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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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Robert Bass, ) No. CV 16-782-TUC-LAB

8

Plaintiff, ) **ORDER**

9

vs. )

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Commissioner of Social Security) )

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Administration, ) )

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Defendant. ) )

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The plaintiff filed this action for review of the final decision of the Commissioner for Social Security pursuant to 42 U.S.C. § 405(g). (Doc. 1, p. 1)

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The Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636(c) having received the written consent of both parties. *See* FED.R.CIV.P. 73; (Doc. 15)

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The court finds that the final decision of the Commissioner is supported by substantial evidence and free from legal error.

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Bass’s condition does not meet or equal Listing 5.06. *See* 20 C.F.R. Part 404, Subpt P, App. 1 § 5.06. The ALJ properly discounted Bass’s credibility. The ALJ properly identified and resolved the conflict between the Dictionary of Occupational Titles (DOT) and the testimony from the vocational expert.

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PROCEDURAL HISTORY

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On September 17, 2014, Bass filed for disability insurance benefits pursuant to Title II of the Social Security Act and supplemental security income pursuant to Title XVI. (Tr. 19),

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1 (Tr. 251), (Tr. 279-287) He alleged disability beginning on May 30, 2014, due to scoliosis,  
2 degenerative disc disease with radiculopathy, headaches, gastric complications of hernia repair,  
3 left knee DJD (degenerative joint disease), depression, anxiety, and gastroparesis (stomach  
4 partial paralysis). (Tr. 313)

5 His claims were denied initially (Tr. 154-157, 251) and upon reconsideration (Tr. 159-  
6 162, 251). Bass requested review and appeared with counsel at a hearing before Administrative  
7 Law Judge (ALJ) Laura Havens on February 11, 2016 and again on June 22, 2016. (Tr. 39, 60)  
8 In her decision, dated July 14, 2016, the ALJ found Bass was not disabled. (Tr. 19-29) Bass  
9 appealed, and on September 23, 2016, the Appeals Council accepted review. (Tr. 4)

10 In a decision dated October 25, 2016, the Appeals Council found that Bass is not  
11 disabled. (Tr. 4-6) The Appeals Council adopted most of the ALJ's decision but made some  
12 significant amendments. *Id.* Bass's filing date was changed to June 16, 2014, his last insured  
13 date was changed to December 31, 2018, and his Residual Functional Capacity was changed  
14 to "a reduced range of *light* exertional work." (Tr. 4-5) (emphasis added) The Appeals Council  
15 concluded that Bass was able to "perform past relevant work as a pharmacy clerk/customer  
16 service clerk as it was actually performed by him and generally performed in the national  
17 economy." (Tr. 5) In the alternative, Bass could work as a counter clerk or a cashier. (Tr. 6)  
18 Accordingly, the Appeals Council found that Bass was not disabled through the date of the  
19 hearing decision. (Tr. 6) Bass subsequently filed this action appealing the Commissioner's  
20 final decision. (Doc. 1)

#### 21 22 Claimant's Work History and Medical History

23 Bass worked as an emergency medical technician between March of 1993 and September  
24 of 2008. (Tr. 315) He worked as a driver between July of 2010 and June of 2011. (Tr. 315)  
25 He worked in a mail order pharmacy between September 2011 and March of 2013. (Tr. 315,  
26 66)

27 Bass alleged disability beginning on May 30, 2014, due to scoliosis, degenerative disc  
28 disease with radiculopathy, headaches, gastric complications of hernia repair, left knee DJD

1 (degenerative joint disease), depression, anxiety, and gastroparesis (a disorder that slows or  
2 stops the movement of food from the stomach to the small intestine). (Tr. 313)

3 In January of 2015, John Fahlberg, M.D., reviewed the medical record for the disability  
4 determination service and offered an opinion of Bass's physical limitations. (Tr. 99) Fahlberg  
5 opined that Bass could lift 20 pounds occasionally and 10 pounds frequently. (Tr. 99) He could  
6 sit, stand, and/or walk for 6 hours in an 8-hour day. (Tr. 99) He should only occasionally  
7 climb ladders, rope, or scaffolds. (Tr. 99) Fahlberg opined that Bass "is on [a] vigorous  
8 campaign for disability due to homelessness and unemployment." (Tr. 99) "He does have some  
9 mild to mod[erate] [diagnoses] that are supported but [it] appears his seeking of med[ical]  
10 attention for rather minor illnesses is exaggerated and [is] leading to excessive weakly supported  
11 [diagnoses]." (Tr. 99) Fahlberg's opinion suggests that Bass can perform light work with some  
12 exceptions. *See* 20 C.F.R. §§ 404.1567(b), 416.967(b).

13 In February of 2015, Stephen Bailey, Ed.D., reviewed the medical record for the  
14 disability determination service and offered an opinion of Bass's mental limitations. (Tr. 97)  
15 He diagnosed affective disorder and anxiety-related disorder. (Tr. 97) He evaluated Bass's "B"  
16 listing criteria, which gauge the severity of his mental impairment. *See* 20 C.F.R. §§  
17 404.1520a(c)(3), 416.920a(c)(3). He found Bass has no restrictions of his daily activities;  
18 "mild" difficulties in maintaining social functioning; "mild" difficulties in maintaining  
19 concentration, persistence or pace; and no evidence of decompensation. (Tr. 97) Bailey further  
20 opined that the medical evidence did not establish the presence of the "C" criteria, which are  
21 an alternative gauge of the extent of his mental impairment. (Tr. 97) According to Bailey, Bass  
22 has been treated for depression and anxiety, but he reports "no psychological symptoms that  
23 would limit him in a work setting." (Tr. 97) Bailey concluded that Bass's mental impairment  
24 was non-severe. (Tr. 97)

25 In April of 2015, Eric Penner, Ph.D., reevaluated Bass's medical record and affirmed  
26 Bailey's opinion. (Tr. 118) According to Penner, "[the] evidence . . . indicates no significant  
27 changes in his mental status." (Tr. 117)

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1 In April of 2015, J. Wright, M.D., reevaluated Bass's medical record and agreed with  
2 Falhberg that Bass could perform light work with some exceptions. (Tr. 120-121)

3 In February of 2016, Jerome C. Rothbaum, M.D., examined Bass for the disability  
4 determination services. (Doc. 1069) He diagnosed scoliosis, bilateral knee pain, myofascial  
5 low back pain, headache, history of gastroparesis (stomach partial paralysis), hiatal hernia,  
6 history of diverticulosis (a colon abnormality), status post cholecystectomy (gallbladder  
7 removal), history of pulmonary hypertension, history of fibromyalgia (not substantiated), history  
8 of malabsorption, and B-12 and ferrous sulfate injections. (Tr. 1079) He opined that Bass  
9 could occasionally lift and carry up to 20 lbs. (Tr. 1073) He could sit for 6 hours, stand for 3  
10 hours and walk for 2 hours in an 8-hour day. (Tr. 1074) He could occasionally reach, handle,  
11 finger, feel, push, and pull. (Tr. 1075) He could occasionally climb stairs and ramps, balance,  
12 stoop, kneel, crouch, or crawl. (Tr. 1067) He should never work at unprotected heights; with  
13 moving mechanical parts; or with dust, odors, fumes, or other pulmonary irritants. (Tr. 1077)  
14 He could occasionally operate a motor vehicle; work around humidity and wetness; or be  
15 exposed to extreme cold, extreme heat, or vibrations. (Tr.1077)

16 On February 11, 2016, Bass appeared with counsel at a hearing before the ALJ. (Tr. 60)  
17 Bass explained that his disabling impairments are "physical only." (Tr. 68-60) His depression  
18 and anxiety are "maybe just situational." (Tr. 60) He currently takes "19 or 20 medications."  
19 (Tr. 60) He has pain over his entire body. (Tr. 70) Sometimes it is "dull and achy, sometimes  
20 it's sharp." (Tr. 70) He has stomach problems that result in constipation, diarrhea, and  
21 vomiting. (Tr. 71) He goes to the bathroom six to ten times an hour. (Tr. 71) Bass testified  
22 that he can sit, walk, or stand for only 10 to 15 minutes at a time. (Tr. 70)

23 The ALJ took testimony from Lawrence Haney, a vocational expert. (Tr. 76) Haney  
24 opined that a person of the claimant's age, education, and past relevant work, who could sit,  
25 stand, or walk 6 hours out of an 8-hour day, who could occasionally lift and carry 20 pound and  
26 frequently lift and carry 10 pounds, could frequently climb stairs and occasionally climb  
27 ladders, and could frequently balance, stoop, kneel, crouch and crawl, could work as a  
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1 pharmacy clerk. (Tr. 76-77) The ALJ decided at the end of the hearing to obtain another  
2 evaluation of Bass's medical condition. (Tr. 79)

3 On June 22, 2016, Bass appeared with counsel at a second hearing before the ALJ. (Tr.  
4 39) On the advice of counsel, Bass amended his disability onset date to April 2, 2015. (Tr. 41)  
5 The ALJ took testimony from a medical expert, Alexander B. White, M.D. (Tr. 42) White  
6 opined, based on the medical record, that Bass suffers from fibromyalgia syndrome. (Tr. 42)  
7 His worst symptom is gastroparesis, partial paralysis of the stomach, which is caused by all the  
8 medications he is taking. (Tr. 43) White opined that Bass could perform light work now and,  
9 with continued activity, could return to normal functioning. (Tr. 45); *see* 20 C.F.R. §§  
10 404.1567(b), 416.967(b). He noted that Bass has lost weight recently but he still has a BMI  
11 (body mass index) of 26 to 27 (Tr. 46) White opined that Bass's recent loss of 65 pounds was  
12 not indicative of a disability. (Tr. 47-48) Assuming the loss was due to nausea and vomiting,  
13 White opined that Bass's symptoms were caused by the excessive medication that he had been  
14 prescribed. (Tr. 50)

15 The ALJ took testimony from Robert Bradley Cottle, a vocational expert. (Tr. 53) The  
16 ALJ asked Cottle a hypothetical assuming Bass had the RFC given by Rothbaum but without  
17 his manipulative restrictions. (Tr. 1073-1077) Cottle opined that a person of the claimant's age,  
18 education, and past relevant work, who could sit 6 hours out of an 8-hour day, stand for 3 hours,  
19 walk for 2 hours, who requires a sit/stand option every hour, who could occasionally lift and  
20 carry 20 pounds, who could never climb ladders, who could occasionally climb stairs, balance,  
21 stoop, kneel, crouch and crawl, who is precluded from working jobs involving heights, moving  
22 mechanical parts, and dust, fumes, or odors, and who can only occasionally be exposed to  
23 temperature extremes and vibrations, could work as a pharmacy clerk, Bass's past relevant  
24 work. (Tr. 54-55) In the alternative, such a person could work as a counter clerk or cashier.  
25 (Tr. 56)

26  
27 CLAIM EVALUATION  
28

1 Social Security Administration (SSA) regulations require that disability claims be  
2 evaluated pursuant to a five-step sequential process. 20 C.F.R. §§ 404.1520, 416.920. The first  
3 step requires a determination of whether the claimant is engaged in substantial gainful activity.  
4 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If so, then the claimant is not disabled, and  
5 benefits are denied. *Id.*

6 If the claimant is not engaged in substantial gainful activity, the ALJ proceeds to step  
7 two, which requires a determination of whether the claimant has a severe impairment or  
8 combination of impairments. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). In making a  
9 determination at step two, the ALJ uses medical evidence to consider whether the claimant's  
10 impairment significantly limits or restricts his or her physical or mental ability to do basic work  
11 activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). *Id.* If the ALJ concludes the impairment is  
12 not severe, the claim is denied. *Id.*

13 Upon a finding of severity, the ALJ proceeds to step three, which requires a  
14 determination of whether the impairment meets or equals one of several listed impairments that  
15 the Commissioner acknowledges are so severe as to preclude substantial gainful activity. 20  
16 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); 20 C.F.R. Pt. 404, Subpt. P, App.1. If the claimant's  
17 impairment meets or equals one of the listed impairments, then the claimant is presumed to be  
18 disabled, and no further inquiry is necessary. *Ramirez v Shalala*, 8 F.3d 1449, 1452 (9<sup>th</sup> Cir.  
19 1993). If the claimant's impairment does not meet or equal a listed impairment, evaluation  
20 proceeds to the next step.

21 The fourth step requires the ALJ to consider whether the claimant has sufficient residual  
22 functional capacity (RFC)<sup>1</sup> to perform past work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4).  
23 If yes, then the claim is denied. *Id.* If the claimant cannot perform any past work, then the ALJ  
24 must move to the fifth step, which requires consideration of the claimant's RFC to perform  
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28 <sup>1</sup> Residual functional capacity is defined as that which an individual can still do despite  
his or her limitations. 20 C.F.R. §§ 404.1545, 416.945.

1 other substantial gainful work in the national economy in view of claimant’s age, education, and  
2 work experience. 20 C.F.R. §§ 404.1520(a)(4); 416.920(a)(4).

3  
4 The ALJ’s Findings

5 At step one of the disability analysis, the ALJ found Bass “has not engaged in substantial  
6 gainful activity since April 2, 2015, the alleged onset date. . . .” (Tr. 21) At step two, he found  
7 Bass “has the following severe impairments: chronic pain syndrome, fibromyalgia,  
8 gastroparesis, degenerative joint disease, [and scoliosis]. . . .” (Tr. 21)

9 At step three, the ALJ found Bass’s impairments did not meet or equal the criteria for any  
10 impairment found in the Listing of Impairments, Appendix 1, Subpart P, of 20 C.F.R., Part 404.  
11 (Tr. 23) The ALJ’s findings at steps one, two, and three were later adopted by the Appeals  
12 Council. (Tr. 5)

13 The ALJ then analyzed Bass’s residual functional capacity (RFC). She found “the  
14 claimant had the residual functional capacity to perform sedentary work as defined in 20 CFR  
15 §§ 404.1567(a) and 416.967(a) except that the claimant is able to sit for six hours out of an  
16 eight-hour day. The claimant can stand for three hours out of an eight-hour day. The claimant  
17 can walk for two hours out of an eight-hour day. The claimant requires a sit/stand option every  
18 1 hour. The claimant can occasionally lift and carry twenty pounds. The claimant can never  
19 climb ladders. The claimant can occasionally climb stairs, or balance, stoop, kneel, crouch or  
20 crawl. The claimant is precluded from working at jobs with heights and moving mechanical  
21 parts, or around dust, fumes or odors. The claimant can only occasionally be exposed to  
22 temperature extremes or vibrations.” (Tr. 23-24) It appears that this is the RFC given by  
23 Rothbaum without his manipulative restrictions. (Tr. 1073-1077) The Appeals Council adopted  
24 this finding except that it concluded Bass can perform a reduced range of *light* exertional work.  
25 (Tr. 5); *see* 20 CFR §§ 404.1567(b) and 416.967(b).

26 At step four, the Appeals Council found Bass was able to perform his “past relevant work  
27 as a pharmacy clerk/customer service clerk as it was actually performed by him and generally  
28 performed in the national economy.” (Tr. 5) In the alternative, Bass could work as a counter

1 clerk and a cashier. (Tr. 6) These findings are apparently based on the testimony given by the  
2 vocational expert, Robert Bradley Cottle. (Tr. 27, 53) Consequently, the Appeals Council  
3 found Bass was not disabled.

#### 4 5 STANDARD OF REVIEW

6 An individual is entitled to disability benefits if he or she demonstrates, through  
7 medically acceptable clinical or laboratory standards, an inability to engage in substantial  
8 gainful activity due to a physical or mental impairment that can be expected to last for a  
9 continuous period of at least twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). “[A]  
10 claimant will be found disabled only if the impairment is so severe that, considering age,  
11 education, and work experience, that person cannot engage in any other kind of substantial  
12 gainful work which exists in the national economy.” *Penny v. Sullivan*, 2 F.3d 953, 956 (9<sup>th</sup> Cir.  
13 1993).

14 The findings of the Commissioner are meant to be conclusive. 42 U.S.C. §§ 405(g),  
15 1383(c)(3). The decision to deny benefits “should be upheld unless it contains legal error or is  
16 not supported by substantial evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9<sup>th</sup> Cir. 2007).  
17 Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept  
18 as adequate to support a conclusion.” *Id.* It is “more than a mere scintilla but less than a  
19 preponderance.” *Id.*

20 “Where evidence is susceptible to more than one rational interpretation, the  
21 [Commissioner’s] decision should be upheld.” *Orn*, 495 F.3d at 630. “However, a reviewing  
22 court must consider the entire record as a whole and may not affirm simply by isolating a  
23 specific quantum of supporting evidence.” *Id.*

24 The Commissioner need not accept the claimant’s subjective testimony of disability, but  
25 if she decides to reject it, “she must provide specific, cogent reasons for the disbelief.” *Lester*,  
26 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). “Unless there is affirmative evidence showing that the  
27 claimant is malingering, the Commissioner’s reasons for rejecting the claimant’s testimony must  
28 be clear and convincing.” *Id.* “General findings are insufficient; rather, the [Commissioner]

1 must identify what testimony is not credible and what evidence undermines the claimant's  
2 complaints." *Id.*

3  
4 Discussion: Listing 5.06

5 Bass argues first that the ALJ erred at step three of the disability analysis by failing to  
6 find that his condition meets Listing 5.06, which describes when inflammatory bowel disease  
7 is so serious that it is *per se* disabling. (Doc. 16, p. 12); see 20 C.F.R. Part 404, Subpt P, App.  
8 1 § 5.06.

9 As a preliminary matter, Bass argues that the ALJ erred as a matter of law by relying on  
10 the medical expert's testimony because it was too equivocal. Bass notes that in *Tonapetyan*,  
11 a medical expert testified that he found "the lack of treatment notes from the plaintiff's treating  
12 psychiatrist 'confusing' and that it was 'difficult to say' whether the record was complete  
13 enough to render an opinion." (Tr. 16, p. 13) (*citing Tonapetya v. Halter*, 242 F.3d 1144, 1150  
14 (9<sup>th</sup> Cir. 2001)). The Ninth Circuit found the ALJ erred in relying on that expert's equivocal  
15 testimony. *Id.* Similarly, in *Padilla*, where "a medical expert testified both that the plaintiff had  
16 no severe impairments and that the expert would agree with another doctor's opinion that the  
17 plaintiff would be limited," "the ALJ's reliance on this contradictory testimony was found to  
18 be reversible error." (Tr. 16, p. 13) (*citing Padilla v. Astrue*, 541 F. Supp 2d 1102, 1107-08).  
19 Bass argues that the medical expert in this case gave a similarly equivocal statement concerning  
20 Bass's qualification for Listing 5.06 and that the ALJ should not have relied upon it. The court  
21 does not agree with Bass's characterization of the medical expert's testimony.

22 The medical expert here, Alexander B. White, M.D., testified that Bass did not meet  
23 listing 5.06. (Tr. 44) He was not equivocal. He testified that Bass does not have inflammatory  
24 bowel disease, he has irritable bowel syndrome. (Tr. 44) White noted that Bass recently lost  
25 weight, but he believed this weight loss would not be disabling because Bass was overweight  
26 to begin with and "he needed to lose weight." (Tr. 45) He noted that Bass was taking Ensure  
27 supplemental nutrition to minimize his stomach discomfort, but he believed it was "no  
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1 significant problem.” (Tr. 49) White’s testimony was not equivocal. The ALJ’s reliance on  
2 his testimony was not error.

3 Bass further argues that his condition *is* equivalent to Listing 5.06. 20 C.F.R. Part 404,  
4 Subpt P, App. 1 § 5.06. Listing 5.06 explains when a claimant with inflammatory bowel disease  
5 has a condition so serious that it is *per se* disabling. The listing sets forth a number of specific  
6 factors, two of which must be present to qualify for a *per se* disability finding. Among the listed  
7 factors are (1) an “[i]nvoluntary weight loss of at least 10 percent” over six months and (2) a  
8 “[n]eed for supplemental daily enteral nutrition via a gastrostomy or daily parenteral nutrition  
9 via a central venous catheter.” 20 C.F.R. Part 404, Subpt P, App. 1 § 5.06.

10 Bass argues that he experienced an involuntary weight loss of at least 10 percent and that  
11 his doctors “directed him to consume nutritional supplements for persistent gastroparesis  
12 symptoms.” (Doc. 16) He argues these two factors medically equal the two factors set forth  
13 by Listing 5.06 and he is *per se* disabled. The court does not agree.

14 First, as the medical expert White testified, Bass does not have a diagnosis for  
15 inflammatory bowel disease. Second, his condition does not medically equal the two stated  
16 factors.

17 Assuming that Bass did have a 10 percent weight loss, the court finds that his doctor’s  
18 prescription for the nutritional supplement Ensure does not medically equal the requirement of  
19 a “need for supplemental daily enteral nutrition via a gastrostomy [an opening to the stomach  
20 through the abdominal wall] or daily parenteral nutrition via a central venous catheter.” Listing  
21 5.06. This later factor is important, not simply because the patient needs supplemental nutrition,  
22 but because the patient’s need for nutrition is so severe and difficult to remedy that nutrition  
23 must be introduced through a surgically created abdominal opening or through a central venous  
24 catheter. Bass’s need for supplemental nutrition is not so dire. Bass has been prescribed the  
25 nutritional supplement Ensure, but he takes it the usual way, by drinking it. Bass’s prescription  
26 for Ensure does not medically equal the supplemental nutrition factor in Listing 5.06.

27 Bass further argues that White improperly discounted his nausea, vomiting, and weight  
28 loss because he found they are merely side effects of his prescribed medications. Bass argues

1 to the contrary that medical side effects must be considered when evaluating a claimant's ability  
2 to work and should not be ignored. (Doc. 16, p. 15) This court agrees that a medication's side  
3 effects ordinarily should be considered in the disability analysis. *See* 20 C.F.R. §§  
4 404.1529(c)(3)(iv), 416.929(c)(3)(iv). The court does not agree, however, with Bass's  
5 characterization of White's testimony.

6 White found that Bass's nausea, vomiting, and weight loss are side effects of his  
7 prescribed medications, and he found that they do not constitute a disabling condition. (Tr. 50)  
8 But he did not reach this conclusion because they are side effects of his medication and  
9 therefore unimportant. (Tr. 50) He reached this conclusion because these side effects are the  
10 result of over-medication. (Tr. 50-51) White concluded that Bass is taking too much  
11 medication. (Tr. 50-51) ("He was eating medicines instead of food."). If he were being  
12 properly treated, he would be taking fewer medications and his symptoms would greatly  
13 improve. White did not improperly discount side effects that result from necessary medication.  
14 He discounted side effects resulting from over-prescription. White's opinion was not error.

#### 15 16 Discussion: Credibility

17 Bass also argues that the ALJ failed to properly assess his credibility. (Doc. 16, p. 16)  
18 The court does not agree.

19 The ALJ is not required to accept a claimant's subjective testimony of disability and may  
20 discount it if she provides the proper justification. *See also Molina v. Astrue*, 674 F.3d 1104,  
21 1112 (9<sup>th</sup> Cir. 2012) ("[T]he ALJ is not required to believe every allegation of disabling pain,  
22 or else disability benefits would be available for the asking.") (punctuation modified). "To  
23 determine whether the claimant's testimony regarding the severity of his symptoms is credible,  
24 the ALJ may consider, for example: (1) ordinary techniques of credibility evaluation, such as  
25 the claimant's reputation for lying, prior inconsistent statements concerning the symptoms, and  
26 other testimony by the claimant that appears less than candid; (2) unexplained or inadequately  
27 explained failure to seek treatment or to follow a prescribed course of treatment; and (3) the  
28 claimant's daily activities." *Smolen v. Chater*, 80 F.3d 1273, 1284 (9<sup>th</sup> Cir. 1996). In this case,

1 the ALJ found that while “the claimant’s medically determinable impairments could reasonably  
2 be expected to cause the alleged symptoms” his statements concerning limiting effects of those  
3 impairments was not entirely consistent with the medical record. (Tr. 24)

4 The ALJ noted that in January of 2015, Bass presented to the emergency department  
5 complaining of nausea and vomiting for four days. (Tr. 24) (citing Ex. 20F/4); (Tr. 772-776)  
6 Bass was given a differential diagnosis of gastroparesis, viral syndrome, malingering, and  
7 electrolyte abnormality. (Tr. 775) Melissa Ann Kelsey, D.O., found no abdominal tenderness  
8 or dehydration. (Tr. 776) She told Bass he needed to undergo a [per oral] challenge for a  
9 proper evaluation, but Bass refused. *Id.* “He had completely unremarkable labs and there was  
10 no concern for significant pathology based upon normal labs, normal vitals, normal physical  
11 exam” *Id.* The ALJ incorrectly stated that Bass was given a final diagnosis of malingering.  
12 (Tr. 24) As Bass correctly notes, malingering was only a “differential diagnosis” and did not  
13 appear in the final diagnosis which was “Nondiabetic gastroparesis, Abdominal pain, and  
14 Dehydration.” (Tr. 777); (Doc. 21, p. 4) Nevertheless, the ALJ correctly highlighted the fact  
15 that the Bass did not display the clinical signs ordinarily associated with the symptoms he  
16 reported. (Tr. 24, 776) In addition, he noted that Bass was unwilling to accept the suggested  
17 course of treatment offered by the attending physician. (Tr. 24, 776)

18 The ALJ further noted that Bass was evaluated on April 2, 2015 by Miguel Arenas, M.D.  
19 (Tr. 25) (citing Ex. 25F/7); (Tr. 877) Arenas found Bass “well developed, well-nourished and  
20 in no acute distress.” *Id.* He further found “that the claimant was non-compliant with his  
21 medications.” *Id.*; (Tr. 878) A claimant’s failure to follow a prescribed course of treatment is  
22 some evidence that the claimant’s subjective testimony is not entirely credible. *See Smolen v.*  
23 *Chater*, 80 F.3d at 1284.

24 The ALJ also noted that Bass was examined by Jerome Rothbaum, M.D., on February  
25 25, 2016. (Tr. 25) (citing Ex. 34F) Rothbaum also found Bass “in no acute distress” but he  
26 did observe substantial weight and muscle loss. (Tr. 26) (citing Ex. 34F) Rothbaum “felt that  
27 the claimant did not give maximum effort” during his examination of Bass’s respiration. *Id.*;  
28 (Tr. 1071) Bass “complained of substantial accentuation of abdominal pain although the

1 examination was very minimal and very light.” *Id.*, (Tr. 1072) “He also complained of  
2 exacerbation of left knee pain although the examination was very minimal.” *Id.* Rothbaum’s  
3 observations also support the ALJ’s adverse credibility findings.

4 The ALJ discounted Bass’s testimony of disabling pain because the medical record  
5 contains evidence that Bass is non-compliant with his medications and he exaggerates the extent  
6 of his symptoms. In addition, Bass’s testimony concerning his residual functional capacity is  
7 not supported by any similar opinion in the medical record. Bass testified that he can sit, walk,  
8 or stand for only 10 to 15 minutes at a time. (Tr. 70) None of the physicians in the medical  
9 record opined that Bass is limited to that extent. The ALJ’s decision to discount Bass’s  
10 credibility is supported by substantial evidence and is free from legal error. *See Carmickle v.*  
11 *Commissioner*, 533 F.3d 1155, 1161 (9<sup>th</sup> Cir. 2008) (“Contradiction with the medical record is  
12 a sufficient basis for rejecting the claimant’s subjective testimony.”).

#### 13 14 Discussion: Vocational Testimony

15 Bass argues that the ALJ erred by failing to clarify why the vocational expert’s testimony  
16 differed from the Dictionary of Occupational Titles (DOT). The court concludes that the ALJ  
17 properly resolved this conflict at the hearing.

18 At step five of the disability analysis, the ALJ must determine whether the claimant’s  
19 Residual Functional Capacity (RFC) allows him to perform work that exists in the national  
20 economy. *Zavalin v. Colvin*, 778 F.3d 842, 845 (9<sup>th</sup> Cir. 2015). “In making this determination,  
21 the ALJ relies on the DOT, which is the SSA’s primary source of reliable job information  
22 regarding jobs that exist in the national economy.” *Id.*, pp. 845-46 (punctuation modified). The  
23 DOT describes the exertional and educational requirements for each listed occupation. *Id.*, p.  
24 846. The ALJ may also rely on the testimony of a vocational expert. *Id.* “When there is an  
25 apparent conflict between the vocational expert’s testimony and the DOT—for example, expert  
26 testimony that a claimant can perform an occupation involving DOT requirements that appear  
27 more than the claimant can handle—the ALJ is required to reconcile the inconsistency.” *Id.*  
28 “The ALJ must ask the expert to explain the conflict and then determine whether the vocational

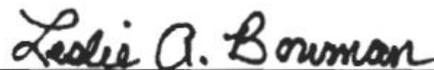
1 expert's explanation for the conflict is reasonable before relying on the expert's testimony to  
2 reach a disability determination.” *Id.* (punctuation modified).

3 In this case, the vocational expert, Cottle, testified that a person with Bass's RFC could  
4 work as a pharmacy clerk, counter clerk, or cashier. (Tr. 55-56) The jobs identified by Cottle  
5 were light work jobs, but Bass did not have the exertional ability to perform the full range of  
6 light work. Accordingly, the ALJ asked Cottle to explain the discrepancy between his  
7 testimony and the DOT. (Tr. 56) Cottle explained that the discrepancy was “based on my  
8 experience as a provid[er] [of] rehab services and written job analysis.” *Id.* He asked, “You  
9 included a sit/stand option?” *Id.* The ALJ answered, “Yes,” and Cottle replied, “It's . . . It's  
10 based on my experiences.” *Id.* This court concludes that the ALJ properly identified and  
11 resolved the conflict between the DOT and the expert's testimony.

12 Bass argues that the expert only resolved the conflict surrounding the sit/stand option and  
13 nothing more. This court reads the record differently. Accordingly,  
14

15 IT IS ORDERED that the Commissioner's final decision in this matter is AFFIRMED.  
16 Bass's condition does not meet or equal Listing 5.06. *See* 20 C.F.R. Part 404, Subpt P, App.  
17 1 § 5.06. The ALJ properly discounted Bass's credibility. The ALJ properly identified and  
18 resolved the conflict between the Dictionary of Occupational Titles (DOT) and the testimony  
19 from the vocational expert. The Clerk of the Court is instructed to enter judgment accordingly  
20 and close this case.  
21

22 DATED this 31<sup>st</sup> day of October, 2017.  
23

24 

25 Leslie A. Bowman  
26 United States Magistrate Judge  
27  
28