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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

IGNACIO FLETES VERA,)	Case No. CV 12-7078-SS
)	
Plaintiff,)	
)	
vs.)	
)	MEMORANDUM OPINION AND ORDER
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security, ¹)	
)	
Defendant.)	
)	

I. PROCEEDINGS

Plaintiff Ignacio Fletes Vera ("Plaintiff") seeks review of the Commissioner's final decision denying his application for Social Security disability insurance benefits ("DIB"). 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 May 28, 2013, which

¹ On February 14, 2013, Colvin became the Acting Commissioner of Social Security. Pursuant to Federal Rule of Civil Procedure 25(d), the Court therefore substitutes Colvin for Michael J. Astrue as the proper Respondent.

1 the Court has taken the motion under submission without oral
2 argument. For the reasons stated below, the Commissioner's
3 decision is affirmed and this action is dismissed.

4
5 **II. BACKGROUND**

6
7 Plaintiff was born on July 31, 1965 and was thirty-nine, a
8 younger individual, at the time of the hearing. (Administrative
9 Record ("AR") 18, 91, 175.) He finished high school and an
10 associate degree. (AR 19-20.) He previously worked as a tool-crib
11 attendant in the aerospace industry, a tool-truck operator in the
12 Army, a parts-delivery person at a car dealership, a slot
13 representative and slot supervisor at casinos, and a stocker at
14 Walmart. (AR 21-36.)

15
16 On August 12, 2008, Plaintiff filed an application for DIB.
17 (AR 175-77.) Plaintiff alleged that he had been unable to work
18 since June 30, 2005, because of major depression, posttraumatic
19 stress disorder, a kidney condition, a back condition, and migraine
20 headaches. (AR 175, 211.) After his application was denied on
21 initial review and reconsideration, Plaintiff requested a hearing
22 before an Administrative Law Judge ("ALJ"). (AR 104-09, 112-16,
23 118-19.) A hearing was held on June 11, 2010, at which Plaintiff,
24 who was represented by counsel, testified, as did a vocational
25 expert ("VE"). (AR 14-69.) In a written decision issued November
26 22, 2010, the ALJ found that Plaintiff was not disabled. (AR 78-
27 93.) Plaintiff requested that the Appeals Council review the ALJ
28 decision and submitted additional argument and evidence, including

1 Department of Veterans Affairs ("VA") treatment notes dating
2 through May 2011. (AR 257-91, 685-750.) On June 22, 2012, the
3 Appeals Council noted that the new information "d[id] not provide
4 a basis for changing the [ALJ's] decision" and denied his request
5 for review. (AR 97-102.) The Council also noted that some of the
6 submitted medical evidence postdated the ALJ's November 22, 2010
7 decision and therefore "d[id] not affect the decision about whether
8 [he was] disabled beginning on or before" that date.² (AR 98.)
9 This action followed.

11 **III. STANDARD OF REVIEW**

13 Pursuant to 42 U.S.C. § 405(g), a district court may review
14 the Commissioner's decision to deny benefits. The ALJ's findings
15 and decision should be upheld if they are free of legal error and
16 supported by substantial evidence based on the record as a whole.
17 § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420,
18 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d 742, 746
19 (9th Cir. 2007). Substantial evidence means such evidence as a
20 reasonable person might accept as adequate to support a conclusion.
21 Richardson, 402 U.S. at 401; Lingenfelter v. Astrue, 504 F.3d 1028,
22 1035 (9th Cir. 2007). It is more than a scintilla but less than a
23 preponderance. Lingenfelter, 504 F.3d at 1035 (citing Robbins v.
24 Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine

26 ² The Appeals Council informed Plaintiff that "[i]f you
27 want us to consider whether you were disabled after November 22,
28 2010, you need to apply again" and that it would use the date of
Plaintiff's request for review as the date of his new claim. (AR
98.)

1 whether substantial evidence supports a finding, the reviewing
2 court "must review the administrative record as a whole, weighing
3 both the evidence that supports and the evidence that detracts from
4 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
5 720 (9th Cir. 1996). Moreover, "when the Appeals Council considers
6 new evidence in deciding whether to review a decision of the ALJ,
7 that evidence becomes part of the administrative record, which the
8 district court must consider when reviewing the Commissioner's
9 final decision for substantial evidence." Brewes v. Comm'r of Soc.
10 Sec. Admin., 682 F.3d 1157, 1163 (9th Cir. 2012); see also Taylor
11 v. Comm'r of Soc. Sec. Admin., 659 F.3d 1228, 1232 (9th Cir. 2011).
12 "If the evidence can reasonably support either affirming or
13 reversing," the reviewing court "may not substitute its judgment"
14 for that of the Commissioner. Id. at 720-21.

15
16 **IV. THE EVALUATION OF DISABILITY**

17
18 People are "disabled" for purposes of receiving Social
19 Security benefits if they are unable to engage in any substantial
20 gainful activity owing to a physical or mental impairment that is
21 expected to result in death or which has lasted, or is expected to
22 last, for a continuous period of at least 12 months. 42 U.S.C. §
23 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
24 1992).

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1 A. The Five-Step Evaluation Process

2
3 The ALJ follows a five-step sequential evaluation process in
4 assessing whether a claimant is disabled. 20 C.F.R.
5 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
6 1995) (as amended Apr. 9, 1996). In the first step, the
7 Commissioner must determine whether the claimant is currently
8 engaged in substantial gainful activity; if so, the claimant is not
9 disabled and the claim must be denied. § 404.1520(a)(4)(I). If
10 the claimant is not engaged in substantial gainful activity, the
11 second step requires the Commissioner to determine whether the
12 claimant has a "severe" impairment or combination of impairments
13 significantly limiting his ability to do basic work activities; if
14 not, a finding of not disabled is made and the claim must be
15 denied. § 404.1520(a)(4)(ii). If the claimant has a "severe"
16 impairment or combination of impairments, the third step requires
17 the Commissioner to determine whether the impairment or combination
18 of impairments meets or equals an impairment in the Listing of
19 Impairments ("Listing") set forth at 20 C.F.R., Part 404, Subpart
20 P, Appendix 1; if so, disability is conclusively presumed and
21 benefits are awarded. § 404.1520(a)(4)(iii). If the claimant's
22 impairment or combination of impairments does not meet or equal an
23 impairment in the Listing, the fourth step requires the
24 Commissioner to determine whether the claimant has sufficient
25 residual functional capacity ("RFC")³ to perform his past work; if

26 _____
27 ³ RFC is what a claimant can still do despite existing
28 exertional and nonexertional limitations. 20 C.F.R. § 404.1545;
see Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 so, the claimant is not disabled and the claim must be denied.
2 § 404.1520(a)(4)(iv). The claimant has the burden of proving that
3 he is unable to perform past relevant work. Drouin, 966 F.2d at
4 1257. If the claimant meets that burden, a prima facie case of
5 disability is established. Id. If that happens or if the claimant
6 has no past relevant work, the Commissioner then bears the burden
7 of establishing that the claimant is not disabled because he can
8 perform other substantial gainful work available in the national
9 economy. § 404.1520(a)(4)(v). That determination comprises the
10 fifth and final step in the sequential analysis. § 404.1520;
11 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

12
13 B. The ALJ's Application of the Five-Step Process

14
15 At step one, the ALJ found that Plaintiff had not engaged in
16 any substantial gainful activity since June 30, 2005. (AR 80.) At
17 step two, the ALJ concluded that Plaintiff had the severe
18 impairments of

19
20 [m]ild-to-moderate degenerative disc and joint disease,
21 lumbosacral spine, including bilateral L5-S1 pars defect,
22 stable, and without significant spondylolisthesis;
23 nephropathy, presumed IgA although biopsy was non-
24 diagnostic,⁴ resulting in chronic kidney disease,
25

26 ⁴ "Nephropathy is damage, disease, or other problems with
27 the kidney." IgA nephropathy, MedlinePlus, <http://www.nlm.nih.gov/medlineplus/ency/article/000466.htm> (last updated Mar. 22,
28 2013). "IgA nephropathy is a kidney disorder in which antibodies
called IgA build up in kidney tissue." Id. Symptoms include

1 arrested at stage 3, and currently inactive with labs
2 improving; obstructive sleep apnea, improved after
3 parathyroid surgery, no longer on CPAP;⁵ infrequent
4 migraine headaches; hypertension, controlled on
5 medication; parathyroid adenoma,⁶ excised in March 2008;

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18 dark or bloody urine, swelling of the hands and feet, and
19 symptoms of chronic kidney disease. Id. The goal of treatment
20 is to relieve symptoms and prevent or delay chronic renal
failure. Id.

21 ⁵ "CPAP" stands for continuous positive airway pressure.
22 Sleep Apnea Health Center, WebMD, [http://www.webmd.com/
23 sleep-disorders/sleep-apnea/continuous-positive-airway-pressure-c
24 pap-for-obstructive-sleep-apnea](http://www.webmd.com/sleep-disorders/sleep-apnea/continuous-positive-airway-pressure-cpap-for-obstructive-sleep-apnea) (last updated June 17, 2011).
CPAP therapy uses a machine to help a person who has obstructive
sleep apnea breathe more easily during sleep. Id.

25 ⁶ "A parathyroid adenoma is a noncancerous (benign) tumor
26 of the parathyroid glands, which are located in the neck."
Parathyroid adenoma, MedlinePlus, [http://www.nlm.nih.gov/
27 medlineplus/ency/article/001188.htm](http://www.nlm.nih.gov/medlineplus/ency/article/001188.htm) (last updated July 19, 2012).
"Parathyroid adenomas are the most common cause of
28 hyperparathyroidism (overactive parathyroid glands), which leads
to increased blood calcium levels." Id.

1 mild osteopenia,⁷ in femur only, not in spine; mild
2 degenerative joint disease, left knee; remote history of
3 left elbow injury with apparent intra-articular loose
4 body on x-rays; obesity, improving (68 inches tall, 256-
5 to-229 pounds, BMI 39-to-45); major depressive disorder;
6 and dysthymia.

7
8 (AR 80.) At step three, the ALJ determined that Plaintiff's
9 impairments did not meet or equal any of the impairments in the
10 Listing. (AR 83.) At step four, the ALJ found that Plaintiff
11 retained the RFC to perform:

12
13 work activity at the sedentary exertional level,⁸ lifting
14 and carrying up to ten pounds, sitting for six hours per
15 eight-hour workday, and standing and walking for two
16 hours per eight-hour workday, with no pushing or pulling
17 in the operation of machinery with the non-dominant left
18 upper extremity, and with the following nonexertional

19
20 ⁷ "Osteopenia refers to bone mineral density (BMD) that
21 is lower than normal peak BMD but not low enough to be classified
22 as osteoporosis." Osteopenia - Overview, WebMD, <http://www.webmd.com/osteoporosis/tc/osteopenia-overview> (last updated Feb. 23,
23 2011). "Having osteopenia means there is a greater risk that, as
24 time passes, [a person] may develop BMD that is very low compared
25 to normal, known as osteoporosis." Id. Osteopenia has no
26 symptoms, although the risk of breaking a bone increases as the
27 bone becomes less dense. Id.

28 ⁸ "Sedentary work" involves "lifting no more than 10
pounds at a time and occasionally lifting or carrying articles
like docket files, ledgers, and small tools." 20 C.F.R. §
404.1567(a). Sedentary work involves sitting most of the time
but may involve occasional walking or standing for brief periods
of time. Id.

1 limitations: never climbing ladders, ropes or scaffolds;
2 occasionally climbing ramps and stairs; occasionally
3 stooping and crouching; never balancing, kneeling, or
4 crawling; avoiding concentrated exposure to dangerous
5 moving machinery, electric shock, radiation and
6 unprotected heights; avoiding concentrated exposure [to]
7 extremes of heat, cold and humidity; and mentally limited
8 to unskilled work with no close or frequent interpersonal
9 contact with supervisors, co-workers, or the public.

10
11 (AR 84.) Based on the VE's testimony, the ALJ concluded that
12 Plaintiff was capable of performing jobs that existed in
13 significant numbers in the national economy. (AR 91-92.)
14 Accordingly, the ALJ determined that Plaintiff was not disabled.
15 (AR 92-93.)

16
17 **V. RELEVANT FACTS**

18
19 On August 6, 2005, a doctor at the Inland Psychiatric Medical
20 Group, Inc., diagnosed Plaintiff with bipolar disorder, mixed type.
21 (AR 295.) The doctor found that Plaintiff had a labile affect and
22 depressed and anxious mood but was well-groomed; had calm motor
23 activity and intact thought process, memory, and judgment; and did
24 not have hallucinations or delusions. (Id.) The doctor opined
25 that Plaintiff's mental condition had no effect on his relationship
26 with his wife, a mild effect on his relationship with his family
27 and health, and a severe effect on his other primary relationships
28 and his ability to work. (Id.)

1 On January 14, 2005, Plaintiff underwent a renal biopsy
2 through the VA healthcare system.⁹ (AR 311-12.) On March 14,
3 2005, Plaintiff was diagnosed with a left renal hematoma resulting
4 from the renal biopsy. (AR 306-08.) He was prescribed morphine to
5 control his pain. (AR 308.)

6
7 On December 19, 2005, x-rays of Plaintiff's lumbar spine
8 showed mild to moderate L1/L2 spondylosis and degenerative disc
9 disease, mild L5/S1 degenerative disc disease, and L4-S1 facet
10 arthritis. (AR 384.) On January 25, 2006, parathyroid imaging
11 showed a parathyroid adenoma. (AR 554-55.)

12
13 On August 3, 2007, Dr. Donald Martindill examined Plaintiff as
14 part of Plaintiff's application for VA benefits, noting that
15 Plaintiff was seeking "individual unemployment."¹⁰ (AR 380-83.)
16 Dr. Martindill noted that Plaintiff had served in the Army from
17 February 1996 to August 1998, when he was honorably discharged.
18 (AR 380.) Dr. Martindill noted that Plaintiff "became depressed
19 after injuring his elbow" in the service but was never in combat.
20 Plaintiff reported that he had "massive financial problems," his
21 marriage was "stressful," his wife was "continually on his back,"
22 and he had "a strong sex drive, but his wife [was] not quite up to

23
24 ⁹ Unless otherwise noted, all of Plaintiff's medical
treatment has been through the VA.

25
26 ¹⁰ VA regulations state that a veteran may receive a
"[t]otal disability rating" based on the "unemployability of the
27 individual" when he or she is "unable to secure or follow a
substantially gainful occupation as a result of service-connected
28 disabilities" that are "rated" by the VA as at least 60 or 70
percent disabling. 38 C.F.R. § 4.16(a).

1 speed in that department.” (Id.) Dr. Martindill found that
2 Plaintiff felt “picked on” with “low-grade paranoia” but was “not
3 psychotic.” (Id.) Dr. Martindill noted that Plaintiff complained
4 of depression without suicidal ideation and worried that he would
5 never be able to keep a job. (AR 381.) Dr. Martindill’s mental-
6 status examination revealed:

7
8 [a] veteran who thought it was August 5, 2007, rather
9 than August 3, 2007. He knew the current officeholders
10 and intercity distances but had no idea as to the
11 distance to New York City. He would not even make a
12 guess. His IQ was in the average range. He has an AA
13 degree. He was cognitively intact, but his mentation
14 seemed slow. He put little effort into the examination.
15 He did well naming presidents backwards, adequately on
16 the serial 7’s. Concentration was poor. He had “I don’t
17 give a shit attitude.” He was serious-minded. He spoke
18 only when spoken to. His affect was dull, his mood
19 depressed, but he was not psychotic. He only gets 5
20 hours of sleep per night. His wife apparently turns him
21 down for sex occasionally, if not frequently. He has not
22 seen a psychiatrist for quite a long time. He just gets
23 his medication refilled.

24
25 (Id.) Dr. Martindill noted that Plaintiff indicated that he did
26 not care whether he lived or died “but [was] willing to get his
27 kidney status checked and see a neurologist for his migraine
28 headaches.” (Id.) He noted that Plaintiff did not have an

1 "impulse problem" and denied ever having alcohol or drug problems,
2 which was "quite hard to believe." (AR 382.) Dr. Martindill
3 diagnosed "[m]ajor depressive disorder, ongoing" and a global
4 assessment of functioning ("GAF") score of 50 and noted that
5 Plaintiff had "prominent" passive-aggressive traits but did not
6 have a "full-blown" personality disorder.¹¹ (AR 382-83.)

7
8 Dr. Martindill opined that Plaintiff's depressive disorder had
9 a "moderately severe" effect on his occupational and social
10 functioning, but that "with more aggressive treatment and closer
11 monitoring and possible group therapy, anger management, and other
12 changes in a therapeutic approach, including a possible
13 consideration of other anti-depressants or even psychostimulants,
14 it is more likely than not that the veteran could obtain work."
15 (AR 383.) Dr. Martindill noted that he "frankly [did] not feel [he
16 could] recommend unemployability status to this individual at this
17 early age," and that "it seems . . . something could be done with
18 this relatively young individual with a past history of good work
19 performance . . . to get back to a status where he could be
20 employed." (Id.)

21 \\

22 \\

24 ¹¹ A GAF score represents a rating of overall
25 psychological functioning on a scale of 0 to 100. See Am.
26 Psychiatric Ass'n, Diagnostic and Statistical Manual of
27 Disorders, Text Revision 34 (4th ed. 2000). A GAF score in the
28 range of 41 to 50 indicates "[s]erious symptoms (e.g., suicidal
ideation, severe obsessional rituals, frequent shoplifting) OR
any serious impairment in social, occupational, or school
functioning (e.g., no friends, unable to keep a job)." Id.

1 Dr. Martindill noted that Plaintiff was "unmotivated for further
2 work," had indicated he had "no will to live" but had never been
3 hospitalized and was "not felt to be a danger to self or others."
4 (Id.)

5
6 On October 30, 2007, primary-care physician Dr. Laura M. Kim
7 noted that Plaintiff had missed medical appointments for the past
8 18 months because he "felt frustrated with his [appointments]" and
9 felt that "no one cares." (AR 582.) Dr. Kim noted that Plaintiff
10 had IgA nephrology and chronic kidney disease, parathyroid adenoma,
11 depression, "controlled" hypertension, chronic pain, and osteopenia
12 because of his hyperparathyroidism.¹² (AR 585-86.) She noted that
13 Plaintiff "did not complain much of pain during visit" and
14 recommended that he continue taking "apap," or acetaminophen.¹³ (AR
15 586.)

16
17 On November 16, 2007, Dr. Kim noted that Plaintiff reported
18 that his depression started when he joined the Army ten years
19 earlier. (AR 579.) Dr. Kim noted that Plaintiff had injured his
20 elbow early in the training and "still holds anger and resentment
21 about not having advanced onward in rank while others who came in
22

23 ¹² Hyperparathyroidism is a disorder in which the
24 parathyroid glands in the neck produce too much parathyroid
25 hormone, which controls calcium, phosphorus, and vitamin D levels
26 in the blood and bone. Hyperparathyroidism, MedlinePlus,
<http://www.nlm.nih.gov/medlineplus/ency/article/001215.htm> (last
updated Mar. 22, 2013).

27 ¹³ APAP is another term for acetaminophen. Acetaminophen,
28 MedlinePlus, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a681004.html> (last updated July 15, 2013).

1 after him did." (Id.) Plaintiff said that he had hard time
2 holding a job because "any sight of 'injustice' towards anyone
3 around him gets him angry." (AR 580.) Dr. Kim diagnosed mixed
4 depression and posttraumatic stress disorder, prescribed
5 medications, advised him to seek counseling, and referred him to
6 psychiatry. (Id.) Dr. Kim also noted that Plaintiff complained of
7 back pain related to his renal biopsy, but that testing did not
8 reveal a cause of his pain. (Id.) She advised him to continue
9 taking acetaminophen and referred him to physical therapy. (Id.)

10
11 On December 3, 2007, Dr. Ken J. Park noted that Plaintiff
12 suffered from IgA nephropathy, hypertension, depression, stage-
13 three chronic kidney disease, parathyroid adenoma, obstructive
14 sleep apnea "on CPAP," and osteopenia. (AR 575, 577.) Dr. Park
15 noted that Plaintiff was not taking any over-over-the-counter
16 medications and that his chronic kidney disease was "presumed" to
17 be caused by IgA nephropathy even though Plaintiff's renal biopsy
18 had been "nondiagnostic." (AR 575, 577.) Dr. Park noted that
19 Plaintiff complained of "flank pain," ordered a renal ultrasound,
20 and instructed Plaintiff to return in one year. (AR 577.) On
21 December 4, 2007, Dr. Sumana Jothi noted that Plaintiff had
22 transient increased calcium levels and other findings consistent
23 with parathyroid adenoma. (AR 573.) Plaintiff was scheduled for
24 a parathyroidectomy. (AR 573-74.)

25
26 On December 13, 2007, Dr. Julie M. Wilcox, who was board-
27 certified in psychiatry and neurology (AR 315), noted that
28 Plaintiff's last psychiatric appointment had been with a different

1 doctor in May 2006. (AR 571.) At that time, Plaintiff's diagnosis
2 was dysthymia with superimposed major depressive episode and his
3 GAF score was 55.¹⁴ (Id.). Plaintiff reported that he had stopped
4 going to his appointments because he "did not feel he was being
5 treated with respect by any of his doctors and was concerned that
6 he couldn't be around people [because] of his anger." (AR 572.)
7 Plaintiff reported anger, bad mood, middle insomnia, anhedonia,
8 decreased short-term memory and concentration, feelings of
9 worthlessness and hopelessness, poor motivation, and occasional
10 suicidal ideation. (Id.) Dr. Wilcox noted that Plaintiff had a
11 tired, mildly sad affect but was alert and oriented with good
12 hygiene and eye contact, normal speech, goal-directed thoughts, and
13 intact insight and judgment. (Id.) She prescribed medication and
14 referred Plaintiff to anger management. (Id.)

15
16 On December 13, 2007, an echogram showed signs "consistent
17 with medical renal disease" and a nine-millimeter cyst in the
18 midpole of the right kidney. (AR 440.) On January 10, 2008, Dr.
19 Jhanna Nariyants noted that Plaintiff had hypercalemia related to
20 primary hyperparathyroidism and was scheduled to have a
21 parathyroidectomy. (AR 567-71.)

22 \\

23 \\

24
25 ¹⁴ A GAF score in the range of 51 to 60 indicates
26 "[m]oderate symptoms (e.g., flat affect and circumstantial
27 speech, occasional panic attacks) OR moderate difficulty in
28 social, occupational, or school functioning (e.g., few friends,
conflicts with peers or co-workers)." See Am. Psychiatric Ass'n,
supra, at 34.

1 On January 30, 2008, Dr. Wilcox noted that Plaintiff reported
2 that his medications were not helping, his "[s]evere irritability
3 and anger is ruining his marriage and negatively affecting his
4 relat[ionships] with his children." (AR 566.) Plaintiff reported
5 that he was tired of his medication because of sexual side effects
6 and was "desperate to get better." (Id.) Dr. Wilcox noted that
7 Plaintiff had a "[d]istressed and irritable mood and affect," his
8 speech was raised at times with "mild pressure," but he was alert
9 and oriented with good hygiene and eye contact, goal-directed
10 thoughts, and intact insight and judgment. (AR 566-67.)
11

12 On February 4, 2008, Dr. Kim changed Plaintiff's hypertension
13 medication, noted that he was using his CPAP machine for an hour a
14 night and recommended that he use it more, and recommended diet and
15 exercise to help resolve his obesity and depression. (AR 565.)
16 Dr. Kim noted that Plaintiff complained of migraine headaches with
17 "unusual characteristic" but had a negative neurological exam; she
18 recommended that he take acetaminophen as needed. (AR 566.)
19

20 On March 5, 2008, Plaintiff was noted to have
21 hyperparathyroidism and underwent a parathyroidectomy. (AR 370-71,
22 437-38, 470-72.) Pathology findings were consistent with
23 parathyroid adenoma. (AR 441.) On March 7, 2008, Plaintiff was
24 discharged in good condition. (AR 412, 470-71.) On March 13,
25 2008, Dr. Cyrus Torchinsky noted that Plaintiff was doing well
26 after his parathyroidectomy. (AR 408.)
27 \\

28 \\

1 On March 27, 2008, Dr. Wilcox noted that Plaintiff had not
2 seen any changes with his psychiatric medication, his nightmares
3 were worse and sleep poor, and he was more restless and irritable.
4 (AR 407.) Plaintiff was alert and oriented, with normal speech,
5 good hygiene and eye contact, goal-directed thoughts, and intact
6 insight and judgment. (Id.) She diagnosed recurrent major
7 depressive disorder and dysthymia. (Id.)

8
9 On April 3, 2008, Dr. Karl Y. Hostetler noted that Plaintiff
10 was doing well after his parathyroidecomy and had "no
11 hypocalcemia" and normal levels calcium and "pth," or parathyroid
12 hormone.¹⁵ (AR 406.) He recommended that Plaintiff follow up in
13 six months. (Id.)

14
15 On May 15, 2008, Dr. Wilcox noted that Plaintiff reported that
16 he "does not care about anything or anyone, feels nothing." (AR
17 402.) Plaintiff was alert and oriented with normal speech, good
18 hygiene and eye contact, goal-directed thoughts, and intact insight
19 and judgment. (Id.) Dr. Wilcox diagnosed major depressive
20 disorder, recurrent and dysthymic and advised him to return in six
21 weeks. (Id.)

22
23 On May 27, 2008, Dr. Kim noted that Plaintiff complained of
24 left-sided post-biopsy back pain that was nonradiating, felt better
25 with activity, and did not interfere with Plaintiff's sleep. (AR
26

27 ¹⁵ PTH stands for parathyroid hormone. PTH, MedlinePlus,
28 <http://www.nlm.nih.gov/medlineplus/ency/article/003690.htm> (last
updated Mar. 22, 2013).

1 395.) Plaintiff said that acetaminophen was not working and he
2 wanted "something to bring the level down" and that he was sleeping
3 better and walking with his family almost daily. (AR 395, 397.)
4 Dr. Kim found that Plaintiff weighed 259 pounds, had tenderness to
5 palpation in the mid-thoracic area on the left, full range of
6 motion but some pain, no active spasms, and 5/5 lower-extremity
7 strength. (Id.) She noted that x-rays and CT scans were negative
8 for a source of Plaintiff's back pain, advised him to continue
9 daily walking, and prescribed acetaminophen with codeine. (AR
10 398.)

11
12 On June 19, 2008, Dr. Wilcox noted that Plaintiff was being
13 evicted from his home and that since he had started receiving "100%
14 disability he [had not] been able to work and therefore [could not]
15 provide for his family." (AR 393.) Plaintiff reported a "definite
16 benefit" from his medications and said that he was sleeping six
17 hours straight each night. (Id.) Dr. Wilcox noted that Plaintiff
18 had a "stressed" mood and "congruent, frustrated affect," but he
19 was alert and oriented, with normal speech, good hygiene and eye
20 contact, goal-directed thoughts, and intact insight and judgment.
21 (Id.) She diagnosed recurrent major depressive disorder and
22 dysthymia and recommended that he return in six to eight weeks.
23 (AR 393-94.)

24
25 On August 7, 2008, Dr. Wilcox noted that Plaintiff and his
26 family were living with Plaintiff's mother, which Plaintiff found
27 "extremely stressful." (AR 392.) Plaintiff reported that his
28 depression had worsened, his sleep was poor, and he was isolating

1 himself. (Id.) He requested "a letter stating his treatment for
2 his application for social security disability." (Id.) Dr. Wilcox
3 found that Plaintiff had a "[d]epressed mood and affect" but was
4 alert and oriented with normal speech, goal-directed thoughts, and
5 intact judgment and insight. (Id.) She diagnosed recurrent major
6 depressive disorder and dysthymia and recommended that he return in
7 six weeks. (AR 392.)

8
9 Also on August 7, 2008, Dr. Wilcox wrote a letter stating that
10 Plaintiff was compliant with his treatment but it had been
11 "difficult to get his illness stabilized with a medication regimen
12 and therefore he continues to be quite depressed." (AR 315.) She
13 listed his symptoms as depressed mood, isolation, irritability,
14 insomnia, decreased daytime energy, poor short-term memory, poor
15 attention span, decreased concentration, passive thoughts of death,
16 and decreased motivation. (Id.) She found that, "[b]ecause of
17 this, in no way is he able to obtain or maintain gainful
18 employment." (Id.)

19
20 On September 5, 2008, a Social Security Administration ("SSA")
21 consulting doctor, K. Loomis, reviewed Plaintiff's medical records
22 and completed a psychiatric-review-technique form at the SSA's
23 request. (AR 316-26.) Dr. Loomis found that Plaintiff had a
24 depressive disorder that resulted in no restriction of activities
25 of daily living; mild difficulties in maintaining social
26 functioning; mild difficulties in maintaining concentration,
27 persistence, or pace; and no repeated episodes of decompensation.
28 (AR 319, 324.) Dr. Loomis concluded that Plaintiff's impairments

1 were not severe. (AR 316.) On September 11, 2008, another SSA
2 consulting doctor, Thu N. Do, reviewed the record and affirmed Dr.
3 Loomis's assessment. (AR 329.)
4

5 On September 2, 2008, Dr. Mounir Soliman, who was board
6 certified in psychiatry and neurology, examined Plaintiff at SSA's
7 request. (AR 339-43.) Dr. Soliman noted that Plaintiff was
8 "pleasant and cooperative" throughout the interview. (AR 339.)
9 Plaintiff reported that he had had nightmares and flashbacks since
10 being injured during military training. (AR 339-40.) Dr. Soliman
11 noted that Plaintiff was able to cook, clean, shop, run errands,
12 take care of his own personal hygiene, drive a car, and take care
13 of his own finances. (AR 341.) Plaintiff reported that he got
14 along well with family, friends, and neighbors and was able to
15 focus on his daily activities. (Id.)
16

17 Upon examination, Dr. Soliman found that Plaintiff was able to
18 recall three of three objects in five minutes and perform serial
19 sevens without error. (AR 341.) Plaintiff had intact memory,
20 normal abstract thinking, and good insight. (AR 341-42.) Dr.
21 Soliman diagnosed "moderate" major depression and assigned a GAF
22 score of "about 66."¹⁶ (AR 342-43.) He concluded that, from a
23 psychiatric standpoint, Plaintiff was able to understand, carry
24

25 ¹⁶ A GAF score in the range of 61 to 70 indicates "[s]ome
26 mild symptoms (e.g., depressed mood and mild insomnia) OR some
27 difficulty in social, occupational, or school functioning (e.g.,
28 occasional truancy, or theft within the household), but generally
functioning pretty well, has some meaningful interpersonal
relationships." See Am. Psychiatric Ass'n, supra, 34.

1 out, and remember simple and complex instructions; interact with
2 coworkers, supervisors, and the general public; and "withstand the
3 stress and pressures associated with an eight-hour workday, and
4 day-to-day activities." (AR 343.) Dr. Soliman believed that
5 Plaintiff had a "fair" prognosis and that his condition would be
6 manageable with appropriate treatment. (Id.)
7

8 On September 8, 2008, Dr. Hau H. Tan, who was board-certified
9 in internal medicine, examined Plaintiff at the SSA's request. (AR
10 331-35.) Dr. Tan noted that Plaintiff complained of low-back pain,
11 left-elbow pain, left-knee pain, and migraine headaches. (AR 331.)
12 Plaintiff weighed 256 pounds and his grip strength was 125/130/125
13 on the right and 45/45/35 on the left. (AR 333.) Plaintiff had
14 slight tenderness to palpation of the left flank, a negative
15 straight-leg-raising test, no effusion or instability of the knees,
16 and normal ranges of motion of the back, hips, knees, and ankles.
17 (AR 333-34.) Plaintiff had a normal gait, good muscle tone
18 bilaterally with good active motion, 5/5 strength in all
19 extremities, intact sensation, and normal reflexes. (AR 334-35.)
20 Dr. Tan believed that Plaintiff could perform medium work and lift
21 and carry 50 pounds occasionally and 25 pounds frequently. (AR
22 335.) Plaintiff had unlimited ability to walk, stand, sit, push,
23 and pull. (Id.)
24

25 On September 11, 2008, a SSA consulting physician, Dr. T. Do,
26 reviewed Plaintiff's records and completed a physical-RFC
27 assessment. (AR 346-50.) Dr. Do noted Plaintiff had low-back pain
28 and opined that he was limited to lifting 50 pounds occasionally

1 and 25 pounds frequently, standing and walking for about six hours
2 in an eight-hour workday, and sitting for about six hours in an
3 eight-hour workday. (AR 346.)
4

5 On December 1, 2008, Dr. Ali Kashkouli in the nephrology
6 department noted that Plaintiff was doing "quite well." (AR 388-
7 89.) Plaintiff was "essentially non proteinuric"¹⁷ and had "normal
8 sleep wake cycles," "good appetite," good blood pressure control,
9 and "ok" calcium levels. (AR 388-89.) Plaintiff was instructed to
10 return to the nephrology department in one year. (AR 389.)
11

12 On December 11, 2008, Dr. Wilcox noted that Plaintiff reported
13 middle insomnia, depression, nightmares, and decreased energy but
14 he had a normal appetite and no suicidal ideation. (AR 387.) Upon
15 examination, Plaintiff had a dysphoric mood and tired affect but
16 was alert and oriented with normal speech, good hygiene and eye
17 contact, goal-directed thoughts, intact insight and judgment.
18 (Id.) Dr. Wilcox diagnosed recurrent major depressive disorder and
19 dysthymia and told him to return in two months. (Id.)
20

21 On December 17, 2008, a SSA consulting psychiatrist, Dr. B. A.
22 Smith, reviewed Plaintiff's medical records and agreed with the
23 earlier opinions that Plaintiff's mental impairment was not severe.
24 (AR 358-59.)
25

26 ¹⁷ People with proteinuria have urine with an abnormal
27 amount of protein. Protein in Urine (Proteinuria), WebMD,
28 <http://www.webmd.com/a-to-z-guides/proteinuria-protein-in-urine>
(Mar. 14, 2012). The condition is often a sign of kidney
disease. (Id.)

1 On December 19, 2008, Dr. Susan E. Trompeter noted that
2 Plaintiff weighed 255 pounds and had tenderness at L5/S1 but no
3 straight-leg-raising pain. (AR 383-84.) Plaintiff reported that
4 he was not working because "his psychiatrist [would] not clear him
5 to return to work." (AR 383.) Dr. Trompeter recommended that
6 Plaintiff treat his low-back pain with strengthening and stretching
7 exercises and walking and that he "return to work as soon as
8 psychiatry can clear." (AR 386.)

9
10 On January 21, 2009, a SSA consulting physician, Dr. D. Rose,
11 reviewed Plaintiff's medical records and found that Plaintiff could
12 perform medium work. (AR 359.)

13
14 On February 25, 2009, Dr. Wilcox noted that Plaintiff
15 complained of "severe migraine headaches" and "continue[d] to be
16 depressed with anhedonia." (AR 485.) Plaintiff was seeking Social
17 Security and VA benefits and "wish[ed] he could get back to work."
18 (AR 485.) Dr. Wilcox noted that Plaintiff had a depressed mood and
19 affect but was alert and oriented with normal speech, good hygiene
20 and eye contact, goal-directed thoughts, and intact judgment. (AR
21 485-86.) Dr. Wilcox diagnosed recurrent major depressive disorder
22 and dysthemia. (AR 486.)

23
24 On April 9, 2009, Dr. Wilcox noted that Plaintiff reported
25 feeling "numb" and always "on the alert" but that his irritability
26 had decreased. (AR 485.)

27 \\
28 \\
29

1 Dr. Wilcox noted that Plaintiff was alert and oriented with normal
2 speech, good hygiene and eye contact, "neutral mood and affect,"
3 goal-directed thoughts, and intact insight and judgment. (Id.)
4

5 On May 13, 2009, Dr. Wilcox noted that Plaintiff's mood and
6 sleep had improved and his irritability had decreased with
7 medication. (AR 484.) She noted that Plaintiff had a "[e]uthymic
8 affect" and was alert and oriented with normal speech, good hygiene
9 and eye contact, goal-directed thoughts, and intact judgment.
10 (Id.) She diagnosed recurrent major depressive disorder and
11 dysthymia and recommended that he return in two months. (Id.)
12

13 On June 11, 2009, Dr. Wilcox noted that Plaintiff had not been
14 doing well over the past week because of his daughter's child-
15 custody problems but that "[p]rior to last week he was doing well,"
16 his mood was improved, and he "felt good." (AR 482.) Dr. Wilcox
17 noted that Plaintiff said that he "felt at ease right now" and was
18 alert and oriented with normal speech, good hygiene and eye
19 contact, goal-directed thoughts, and intact judgment. (Id.)
20

21 On July 9, 2009, Dr. Wilcox noted that Plaintiff's daughter
22 was having problems with child custody and that Plaintiff had been
23 "extremely angry, ready to 'hurt' anyone." (AR 480-81.) Dr.
24 Wilcox noted that Plaintiff was alert and oriented with normal
25 speech, good hygiene and eye contact, goal-directed thoughts, and
26 intact judgment. (AR 481.)

27 \\
28 \\
29

1 On August 6, 2009, Dr. Wilcox noted that Plaintiff's physical
2 pain was increasing but that he was "controlling his intense anger
3 towards everything." (AR 479.) Plaintiff had a "[d]ysphoric mood
4 and affect" but was alert and oriented with normal speech, good
5 hygiene and eye contact, goal-directed thoughts, and intact insight
6 and judgment. (Id.)

7
8 On August 24, 2009, Dr. Trompeter noted that Plaintiff was no
9 longer using his CPAP machine because he felt that he did not need
10 it after his parathyroid was removed. (AR 473.) Plaintiff had
11 lost 20 pounds, bringing his weight down to 229 pounds, which he
12 attributed to "better dietary choices." (Id.) Plaintiff also
13 reported that he had moved to a new home with a pool and had been
14 swimming since May 2009. (Id.) Dr. Trompeter noted that Plaintiff
15 "has five children and had a great summer with them but for the
16 last month they have been back at school." (Id.) Dr. Trompeter
17 noted that Plaintiff's hypertension was in "[g]ood control" but
18 that Plaintiff reported pain in his elbow, knees, and back and
19 requested x-rays. (AR 474.) She noted that Plaintiff's medications
20 included gabapentin for pain.¹⁸ (AR 473-74.)

21
22 On August 24, 2009, an x-ray of Plaintiff's left knee showed
23 "[s]table, mild joint space narrowing of the medial femorotibial
24 compartment" but was "otherwise unremarkable." (AR 453.) An x-ray
25

26
27 ¹⁸ Gabapentin is an anticonvulsant that is used to relieve
28 certain types of pain. Gabapentin, MedlinePlus,
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html>
(last updated July 25, 2013).

1 of the left elbow showed no acute injury and a "[p]robable
2 interarticular body of the radial aspect of the left elbow joint."
3 (AR 454.) X-rays of his lumbar spine showed bilateral L5 pars
4 defects without significant anterolisthesis of L5 on S1 and mild
5 progression of degenerative disc disease since Plaintiff's December
6 2005 x-ray. (AR 455.)

7
8 On September 17, 2009, Dr. Wilcox noted that Plaintiff was
9 sleeping better and his pain was more manageable. (AR 671.)
10 Plaintiff reported that his irritability and depression had not
11 improved. (Id.) Dr. Wilcox found that Plaintiff had a
12 "[d]ysphoric mood and affect" but was alert and oriented with
13 normal speech, good hygiene, goal-directed thoughts, and intact
14 judgment and insight. (Id.) She diagnosed recurrent major
15 depressive disorder, dysthymia, and mood disorder secondary to a
16 general medical condition. (Id.)

17
18 On December 7, 2009, Dr. Kashkouli noted that Plaintiff was
19 "feeling well aside from depression" and had "lost weight over the
20 course of the past several months which he attributes to
21 depression." (AR 661.) On December 9, Dr. Kashkouli noted that
22 Plaintiff's labs were within normal limits and advised Plaintiff to
23 return for follow up in one year. (AR 660.)

24
25 On February 11, 2010, Dr. Wilcox noted that Plaintiff
26 "continues to be depressed, under a lot of stress, [and] very
27 irritable," but had "good sleep." (AR 658.) Plaintiff reported
28 that he had stopped taking gabapentin for a week and had not

1 noticed an increase in his pain. (AR 658.) Plaintiff also
2 reported that he had not had any headaches since before Christmas.
3 (AR 659.) He described himself as being "intolerant to the
4 injustices around us" and was "very irritable." (AR 659.)
5

6 On April 29, 2010, Dr. Wilcox noted that Plaintiff reported
7 that his irritability was "contained inside [him]." (AR 656.)
8 Plaintiff was distant from his wife and children and stayed home,
9 spending his time watching television, reading the paper, and
10 searching the internet for "injustices." (Id.) Plaintiff said
11 that he had "great difficulty" interacting with people because he
12 gets "extremely angry and distrusting"; his only support was his
13 wife who was talking about a divorce. (AR 656-57.) Dr. Wilcox
14 noted that Plaintiff had an irritable mood with restricted affect
15 but was alert and oriented with normal speech, good hygiene and eye
16 contact, goal-directed thoughts, and intact insight and judgment.
17 (AR 657.) Dr. Wilcox recommended that Plaintiff discontinue all of
18 his psychiatric medications because "they have had no benefits" and
19 informed Plaintiff that "he must make some behavioral changes if he
20 would like to have a fulfilling life."¹⁹ (Id.) She advised him to
21 return to the clinic in three months. (Id.)
22 \\

23
24 ¹⁹ Specifically, Dr. Wilcox recommended that Plaintiff
25 "read bible for not more than 2 hours"; avoid the internet unless
26 his wife was there, so he would not "get on
27 political/news/negative websites"; walk outside with his wife
28 every day; watch no television except for funny movies, which he
should try to watch every day; and "acknowledge when he gets up
and before bed the gifts God has given and the blessings he has."
(AR 657.)

1 On July 29, 2010, Dr. Wilcox noted that Plaintiff complained
2 of middle insomnia with multiple awakenings, nightly nightmares,
3 and depressed mood. (AR 744.) Plaintiff reported that his wife
4 made sure he didn't watch the news and that he read the bible less
5 than he used to. (Id.) Dr. Wilcox found that Plaintiff had a
6 "depressed mood with mildly restricted affect" but was alert and
7 oriented with normal speech, good hygiene and eye contact, goal-
8 directed thoughts, and intact insight and judgment. (AR 745.) Dr.
9 Wilcox agreed to continue one psychiatric medication at Plaintiff's
10 request, noting that Plaintiff thought that it was "helping him to
11 'stay' in reality." (AR 744-45.) She recommended that he return
12 to the clinic in two or three months. (Id.)

13
14 On August 31, 2010, Dr. Trompeter noted that Plaintiff
15 reported a "feeling of itchiness" like "bugs crawling on him" and
16 that his depression had worsened over the previous year and
17 "continue[d] to dramatically affect his interpersonal
18 relationships." (AR 741.) She noted that Plaintiff was "in the
19 process of undergoing psychotherapy to try to unlock PTSD memories
20 to subsequently deal with them and move on." (Id.)

21
22 Plaintiff also complained of "constant" left-elbow pain
23 stemming from a "dislocation while on active duty." (AR 742.) Dr.
24 Trompeter noted that Plaintiff weighed 229 pounds and had
25 "difficulty" with his weight because he sat at home and ate all day
26 long. (Id.) Dr. Trompeter noted that Plaintiff had an
27 "exaggerated 'jumps off the table response'" when she touched his
28 lumbar spine or right elbow. (AR 742.) Plaintiff's skin exam was

1 normal and Dr. Trompeter opined that his abnormal skin sensations
2 were "a heightened sensitivity to his surroundings due to a
3 medication effect, boredom, [or] primarily psychiatric illness."
4 (AR 743.) She was "uncertain that there is much chance for
5 meaningful change in his depression/outlook and also relief of his
6 chronic aches and pains if he continues to be medicated, homebound,
7 and dependent on others." (Id.) Dr. Trompeter recommended that
8 Plaintiff get out more to improve his mood and enable weight loss,
9 do yoga to help his back pain, use night splints and undergo
10 physical therapy for elbow pain, and lose weight to help his knee
11 pain.²⁰ (AR 743.) She recommended that he return to the clinic in
12 one year. (Id.)

13
14 On September 1, 2010, an x-ray of Plaintiff's right elbow
15 showed possible olecranon bursitis. (AR 691.) Plaintiff underwent
16 physical therapy. (AR 712-13.)

17
18 On November 3, 2010, Dr. Wilcox noted that Plaintiff reported
19 that his medication was helping him "'stay' in reality." (AR 714.)
20 Plaintiff said he was happy with his medication, his mood was good,
21 and he was sleeping better. (Id.) Dr. Wilcox found that Plaintiff
22 did not need his medications changed and that he was alert and
23 oriented, with normal speech rate and tone, good hygiene and eye
24 contact, goal-directed thoughts, and intact insight and judgment.
25 (Id.)

26 \\

27
28 ²⁰ Plaintiff's list of active medications did not include
gabapentin or any other pain medication. (See AR 742-43.)

1 She noted that Plaintiff had moved and advised him to follow up in
2 three months at a clinic closer to his new home.²¹ (AR 714.)

3
4 **VI. DISCUSSION**

5
6 Plaintiff alleges that the ALJ erred in (1) evaluating
7 Plaintiff's credibility; (2) assessing Plaintiff's mental
8 impairments; (3) assessing the VA's disability rating decision; and
9 (4) relying on the VE's testimony that Plaintiff could perform jobs
10 that existed in sufficient numbers in the regional and national
11 economy.²² (J. Stip. at 5.)

12
13 A. The ALJ Provided Clear And Convincing Reasons For
14 Rejecting Plaintiff's Credibility

15
16 Plaintiff argues that the ALJ "failed to articulate legally
17 sufficient reasons" for rejecting Plaintiff's testimony. (J. Stip.
18 at 44.) Because the ALJ provided clear and convincing reasons

19
20 ²¹ The record contains additional treatment records that
21 postdate the ALJ's November 22, 2010 decision, but as the Appeals
22 Council noted (AR 98), they do not appear to be relevant to the
23 period before the ALJ's decision, see 20 C.F.R. § 404.970(b)
24 (Appeals Council "shall consider the additional evidence only
25 where it relates to the period on or before the date of the [ALJ]
26 hearing decision"); compare Taylor, 659 F.3d at 1233
(treating physician's opinion "concerned his assessment of
[claimant's] mental health since his alleged disability onset
date" and therefore "related to" period before claimant's
disability insurance coverage expired and before ALJ's decision
(citing 20 C.F.R. § 404.970(b))).

27 ²² The Court addresses the issues raised in the Joint
28 Stipulation in an order different from that used by the parties,
to avoid repetition and for other reasons.

1 supporting his evaluation of Plaintiff's testimony and those
2 reasons were supported by substantial evidence in the record,
3 reversal is not warranted on this basis.

4
5 1. Applicable law

6
7 An ALJ's assessment of pain severity and claimant credibility
8 is entitled to "great weight." See Weetman v. Sullivan, 877 F.2d
9 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779 F.2d 528, 531 (9th
10 Cir. 1986). "[T]he ALJ is not required to believe every allegation
11 of disabling pain, or else disability benefits would be available
12 for the asking, a result plainly contrary to 42 U.S.C.
13 § 423(d)(5)(A)." Molina v. Astrue, 674 F.3d 1104, 1122 (9th Cir.
14 2012). In evaluating a claimant's subjective symptom testimony,
15 the ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
16 at 1035-36. "First, the ALJ must determine whether the claimant
17 has presented objective medical evidence of an underlying
18 impairment [that] could reasonably be expected to produce the pain
19 or other symptoms alleged." Id. at 1036 (internal quotation marks
20 omitted). If such objective medical evidence exists, the ALJ may
21 not reject a claimant's testimony "simply because there is no
22 showing that the impairment can reasonably produce the degree of
23 symptom alleged." Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir.
24 1996) (emphasis in original). When the ALJ finds a claimant's
25 subjective complaints not credible, the ALJ must make specific
26 findings that support the conclusion. See Berry v. Astrue, 622
27 F.3d 1228, 1234 (9th Cir. 2010). Absent affirmative evidence of
28 malingering, those findings must provide "clear and convincing"

1 reasons for rejecting the claimant's testimony. Lester, 81 F.3d at
2 834. If the ALJ's credibility finding is supported by substantial
3 evidence in the record, the reviewing court "may not engage in
4 second-guessing." Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir.
5 2002).

6
7 2. Relevant facts
8

9 In an undated disability report, Plaintiff alleged that he
10 could not work because of his major depression, posttraumatic
11 stress disorder, kidney condition, back condition, and migraine
12 headaches. (AR 211.) Plaintiff said that he had stopped working
13 because his "[m]igraine headaches and back pain" caused him to miss
14 a lot of work and "[t]ogether with [his] chronic major depression,
15 Posttraumatic stress disorder, [he] did not want to hear or
16 tolerate [his] supervisor's requests or suggestions." (Id.)
17

18 In an undated "disability report - appeal," Plaintiff wrote
19 that his "chronic migraines" had not improved since his last
20 report, he had undergone a kidney biopsy that was causing high
21 blood pressure, and "only 50% of his kidney [was] functioning."
22 (AR 220.) Plaintiff said he had been "feeling more depressed"
23 since his last report and had "PTSD [from] serving in the
24 military." (Id.)
25

26 At the hearing before the ALJ on June 11, 2010, Plaintiff
27 testified that he received VA compensation for a service-connected
28 disability at the 100% disabled rate, which was \$3007 a month. (AR

1 40.) Plaintiff testified that he was unable to work because his
2 anger, anxiety, and "inability to cope with people." (AR 43.)
3 Plaintiff said that his "physical problems," including his knee,
4 left-elbow, and back conditions, also prevented him from working.
5 (AR 43-44.)

6
7 Plaintiff testified that he "will not tolerate injustices,"
8 and may get "physical" if he needed to (AR 43), but he later
9 admitted that he had not physically harmed anyone since his alleged
10 disability onset date in June 2005. (AR 47-48.) Plaintiff also
11 testified that he had stopped going to anger-management classes
12 after he "threatened to physically do harm to another person there"
13 and after that he "refused to continue on those classes." (AR 48.)

14
15 Plaintiff testified that his current weight was 220 and that
16 he had stopped using his CPAP machine because he did not need it
17 after his parathyroid was removed. (AR 44, 46-47.) Plaintiff
18 testified that he drove three times a week, usually to take his
19 children to and from two different schools, which took about 20
20 minutes each trip. (AR 49.) He had last driven on the highway one
21 week earlier, when he took his wife to a store. (AR 50.) He
22 cooked "easy" food like sandwiches and hot dogs, shopped for food
23 with his wife, did the dishes twice a week, vacuumed once every two
24 weeks, and paid the family's bills. (AR 50-51, 53-54.) His wife,
25 who did not work, made the bed. (AR 42, 51.) She left the
26 children home with Plaintiff about eight times a month for about an
27 hour at a time. (AR 55.)

28 \\

1 Plaintiff testified that he did not have the "mental capacity" to
2 help his daughter with her homework. (AR 52.) When the ALJ asked
3 what Plaintiff did all day, Plaintiff said he slept and watched
4 television. (AR 54.)

5
6 3. Analysis
7

8 The ALJ found that Plaintiff's medically determinable
9 impairments could reasonably be expected to cause only some of the
10 alleged symptoms, and that his "statements concerning the
11 intensity, persistence and limiting effects of these symptoms are
12 not credible to the extent they are inconsistent with" Plaintiff's
13 RFC for a limited range of sedentary, unskilled work with no close
14 or frequent interpersonal contact with supervisors, co-workers, or
15 the public. (AR 84-85.) These findings are supported by the
16 record.

17
18 As an initial matter, the ALJ accommodated most of Plaintiff's
19 subjective complaints by finding he was capable of only a limited
20 range of sedentary work. (See AR 84.) For example, the ALJ
21 accommodated Plaintiff's asserted "inability to cope with people"
22 (AR 43) by limiting him to "unskilled work with no close or
23 frequent interpersonal contact with supervisors, co-workers, or the
24 public" (AR 84); see also SSR 85-15, 1985 WL 56857, at *4
25 (unskilled jobs "ordinarily involve dealing primarily with objects,
26 rather than with data or people"). The ALJ also accommodated
27 Plaintiff's reports of knee, left-elbow, and back pain (AR 43-44)
28 by limiting him to standing and walking for only two hours a day,

1 with no pushing or pulling with the left arm, never kneeling or
2 crawling, and only occasionally climbing ramps or stairs, among
3 other things (AR 84). Indeed, Plaintiff acknowledges that the ALJ
4 "credited the vast majority of [his] complaints of physical pain
5 and limitation." (J. Stip. at 38.)

6
7 To the extent the ALJ rejected Plaintiff's subjective
8 complaints, however, he provided clear and convincing reasons for
9 doing so. First, the ALJ correctly noted that Plaintiff's
10 testimony and other statements contained inconsistencies. (AR 86,
11 89-90.) At the hearing before the ALJ, Plaintiff testified that he
12 was angry and anxious and would get "physical" with people, but he
13 later admitted that he had never actually physically harmed anyone
14 (AR 86; AR 43, 47-48).²³ Moreover, in August 2009, Dr. Wilcox noted
15 that Plaintiff presented with a "[d]ysphoric mood and affect" and
16 reported that his pain was "increasing" and he was controlling his
17 "intense anger toward everything." (AR 479.) Later that same
18 month, however, Dr. Trompeter recorded a very different picture,
19 noting that Plaintiff reported that he had enjoyed a "great summer"
20 with his five children, "moved into a new home with a pool and
21 ha[d] been swimming since May," and lost 20 pounds, bringing his

22 \\

23 \\

24
25 ²³ After Plaintiff testified that he would get "physical"
26 with people if necessary, the ALJ asked, "since June 2005, have
27 you physically harmed anyone in any way?" (AR 47.) Plaintiff
28 answered, "Yes." (Id.) The ALJ asked, "Who did you harm
physically?" (Id.) Plaintiff responded, "I'm sorry, not
physically," and "[m]entally, I have, but not physically." (AR
47-48.)

1 weight down to 229.²⁴ (AR 473.) Plaintiff also made inconsistent
2 statements about the reason for his weight fluctuations, telling
3 Dr. Trompeter in August 2009 that his weight loss had been "due to
4 better dietary choices" (AR 473), then telling Dr. Kashkouli in
5 December 2009 that he had a "poor appetite" and had "lost weight
6 over the course of the past several months" because of "depression"
7 (AR 661). In August 2010, moreover, Plaintiff still weighed 229
8 pounds but reported to Dr. Trompeter that he had had "difficulty
9 with his weight because he sits at home and eats all day long."²⁵
10 (AR 742.) Those conflicts in Plaintiff's statements were
11 permissible reasons for discounting his credibility. See Smolen,
12 80 F.3d at 1284 (in determining credibility, ALJ may consider
13 "ordinary techniques of credibility evaluation," such as claimant's
14 prior inconsistent statements concerning symptoms); Thomas, 278
15 F.3d at 958-59 (in determining credibility, ALJ may consider
16 inconsistencies in claimant's testimony); Johnson v. Shalala, 60
17 F.3d 1428, 1434 (9th Cir. 1995) (ALJ permissibly discounted
18 credibility based on contradictions within claimant's testimony).

19 \\

20 \\

21
22 ²⁴ It appears that Plaintiff had actually lost about 30
23 pounds by August 2009. (See AR 473; AR 395 (259 pounds on May
24 27, 2008); AR 333 (256 pounds on Sept. 8, 2008); AR 384 (255
pounds on Dec. 19, 2008).

25 ²⁵ Plaintiff submitted Dr. Trompeter's August 2010 note,
26 along with several other medical records, to the Appeals Council
27 after the ALJ issued his written decision. (See AR 101, 727.)
28 Because the Appeals Council considered that evidence and made it
part of the administrative record (AR 97-101), the Court reviews
it in determining whether the ALJ's decision is supported by
substantial evidence, Brewes, 682 F.3d at 1163.

1 The ALJ also permissibly found that Plaintiff's daily
2 activities were inconsistent with his claim of total disability.
3 (AR 87.) See Thomas, 278 F.3d at 958-59 (in assessing credibility,
4 ALJ may consider inconsistencies either in claimant's testimony or
5 between testimony and conduct); cf. Molina, 674 F.3d at 1113 ("Even
6 where [claimant's] activities suggest some difficulty functioning,
7 they may be grounds for discrediting the claimant's testimony to
8 the extent that they contradict claims of a totally debilitating
9 impairment."). Plaintiff testified that he drove regularly, taking
10 his children to school and his wife shopping; prepared simple
11 meals; went grocery shopping with his wife; washed dishes twice a
12 week; vacuumed every two weeks; paid bills using a checkbook; and
13 occasionally took care of his children on his own. (AR 87; AR 49-
14 51, 55.) Plaintiff reported having five children. (AR 341).
15 Similarly, Plaintiff reported to Dr. Soliman that he was able to
16 cook, clean, shop, run errands, take care of his personal hygiene
17 and financial responsibilities, drive a car, focus on daily
18 activities, and get along well with family, friends, and neighbors.
19 (AR 341.) As the ALJ found, those activities indicate that
20 Plaintiff was "not so debilitated as he claim[ed]." (AR 87.)

21
22 The ALJ was also permitted to discount Plaintiff's claims of
23 debilitating pain because they conflicted with the medical evidence
24 showing that his pain was treated conservatively and that he was
25 "clearly physically able to work." (AR 86); see Carmickle v.
26 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1161 (9th Cir. 2008)
27 ("Contradiction with the medical record is a sufficient basis for
28 rejecting the claimant's subjective testimony."); Tommasetti v.

1 Astrue, 533 F.3d 1035, 1040 (9th Cir. 2008) (ALJ may infer that
2 claimant's "response to conservative treatment undermines
3 [claimant's] reports regarding the disabling nature of his pain");
4 Lingenfelter, 504 F.3d at 1040 (in determining credibility, ALJ may
5 consider "whether the alleged symptoms are consistent with the
6 medical evidence"); see also Burch v. Barnhart, 400 F.3d 676, 681
7 (9th Cir. 2005) ("Although lack of medical evidence cannot form the
8 sole basis for discounting pain testimony, it is a factor that the
9 ALJ can consider in his credibility analysis."). As the ALJ found,
10 Plaintiff's "analgesic medication history [was] inconsistent with
11 his claimed severity of pain." (AR 87.) Indeed, Plaintiff claimed
12 to have debilitating back, knee, and elbow pain, but his doctors
13 generally recommended only that he take acetaminophen or
14 acetaminophen with codeine, exercise, or lose weight. (See AR 384
15 (recommending acetaminophen with codeine and exercise); AR 398
16 (recommending acetaminophen with codeine); AR 566 (recommending
17 acetaminophen); AR 580 (recommending acetaminophen); AR 586
18 (recommending acetaminophen); AR 743 (recommending yoga and weight
19 loss).) Plaintiff also briefly took gabapentin (AR 743-44) but he
20 discontinued it without any increase in pain (AR 658). Moreover,
21 in August 2010, Dr. Trompeter, Plaintiff's primary-care physician,
22 indicated that Plaintiff was exaggerating his pain symptoms, noting
23 that he had an "exaggerated 'jumps off the table response'" when
24 she touched his lumbar spine and right elbow.²⁶ (AR 742);

26
27 ²⁶ This note was also part of the records that Plaintiff
28 submitted the Appeals Council after the ALJ rendered his
decision, and it constitutes further substantial evidence in
support of the ALJ's decision. See Brewes, 682 F.3d at 1163.

1 Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001)
2 (credibility determination based on, among other things,
3 plaintiff's "tendency to exaggerate" proper when supported by
4 "substantial evidence"). As the ALJ noted (AR 83, 86), Dr.
5 Trompeter clearly believed that Plaintiff's physical problems did
6 not prevent him from working, recommending that he "return to work
7 as soon as psychiatry can clear." (AR 386.)

8
9 Finally, the ALJ found that Plaintiff's "demeanor as a witness
10 at [the] hearing was very poor." As an ALJ's personal observations
11 can support an adverse credibility determination, see Thomas, 278
12 F.3d at 960 (ALJ properly relied on claimant's "demeanor at the
13 hearing" in rejecting her credibility), and as there were numerous
14 alternative convincing reasons to reject Plaintiff's testimony, no
15 remand is required. As the reasons were supported by substantial
16 evidence, this Court "may not engage in second-guessing." Thomas,
17 278 F.3d at 959 (citation omitted).

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1 B. The ALJ Properly Evaluated Plaintiff's Mental
2 Impairments

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4 Plaintiff contends that the ALJ erred in rejecting Dr.
5 Wilcox's August 7, 2008 opinion that Plaintiff was unable to obtain
6 and maintain employment. (J. Stip. at 28-35.)

7
8 1. Applicable law

9
10 Three types of physicians may offer opinions in Social
11 Security cases: "(1) those who treat[ed] the claimant (treating
12 physicians); (2) those who examine[d] but d[id] not treat the
13 claimant (examining physicians); and (3) those who neither
14 examine[d] nor treat[ed] the claimant (non-examining physicians)."
15 Lester, 81 F.3d at 830. A treating physician's opinion is
16 generally entitled to more weight than the opinion of a doctor who
17 examined but did not treat the claimant, and an examining
18 physician's opinion is generally entitled to more weight than that
19 of a nonexamining physician. Id.

20
21 The opinions of treating physicians are generally afforded
22 more weight than the opinions of nontreating physicians because
23 treating physicians are employed to cure and have a greater
24 opportunity to know and observe the claimant. Smolen, 80 F.3d at
25 1285. If a treating physician's opinion is well supported by
26 medically acceptable clinical and laboratory diagnostic techniques
27 and is not inconsistent with the other substantial evidence in the
28 record, it should be given controlling weight. 20 C.F.R.

1 § 404.1527(c) (2). If a treating physician's opinion is not given
2 controlling weight, its weight is determined by length of the
3 treatment relationship, frequency of examination, nature and extent
4 of the treatment relationship, amount of evidence supporting the
5 opinion, consistency with the record as a whole, the doctor's area
6 of specialization, and other factors. Id. § 404.1527(c) (2)-(6).
7

8 When a treating doctor's opinion is not contradicted by
9 another doctor, it may be rejected only for "clear and convincing"
10 reasons. Carmickle, 533 F.3d at 1164 (quoting Lester, 81 F.3d at
11 830-31). When a treating physician's opinion conflicts with
12 another doctor's, the ALJ must provide only "specific and
13 legitimate reasons" for discounting it. Id. Further, the ALJ need
14 not accept any medical opinion that conflicts with the physician's
15 own treatment notes or the record as a whole. See Bayliss v.
16 Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (holding that
17 discrepancy between physician's notes and his assessment of
18 limitations was "clear and convincing" reason for rejecting
19 opinion); Connett v. Barnhart, 340 F.3d 871, 874-75 (9th Cir. 2003)
20 (affirming ALJ's rejection of physician's RFC questionnaire because
21 it was "not supported by his own notes" and "had multiple
22 inconsistencies with all other evaluations" (alteration omitted)).
23

24 2. Relevant facts

25

26 On August 7, 2008, Dr. Wilcox wrote a letter stating that
27 Plaintiff was compliant with his treatment but it had been
28 "difficult to get his illness stabilized with a medication regimen

1 and therefore he continues to be quite depressed." (AR 315.) She
2 listed Plaintiff's symptoms as depressed mood, isolation,
3 irritability, insomnia, decreased daytime energy, poor short-term
4 memory, poor attention span, decreased concentration, passive
5 thoughts of death, and decreased motivation. (Id.) Dr. Wilcox
6 opined that, "[b]ecause of this, in no way is he able to obtain or
7 maintain gainful employment." (Id.)

8
9 3. Analysis

10
11 The ALJ permissibly accorded "little weight" to Dr. Wilcox's
12 opinion that Plaintiff was unable to obtain or maintain gainful
13 employment. (AR 88.) First, the ALJ noted Dr. Wilcox "made no
14 assessment of what [Plaintiff] can still do despite his
15 impairments" and instead concluded only that Plaintiff was unable
16 to obtain or maintain employment, which was "an issue reserved to
17 the Commissioner." (AR 89.) It is true that a treating
18 physician's statement on an issue reserved to the Commissioner,
19 such as the determination of a claimant's ultimate disability, is
20 not binding on the ALJ or entitled to special weight. 20 C.F.R. §
21 404.1527(d)(1) ("A statement by a medical source that you are
22 'disabled' or 'unable to work' does not mean that we will determine
23 that you are disabled."); SSR 96-5p, 1996 WL 374183, at *5
24 (treating-source opinions that a person is disabled or unable to
25 work "can never be entitled to controlling weight or given special
26 significance"); see also McLeod v. Astrue, 640 F.3d 881, 885 (9th
27 Cir. 2011) ("A disability is an administrative determination of how
28 an impairment, in relation to education, age, technological,

1 economic, and social factors, affects ability to engage in gainful
2 activity.”). Thus, the ALJ was not obligated to accept it.

3
4 The ALJ also properly discounted Dr. Wilcox’s opinion because
5 her finding of “multiple aspects of cognitive impairment by way of
6 ‘poor short-term memory, poor attention span, and decreased
7 concentration’” was “not supported by the medical record including
8 [her] own treating notes.”²⁷ (AR 89); see Valentine v. Comm’r, Soc.
9 Sec. Admin., 574 F.3d 685, 692-93 (9th Cir. 2009) (contradiction
10 between treating physician’s opinion and his treatment notes
11 constitutes specific and legitimate reason for rejecting treating
12 physician’s opinion); Batson v. Comm’r of Soc. Sec. Admin., 359
13 F.3d 1190, 1195 (9th Cir. 2004) (“an ALJ may discredit treating
14 physicians’ opinions that are conclusory, brief, and unsupported by
15 the record as a whole . . . or by objective medical findings”);
16 Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (ALJ
17 permissibly rejected treating physician’s opinion when opinion was
18 contradicted by or inconsistent with treatment reports). Although
19 Plaintiff reported decreased short-term memory and concentration
20 when Dr. Wilcox first evaluated him (AR 572), Dr. Wilcox did not
21 thereafter note any cognitive problems and instead consistently
22 found that Plaintiff was “alert and oriented” with normal speech,
23 goal-directed thoughts, and intact insight and judgment (see, e.g.,

24
25
26 ²⁷In Dr. Wilcox’s notes, she reported Plaintiff as stating:
27 “He said that once he got 100% disability he hasn’t been able to
28 work and therefore cannot provide for his family. His wife has
never worked. Both he and his wife say that he has noticed a
definite benefit from the medication. He is still tired during
the day, often takes a nap.” (AR 393.)

1 AR 387, 392-93, 402, 407, 479, 481-82, 484-86, 567, 572, 657, 659,
2 671, 714, 745). Dr. Soliman, moreover, examined Plaintiff on
3 September 2, 2008, less than one month after Dr. Wilcox rendered
4 her opinion, and found that Plaintiff was able to recall three out
5 of three objects after five minutes and perform serial sevens
6 without error; had intact memory, normal abstract thinking, and
7 good insight; and reported that he was able to focus on his daily
8 activities. (AR 341-42.) Those findings conflict with Dr.
9 Wilcox's finding that Plaintiff had poor memory, attention, and
10 concentration. The ALJ was entitled to reject Dr. Wilcox's opinion
11 on this basis.²⁸

12
13 The ALJ therefore did not err in rejecting Dr. Wilcox's
14 opinion that Plaintiff was unable to work. Remand is not warranted
15 on this ground.

16
17 ²⁸ Plaintiff contends that the findings of psychiatrist
18 Kristin S. Beizai "confirm the reasonableness of Dr. Wilcox's
19 assessments and observations." (J. Stip. at 34.) Dr. Beizai's
20 findings do not appear to be relevant to the time period on or
21 before the ALJ's decision, however, because her first evaluation
22 of Plaintiff was not until December 14, 2010, nearly a month
23 after the ALJ issued his decision in November 2010, and nothing
24 indicates that it related to the period before that. (See AR
25 705-08); 20 C.F.R. § 404.970(b). In any event, Dr. Beizai's
26 findings fail to corroborate Dr. Wilcox's opinion that Plaintiff
27 was totally disabled. At the December 2010 evaluation, Plaintiff
28 reported that he was depressed and isolating himself, among other
symptoms; had been seeing a psychologist for three or four
months, which had been "very helpful"; and was "doing better" on
his current medication, with improved sleep and fewer nightmares.
(AR 705-06.) Dr. Beizai found that Plaintiff had a "down" mood
and was irritable "at points" but was cooperative with a linear
thought process; had no psychosis, suicidal ideations, delusions,
or impulsivity; and had good judgment and insight. (AR 707.)
Those findings fail to corroborate Dr. Wilcox's finding that
Plaintiff was totally disabled.

1 C. The ALJ Permissibly Discounted Plaintiff's VA Rating
2 Decision

3
4 Plaintiff argues that the ALJ should have accorded more weight
5 to the VA's conclusion that Plaintiff was disabled. (J. Stip. at
6 6-11.)

7
8 1. Applicable law

9
10 An ALJ must "ordinarily give great weight to a VA
11 determination of disability." McCartey v. Massanari, 298 F.3d
12 1072, 1076 (9th Cir. 2002). "While a VA disability decision does
13 not necessarily compel the SSA to reach an identical result, the
14 ALJ must consider the VA's finding in reaching his decision,
15 because of the similarities between the VA disability program and
16 the Social Security disability program." Hiler v. Astrue, 687 F.3d
17 1208, 1211 (9th Cir. 2012) (internal quotation marks, alteration,
18 and citation omitted). But because the two federal programs are
19 not identical, "the ALJ may give less weight to a VA disability
20 rating if he gives persuasive, specific, valid reasons for doing so
21 that are supported by the record." McCartey, 298 F.3d at 1076;
22 accord Valentine, 574 F.3d at 695.

23
24 2. Relevant facts

25
26 On August 20, 2007, the VA found that Plaintiff was entitled
27 to "individual unemployability" effective November 15, 2005. (AR
28 599.) After summarizing the medical evidence, including Dr.

1 Martindill's August 2007 examination report, the VA noted that
2 Plaintiff's "combination of [] service connected disabilities
3 (predominately [] depression) has been shown to significantly
4 impact [his] ability to retain gainful employment." (AR 602.) The
5 VA noted that its determination was "not final" and was "subject to
6 future reduction based on further evaluation and substantial
7 improvement of [his] service connected conditions with necessary
8 treatment." (AR 602-03.) At that time, Plaintiff was rated 80
9 percent disabled, which apparently included a 50-percent disability
10 rating for major depression with dysthymia, a 30-percent disability
11 rating for "cluster migraine headaches," and 30-percent disability
12 rating for "hypertension associated with glomerulonephritis."²⁹ (AR
13 247 (Nov. 5, 2008 VA rating decision "continu[ing]" Plaintiff's
14 disability ratings), 596 (VA letter stating that Plaintiff's
15 "overall or combined rating is 80% although we are paying you at
16 the 100% rate for Individual Unemployability").)

17
18 On November 22, 2010, the ALJ denied Plaintiff's claim for
19 Social Security DIB. (AR 78-93.) In doing so, the ALJ gave
20 "considerable weight" to Dr. Martindill's "implied opinion that
21 [Plaintiff was] not mentally debilitated," which the ALJ found was
22 "implicit in his refusal to endorse qualification for VA rating of
23 'individual unemployability.'" (AR 90.) The ALJ also considered
24 Plaintiff's VA rating decision but concluded that it "did not
25

26 ²⁹ "Glomerulonephritis is a type of kidney disease in
27 which the part of your kidneys that helps filter waste and fluids
28 from the blood is damaged." Glomerulonephritis, MedlinePlus,
<http://www.nlm.nih.gov/medlineplus/ency/article/000484.htm> (last
updated Mar. 22, 2013).

1 change [his] independent assessment of the entire record in this
2 case." (AR 90-91.) First, the ALJ noted that the VA awarded
3 Plaintiff "individual unemployability" "on the unelaborated ground
4 of resolving reasonable doubt in [Plaintiff's] favor." (AR 90.)
5 Second, the ALJ found that "a 100% VA disability rating certainly
6 does not preclude full-time work at the level of substantial
7 gainful activity." (AR 90.) Third, the ALJ noted that

8
9 the VA's definition of "unemployability" is importantly
10 different than the definition of "disability" under the
11 Social Security Act. Under VA regulations, "A veteran
12 may be considered as unemployable . . . when it is
13 satisfactorily shown that he or she is unable to secure
14 further employment." (38 C.F.R. § 4.18). Obviously,
15 veterans may be "unable to secure further employment"
16 simply because no one will hire them. However, the
17 Social Security Act specifically forbids consideration of
18 that fact in determining disability under the act (Social
19 Security Act §§ 223(d) (2) (A), 1614(a) (3) (B); 42 U.S.C. §§
20 423(d) (2) (A), 1382(a) (3) (B)).

21
22 (AR 90-91.) Finally, the ALJ noted that he had "independently
23 addressed and assessed" the "evidentiary basis" for the VA's
24 decision and found that it did not show that Plaintiff was
25 disabled. (AR 90-91.)

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1 3. Discussion

2
3 The ALJ provided reasons for according little weight to the VA
4 decision that are persuasive, specific, valid. See McCartey, 298
5 F.3d at 1076. Plaintiff therefore is not entitled to reversal on
6 this ground.

7
8 First, the ALJ indicated that he had "independently addressed
9 and assessed" the "evidentiary basis" for the VA's decision and
10 found that it did not support a finding of disability. (AR 91.)
11 Indeed, the VA decision appears to rest, in part, on Dr.
12 Martindill's opinion (see AR 602), but the ALJ correctly noted that
13 Dr. Martindill "refus[ed] to endorse qualification for VA rating of
14 'individual unemployability'" and "opined that with treatment
15 [Plaintiff] could likely work." (AR 90); 20 C.F.R. § 404.1530(a)-
16 (b) (stating that benefits will be denied to a claimant who fails
17 to follow treatment that can restore his ability to work). Indeed,
18 Dr. Martindill's findings during the mental examination were
19 relatively benign: Plaintiff had slow mentation but was
20 "cognitively intact," had an average IQ, "did well on naming
21 presidents backwards" and "adequately on serial 7's," had a
22 depressed mood but was "not psychotic," and did not have an
23 "impulse problem." (AR 381.) Dr. Martindill also noted that
24 Plaintiff put "little effort" into the exam, thereby indicating
25 that Plaintiff's symptoms may have been exaggerated. (AR 381.)
26 Dr. Martindill concluded that he could not "recommend
27 unemployability status," noting that Plaintiff was "not psychotic,"
28 had never been hospitalized, and had a history of "good work

1 performance." (AR 383.) Dr. Martindill also noted that Plaintiff
2 had not seen a psychiatrist for "quite a long time" and opined that
3 Plaintiff would likely be able to work if he received "more
4 aggressive treatment and closer monitoring" and possibly group
5 therapy, anger management, and different medication. (AR 381,
6 383.) Moreover, the VA's decision also apparently rested, in part,
7 on the fact that Plaintiff was rated 30 percent disabled for
8 migraine headaches and 30 percent disabled for hypertension³⁰, but
9 the ALJ correctly found that Plaintiff suffered only "infrequent"
10 migraines and his hypertension was "controlled on medication." (AR
11 80, 82; see, e.g., AR 398 (hypertension "well controlled"); AR 474
12 (hypertension in "good control"); AR 565 (noting blood pressure was
13 high that day but "well controlled at home"); AR 585 (noting
14 "controlled" hypertension); AR 659 (Feb. 2010, Plaintiff reported
15 he had not had headache since before Christmas).) Indeed,
16 Plaintiff does not challenge the ALJ's findings regarding his
17 migraine headaches and hypertension. Thus, the ALJ's reliance on
18 his own independent assessment of the "evidentiary basis" of the
19 VA's opinion was a proper reason for rejecting it. See Valentine,

21 ³⁰ VA regulations provide that a veteran usually must meet
22 certain rating criteria in order to be awarded individual
23 unemployability. 38 C.F.R. § 4.16(a) (stating, in relevant part,
24 that "if there are two or more disabilities, there shall be at
25 least one disability ratable at 40 percent or more, and
26 sufficient additional disability to bring the combined rating to
27 70 percent or more"). Plaintiff appears to have met those
28 criteria because he was rated 50 percent disabled because of his
depression, 30 percent disabled because of hypertension, and 30
percent disabled because of migraine headaches. (See AR 596
(noting that Plaintiff's "overall or combined rating is 80%"); AR
245 (noting that Plaintiff's depression was rated 50 percent
disabling, his hypertension 30 percent disabling, and his
migraine headaches 30 percent disabling).)

1 574 F.3d at 695 (finding that "the acquisition of new evidence or
2 a properly justified reevaluation of old evidence constitutes a
3 persuasive, specific, and valid reason supported by the record . .
4 . for according little weight to a VA disability rating" (internal
5 quotation marks and alterations omitted)).

6
7 Second, the ALJ noted that the VA awarded Plaintiff
8 "individual unemployability" status "on the unelaborated ground of
9 resolving reasonable doubt in his favor." (AR 90.) Indeed, in its
10 decision, the VA simply summarized the medical evidence, including
11 Dr. Martindill's report, and acknowledged that "reasonable doubt"
12 existed regarding Plaintiff's employability. (AR 602.) As
13 required by VA regulations, the VA resolved that doubt in
14 Plaintiff's favor and granted entitlement to individual
15 unemployability. (AR 602); 38 C.F.R. § 4.3 ("When after careful
16 consideration of all procurable and assembled data, a reasonable
17 doubt arises regarding the degree of disability such doubt will be
18 resolved in favor of the claimant."). Here, however, the ALJ was
19 under no such obligation.

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1 Indeed, even if the medical evidence could reasonably be
2 interpreted differently – which the VA decision appears to
3 acknowledge – this Court must “uphold the ALJ’s decision where the
4 evidence is susceptible to more than one rational interpretation.”³¹
5 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989); accord Orn
6 v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007).

7
8 This Court does acknowledge disagreement with some of the
9 ALJ’s reasons for discounting the VA rating decision. The ALJ did
10 erroneously conclude that the VA’s definition of “unemployable”
11 conflicted with the Social Security Act’s definition. (AR 90-91.)
12 The VA regulation governing “[t]otal disability ratings for
13 compensation based on unemployability of the individual,” which was
14 the relevant regulation in Plaintiff’s claim for VA individual
15 unemployability benefits, provides that “[t]otal disability ratings
16 for compensation may be assigned, where the schedular rating is
17 less than total, when the disabled person is, in the judgment of
18 the rating agency, *unable to secure or follow a substantially*
19 *gainful occupation as a result of service-connected disabilities.*”
20 38 C.F.R. 4.16(a) (emphasis added). Contrary to the ALJ’s
21 findings, that standard appears largely consistent with the Social
22

23 ³¹ Plaintiff contends that “the ALJ parsed out of the
24 opinions of Dr. Martindill the sociological concern of placing a
25 relatively young man on the disability rolls” and “ignor[ed] the
26 finding of a depressed level of function that permitted if not
27 required the VA rating on depression.” (J. Stip. at 11.) The
28 ALJ, however, credited Dr. Martindill’s opinion (AR 90) and
concluded that Plaintiff’s depression was a severe impairment and
limited him to unskilled work with no close or frequent
interpersonal contact with supervisors, coworkers, or the public
(AR 80, 84).

1 Security Act's definition of "disability" as the "inability to
2 engage in any substantial gainful activity by reason of any
3 medically determinable physical or mental impairment which can be
4 expected to result in death or which has lasted or can be expected
5 to last for a continuous period of not less than 12 months." 42
6 U.S.C. § 423(d)(1)(A). Second, the ALJ erroneously found that "a
7 100% VA disability rating certainly does not preclude full-time
8 work at the level of substantial gainful activity," implying that
9 Plaintiff received a 100% VA disability rating, which is incorrect.
10 (AR 90.) It is also true that the VA's percentage ratings are
11 based on an "average impairment in earning capacity" resulting from
12 various impairments, as opposed to an individualized determination
13 that the particular veteran is unable to work. See 38 C.F.R. § 4.1
14 ("The percentage ratings represent as far as can practicably be
15 determined the average impairment in earning capacity resulting
16 from such diseases and injuries and their residual conditions in
17 civil occupations."). Here, Plaintiff was found to be less than
18 100% disabled under the percentage ratings but was nonetheless
19 awarded "individual unemployability" based on the VA's finding that
20 he was likely "unable to secure or follow a substantially gainful
21 occupation as a result of service-connected disabilities." 38
22 C.F.R. § 4.16(a). As discussed, that individualized determination
23 is substantially similar to the Social Security Administration's
24 own disability standard. Those errors, however, are harmless
25 because the ALJ's rejection of the VA rating decision was supported
26 by other persuasive, specific, and valid reasons. See Valentine,
27 574 F.3d at 695 (finding ALJ justified in rejecting VA disability
28 rating even though only one of two offered reasons was proper); see

1 also Stout v. Comm’r, Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th
2 Cir. 2006) (ALJ’s error harmless when “inconsequential to the
3 ultimate nondisability determination”). As the ALJ’s decision
4 remains legally valid despite these errors, no remand is required.
5

6 D. The ALJ Properly Relied on the VE’s Testimony
7

8 Plaintiff contends that the ALJ erred by relying on the VE’s
9 testimony regarding the number of jobs available to Plaintiff in
10 the local and national economy because two sources, Job Browser Pro
11 and Specific Occupation Employment Unskilled Quarterly, “alter[s]
12 the landscape of the evidence about the number of jobs” available
13 to Plaintiff. (J. Stip. at 60.)
14

15 1. Applicable law
16

17 At step five of the five-step process, the Commissioner has
18 the burden to demonstrate that the claimant can perform some work
19 that exists in “significant numbers” in the national or regional
20 economy, taking into account the claimant’s RFC, age, education,
21 and work experience. Lounsbury v. Barnhart, 468 F.3d 1111, 1114
22 (9th Cir. 2006); 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1560(c).
23 The Commissioner may satisfy that burden either through the
24 testimony of a VE or by reference to the Medical-Vocational
25 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2.
26 Lounsbury, 468 F.3d at 1114.

27 \\
28

1 When the services of a VE are used at step five, an ALJ may
2 call upon the VE to testify as to "(1) what jobs the claimant,
3 given his or her [RFC], would be able to do; and (2) the
4 availability of such jobs in the national economy." Tackett v.
5 Apfel, 180 F.3d 1094, 1101 (9th Cir. 1999). In doing so, an ALJ
6 "poses hypothetical questions to the [VE] that set out all of the
7 claimant's impairments for the [VE's] consideration." Id.
8 (citation and internal quotation marks omitted). When a
9 hypothetical includes "all of the limitations that the ALJ found
10 credible and supported by substantial evidence in the record," then
11 the ALJ may properly rely on the VE's response. Bayliss, 427 F.3d
12 at 1217-18. A VE's "recognized expertise provides the necessary
13 foundation for his or her testimony." Id. at 1218. The Federal
14 Rules of Evidence do not apply to the admission of evidence in
15 Social Security administrative proceedings. Id. at 1218 n. 4. No
16 additional foundation is required. Id.

17
18 2. Relevant facts
19

20 At the administrative hearing, the ALJ solicited the testimony
21 of VE John Kilcher, who Plaintiff stipulated was qualified to
22 provide expert testimony. (AR 60.) After the VE testified that he
23 had "studied the exhibits and heard [Plaintiff's] testimony about
24 his work history," the ALJ asked him whether full-time work existed
25 for a person with Plaintiff's physical and mental limitations (AR
26 62-63). The VE testified that such person could perform assembler
27 jobs, an example of which would be "final assembler," DOT
28 713.687-018, 1991 WL 679271; production-inspector jobs, an example

1 of which would be table worker, DOT 739.687-182, 1991 WL 680217;³²
2 and administrative-support jobs, and example of which would be
3 "document preparer," DOT 249.587-018, 1991 WL 672349. (AR 63-64.)
4 The VE testified that about 600 final-assembler jobs existed
5 regionally and 230,000 existed nationally, 300 table-worker jobs
6 existed regionally and 150,000 existed nationally, and 400
7 document-preparer jobs existed regionally and 175,000 existed
8 nationally. (AR 64.) Plaintiff's counsel cross-examined the VE
9 but did not question him regarding the number of available jobs or
10 his basis for making that determination. (AR 64-68.) Arguably,
11 Plaintiff's counsel's failure to question the VE about the number
12 of available jobs waived this issue for further review. See Meanel
13 v. Apfel, 172 F.3d 1111, 1115 (9th Cir. 1999). Had it been raised
14 before the ALJ, the ALJ would have had the opportunity to explore
15 and address the issue and its supporting evidence in the manner
16 contemplated by the regulatory scheme.

17
18 After the ALJ issued his written decision finding Plaintiff
19 not disabled, Plaintiff retained new counsel and asked the Appeals
20 Council to review the ALJ's decision. (AR 257-91.) In his brief
21 in support of his request for review, Plaintiff argued that the ALJ
22 erroneously relied on the VE's testimony regarding the number of
23 jobs existing in the regional and national economies because
24 "[a]ccording to two published resources, these numbers are
25

26
27 ³² The hearing transcript and the ALJ refer to this job as
28 "cable worker" (AR 64, 92), but this appears to be a
transcription error because the relevant DOT job description is
for "table worker," DOT 739.687-182, 1991 WL 680217.

1 unreliable and should suffer summary rejection.” (AR 258.) First,
2 Plaintiff asserted that the Specific Occupation Employment
3 Unskilled Quarterly stated that one final-assembler job existed
4 regionally and 64 existed nationally, 33 table-worker jobs existed
5 regionally and 3,703 existed nationally, and 35 document-preparer
6 jobs existed regionally and 3,335 existed nationally. (AR 258-58.)
7 Second, Plaintiff asserted that Job Browser Pro stated that one
8 final-assembler job existed statewide and 15 existed nationally, 26
9 table-worker jobs existed regionally and 2,571 existed nationally,
10 and 689 document-preparer jobs existed regionally and 63,832
11 existed nationally. (AR 259.) Plaintiff further asserted that,
12 according to Job Browser Pro, only 90 percent of the table-worker
13 jobs and 70.3 percent of the document-preparer jobs were full-time
14 positions. (Id.) Plaintiff attached to his brief three pages of
15 a spread sheet entitled Specific Occupation Employment Unskilled
16 Quarterly and three unidentified computer print-outs, presumably
17 from Job Browser Pro. (See AR 260-91.)

18
19 The Appeals Council received Plaintiff’s brief and attached
20 documents and included them in the record. (AR 97-102.) The
21 Council, however, found that the information submitted did not
22 provide a basis for changing the ALJ’s decision and denied
23 Plaintiff’s request for review. (AR 97-102.)

24
25 3. Analysis
26

27 Plaintiff contends that the Specific Occupation Employment
28 Unskilled Quarterly “is a data source that [VEs] rely upon as a

1 matter of custom" and that Job Browser Pro is "a tool used by [VEs]
2 in the divination of the number of jobs in the economy." (J. Stip.
3 at 55-56.) Those sources, Plaintiff argues, estimate that the
4 "size of the occupational bases is substantially smaller" than the
5 VE testified. (J. Stip. at 60.) Thus, Plaintiff argues, "no
6 reasonable person would accept the testimony of the [VE] given in
7 this case about the number of jobs." (Id.)

8
9 Plaintiff's argument fails because his lay assessment of the
10 data derived from the Specific Occupation Employment Unskilled
11 Quarterly and Job Browser Pro does not undermine the reliability of
12 the VE's testimony. Plaintiff failed to introduce any VE opinion
13 interpreting the data from those sources and the significance of
14 the information reflected on the various reports is not entirely
15 clear.³³ Indeed, neither of the cited reports are included in the
16 Social Security regulations' list of authoritative sources. See 20
17 C.F.R. § 404.1566(d) (ALJ will take administrative notice of
18 "reliable job information" in certain publications).³⁴ Although

19
20 ³³ For example, the Job Browser Pro report for the
21 document-preparer job lists "group numbers" that show 30,100 jobs
22 regionally and 2,789,590 nationally; "unweighted cumulative
23 estimated adjusted employment numbers" that show 2,206 jobs
24 regionally and 204,449 jobs nationally; and a "weighted DOT
25 estimate," upon which Plaintiff relies, that shows 609 jobs
26 regionally and 63,832 jobs nationally. (AR 287.)

27 ³⁴ The regulation specifically lists the following
28 publications as sources of reliable job information: (1)
Dictionary of Occupational Titles, published by the Department of
Labor; (2) County Business Patterns, published by the Bureau of
the Census; (3) Census Reports, also published by the Bureau of
the Census; (4) Occupational Analyses, prepared for the Social
Security Administration by various State employment agencies; and
(5) Occupational Outlook Handbook, published by the Bureau of

1 Plaintiff cites several decisions that generally acknowledge the
2 reliability of the data generated by programs such as Job Browser
3 Pro (J. Stip. at 56-57), none of these decisions find that such
4 information, submitted for the first time to the Appeals Council,
5 is sufficient grounds for finding that the ALJ's reliance on VE
6 testimony lacked substantial evidence. To the contrary, those
7 decisions actually suggest that the VE should rely on his or her
8 professional expertise rather than adopting wholesale the data from
9 any one source such as Job Browser Pro.³⁵ Indeed, Plaintiff's
10 argument has been rejected by several Courts in this district.
11 See, e.g., Solano v. Colvin, No. SA CV 12-01047 RZ, 2013 WL

12
13 Labor Statistics.

14
15 ³⁵ See, e.g., Poisson v. Astrue, No. 2:11-cv-245-NT, 2012
16 WL 1067661, at *9 (D. Me. Mar. 28, 2012) (finding that VE's
17 reliance on Job Browser Pro was not error because she "relied on
18 her professional experience and expertise, and not strictly on a
19 software program, in endorsing the numbers provided to the
20 [ALJ]."), accepted by 2012 WL 1416669 (D. Me. Apr. 24, 2012);
21 Cole v. Astrue, Civ. No. 10-510-CL, 2011 WL 5358557, at *26 (D.
22 Or. June 7, 2011) (VE permissibly relied in part on job numbers
23 generated by "Skill Trend by Job Browser"), accepted by 2011 WL
24 5358550 (D. Or. Nov. 4, 2011); Pitts v. Astrue, No. 1:10-CV-870,
25 2011 WL 2553340, *6 (N.D. Ohio May 19, 2011) (ALJ permissibly
26 relied on VE testimony regarding number of jobs despite possible
27 inconsistency with information from Job Browser Pro because VE's
28 "job incidence figures were based on several sources of
information," among other things), accepted by 2011 WL 2553311
(N.D. Ohio June 28, 2011); Drossman v. Astrue, 2011 WL 4496568,
*7-8 (N.D. Ohio July 15, 2011) (ALJ properly relied on VE's
opinion, even though it could conflict with information from Job
Browser Pro, because "[a]lthough the VE confirmed that the Job
Browser Pro program was a valid source of information on which he
relied, the VE also indicated that he relied upon other sources
of information" and "explained that Plaintiff's counsel was
misinterpreting the statistical information listed in the Job
Browser Pro program"), accepted by 2011 WL 4496561 (N.D. Ohio
Sept. 27, 2011).

1 3776333, at *1 (C.D. Cal. July 16, 2013) (“The Appeals Council
2 certainly was entitled to rely on the vocational expert’s
3 testimony, even in the face of the page from Job Browser Pro, in
4 making its determination.”); Villareal v. Colvin, No. EDCV
5 12-01640-JEM, 2013 WL 3071259, at *6 (C.D. Cal. June 18, 2013)
6 (“There is no reason to believe that the Job Browser Pro data is
7 the only source of job data or superior to others, and thus such
8 data is not conclusive.”); see also Valenzuela v. Colvin, No. CV
9 12-0754-MAN, 2013 WL 2285232, at *4 n.4 (C.D. Cal. May 23, 2013)
10 (collecting cases).

11
12 Moreover, the VE was not obligated to explain his methodology
13 for determining the number of available jobs because his
14 professional expertise, which Plaintiff specifically acknowledged
15 and did not challenge at the hearing (AR 60), was a sufficient
16 foundation for his testimony. See Bayliss, 427 F.3d at 1218; see
17 also 20 C.F.R. § 404.1566(e) (ALJs may use VE to determine
18 occupational issues). At the hearing, moreover, neither Plaintiff
19 nor his counsel challenged the VE’s job numbers, inquired about his
20 methodology for generating those numbers, solicited his opinion
21 regarding the validity of the information in the Job Browser Pro or
22 Specific Occupation Employment Unskilled Quarterly, or presented
23 any reports or other evidence regarding the availability of jobs.
24 (See AR 60-68.) Instead, Plaintiff waited until after the ALJ’s
25 adverse decision to submit the alternative jobs data to the Appeals
26 Council. As such, at the hearing, the VE had no reason to explain
27 the basis of his opinion or address the validity of the two job-
28 data sources.

1 Finally, Plaintiff argues that the VE “engaged in aggregation
2 error” because in calculating the number of jobs existing in the
3 regional and national economies, he improperly counted jobs that
4 exceeded Plaintiff’s limitations. (J. Stip. at 59). Plaintiff
5 asserts that the job numbers that the VE provided at the hearing
6 were improperly based on broad job categories rather than the
7 individual occupations that Plaintiff could perform. To support
8 his argument, Plaintiff relies on the Second Circuit’s decision in
9 Brault v. Soc. Sec. Admin., 683 F.3d 443, 446 (2d Cir. 2012),
10 which, while affirming the ALJ’s reliance on the VE’s testimony,
11 also explained that because the DOT only defines jobs, vocational
12 experts rely on other tools to determine whether jobs exist for
13 particular DOT occupations. (J. Stip. at 57-58). However, these
14 tools do not compile data for each DOT job code individually;
15 rather, they calculate the number of jobs in particular job
16 groupings, which encompass many individual DOT occupations.
17 Brault, 683 F.3d at 446. The Second Circuit noted that because DOT
18 codes “are much more granular” than job groupings, it is possible
19 that VE calculations based on the groupings will include jobs that
20 a claimant is not fit to perform. Id.

21
22 If, for example, ten DOT codes map to a single [job
23 grouping] code, saying there are 100,000 total positions
24 available in that [grouping] code gives no information at
25 all about how many positions each of the ten DOT codes
26 contributed to that total. This becomes a problem if DOT
27 titles with different exertion or skill levels map to the
28 same [grouping] code. In such a situation . . . a rough

1 weighted algorithm [is used] – if ten DOT codes
2 correspond to one [grouping] code, and four of those
3 codes are light-duty, unskilled positions, then the
4 [grouping] code will list 40% of the positions available
5 . . . as light-duty, unskilled positions. That estimate
6 may deviate significantly from the actual number of
7 existing positions.”

8
9 Id. at 447 n.4. Unlike the current case, the plaintiff in Brault
10 raised these concerns to the ALJ. Even so, the ALJ relied upon the
11 VE’s testimony and the Second Circuit ultimately upheld that
12 decision. Id. at 451.

13
14 Plaintiff argues that data from Job Browser Pro indicate that
15 the VE committed this type of “aggregation error” and overestimated
16 the number of existing jobs that Plaintiff could perform. The VE
17 testified that about 600 final-assembler jobs existed regionally
18 and 230,000 existed nationally, 300 table-worker jobs existed
19 regionally and 150,000 existed nationally, and 400 document-
20 preparer jobs existed regionally and 175,000 existed nationally.
21 (AR 63-64.) According to the Job Browser Pro data that Plaintiff
22 introduced, the job “final-assembler” corresponds to grouping code
23 51-9399, which encompasses over 1,500 distinct occupations and
24 represented a total of 1,310 jobs regionally and 229,240
25 nationwide. (J. Stip. 58) The job “table-worker” corresponds to
26 grouping code 51-9061, which encompasses 782 distinct occupations
27 and represented a total of 4,230 jobs regionally and 410,750
28 nationwide. (Id. at 59) The job “document-preparer” corresponds

1 to grouping code 43-9061, which encompasses 72 distinct occupations
2 and represented 30,100 jobs in the region and 2,789,590 jobs
3 nationwide. (Id. at 59) Plaintiff argues that these numbers
4 “rob[] the testimony of the [VE] of classification as ‘substantial’
5 evidence[]” because they indicate “aggregation error.” (Id. 59)
6

7 The vocational expert testified that 600 local and
8 230,000 national jobs as a final assembler [exist]. The
9 [VE] therefore stated that half of the local jobs and all
10 of the national jobs of [job] group[ing] 51-9399 were as
11 a final assembler to the exclusion of the 1,586 other
12 occupations in this group The [VE] estimated that
13 8% of the local but 30% of the national jobs in [job]
14 group[ing] 51-9061 were [t]able [w]orker jobs to the
15 exclusion of 781 other DOT classifications [in that
16 grouping] The [VE] . . . estimated that 1.3% of
17 the regional and 6% of the national jobs in [job]
18 group[ing] 43-9061 were [d]ocument [p]reparer jobs to the
19 exclusion of other 71 unique DOT codes [in that
20 grouping]. The disconnect and complete lack of symmetry
21 . . . coupled with the additional evidence robs the
22 testimony of the [VE] of the classification of
23 ‘substantial’ evidence.

24
25 (Id. at 59-60).
26

27 Plaintiff’s argument that these statistics render the VE’s
28 testimony unreliable and an inadequate basis for the ALJ’s decision

1 is without merit. As discussed supra, a VE's "recognized expertise
2 provides the necessary foundation for his or her testimony. Thus,
3 no additional foundation is needed." Bayliss, 427 F.3d at 1217.
4 Here, the VE – whom the parties stipulated was a qualified expert
5 (AR 60) – did not specify the methodology he used to determine the
6 number of existing jobs that Plaintiff could perform, (AR 60-68),
7 nor was he required to do so. See id.; Brault, 683 F.3d at 448-49
8 (an ALJ need not expressly state his reasons for accepting a VE's
9 testimony and an ALJ need not inquire into a VE's methodologies).
10 During the hearing before the ALJ, Plaintiff's counsel had the
11 opportunity to question the VE regarding how he calculated the
12 number of existing jobs and whether there was any risk of
13 "aggregation error." Plaintiff's counsel, however, chose not to do
14 so. (AR 60-68). Accordingly, Plaintiff cannot undermine the
15 reliability of the VE's testimony by after-the-fact speculation or
16 the introduction of statistics that have not been analyzed by an
17 expert and are derived from non-authoritative sources. See 20
18 C.F.R. § 404.1566(d).

19
20 Moreover, when evidence "is susceptible to more than one
21 rational interpretation," the Court must uphold the ALJ's decision.
22 Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). Therefore,
23 even if Plaintiff's evidence provided a rational basis for
24 disagreeing with the ALJ's decision, the Court must still uphold
25 the ALJ's finding so long as it was based on substantial evidence.
26 For the reasons discussed above, the ALJ's decision was supported by
27
28

1 substantial evidence and Plaintiff's claim fails.³⁶ Because the
2 ALJ properly relied on the VE's opinion, the Court finds no
3 reversible error. See Osenbrock v. Apfel, 240 F.3d 1157, 1163 (9th
4 Cir. 2001) (VE testimony constitutes substantial evidence
5 supporting ALJ's finding). Plaintiff is not entitled to remand on
6 this claim.

7
8 **VI. CONCLUSION**

9
10 Consistent with the foregoing, and pursuant to sentence four
11 of 42 U.S.C. § 405(g),³⁷ IT IS ORDERED that judgment be entered
12 AFFIRMING the decision of the Commissioner and dismissing this
13 action with prejudice. IT IS FURTHER ORDERED that the Clerk serve
14 copies of this Order and the Judgment on counsel for both parties.

15
16 DATED: November 21, 2013

17 /s/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

18
19
20 ³⁶ Plaintiff's reliance on Farias v. Colvin, No. 11-57088,
21 2013 WL 2151422 (9th Cir. May 20, 2013) (J. Stip. at 66), is also
22 misplaced because there the Ninth Circuit specifically observed
23 that the VE "properly testified that a person with [plaintiff's]
24 characteristics and RFC could perform the job requirements of
25 head dance hall hostess but erroneously provided employment data
26 for restaurant hostess – an occupation that exists in far larger
27 numbers," and that "the employment numbers reported by the Bureau
28 of Labor Statistics for the occupation of restaurant host/hostess
are very similar to the numbers the VE proffered for the job of
head dance hall hostess." 2013 WL 2151422, at *1.

³⁷ This sentence provides: "The [district] court shall
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."