

O

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BRIAN C. EPPS,)	Case No. CV 12-1771-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	AFFIRMING THE COMMISSIONER
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security Supplemental Security Income benefits ("SSI"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is before the Court on the parties' Joint Stipulation, filed November 26, 2012, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner's decision is affirmed and this action is dismissed.

II. BACKGROUND

Plaintiff was born on July 29, 1969. (Administrative Record

1 ("AR") 51.) He has a ninth-grade education. (AR 429.) He has
2 worked as a general laborer and sign exhibitor. (AR 122.)

3 On June 10, 2009, Plaintiff filed his SSI application,
4 alleging that he had been unable to work since December 1, 2006,
5 because of bipolar disorder, leg pain, and back pain. (AR 51-
6 79.) After Plaintiff's application was denied on initial review
7 and reconsideration, he requested a hearing before an
8 Administrative Law Judge ("ALJ"). (AR 37-47.) A hearing was
9 held on April 29, 2011, at which Plaintiff, who was represented
10 by counsel, appeared and testified on his own behalf. (AR 420-
11 36.) Medical Expert Steven Gerber and Vocational Expert ("VE")
12 Alan Ey also testified. (Id.) In a written decision issued on
13 July 14, 2011, the ALJ determined that Plaintiff was not
14 disabled. (AR 14-23.) On January 10, 2012, the Appeals Council
15 denied Plaintiff's request for review. (AR 4-6.) This action
16 followed.

17 **III. STANDARD OF REVIEW**

18 Pursuant to 42 U.S.C. § 405(g), a district court may review
19 the Commissioner's decision to deny benefits. The ALJ's findings
20 and decision should be upheld if they are free of legal error and
21 are supported by substantial evidence based on the record as a
22 whole. § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S.
23 Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481
24 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such
25 evidence as a reasonable person might accept as adequate to
26 support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter
27 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than
28 a scintilla but less than a preponderance. Lingenfelter, 504

1 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880,
2 882 (9th Cir. 2006)). To determine whether substantial evidence
3 supports a finding, the reviewing court "must review the
4 administrative record as a whole, weighing both the evidence that
5 supports and the evidence that detracts from the Commissioner's
6 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
7 1996). "If the evidence can reasonably support either affirming
8 or reversing," the reviewing court "may not substitute its
9 judgment" for that of the Commissioner. Id. at 720-21.

10 **IV. THE EVALUATION OF DISABILITY**

11 People are "disabled" for purposes of receiving Social
12 Security benefits if they are unable to engage in any substantial
13 gainful activity owing to a physical or mental impairment that is
14 expected to result in death or which has lasted, or is expected
15 to last, for a continuous period of at least 12 months. 42
16 U.S.C. § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257
17 (9th Cir. 1992).

18 A. The Five-Step Evaluation Process

19 The ALJ follows a five-step sequential evaluation process in
20 assessing whether a claimant is disabled. 20 C.F.R.
21 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
22 1995) (as amended Apr. 9, 1996). In the first step, the
23 Commissioner must determine whether the claimant is currently
24 engaged in substantial gainful activity; if so, the claimant is
25 not disabled and the claim must be denied. § 416.920(a)(4)(i).
26 If the claimant is not engaged in substantial gainful activity,
27 the second step requires the Commissioner to determine whether
28 the claimant has a "severe" impairment or combination of

1 impairments significantly limiting his ability to do basic work
2 activities; if not, a finding of not disabled is made and the
3 claim must be denied. § 416.920(a)(4)(ii). If the claimant has
4 a "severe" impairment or combination of impairments, the third
5 step requires the Commissioner to determine whether the
6 impairment or combination of impairments meets or equals an
7 impairment in the Listing of Impairments ("Listing") set forth at
8 20 C.F.R., Part 404, Subpart P, Appendix 1; if so, disability is
9 conclusively presumed and benefits are awarded.

10 § 416.920(a)(4)(iii). If the claimant's impairment or
11 combination of impairments does not meet or equal an impairment
12 in the Listing, the fourth step requires the Commissioner to
13 determine whether the claimant has sufficient residual functional
14 capacity ("RFC")¹ to perform his past work; if so, the claimant
15 is not disabled and the claim must be denied.

16 § 416.920(a)(4)(iv). The claimant has the burden of proving that
17 he is unable to perform past relevant work. Drouin, 966 F.2d at
18 1257. If the claimant meets that burden, a prima facie case of
19 disability is established. Id. If that happens or if the
20 claimant has no past relevant work, the Commissioner then bears
21 the burden of establishing that the claimant is not disabled
22 because he can perform other substantial gainful work available
23 in the national economy. § 416.920(a)(4)(v). That determination
24 comprises the fifth and final step in the sequential analysis.

25
26
27 ¹ RFC is what a claimant can still do despite existing
28 exertional and nonexertional limitations. 20 C.F.R. §§ 404.1545,
416.945; see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th
Cir. 1989).

1 § 416.920; Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

2 B. The ALJ's Application of the Five-Step Process

3 At step one, the ALJ found that Plaintiff had not engaged in
4 any substantial gainful activity since June 10, 2009, the date of
5 Plaintiff's application. (AR 16.) At step two, the ALJ
6 concluded that Plaintiff had the severe impairments of bilateral
7 femur fractures and schizoaffective disorder. (Id.) At step
8 three, the ALJ determined that Plaintiff's impairments did not
9 meet or equal any of the impairments in the Listing. (AR 17-18.)

10 At step four, the ALJ found that Plaintiff retained the RFC to
11 lift twenty pounds occasionally and ten pounds
12 frequently; sit for six hours and stand or walk for four
13 hours, with normal breaks, during an eight-hour workday;
14 only occasionally perform postural activities except
15 never climb ladders, ropes, or scaffolds; only perform
16 simple tasks with simple work-related decisions; and
17 never interact with the general public and only
18 occasionally interact with co-workers and supervisors.

19 (AR 18.) The ALJ found that Plaintiff had no past relevant work.

20 (AR 21.) At step five, the ALJ concluded that jobs existed in
21 significant numbers in the national economy that Plaintiff could
22 perform. (AR 22.) Accordingly, the ALJ determined that
23 Plaintiff was not disabled. (AR 22-23.)

24 **V. DISCUSSION**

25 Plaintiff alleges that the ALJ erred in failing to properly
26 consider (1) the opinion of examining physician Concepcion A.
27 Enriquez and (2) Plaintiff's subjective complaints. (J. Stip. at
28 4.)

1 A. The ALJ Did Not Err in Rejecting the Examining
2 Physician's Opinion

3 Plaintiff contends that the ALJ "improperly rejected" the
4 opinion of examining physician Enriquez and instead relied on the
5 opinion of the "non-examining state agency physician." (J. Stip.
6 at 5-9.)

7 1. Applicable law

8 Three types of physicians may offer opinions in Social
9 Security cases: "(1) those who treat the claimant (treating
10 physicians); (2) those who examine but do not treat the claimant
11 (examining physicians); and (3) those who neither examine nor
12 treat the claimant (non-examining physicians)." Lester, 81 F.3d
13 at 830. In general, the opinion of a treating doctor is accorded
14 more weight than the opinion of a doctor who did not treat the
15 claimant, and the opinion of an examining doctor is, in turn,
16 entitled to greater weight than the opinion of a nonexamining
17 doctor. Id. (citations omitted); 20 C.F.R. § 416.927(c)(1)-(2).

18 An ALJ must provide "clear and convincing" reasons for
19 rejecting the uncontradicted opinion of a treating or examining
20 physician. Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155,
21 1164 (9th Cir. 2008) (quoting Lester, 81 F.3d at 830-31). When
22 such an opinion is contradicted, however, "it may be rejected for
23 'specific and legitimate reasons that are supported by
24 substantial evidence in the record.'"² Id. (quoting Lester, 81
25

26 ² Although the legal standard governing rejection of
27 either an examining or a treating physician's opinion is the
28 same, because a treating physician's opinion is entitled to
greater deference, "the type of evidence and reasons that would
justify rejection of an examining physician's opinion might not

1 F.3d at 830-31). An ALJ, moreover, "may reject the testimony of
2 an examining, but non-treating physician, in favor of a
3 nonexamining, nontreating physician when he gives specific,
4 legitimate reasons for doing so, and those reasons are supported
5 by substantial record evidence." Roberts v. Shalala, 66 F.3d
6 179, 184 (9th Cir. 1995) (citing Andrews v. Shalala, 53 F.3d
7 1035, 1043 (9th Cir. 1995)); accord Ruiz v. Comm'r of Soc. Sec.
8 Admin., No. 11-16162, ___ F. App'x ___, 2012 WL 5857135, at *1
9 (9th Cir. Nov. 19, 2012). The weight given a physician's opinion
10 depends on whether it is consistent with the record and
11 accompanied by adequate explanation, among other things. 20
12 C.F.R. § 416.927(c)(3)-(6).

13 2. Relevant facts

14 Sometime in 2005, Plaintiff was walking on railroad tracks
15 and was struck by a train. (AR 426.) On June 16 and 29, 2005,
16 Plaintiff underwent surgeries at UCI Medical Center to repair the
17 soft-tissue injury on his right lower leg. (AR 199-201.) X-rays
18 taken that day showed an "[o]pen comminuted fracture of the right
19 femur with external fixation device in place" and "[n]o evidence
20 of osteomyelitis." (AR 195.) On July 12, 2005, Plaintiff
21 underwent a skin graft to his right-thigh wound. (AR 197.)

22 On September 15, 2005, a California Department of
23 Corrections ("CDC") radiology report noted that Plaintiff had an
24 external fixation device through the proximal and distal right
25 femur and a healing comminuted fracture of the distal one-third
26 of the right femur. (AR 203.) On January 19, 2006, a CDC

27 _____
28 justify rejection of a treating physician's opinion." See
Lester, 81 F.3d at 831 n.8.

1 clinician noted that Plaintiff's external fixation device had
2 been removed on December 21, 2005, and he was ambulating with two
3 crutches. (AR 207.) On January 25, 2006, a CDC clinician noted
4 that Plaintiff was ambulating with two crutches and would be
5 referred to physical therapy. (AR 206.)

6 On May 2, 2008, a nurse at the Orange County Jail noted that
7 Plaintiff had reported "nerve damage" in his right leg resulting
8 from a train accident and was requesting the medication
9 Neurontin. (AR 255.) The nurse noted, however, that Plaintiff
10 had a "steady gait," "good sensation" to his right extremity, and
11 no difficulty sitting or standing. (Id.)

12 On January 13, 2009, a CDC clinician noted that Plaintiff
13 had an infected wound on his right leg. (AR 393.) On February
14 11, 2009, a CDC clinician noted that Plaintiff had a 1.5-
15 centimeter healing wound on his right thigh. (AR 392.) On
16 February 25, 2009, x-rays of Plaintiff's right femur revealed no
17 evidence of acute fracture but "[p]robable old distal femoral
18 metaphyseal fracture with deformity," with "chronic superimposed
19 osteomyelitis . . . not excluded." (AR 225.) On March 4, 2009,
20 a CDC clinician noted that Plaintiff had a right-thigh wound and
21 listed a "chrono" as no pulling, pushing, or shoveling over a
22 certain weight.³ (AR 391.)

23 On July 9, 2009, an SSA field-office staff member conducted
24 a face-to-face interview with Plaintiff, noting that he suffered
25 from "severe memory loss" but had no difficulty sitting,
26

27
28 ³ The listed weight is illegible but appears to be two
pounds. (See AR 391.)

1 standing, or walking, among other things.⁴ (AR 95.)

2 On September 10, 2009, Dr. Enriquez, who was "board
3 eligible" in internal medicine, conducted an internal medicine
4 consultation at the SSA's request. (AR 332-35.) Plaintiff
5 reported his previous leg fractures and surgeries and said that
6 he still had pain with "prolonged" standing and walking but that
7 it was relieved by "resting and changing position." (AR 332.)
8 X-rays performed that day showed a metallic rod and old healed
9 fracture deformity of the mid-shaft of the left femur; an old
10 fracture deformity of the distal right femur, probably
11 incompletely healed; and "minimal osteoarthritis" of the right
12 knee. (AR 336-38.)

13 On examination, Dr. Enriquez found that Plaintiff had
14 "extensive scars" on his lateral right thigh, tenderness of the
15 right knee, and a right lower extremity that was about 1.5
16 centimeters shorter than the left lower extremity. (AR 334.)
17 Plaintiff's right-knee range of motion was 130 out of 150 degrees
18 of flexion, but ranges of motion of all other joints, including
19 his hips, left knee, and ankles, were grossly normal. (Id.)
20 Plaintiff walked with a mild limp on the right but did not need
21 an assistive device. (AR 335.) Plaintiff had normal muscle tone
22 and bulk without atrophy, intact sensation, strength of "5/5
23 throughout" without focal motor deficits, and symmetrical
24 reflexes of "4/4" throughout. (AR 334.) Dr. Enriquez noted that
25 her findings were based on "formal testing as well as

26
27 ⁴ The staff member apparently based his finding of memory
28 problems on Plaintiff's stated inability to remember details
about his employment or medical visits. (AR 95.)

1 observation" of Plaintiff, but she did not indicate that she had
2 reviewed Plaintiff's medical records. (AR 332-35.) Dr. Enriquez
3 concluded that Plaintiff could lift or carry 20 pounds
4 occasionally and 10 pounds frequently, stand or walk for less
5 than one hour in an eight-hour workday, sit for six hours in an
6 eight-hour work day, and frequently bend, stoop, twist, squat,
7 crouch, and kneel. (AR 335.)

8 On October 16, 2009, nonexamining agency physician Paulette
9 M. Harar reviewed all the evidence in Plaintiff's file and
10 completed a physical-RFC-assessment form. (AR 339-45.) Like Dr.
11 Enriquez, Dr. Harar found that Plaintiff could lift and carry 20
12 pounds occasionally and 10 pounds frequently, sit for six hours
13 in an eight-hour work day, and frequently perform all postural
14 activities, such as climbing, balancing, stooping, kneeling,
15 crouching, and crawling. (AR 341-42.) Unlike Dr. Enriquez,
16 however, Dr. Harar found that Plaintiff could stand or walk for a
17 total of about six hours in an eight-hour day. (AR 341.)

18 Dr. Harar noted that her RFC finding was "significantly
19 different" from the RFC found by the examining physician, Dr.
20 Enriquez. (AR 344.) In a case-analysis form, which noted
21 Plaintiff's CDC x-rays and his stated daily activities, Dr. Harar
22 explained that "[g]iven that [Plaintiff] was observed by the
23 Field Officer to have no problems moving/sitting and given that
24 he has normal strength and bulk without atrophy and normal
25 sensation and only walks with a mild limp on the right," Dr.
26 Enriquez's suggested RFC of less than sedentary "appear[ed] a bit
27 restrictive." (AR 371.) Dr. Harar opined that an "RFC of light
28 appears more medically reasonable despite the heterotopic bone

1 formation in the right femur." (Id.) On April 29, 2010, another
2 nonexamining agency physician, D. Chan, reviewed Plaintiff's
3 medical records and affirmed Dr. Harar's RFC finding. (AR 394-
4 95.)

5 On April 29, 2011, medical expert Dr. Steven Gerber
6 testified at the hearing before an ALJ. (AR 424-25.) Dr. Gerber
7 stated that he had reviewed the medical evidence and that
8 Plaintiff had a history of bilateral femur fractures and obesity.
9 (AR 424.) Like Drs. Enriquez, Harar, and Chan, Dr. Gerber opined
10 that Plaintiff could lift and carry 20 pounds occasionally and 10
11 pound frequently and sit for six hours of an eight-hour workday.
12 (AR 425.) Unlike the other doctors, however, Dr. Gerber found
13 that Plaintiff could stand or walk for four hours and could only
14 occasionally perform postural activities. (Id.)

15 With regard to Plaintiff's physical abilities, the ALJ
16 found, consistent with Drs. Enriquez, Gerber, Harar, and Chan,
17 that Plaintiff had the RFC to lift 20 pounds occasionally and 10
18 pounds frequently and sit for six hours in an eight-hour workday.
19 (AR 18.) The ALJ rejected Drs. Enriquez, Harar, and Chan's
20 finding that Plaintiff could frequently perform all postural
21 activities and instead adopted Dr. Gerber's more limited finding
22 that Plaintiff could only occasionally perform those activities;
23 "as an additional safeguard," he prohibited Plaintiff from ever
24 climbing ladders, ropes, or scaffolds. (AR 18, 20.) Finally,
25 the ALJ rejected Dr. Enriquez's finding that Plaintiff could
26 stand or walk for less than one hour a day and Drs. Harar and
27 Chan's finding that Plaintiff could stand or walk for six hours,
28 instead adopting Dr. Gerber's finding that Plaintiff could stand

1 or walk for four hours. (AR 18-20.) In so finding, the ALJ
2 noted that Dr. Enriquez "agreed with both Dr. Gerber and the
3 State agency consultant in regard to lifting, carrying, and
4 sitting but limited standing and walking to less than one hour
5 and permitted only frequent stooping, kneeling, squatting, and
6 twisting." (AR at 19.)

7 3. Analysis

8 Plaintiff argues that the ALJ erred by rejecting the opinion
9 of examining physician Dr. Enriquez in favor of those of the
10 nonexamining state-agency physicians, apparently referring to
11 Drs. Harar and Chan.⁵ (J. Stip. at 7-8.) But the ALJ, after
12 noting that he was giving Plaintiff "all reasonable
13 consideration," actually assigned "great weight" to medical
14 expert Dr. Gerber's "more restrictive opinion" and
15 "correspondingly less weight" to Drs. Harar's and Chan's
16 opinions. (AR 20.) Although the ALJ stated that he was giving
17 "little weight" to Dr. Enriquez's opinion, it was largely
18 consistent with Dr. Gerber's; they differed only in that Dr.
19 Gerber believed Plaintiff could stand and walk for four hours in
20 an eight-hour day and only "occasionally" perform postural
21 activities, whereas Dr. Enriquez believed that Plaintiff could
22 stand and walk for less than one hour in an eight-hour day and
23 "frequently" perform postural activities. Because Dr. Gerber's
24 postural findings were actually more accommodating of Plaintiff
25

26
27 ⁵ Plaintiff cites to Dr. Harar's and Chan's findings but
28 does not address Dr. Gerber's. (J. Stip. at 7 (citing AR 339-46
(Dr. Harar's physical-RFC assessment), 368-71 (Dr. Harar's case-
analysis form), & 395 (Dr. Chan's case-analysis form).)

1 than Dr. Enriquez's, the only aspect of Dr. Enriquez's finding at
2 issue here is her finding that Plaintiff could walk or stand less
3 than an hour in an eight-hour workday.

4 The ALJ gave specific and legitimate reasons for rejecting
5 Dr. Enriquez's standing-and-walking restriction in favor of Dr.
6 Gerber's. As the ALJ found, Dr. Enriquez's finding that
7 Plaintiff could stand or walk for less than one hour conflicted
8 with Plaintiff's own testimony and other statements. (AR 19.)
9 At the hearing, Plaintiff asserted that he could stand in one
10 place for two or three hours if he "really struggle[d]" with it
11 (AR 430) but later said that he could stand for about eight hours
12 if he "really press[ed] it" (AR 433).⁶ In a function report,
13 Plaintiff indicated that he traveled only by walking and went out
14 every day to, among other things, shop in stores, which also
15 undermines any finding that Plaintiff could stand or walk for
16 only one hour of an eight-hour day. (AR 116.) That
17 inconsistency with Plaintiff's own testimony was a specific and
18 legitimate reason for rejecting Dr. Enriquez's standing-and-
19 walking limitation in favor of Dr. Gerber's. See Andrews, 53
20 F.3d at 1042 (upholding rejection of examining physician's
21 opinion in favor of testifying medical expert's when medical
22 expert's opinion was consistent with plaintiff's testimony, among
23 other things); 20 C.F.R. § 416.927(c)(4) ("Generally, the more
24 consistent an opinion is with the record as a whole, the more
25

26
27 ⁶ Plaintiff testified that he would be in pain if he
28 stood for eight hours (AR 433), which would presumably be
alleviated by Dr. Gerber's limitation to four hours of standing
and walking in an eight-hour day (AR 425).

1 weight we will give to that opinion.”).

2 The ALJ also found that Dr. Enriquez’s “extremely
3 restrictive assessment” of Plaintiff’s standing-and-walking
4 capabilities was inconsistent with her minimal findings on
5 physical exam and the record as a whole. (AR 19.) Indeed, Drs.
6 Harar, Chan, and Gerber each reviewed the evidence, including Dr.
7 Enriquez’s findings and opinion, and concluded that Plaintiff was
8 capable of standing and walking for well over one hour.⁷ (AR
9 341, 395, 425.) There is no indication, on the other hand, that
10 Dr. Enriquez reviewed any of the medical evidence before
11 rendering her opinion. The ALJ noted that the “only
12 abnormalities” that Dr. Enriquez described in her report were
13 “tenderness and slightly decreased range of motion in the right
14 knee, a right lower extremity slightly shorter than the left, and
15 a mild limp on the right side (although [Plaintiff] was able to
16 walk unassisted).” (AR 19, 334-35.) Indeed, Dr. Enriquez found
17 that Plaintiff had normal ranges of motion in all other joints,
18 normal muscle tone and bulk without atrophy, normal strength
19 without focal deficits, normal sensation, and normal reflexes.
20 (AR 334.) A lack of supporting clinical findings was a specific
21 and legitimate reason for rejecting part of Dr. Enriquez’s
22 opinion. Batson v. Comm’r of Soc. Sec. Admin., 359 F.3d 1190,
23 1195 (9th Cir. 2004) (ALJ may discredit physicians’ opinions that

24
25
26 ⁷ In support of her findings, Dr. Harar specifically
27 noted (AR 371) a field-office staff member’s observation that
28 Plaintiff had no difficulty sitting or standing during an in-
person interview (AR 95). An examining psychiatrist, Ernest A.
Bagner, III, also noted that Plaintiff had normal posture and
gait. (AR 348.)

1 are "conclusory, brief, and unsupported by the record as a whole
2 . . . or by objective medical findings"); Thomas v. Barnhart, 278
3 F.3d 947, 957 (9th Cir. 2002) ("The ALJ need not accept the
4 opinion of any physician . . . if that opinion is brief,
5 conclusory, and inadequately supported by clinical findings.").⁸

6 Finally, Drs. Harar and Chan both found that Plaintiff's
7 ability to stand and walk considerably exceeded Dr. Enriquez's
8 estimation – which was not justified by her objective findings –
9 further demonstrating that the ALJ's adoption of Dr. Gerber's
10 more limited view was legitimate and reasonable. Thomas, 278
11 F.3d at 957 ("The opinions of non-treating or non-examining
12 physicians may also serve as substantial evidence when the
13 opinions are consistent with independent clinical findings or
14 other evidence in the record."); Morgan v. Comm'r of Soc. Sec.
15 Admin., 169 F.3d 595, 600 (9th Cir. 1999) ("Opinions of a
16 nonexamining, testifying medical advisor may serve as substantial
17 evidence when they are supported by other evidence in the record
18 and are consistent with it" (citing Andrews, 53 F.3d at 1041));
19 see 20 C.F.R. § 416.927(c)(4) (ALJ will generally give more
20 weight to opinions that are "more consistent . . . with the
21 record as a whole"). Dr. Gerber, unlike Dr. Enriquez, reviewed
22 all of the medical evidence before rendering his opinion. See 20
23 C.F.R. § 416.927(c)(3) (in weighing medical opinions, ALJ "will

24
25
26 ⁸ Other evidence in the record also showed that Plaintiff
27 could stand for longer than Dr. Enriquez found. For example,
28 Robert Lindsey, the manager of the sober-living home where
Plaintiff had lived for five months, stated that although
Plaintiff's physical conditions affected his walking, they had no
impact on his ability to stand. (AR 141.)

1 evaluate the degree to which these opinions consider all of the
2 pertinent evidence in [claimant's] claim, including opinions of
3 treating and other examining sources"). Moreover, the ALJ could
4 credit Dr. Gerber's opinion because he testified at the hearing
5 and was subject to cross-examination. See Andrews, 53 F.3d at
6 1042 (greater weight may be given to nonexamining doctors who are
7 subject to cross-examination). Any conflict in the properly
8 supported medical-opinion evidence was therefore the sole
9 province of the ALJ to resolve. See id. at 1041. Plaintiff is
10 not entitled to reversal on this ground.

11 B. The ALJ Did Not Improperly Discount Plaintiff's
12 Subjective-Symptom Testimony

13 Plaintiff next argues that the ALJ improperly assessed his
14 subjective-symptom testimony in assessing his RFC. (J. Stip. at
15 12-20.)

16 1. Applicable law

17 An ALJ's assessment of pain severity and claimant
18 credibility is entitled to "great weight." See Weetman v.
19 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779
20 F.2d 528, 531 (9th Cir. 1986). When the ALJ finds a claimant's
21 subjective complaints not credible, the ALJ must make specific
22 findings that support the conclusion. See Berry v. Astrue, 622
23 F.3d 1228, 1234 (9th Cir. 2010). Absent affirmative evidence of
24 malingering, the ALJ must give "clear and convincing" reasons for
25 rejecting the claimant's testimony. Lester, 81 F.3d at 834. "At
26 the same time, the ALJ is not required to believe every
27 allegation of disabling pain, or else disability benefits would
28 be available for the asking, a result plainly contrary to 42

1 U.S.C. § 423(d)(5)(A)." Molina v. Astrue, 674 F.3d 1104, 1112
2 (9th Cir. 2012) (internal quotation marks and citation omitted).
3 If the ALJ's credibility finding was supported by substantial
4 evidence in the record, the reviewing court "may not engage in
5 second-guessing." Thomas, 278 F.3d at 959.

6 2. Relevant facts

7 In a July 2009 function report, Plaintiff stated that he
8 could walk "not very far" before having to rest for about an hour
9 and could pay attention for "not long." (AR 118.) He also
10 stated that he went outside every day, and when going out, he
11 traveled only by walking, not public transportation. (AR 116.)
12 He alleged that his conditions affected his ability to lift,
13 squat, bend, stand, reach, walk, kneel, climb stairs, complete
14 tasks, concentrate, and understand. (AR 118.) Plaintiff said
15 that he had no problem performing personal care, following spoken
16 instructions, getting along with authority figures, or handling
17 stress and changes in routine. (AR 114, 118-19.) He said he was
18 able to pay bills and count change. (AR 116.) In a subsequent
19 undated Disability Report - Appeal, Plaintiff stated that he was
20 unable to stand for "long periods of time." (AR 162.)

21 At the April 2011 hearing, Plaintiff testified that his legs
22 would start hurting if he stood for a while, specifying that he
23 could stand in one place for two or three hours and could stand
24 for about eight hours if he "really push[ed] it." (AR 430, 433.)
25 He said he felt paranoid and depressed and had a bad memory but
26 could concentrate well. (AR 431-32.) In response to a question
27 by the VE, Plaintiff testified that he was unable to handle money
28 or make change. (AR 434-35.)

1 As discussed in Section A, the ALJ found that as a result of
2 his physical conditions, Plaintiff was limited to lifting 20
3 pounds occasionally and 10 pounds frequently; sitting for six
4 hours of an eight-hour workday; standing or walking for four
5 hours of an eight-hour workday; and only occasionally performing
6 most postural activities but never climbing ladders, ropes, or
7 scaffolds. (AR 18.) The ALJ also found that as a result of his
8 mental condition, Plaintiff was limited to "simple tasks with
9 simple work-related decisions," "never interact[ing] with the
10 general public," and "only occasionally interact[ing] with co-
11 workers and supervisors." (AR 18.) The ALJ found that
12 Plaintiff's "medically determinable impairments could reasonably
13 be expected to cause the alleged symptoms" but that his
14 statements "concerning the intensity, persistence, and limiting
15 effects of these symptoms are not credible to the extent they are
16 inconsistent with the [RFC] assessment." (AR 21.) As explained
17 more fully below, the ALJ offered several clear and convincing
18 reasons why this was so.

19 3. Analysis

20 As an initial matter, the ALJ's RFC finding largely
21 accommodated Plaintiff's subjective complaints by limiting
22 Plaintiff to, for example, only four hours of walking in a
23 workday, occasional postural activities with no climbing, and
24 simple tasks with limited social contact. To the extent that
25 Plaintiff's subjective symptom testimony was inconsistent with
26 that RFC, however, the ALJ gave clear and convincing reasons for
27 discrediting it.

28 First, the ALJ correctly noted that Plaintiff's testimony

1 and other statements contained inconsistencies:

2 . . . [Plaintiff's] allegations of generally disabling
3 symptoms and limitations are not corroborated by the
4 record. In addition, [Plaintiff] has admitted that he
5 has not always been compliant with his medication
6 regimen. Furthermore, while he testified he was unable
7 to make change, both he (and Mr. Lindsey) have reported
8 otherwise. [Plaintiff] has also indicated that he does
9 not do household chores or use public transportation,
10 although there is significant evidence to the contrary.
11 Finally, the recent treatment history belies current
12 claims of depression and paranoia.

13 (AR 21 (internal citations omitted).) Indeed, in response to the
14 VE's question at the hearing, Plaintiff testified that he was
15 unable to handle money or make change. (AR 434-35.) Previously,
16 however, Plaintiff and a third party, Robert Lindsey, the house
17 manager at Plaintiff's sober-living house, had stated that
18 Plaintiff was able to perform those tasks. (AR 116 (Plaintiff's
19 function report stating that he can pay bills and count change),
20 AR 139 (third-party statement of Lindsey that Plaintiff could
21 count change).) In his function report, Plaintiff also indicated
22 that his only form of transportation was walking, but the
23 evidence established that he often also took public
24 transportation. (Compare AR 116 (Plaintiff's function report
25 stating that he traveled only by walking) with AR 139 (statement
26 of Lindsey that Plaintiff traveled by walking, public
27 transportation, and riding bicycle), 349 (Plaintiff's statement
28 to examining physician that he "takes the bus to get around").)

1 Those conflicts in Plaintiff's statements were permissible
2 reasons for discounting his credibility. See Smolen v. Chater,
3 80 F.3d 1273, 1284 (9th Cir. 1996) (in determining credibility,
4 ALJ may consider claimant's prior inconsistent statements
5 concerning symptoms); Thomas, 278 F.3d at 958-59 (in determining
6 credibility, ALJ may consider inconsistencies in claimant's
7 testimony); Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir.
8 1995) (ALJ permissibly discounted credibility based on
9 contradictions within claimant's testimony).

10 Second, the ALJ properly noted that Plaintiff's "allegations
11 of generally disabling symptoms and limitations" were not
12 corroborated by the evidence of record. (AR 21.) Indeed, as the
13 ALJ found, Plaintiff's most recent medical records, from a parole
14 medical clinic, showed that his psychological symptoms were
15 stable and controlled when he took his medication. (AR 21.) For
16 example, on June 25, 2009, psychiatrist Gul Ebrahim noted that
17 Plaintiff was "stable" and taking his medication as prescribed;
18 Plaintiff reported that his medication "help[ed] him" with "his
19 mood and psychosis/paranoia." (AR 407-08.) On August 24, 2009,
20 however, Gamze Gurbuz, Ph.D., noted that Plaintiff reported
21 taking his medication only "every other day" and was "[m]ore
22 irritable and confused." (AR 407.) Gurbuz noted that
23 Plaintiff's lack of medication compliance was "apparent" and he
24 "[s]trongly encouraged" Plaintiff to take his medication. (Id.)
25 On September 16, 2009, Gurbuz noted that Plaintiff was "taking
26 his full dose of medication" and was "more composed, stable."
27 (Id.) In September, October, and November 2009, Dr. Ebrahim
28 noted that Plaintiff was stable on his medication and his

1 medication helped him. (AR 406-07.)

2 On February 4, 2010, however, Dr. Ebrahim noted that
3 Plaintiff was not taking his medication as prescribed and was
4 paranoid and making nonsensical statements. (AR 405.) On
5 February 10, 2010, Dr. Ebrahim noted that Plaintiff reported
6 being a "little better" but still was not taking his medication
7 as prescribed. (Id.) On February 18, 2010, Dr. Ebrahim noted
8 that Plaintiff was compliant with medication but still psychotic;
9 he increased Plaintiff's dosage. (AR 404.) By March 3, 2010,
10 Dr. Ebrahim found that Plaintiff was compliant with his
11 medication and had "no more voices and no more paranoia." (Id.)
12 Dr. Ebrahim noted that Plaintiff had improved on his current
13 medication and advised him to continue them. (Id.) In March,
14 April, May, June, and September 2010, Dr. Ebrahim continued to
15 note that Plaintiff was medication compliant, his medications
16 were helping him, and he was stable. (AR 400-03.) On November
17 8, 2010, moreover, psychiatrist Garret M. Halweg noted that
18 Plaintiff had good medication compliance with no side effects, he
19 was able to fully attend and concentrate, his memory was grossly
20 intact for immediate, recent, and remote events, and he denied
21 audio or visual hallucinations or paranoid delusions. (AR 398-
22 99.) Thus, substantial evidence supports the ALJ's finding that
23 Plaintiff's symptoms were controlled as a result of his "current,
24 consistent adherence to his medication regimen." (AR 21.)

25 The ALJ also discussed the findings of examining
26 psychiatrist Ernest A. Bagner, III, CDC psychologist K. Nesson,
27 and psychiatric consultant P.M. Balson, which were all consistent
28 with Plaintiff's RFC and undercut his allegations of debilitating

1 psychological symptoms. (AR 20-21.) On January 13, 2009, Nesson
2 found that Plaintiff had slight auditory hallucinations and
3 slight paranoia at times but normal fund of information,
4 intellectual functioning, concentration, attention, memory,
5 thought processes, insight, and judgment. (AR 227.) On November
6 4, 2009, Dr. Bagner found that Plaintiff had average intelligence
7 and tight thought processes, with no evidence of auditory or
8 visual hallucinations or paranoid or grandiose hallucinations.
9 (AR 349-50.) Dr. Bagner opined that Plaintiff would have no
10 limitations interacting with supervisors, peers, and the public;
11 zero to mild limitations maintaining concentration and attention
12 and completing simple tasks; mild limitations completing complex
13 tasks; and mild to moderate limitations handling normal stresses
14 at work and completing a normal work week without interruption.
15 (AR 351.) On December 1, 2009, Dr. Balson reviewed the evidence
16 in Plaintiff's file and found that Plaintiff had a mood disorder
17 that was "well managed via meds & sobriety." (AR 359; see
18 also AR 366 (noting that prison records showed diagnosis of
19 bipolar disorder versus schizoaffective disorder that was "well
20 managed on meds - relatively [symptom]/sign free".) Dr. Balson
21 opined that Plaintiff was not significantly limited in most areas
22 but was moderately limited in his ability to understand,
23 remember, and carry out detailed instructions; complete a normal
24 work week without interruption from psychological problems; and
25 respond appropriately to changes in the work setting. (AR
26 352-53.) Dr. Balson concluded that Plaintiff retained the RFC to
27 perform simple, repetitive tasks in the open marketplace if he
28 "maintains med[ication] adherence and sobriety." (AR 354.)

1 Indeed, as the ALJ found, “[w]hile [Plaintiff] claims to have a
2 bad memory, treating psychiatrists have found that his memory is
3 grossly intact for immediate, recent, and remote events.” (AR
4 18.)

5 Thus, the ALJ’s detailed reasons for rejecting Plaintiff’s
6 testimony and other statements in total constituted appropriate
7 bases for discounting Plaintiff’s subjective-symptom testimony.
8 See, e.g., Tommasetti v. Astrue, 533 F.3d 1035, 1040 (9th Cir.
9 2008) (ALJ may infer that claimant’s “response to conservative
10 treatment undermines [claimant’s] reports regarding the disabling
11 nature of his pain”); Johnson, 60 F.3d at 1434 (holding that
12 “contradictions between claimant’s testimony and the relevant
13 medical evidence” provided clear and convincing reasons for ALJ
14 to reject plaintiff’s subjective symptom testimony);
15 Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1175 (9th Cir. 2008)
16 (doctors’ opinions finding plaintiff “could perform a limited
17 range of work [] support the ALJ’s credibility determination”);
18 Doney v. Astrue, No. 11-35561, ___ F. App’x ___, 2012 WL 2584837,
19 at *2 (9th Cir. July 5, 2012) (upholding ALJ’s finding that
20 plaintiff not credible regarding extent of impairments because
21 plaintiff “provided contradictory statements and because her
22 claims about the extent of her impairments were not supported by
23 the objective medical record as a whole”).

24 Plaintiff does not argue that the medical evidence supports
25 his subjective-symptom testimony but instead incorrectly contends
26 that the “rejection of a claimant’s testimony based on a lack of
27 objective evidence is always legally insufficient.” (J. Stip. at
28 15.) An ALJ may not disregard a claimant’s subjective-symptom

1 testimony "solely because it is not substantiated affirmatively
2 by objective medical evidence." Robbins, 466 F.3d at 883
3 (emphasis added); see also Bunnell v. Sullivan, 947 F.2d 341,
4 346-47 (9th Cir. 1991). The ALJ may, however, use the medical
5 evidence in the record as one factor in his evaluation. See
6 Carmickle, 533 F.3d at 1161 ("Contradiction with the medical
7 record is a sufficient basis for rejecting the claimant's
8 subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in
9 determining credibility, ALJ may consider "whether the alleged
10 symptoms are consistent with the medical evidence"); Burch v.
11 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of
12 medical evidence cannot form the sole basis for discounting pain
13 testimony, it is a factor that the ALJ can consider in his
14 credibility analysis."); Kennelly v. Astrue, 313 F. App'x 977,
15 979 (9th Cir. 2009) (same). Here, as explained above, the ALJ's
16 credibility determination was supported by other clear and
17 convincing reasons; thus, there was no error.


18 This Court may not "second-guess" the ALJ's credibility
19 finding simply because the evidence may have been susceptible of
20 other interpretations more favorable to Plaintiff. See
21 Tommasetti, 533 F.3d at 1039. The ALJ reasonably and properly
22 discredited Plaintiff's testimony regarding the severity of his
23 symptoms and gave clear and convincing reasons for his adverse
24 credibility finding. Reversal is therefore not warranted on this
25 basis.

26 VII. CONCLUSION

27 Consistent with the foregoing, and pursuant to sentence four
28

1 of 42 U.S.C. § 405(g),⁹ IT IS ORDERED that judgment be entered
2 AFFIRMING the decision of the Commissioner and dismissing this
3 action with prejudice. IT IS FURTHER ORDERED that the Clerk
4 serve copies of this Order and the Judgment on counsel for both
5 parties.

6
7 DATED: December 18, 2012


JEAN ROSENBLUTH
U.S. Magistrate Judge

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26 _____
27 ⁹ This sentence provides: "The [district] court shall
28 have power to enter, upon the pleadings and transcript of the
record, a judgment affirming, modifying, or reversing the
decision of the Commissioner of Social Security, with or without
remanding the cause for a rehearing."