections, and that his pain has been at
21 a tolerable level. *Id.* Dr. Ballesteros reported that Plaintiff’s active range of motion in his
22 neck and left upper extremity were within normal limits, and strength 5/5. AR at 399.
23 Additionally, Dr. Ballesteros noted minimal tenderness in the left upper trapezius muscle on
24 palpation. *Id.* at 399. Dr. Ballesteros commented that “patient has remarble [sic]
25 improvement in his upper back pain.” *Id.*

26 On September 26, 2008, Plaintiff returned to Dr. Ballesteros. *Id.* at 680-82. Upon
27 examination Dr. Ballesteros noted “pain and slowing function.” *Id.* at 681. Dr. Ballesteros

1 performed trigger point injection of Plaintiff's left rhomboids major and minor and upper
2 trapezius muscle. AR at 680. Dr. Ballesteros further noted that Plaintiff "had prompt pain
3 relief." *Id.* at 681.

4 On October 10, 2008, Plaintiff's medical records were also reviewed by Robert S.
5 Hirsch, M.D. and a Physical Residual Functional Capacity Assessment completed based
6 upon that review. *Id.* at 620-27. Dr. Hirsch found that Plaintiff could occasionally lift
7 twenty (20) pounds, and frequently lift ten (10) pounds. *Id.* at 621. Dr. Hirsch further found
8 that Plaintiff could both stand and/or walk, as well as sit, (with normal breaks) for a total of
9 about six (6) hours in an eight (8) hour workday. *Id.* Dr. Hirsch further found Plaintiff to
10 be unlimited in his ability to push and/or pull (including operation of hand and/or foot
11 controls). AR at 621. Dr. Hirsch determined that Plaintiff could occasionally climb ladders,
12 ropes, and scaffolds, as well as crawl, and could frequently climb ramps and stairs, balance,
13 stoop, kneel, and crouch. *Id.* at 622. Dr. Hirsch found Plaintiff limited in reaching all
14 directions (including overhead), concluding that Plaintiff could reach above shoulder level
15 up to two-thirds of the time, but that Plaintiff was unlimited in handling, fingering and
16 feeling. *Id.* at 623. Dr. Hirsch reported no visual or communicative limitations. *Id.* at 623-
17 24. Dr. Hirsch found Plaintiff should avoid concentrated exposure to hazards, but was
18 unlimited regarding extreme cold, extreme heat, wetness, humidity, noise, and vibration. *Id.*
19 at 624. On October 31, 2008, Plaintiff received an influenza vaccine. AR at 678.

20 On November 28, 2008, Joan M. Threadgold, Pharm.D. "[c]ontacted [patient]
21 regarding tapering of morphine and new clonidine patch to help withdrawal [symptoms]."
22 *Id.* at 677. "[Plaintiff] stated his current pain is not controlled and if dose is decreased he will
23 end up in the emergency room/hospital." *Id.*

24 On December 2, 2008, Plaintiff saw Dr. Adamczyk regarding his pain medications.
25 *Id.* at 668-74. Plaintiff stated, "[I]'m going to run up a f'king bill until [I] get what [I] need
26 for meds." *Id.* at 668 (alteration in original) (capitalization added). Dr. Adamczyk reported
27 that Plaintiff appeared healthy and "walking slowly without assist[.]" AR at 670. Plaintiff
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1 was “vehement about not tapering off” morphine. *Id.* at 671. On December 4, 2008, Sonia
2 M. Perez-Padilla, M.D. concurred with Dr. Adamczyk’s assessment, noting that “no one in
3 primary care will feel comfortable renewing [morphine at] this dose.” *Id.* at 672. On
4 December 19, 2008, Plaintiff received trigger point injections in his left rhomboids major and
5 minor, and upper trapezius muscle from Dr. Ballesteros. *Id.* at 663-65. Dr. Ballesteros
6 reported that “patient continues receiving benefits from [trigger point injections], [but]
7 patient needs new [trigger point injections] because the pain is reactivated.” *Id.* at 663. On
8 December 23, 2008, Plaintiff failed to attend his appointment with psychologist. AR at 663.

9 On January 20, 2009, Plaintiff’s significant other contacted the clinic reporting that
10 “there was a miscommunication and [patient] did not decrease morphine 30mg SR to from
11 [three times daily] to [twice daily] as noted above.” *Id.* at 667. She further stated that “[t]hey
12 were under the impression that there would be no further [sic] changes until [primary care
13 physician] [follow up] in Feb[ruary] and therefore did not pay attention to the directions on
14 the bottle.” *Id.* Dr. Adamczyk approved a ten (10) day tapering dose. *Id.*

15 On February 3, 2009, Plaintiff’s “friend” called Dr. Hoyer stating that Plaintiff “is
16 hurting so bad that [he] is unable to move” and that he “simply lays in bed and jerks and
17 moans” since the reduction in his morphine dosage. *Id.* at 660. On February 5, 2009,
18 Plaintiff was seen by Vicky McManaman, patient advocate, regarding the reduction in his
19 pain medication. AR at 659. Ms. McManaman contacted Dr. Ballesteros to see if he can be
20 seen sooner for his trigger point injections. *Id.* On February 9, 2009, Plaintiff was seen by
21 Dr. Adamczyk. *Id.* at 654-59. Plaintiff complained that he is “now confined to couch”
22 because “it took years to get to the high doses [of morphine] that worked[.]” *Id.* at 654.
23 Plaintiff further reported that his “back gives out” causing him to fall. *Id.* Dr. Adamczyk
24 noted that Plaintiff was “walking with cane with difficulty and slowly[.]” AR at 656. Dr.
25 Adamczyk further noted a referral to the “seating committee” for a scooter. *Id.* at 654. A
26 depression screen on this same date was positive. *Id.* at 658. On February 10, 2009, Denise
27 M. O’Connell, social worker, called Plaintiff’s home regarding home health aide/homemaker
28

1 services. *Id.* at 644, 653. Ms. O’Connell spoke with Plaintiff’s wife and explained that
2 homemaker service are not authorized through the Veterans Affairs “if that is the only
3 service needed.” *Id.* The following day, Kristy Lefevé, LMSW followed up with Plaintiff’s
4 wife, but did not speak with Plaintiff. AR at 644, 653. On February 26, 2009, Plaintiff saw
5 Dr. Koschorke and reported “that he has episodes of sudden falls, mainly weakness in left
6 leg, he does not have any symptoms prior to the falls, [and] no bowel bladder [sic]
7 problems.” *Id.* at 648, 707. Plaintiff further reported “that sometimes he can not get up by
8 himself after he falls.” *Id.* Plaintiff further reported noticing “sudden weakness in mainly
9 left upper arm and sometimes some tingling[.]” *Id.* Additionally, Plaintiff complained of
10 now “constant headaches[,] [which] he feels [are] secondary to his decrease in morphine.”
11 *Id.* Plaintiff also attributed his increase in falls to the morphine decrease. AR at 648, 707.
12 Plaintiff reported “some chestpain[.]” *Id.* Plaintiff stated that “the pain is better with
13 medication and tens unit[.]” *Id.* at 648, 708. Trigger point injections also help. *Id.* Dr.
14 Koschorke did not note any muscle atrophy, and found upper extremity strength 5/5 with
15 coaching, and right lower extremity strength 5/5, with left lower extremity 4/5 secondary to
16 severe pain. *Id.* at 652, 711. Dr. Koschorke further noted severe pain to palpation in left
17 paraspinous cervical muscle, left deltoid and mid trapezius, right and left midthoracic and
18 paraspinous lumbar muscles. *Id.* Dr. Koschorke determined Plaintiff’s lumbar spine flexion
19 at 60 degrees, and increase in left and right pain; extension resulted in minimal increase in
20 pain; rotation and side bending increased pain, more toward the left than right. AR at 652,
21 711-12. Straight leg raises in sitting position were within normal limits on the right and on
22 left at 40 degrees increase in spine pain. *Id.* at 652, 712. Lower extremity motion was within
23 normal limits, and apparent sacroiliac joint pain. *Id.*

24 On March 3, 2009, Plaintiff saw Andrew C. Jones, Ph.D. for an initial psych
25 evaluation. *Id.* at 646-47, 705-07. Plaintiff reported his typical day as “primary caretaker
26 for his four sons (also has two daughters in college).” *Id.* at 646, 706. Plaintiff further
27 reported that he “spends time with [his] sons when [they] return home from school.” *Id.*

1 Additionally, he “[w]ill go shooting with friends and sons on weekends.” AR at 646, 706.
2 Plaintiff reported a “recent improvement in sleep with start of nortriptyline and increase in
3 morphine.” *Id.* Dr. Jones noted that Plaintiff had a “minimal” level of emotional distress,
4 although he experienced “significant affective distress when morphine [sic] dosage was
5 decreased.” *Id.* Dr. Jones recommended “[n]o further pain psychology intervention at this
6 time.” *Id.* at 647, 707. On March 9, 2009, Plaintiff completed an Exertional Daily Activities
7 Questionnaire. *Id.* at 143. Plaintiff stated he lived alone, and his typical day included
8 waking up, taking his morning medication, and waiting for it to work. AR at 143. Plaintiff
9 further stated that his medications “have been cut due to the State’s new ruling.” *Id.* Plaintiff
10 also asserted that he is “now confined to [his] home because the decrease in [his] pain
11 med[ication]s means a decrease in [his] mobility.” *Id.* Plaintiff states that his pain level “has
12 spiked to the max” and that he “can not move about any long[er], and ha[s] scheduled
13 appointment with the VA to recieve [sic] a scooter to get around due to the number of falls
14 in the last few months w[ith] the decrease of pain medication[.]” *Id.* Plaintiff reported that
15 he now has “trouble getting from the couch to the bathroom[,] and [a] walk to get the mail
16 out of the mailbox requires the use of a cane.” *Id.* Plaintiff further reported that he cannot
17 “lift or carry anything over 5 [pounds].” AR at 144. Plaintiff noted that he doe not grocery
18 shop or clean his home, cook, do laundry, yard work or other household chores. *Id.* Plaintiff
19 indicated that he can only drive a car for a short trip, and that there are “no longer any
20 activities that [he] can do[,] [because] [t]he decrease of pain med[ication]s have confined
21 [him] to the house and couch. *Id.* Plaintiff reported that he does not take naps, despite laying
22 down every day. *Id.* On March 25, 2009, Plaintiff saw Dr. Koschorke for a follow up. *Id.*
23 at 703. Plaintiff stated “that he had his leg slip only once[,] [and] [h]e is able to sleep much
24 better.” AR at 703. Plaintiff further reported that the Tizanidine and Nortriptyline are
25 helping. *Id.* at 704. Plaintiff “was amazed that he could decrease his opioids without too
26 much additional pain.” *Id.* Dr. Koschorke noted Plaintiff “looking actually good” with his
27 gait “upright using cane.” *Id.*

1 On April 22, 2009, Plaintiff returned to Dr. Koschorke for a follow up. *Id.* at 699-701.
2 Plaintiff reported that “he is gettign [sic] minimal relief from the medications (opioids)[.]”
3 AR at 701. Plaintiff further reported that he is not sleeping well. *Id.* Upon examination, Dr.
4 Koschorke noted “no sedation[,] no acute distress[.]” *Id.* Plaintiff’s gait was “upright
5 slow[.]” *Id.* Plaintiff also reported that he feels the aquatics therapy is helping “some.” *Id.*

6 On May 11, 2009, pursuant to request by the Commissioner upon reconsideration,
7 Charles Fina, M.D. reviewed Plaintiff’s medical records and affirmed the initial residual
8 functional capacity indicating light function. *Id.* at 714. On May 13, 2009, Andres Kerns,
9 Ph.D. reviewed Plaintiff’s medical records and completed a Psychiatric Review Technique.
10 AR at 715-28. Dr. Kerns found “[n]o [m]edically [d]eterminable [i]mpairment[.]” *Id.* at 715.

11 On October 1, 2010, pursuant to request by the Commissioner, Plaintiff saw Enrique
12 Suarez, M.D. for a consultative examination. *Id.* at 751-53. Upon physical examination, Dr.
13 Suarez reports that Plaintiff was “in a minimal degree of distress.” *Id.* at 752. Plaintiff’s left
14 shoulder exhibited limited range of motion on flexion and internal rotation. *Id.* Dr. Suarez
15 reported the right upper extremity to have a normal range of motion, and Plaintiff’s hand
16 grips are normal bilaterally. AR at 752. Dr. Suarez further reported that Plaintiff’s lower
17 extremities showed “a normal range of motion of the hips, knees[,] and ankle joints.” *Id.*
18 Further, Dr. Suarez reported Plaintiff’s ambulation as “normal.” *Id.* Dr. Suarez noted that
19 Plaintiff drove to the appointment, and opined that “he should be able to return to some
20 activities.” *Id.* Dr. Suarez further opined that Plaintiff could not lift over forty (40) to fifty
21 (50) pounds occasionally, and twenty-five (25) pounds frequently, with limitation of the left
22 shoulder. *Id.* at 753. Additionally, Dr. Suarez completed a Medical Source Statement of
23 Ability to do Work-Related Activities (Physical). AR at 757-62. Dr. Suarez found Plaintiff
24 able to lift and carry eleven (11) to twenty (20) pounds frequently, and twenty-one (21) to
25 fifty (50) pounds occasionally. *Id.* at 757. Dr. Suarez further found Plaintiff able to sit,
26 stand, and walk for eight (8) hours at one time without interruption, as well as total in an
27 eight (8) hour work day. *Id.* at 758. Dr. Suarez reported that Plaintiff did not use a cane to
28

1 ambulate. *Id.* Dr. Suarez found that Plaintiff could continuously reach, both overhead and
2 all other forms, handle, finger, feel, and push or pull with his right hand. *Id.* at 759. Dr.
3 Suarez further found that with his left hand Plaintiff could frequently handle, finger, feel,
4 push or pull, and occasionally reach overhead or reach in other ways. AR at 759. Dr. Suarez
5 found that Plaintiff could operate foot controls continuously with either foot. *Id.* Dr. Suarez
6 determined that Plaintiff could frequently climb stairs, ramps, ladders, or scaffolds, balance,
7 stoop, kneel, crouch, and crawl. *Id.* at 760. Dr. Suarez further indicated no hearing or visual
8 impairments. *Id.* With regard to environmental limitations, Dr. Suarez determined that
9 Plaintiff could continuously tolerate unprotected heights; moving mechanical parts; operating
10 a motor vehicle; humidity and wetness; dust, odors, fumes and pulmonary irritants; extreme
11 cold; extreme heat; vibrations; and other, including very loud noise. *Id.* at 761. Dr. Suarez
12 also found that Plaintiff could perform activities like shopping; traveling without a
13 companion for assistance; ambulate without using a wheelchair, walker, or two (2) canes or
14 crutches; walk a block at a reasonable pace on rough or uneven surfaces; use standard public
15 transportation; climb a few steps at a reasonable pace with the use of a single hand rail;
16 prepare a simple meal and feed himself; care for his personal hygiene; and sort, handle, or
17 use paper/files. AR at 762.

18 19 **II. STANDARD OF REVIEW**

20 The factual findings of the Commissioner shall be conclusive so long as they are
21 based upon substantial evidence and there is no legal error. 42 U.S.C. §§ 405(g), 1383(c)(3);
22 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008). This Court may “set aside the
23 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based
24 on legal error or are not supported by substantial evidence in the record as a whole.” *Tackett*
25 *v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted).

26 Substantial evidence is ““more than a mere scintilla[,] but not necessarily a
27 preponderance.” *Tommasetti*, 533 F.3d at 1038 (quoting *Connett v. Barnhart*, 340 F.3d 871,
28

1 873 (9th Cir. 2003)); *see also Tackett*, 180 F.3d at 1098. Further, substantial evidence is
2 “such relevant evidence as a reasonable mind might accept as adequate to support a
3 conclusion.” *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Where “the evidence can
4 support either outcome, the court may not substitute its judgment for that of the ALJ.”
5 *Tackett*, 180 F.3d at 1098 (citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992));
6 *see also Massachi v. Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007). Moreover, the court may
7 not focus on an isolated piece of supporting evidence, rather it must consider the entirety of
8 the record weighing both evidence that supports as well as that which detracts from the
9 Secretary’s conclusion. *Tackett*, 180 F.3d at 1098 (citations omitted).

11 **III. ANALYSIS**

12 The Commissioner follows a five-step sequential evaluation process to assess whether
13 a claimant is disabled. 20 C.F.R. § 404.1520(a)(4). This process is defined as follows:
14 Step one asks is the claimant “doing substantial gainful activity[?]” If yes, the claimant is not
15 disabled; step two considers if the claimant has a “severe medically determinable physical
16 or mental impairment[.]” If not, the claimant is not disabled; step three determines whether
17 the claimant’s impairments or combination thereof meet or equal an impairment listed in 20
18 C.F.R. Pt. 404, Subpt. P, App. 1. If not, the claimant is not disabled; step four considers the
19 claimant’s residual functional capacity and past relevant work. If claimant can still do past
20 relevant work, then he or she is not disabled; step five assesses the claimant’s residual
21 functional capacity, age, education, and work experience. If it is determined that the
22 claimant can make an adjustment to other work, then he or she is not disabled. 20 C.F.R. §
23 404.1520(a)(4)(i)-(v).

24 In the instant case, the ALJ found that Plaintiff was not engaged in substantial gainful
25 activity since June 7, 2006. AR at 26. At step two of the sequential evaluation, the ALJ
26 found that “[t]he claimant has the following severe impairments: degenerative joint disease
27 of the lumbar and cervical spine and fracture of the left upper extremity (20 CFR
28

1 404.1520(c)).” *Id.* At step three, the ALJ found that Plaintiff “does not have an impairment
2 or combination of impairments that meets or medically equals one of the listed impairments
3 in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and 404.1526).”
4 *Id.* at 27. The ALJ found that “[a]fter careful consideration of the entire record, . . . the
5 claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR
6 404.1567(b) except the claimant can occasionally reach overhead with his non-dominant left
7 arm/shoulder.” *Id.* At step four, the ALJ determined that Plaintiff “is unable to perform any
8 past relevant work (20 CFR 404.1565).” *Id.* at 32. At step five, the ALJ found that
9 “[c]onsidering the claimant’s age, education, work experience, and residual functional
10 capacity, there are jobs that exist in significant numbers in the national economy that the
11 claimant can perform (20 CFR 404.1569 and 404.1569(a)).” *Id.* at 33. Ultimately, the ALJ
12 determined that “the claimant has not been disabled within the meaning of the Social
13 Security Act[.]” *Id.* Plaintiff asserts that the ALJ erred in “making an adverse credibility
14 determination regarding the Plaintiff’s complaints of symptoms and the effect on his ability
15 to function[;]” determining that “the Commissioner’s examining physician is entitled to
16 ‘substantial weight[;]’” and “in his analysis of the relevance of the VA’s determination that
17 the Plaintiff has a 100% service connected disability.” Pl.’s Opening Br. (Doc. 29) at 2.

18 **A. Plaintiff’s Credibility**

19 “To determine whether a claimant’s testimony regarding subjective pain or symptoms
20 is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter v. Astrue*, 204 F.3d
21 1028, 1035-36 (9th Cir. 2007). First, “a claimant who alleges disability based on subjective
22 symptoms ‘must produce objective medical evidence of an underlying impairment which
23 could reasonably be expected to produce the pain or other symptoms alleged[.]’” *Smolen v.*
24 *Chater*, 80 F.3d 1273, 1281-82 (9th Cir. 1996) (quoting *Bunnell v. Sullivan*, 947 F.2d 341,
25 344 (9th Cir. 1991) (*en banc*) (internal quotations omitted)); *See also Lingenfelter*, 504 F.3d
26 at 1036. Further, “the claimant need not show that [his] impairment could reasonably be
27 expected to cause the severity of the symptom [he] has alleged; [he] need only show that it
28

1 could reasonably have caused some degree of the symptom.” *Smolen*, 80 F.3d at 1282
2 (citations omitted). “[I]f the claimant meets this first test, and there is no evidence of
3 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of [his]
4 symptoms only by offering specific, clear and convincing reasons for doing so.’”
5 *Lingenfelter*, 504 F.3d 1028 (quoting *Smolen*, 80 F.3d at 1281). “Factors that an ALJ may
6 consider in weighing a claimant’s credibility include reputation for truthfulness,
7 inconsistencies in testimony or between testimony and conduct, daily activities, and
8 ‘unexplained, or inadequately explained, failure to seek treatment or follow a prescribed
9 course of treatment.’” *Orn v. Astrue*, 495 F.3d 625, 636 (9th Cir. 2007) (quoting *Fair v.*
10 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

11 Here, the ALJ determined that “the claimant’s medically determinable impairments
12 could reasonably be expected to cause the alleged symptoms; however, the claimant’s
13 statements concerning the intensity, persistence and limiting effects of these symptoms are
14 not credible to the extent they are inconsistent with the residual functional capacity
15 assessment.” AR at 28. As such, Plaintiff has met the first step. *See Smolen*, 80 F.3d at
16 1281-82. The ALJ further found that:

17 The claimant has described a broad range of daily activities. The claimant
18 cares for young children at home, which can be quite demanding both
19 physically and emotionally, without any particular assistance. The claimant
20 completed a Function Report in September 2008. (4E). The claimant reported
21 that on an average day he took care of his four sons under ten years old, and
22 that took up most of his day. He also took a nap every day for a couple of
23 hours and then watched television. The claimant reported he also walked and
24 stretched. (4E/1). The claimant described activities outside the home such as
25 riding around in a vehicle with his sons and going shooting and camping with
26 them. Yet, in this same report, the claimant stated the farthest he had been able
27 to walk since 2004 is just under a block. (4E/1). The claimant’s alleged onset
28 date for being disabled is as of June 2006. That the claimant could only walk
a block back in 2004 without having difficulties is inconsistent with his work
history where he last worked until June 2006, a job at which he walked a total
of 8 hours each day. (2E/3). In March 2009, the claimant reported to the VA
that his daily activities also consisted of taking care of his four sons and that
he spends time with them when they return from school. The claimant stated
he has four good hours a day for activity and reported having learned good
pacing skills. He goes shooting with his friends and sons on the weekends.
(5F/16). In Feb 2009, a social worker with the VA called claimant twice to
discuss whether he required home health aide/homemaker services.

1 Homemaker service through the VA is not authorized if that is the only service
2 needed. The claimant never returned the calls. The claimant reported his
3 activities of daily living were very restricted due to his impairments, yet he did
4 not return the call to the VA social worker to request additional assistance.
5 Claimant's failure to seek assistance with his daily activities undermine the
6 credibility of his statements regarding the debilitating nature of his alleged
7 impairments. The claimant has provided inconsistent information regarding
8 his ability to perform daily activities.

9 AR at 28-29. The ALJ also considered that Plaintiff's "allegations of severe pain are not
10 corroborated by the treating sources." *Id.* Additionally, Plaintiff has received conservative
11 treatment, which "has been generally successful in controlling those symptoms. *Id.*; *see also*
12 AR at 399, 418, 501, 507-08, 648, 681, 701, 704, 708. The ALJ's reasons for an adverse
13 credibility finding include "inconsistencies in testimony or between testimony and conduct,
14 daily activities, and 'unexplained, or inadequately explained, failure to seek treatment or
15 follow a prescribed course of treatment.'" *Orn v. Astrue*, 495 F.3d 625, 636 (9th Cir. 2007)
16 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). Upon reviewing the record as
17 a whole, this Court concludes that the ALJ stated sufficient specific reasons for not fully
18 crediting Plaintiff's testimony.

19 ***B. Dr. Suarez's Opinion***

20 "As a general rule, more weight should be given to the opinion of a treating source
21 than to the opinion of doctors who do not treat the claimant." *Lester v. Chater*, 81 F.3d 821,
22 830 (9th Cir. 1996) (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). "The
23 opinion of a treating physician is given deference because 'he is employed to cure and has
24 a greater opportunity to know and observe the patient as an individual.'" *Morgan v. Comm'r*
25 *of the SSA*, 169 F.3d 595, 600 (9th Cir. 1999) (quoting *Sprague v. Bowen*, 812 F.2d 1226,
26 1230 (9th Cir. 1987) (citations omitted)). "The ALJ may not reject the opinion of a treating
27 physician, even if it is contradicted by the opinions of other doctors, without providing
28 'specific and legitimate reasons' supported by substantial evidence in the record." *Rollins*
v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (citing *Reddick v. Chater*, 157 F.3d 715, 725
(9th Cir. 1998)); *See also Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007); *Embrey v.*

1 *Bowen*, 849 F.2d 418, 421 (9th Cir. 1988). “The ALJ can meet this burden by setting out a
2 detailed and thorough summary of the facts and conflicting clinical evidence, stating his
3 interpretation thereof, and making findings.” *Embrey*, 849 F.2d at 421 (quoting *Cotton v.*
4 *Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)). Moreover, “[e]ven if a treating physician’s
5 opinion is controverted, the ALJ must provide specific, legitimate reasons for rejecting it.”
6 *Id.* (citing *Cotton*, 799 F.2d at 1408). Additionally, “[a] physician’s opinion of disability
7 ‘premised to a large extent upon the claimant’s own account of his symptoms and limitations’
8 may be disregarded where those complaints have been ‘properly discounted.’” *Morgan*, 169
9 F.3d at 602 (quoting *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989) (citations omitted)).
10 Also, “the more consistent an opinion is with the record as a whole, the more weight we will
11 give to that opinion.” 20 C.F.R. § 404.1527(c)(4).

12 Plaintiff argues “that Dr. Suarez’s ‘objective’ findings on clinical exam as well as his
13 opinion is very inconsistent with most other doctor’s findings and diagnoses[.]” and
14 therefore, should not be “entitled to any weight.” Pl.’s Opening Br. (Doc. 29) at 14.
15 Defendant argues that the ALJ’s reliance was reasonable, and that Plaintiff’s objections to Dr.
16 Suarez beyond the minimum requirements for a consultative examiner under Section
17 404.1519g(b), 20 C.F.R., are misplaced. Def.’s Ans. Br. (Doc. 30) at 14-15. The Court
18 recognizes that the agency regulations only require that a consultative examiner be licensed;
19 however, the Court further notes that apparently Dr. Suarez “was removed from the panel
20 entitled to examine disability applicants[.]” AR at 193.

21 With respect to Dr. Suarez’s opinion, the ALJ stated in relevant part:

22 As for the opinion evidence, the undersigned accords significant weight to the
23 consultative examiner. Dr. Suarez reviewed the medical evidence, including
24 treating records and performed a medical examination and clinical review. His
observations and conclusions are consistent with the record as a whole and
consistent with the above listed residual functional capacity.

25 AR at 32. Although the ALJ provided a detailed and thorough summary of the medical
26 evidence, he did not address the conflicts between Plaintiff’s treating physicians’ notes and
27 Dr. Suarez’s report. *See* AR at 332-33, 374, 380, 412, 418, 431, 442, 444-45, 464, 491, 494-

1 96, 507, 509, 512, 591, 610, 652, 681, 701, 711-12; *see also Tommasetti v. Astrue*, 533 F.3d
2 1035, 1041 (“The ALJ can meet [the burden for rejecting a treating physician’s opinion] by
3 setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
4 stating her interpretation thereof, and making findings.” *Id.* (citations omitted)). Moreover,
5 “[w]hen an examining physician relies on the same clinical findings as a treating physician,
6 but differs only in his or her conclusions, the conclusions of the examining physician are not
7 ‘substantial evidence.’” *Orn*, 495 F.3d at 632. To the extent that Dr. Suarez’s conclusions
8 differ from those put forth by Plaintiff’s treating physicians, the ALJ failed to set forth
9 “specific and legitimate” reasons supported by “substantial evidence in the record” for his
10 reliance on Dr. Suarez. *See, e.g., Rollins*, 261 F.3d at 856.

11 **C. Veterans’ Affairs Disability Rating**

12 “[A]lthough a VA rating of disability does not necessarily compel the SSA to reach
13 an identical result, 20 C.F.R. § 404.1504, the ALJ must consider the VA’s finding in reaching
14 his decision.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). Furthermore,
15 “[b]ecause social security disability and VA disability programs ‘serve the same
16 governmental purpose – providing benefits to those unable to work because of a serious
17 disability,’ the ALJ must give ‘great weight to a VA determination of disability.’” *Turner v.*
18 *Comm’r of Soc. Sec. Admin.*, 613 F.3d 1217, 1225 (9th Cir. 2010) (quoting *McCartey*, 298
19 F.3d at 1076). “Nevertheless, ‘[b]ecause the VA and SSA criteria for determining disability
20 are not identical,’ [the Ninth Circuit Court of Appeals has] allowed an ALJ to ‘give less
21 weight to a VA disability rating if he gives persuasive, specific, valid reasons for doing so
22 that are supported by the record.’” *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685,
23 695 (9th Cir. 2009) (quoting *McCartey*, 298 F.3d at 1076). Noting “that the SSA is not
24 bound by the VA’s determination[, however,] is not a ‘persuasive, specific, valid reason[]’
25 for discounting the VA determination.” *Berry v. Astrue*, 522 F.3d 1228, 1236 (9th Cir.
26 2010).

27 Here, regarding the VA’s disability rating, the ALJ stated, in relevant part:
28

1 The evidence also shows that the Department of Veterans Affairs determined
2 that the claimant had a 100 percent VA disability rating due to his service-
3 connected disabilities. This determination was made by another agency based
4 on their rules and is not binding on the Social Security Administration. The
5 U.S. Veterans' Compensation Program is designed to compensate a veteran for
6 injuries and diseases acquired with in military service, and it not [sic] designed
7 to determine an individual's ability to perform work-related activities outside
8 of the military system. The medical evidence of record shows that the
9 claimant is not under a disability within the meaning of the Social Security Act
10 and Regulations. (SSR 06-03p).

11 AR at 32. Plaintiff argues that "the VA disability rating is entitled to great weight in this
12 case." Pl.'s Opening Br. (Doc. 29) at 16. Conversely, Defendant argues that "Plaintiff's VA
13 rating was inapt as a measure of whether he was disabled under the definition applicable in
14 the Social Security context[,] . . . [and] [i]t was therefore reasonable for the ALJ to choose
15 to give the VA's determination no weight. Def.'s Ans. Br. at 17. The ALJ, however, simply
16 mentioned the different purposes between the VA disability rating and a finding of disability
17 under the Social Security Act, with only passing reference to the medical evidence. The
18 Court finds that this does not qualify as persuasive, specific, valid reasons for disregarding
19 the VA disability rating. *Cf Valentine*, 574 F.3d at 695 (according VA disability rating little
20 weight on the basis of "new evidence or a properly justified reevaluation of old evidence
21 constitutes persuasive, specific, valid reason[s]").

22 **D. Determination of Benefits**

23 "[T]he decision whether to remand the case for additional evidence or simply to
24 award benefits is within the discretion of the court." *Rodriguez v. Bowen*, 876 F.2d 759, 763
25 (9th Cir. 1989) (quoting *Stone v. Heckler*, 761 F.2d 530, 533 (9th Cir. 1985)). "Remand for
26 further administrative proceedings is appropriate if enhancement of the record would be
27 useful." *Benecke v. Barnhart*, 379 F.3d 587, 593, (9th Cir. 2004) (citing *Harman v. Apfel*,
28 211 F.3d 1172, 1178 (9th Cir. 2000)). Conversely, remand for an award of benefits is
appropriate where:

- (1) the ALJ failed to provide legally sufficient reasons for rejecting the evidence;
- (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and
- (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence

1 credited.
2 *Benecke*, 379 F.3d at 593 (citations omitted). Where the test is met, “we will not remand
3 solely to allow the ALJ to make specific findings. . . . Rather, we take the relevant testimony
4 to be established as true and remand for an award of benefits.” *Id.* (citations omitted); *see*
5 *also Lester*, 81 F.3d at 834.

6 Here, to the extent that Dr. Suarez’s conclusions differ from those put forth by
7 Plaintiff’s treating physicians, the ALJ failed to set forth “specific and legitimate” reasons
8 supported by “substantial evidence in the record” for his reliance on Dr. Suarez. *See Lester*,
9 81 F.3d at 830; AR at 32. Further, the ALJ did not provide persuasive, specific, valid reasons
10 for disregarding the VA disability rating. *See McCartney*, 298 F.3d at 1076; AR at 32. The
11 Court will exercise its discretion not to award benefits, because “there may be evidence in
12 the record to which the ALJ can point to provide the requisite specific and legitimate
13 reasons” his reliance on Dr. Suarez’s opinion. *Salvador v. Sullivan*, 917 F.2d 13, 15 (9th
14 Cir. 1990). There also may be evidence in the record which the ALJ can point to support his
15 disregarding the VA disability rating. “[T]he Secretary is in a better position than this Court
16 to perform th[ese] task[s].” *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989).

17

18 **IV. MOTION TO EXCEED PAGE LIMIT**

19 Plaintiff filed a Plaintiff’s Motion to Allow Plaintiff’s Opening Brief to Exceed Page
20 Length filed with his Opening Brief (Doc. 29). As an initial matter, it is improper to include
21 a motion for miscellaneous relief as an addendum to the Opening Brief. *See LRCiv. 16.1*
22 (delineating the contents of an opening brief); *see also LRCiv. 7.1* (proper form of papers).
23 Furthermore, Plaintiff was previously directed to “file an amended opening Brief, no more
24 than twenty-five (25) pages in length[,] . . . and Plaintiff’s amended Opening Brief shall fully
25 comply with LRCiv. 16.1.” Order 1/2/14 (Doc. 28). As an initial matter, Plaintiff’s counsel
26 is reminded that requests for relief separate from judicial review of the Commissioner’s
27 decision should be made in a separately filed motion. Furthermore, the Court gave express
28

1 directions as to the length and content of Plaintiff's amended Opening Brief. As such,
2 Plaintiff's Motion to Allow Plaintiff's Opening Brief to Exceed Page Length is DENIED.

3
4 **V. CONCLUSION**

5 In light of the foregoing, the Court REVERSES the ALJ's decision and the case is
6 REMANDED for further proceedings consistent with this decision.

7
8 Accordingly, IT IS HEREBY ORDERED that:

- 9 1) Carolyn W. Colvin, Acting Commissioner of Social Security, is **substituted**
10 **as Respondent** for Michael Astrue pursuant to Rule 25(d) of the Federal Rules
11 of Civil Procedure;
12 2) Plaintiff's Opening Brief (Doc. 29) is GRANTED;
13 3) The Commissioner's decision is REVERSED and REMANDED;
14 4) Upon remand, the Appeals Council will remand the case back to an ALJ with
15 instructions to issue a new decision regarding Plaintiff's eligibility for disability insurance
16 benefits. The ALJ will give further consideration to the medical opinions of record and
17 articulate what weight is given to each, as well as, give further consideration to Plaintiff's
18 VA disability rating and articulate what weight, if any, it was given.
19 5) The Clerk of the Court shall enter judgment, and close its file in this matter.

20
21 DATED this 31st day of March, 2014.

22
23 

24 Bruce G. Macdonald
25 United States Magistrate Judge
26
27
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