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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ARTAVAZD OGANNESYAN,	)	Case No. CV 15-0220-JPR
	)	
Plaintiff,	)	
	)	<b>MEMORANDUM OPINION AND ORDER</b>
v.	)	<b>AFFIRMING COMMISSIONER</b>
	)	
CAROLYN W. COLVIN, Acting	)	
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
	)	

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**I. PROCEEDINGS**

Plaintiff seeks review of the Commissioner’s final decision terminating payment of Supplemental Security Income (“SSI”) benefits. The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed November 13, 2015, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is affirmed.

1 **II. BACKGROUND**

2 Plaintiff was born in Armenia in 1966 and moved to  
3 California in September 1989. (Administrative Record ("AR") 30,  
4 147, 234.) He completed the eighth grade in Armenia<sup>1</sup> and has  
5 never worked. (AR 52, 56, 164.) In a determination dated  
6 January 29, 1993, he was found to have been disabled since June  
7 11, 1992, because of posttraumatic stress disorder and back pain.  
8 (AR 23-24, 61, 63, 241.) In a determination dated August 21,  
9 1996, his disability was found to continue. (AR 23-24.)

10 On February 4, 2011, Plaintiff filed a disability report and  
11 a continuing-review disability report, alleging that he was  
12 unable to work because of back pain, right-leg pain, an eye  
13 injury, and anxiety. (AR 164, 187.) On July 22, 2011, Plaintiff  
14 was notified that his disability was found to have ended as of  
15 July 2011 and that his benefits would be terminated. (AR 65-67.)  
16 He requested reconsideration of the cessation determination and  
17 appeared with an interpreter at a hearing before a Disability  
18 Hearing Officer ("DHO") on January 11, 2012. (AR 64, 68, 80.)  
19 In a written decision issued the following day, the DHO found  
20 Plaintiff not disabled. (AR 80-89.)

21 Plaintiff requested a hearing before an Administrative Law  
22 Judge. (AR 93.) A hearing was held on November 27, 2012, at  
23 which Plaintiff appeared with a nonattorney representative and  
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27 <sup>1</sup> In 2011 and 2012, Plaintiff reported that he had completed  
28 the eighth grade (AR 56, 285), but in 1996, he reported that he  
had completed the 12th grade (AR 234).

1 testified through an Armenian-language interpreter.<sup>2</sup> (AR 46, 49-  
2 57.) A vocational expert ("VE") also testified. (AR 57-59.) In  
3 a written decision issued November 29, 2012, the ALJ found that  
4 Plaintiff's disability had ended on July 1, 2011. (AR 23-32.)  
5 On November 13, 2014, after considering a new opinion from one of  
6 Plaintiff's treating physicians (AR 5, 351), the Appeals Council  
7 denied Plaintiff's request for review. (AR 1-5.) This action  
8 followed.

### 9 **III. STANDARD OF REVIEW**

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

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26 <sup>2</sup> Although the Commissioner states that Plaintiff was  
27 represented by an attorney (see, e.g., J. Stip. at 7, 10), the  
28 ALJ stated that he was represented by a "non-attorney  
representative" (AR 23) and the representative's name does not  
appear on the California State Bar's website.

1 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,  
2 720 (9th Cir. 1996). "If the evidence can reasonably support  
3 either affirming or reversing," the reviewing court "may not  
4 substitute its judgment" for the Commissioner's. Id. at 720-21.

#### 5 **IV. THE EVALUATION OF DISABILITY**

6 People are "disabled" for purposes of receiving Social  
7 Security benefits if they are unable to engage in any substantial  
8 gainful activity owing to a physical or mental impairment that is  
9 expected to result in death or has lasted, or is expected to  
10 last, for a continuous period of at least 12 months. 42 U.S.C.  
11 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.  
12 1992). Once they are found to be disabled, a "presumption of  
13 continuing disability arises in [their] favor," and the  
14 Commissioner "then bears the burden of producing evidence  
15 sufficient to rebut" it. Bellamy v. Sec'y of Health & Human  
16 Servs., 755 F.2d 1380, 1381 (9th Cir. 1985); see also McCalmon v.  
17 Astrue, 319 F. App'x 658, 659 (9th Cir. 2009).

18 Recipients of benefits are generally no longer disabled when  
19 substantial evidence demonstrates medical improvement in their  
20 physical and mental impairments and an ability to engage in  
21 substantial gainful activity. 42 U.S.C. § 423(f); Flaten v.  
22 Sec'y of Health & Human Servs., 44 F.3d 1453, 1460 (9th Cir.  
23 1995).

#### 24 A. The Seven-Step Evaluation Process

25 The ALJ follows a seven-step sequential evaluation process  
26 to assess whether a recipient continues to be disabled and  
27 eligible for SSI benefits. 20 C.F.R. § 416.994; see Khampunbuan  
28 v. Astrue, 333 F. App'x 217, 218 (9th Cir. 2009); Ferguson v.

1 Comm'r of Soc. Sec., No. 2:13-CV-2344-WBS-CMK, 2015 WL 5173952,  
2 at \*1 n.2 (E.D. Cal. Sept. 2, 2015). In the first step, the  
3 Commissioner determines whether the recipient has an impairment  
4 or combination of impairments that meets or equals an impairment  
5 in the Listing of Impairments ("Listing") set forth at 20 C.F.R.  
6 part 404, subpart P, appendix 1; if so, the disability continues.  
7 § 416.994(b)(5)(i).

8 If the recipient's impairment or combination of impairments  
9 does not meet or equal an impairment in the Listing, the second  
10 step requires the Commissioner to determine whether medical  
11 improvement has occurred.<sup>3</sup> § 416.994(b)(5)(ii). If so, the  
12 analysis proceeds to step three; if not, it proceeds to step  
13 four. Id.

14 If medical improvement has occurred, the third step requires  
15 the Commissioner to determine whether the improvement is related  
16 to the recipient's ability to work – that is, whether the  
17 recipient's residual functional capacity ("RFC")<sup>4</sup> has increased  
18 since the most recent favorable medical decision.

19 § 416.994(b)(5)(iii). If medical improvement is not related to  
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21 <sup>3</sup> Medical improvement is "any decrease in the medical  
22 severity of [a recipient's] impairment(s) which was present at  
23 the time of the most recent favorable medical decision that [the  
24 recipient was] disabled or continued to be disabled."  
25 § 416.994(b)(1)(i). "A determination that there has been a  
26 decrease in medical severity must be based on changes  
(improvement) in the symptoms, signs and/or laboratory findings  
associated with [the recipient's] impairment(s)." Id. (citing  
§ 416.928).

27 <sup>4</sup> RFC is what a claimant can do despite existing exertional  
28 and nonexertional limitations. § 416.945; see Cooper v.  
Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 the recipient's ability to work, the analysis proceeds to step  
2 four; if it is, it proceeds to step five. Id.

3 If medical improvement has not occurred or if it is not  
4 related to the recipient's ability to work, the fourth step  
5 requires the Commissioner to determine whether an exception  
6 applies. § 416.994(b)(5)(iv). Under the first group of  
7 exceptions, the Commissioner can find a recipient no longer  
8 disabled even though he has not medically improved if he is able  
9 to engage in substantial gainful activity; if one of these  
10 exceptions applies, the analysis proceeds to step five.<sup>5</sup>

11 § 416.994(b)(3), (b)(5)(iv). Under the second group of  
12 exceptions, the Commissioner can in certain situations find a  
13 recipient no longer disabled without finding medical improvement  
14 or an ability to engage in substantial gainful activity; if one  
15 of these exceptions applies, the recipient is no longer  
16 disabled.<sup>6</sup> § 416.994(b)(4), (b)(5)(iv). If none of the  
17 exceptions apply, the recipient continues to be disabled.

18 § 416.994(b)(5)(iv).

19 The fifth step requires the Commissioner to determine  
20 whether all the recipient's current impairments in combination

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22 <sup>5</sup> The first group of exceptions includes situations in which  
23 the recipient has undergone vocational therapy that improved his  
24 ability to perform jobs, new diagnostic techniques show that his  
25 impairments are not as disabling as previously thought, or the  
26 prior disability decision was erroneous. § 416.994(b)(3).

27 <sup>6</sup> The second group of exceptions includes situations in  
28 which a prior determination was fraudulently obtained, the  
recipient doesn't cooperate with the agency, the agency can't  
find the recipient, or the recipient fails to follow prescribed  
treatment that would restore his ability to work.  
§ 416.994(b)(4).

1 are "severe," which means that they significantly limit his  
2 ability to do basic work activities; if not, the recipient is no  
3 longer disabled. § 416.994(b)(5)(v).

4 If the recipient's current impairments in combination are  
5 severe, the sixth step requires the Commissioner to determine  
6 whether the recipient has sufficient RFC, "based on all [his]  
7 current impairments," to perform his past relevant work; if so,  
8 he is no longer disabled. § 416.994(b)(5)(vi).

9 If the recipient is unable to do his past work or if he has  
10 none, the seventh and final step requires the Commissioner to  
11 determine, using the RFC assessed in step six, whether the  
12 recipient can perform any other substantial gainful work; if so,  
13 he is no longer disabled. § 416.994(b)(5)(vii). If not, the  
14 recipient continues to be disabled. Id.

15 B. The ALJ's Decision and Application of the Seven-Step  
16 Process

17 The ALJ found that as of August 21, 1996, the date of  
18 Plaintiff's most recent favorable medical decision, he had the  
19 medically determinable impairments of posttraumatic stress  
20 disorder and "back pain status post surgery," which had resulted  
21 in an RFC to perform light work with "moderate to severe  
22 psychosocial stressors."<sup>7</sup> (AR 24-25.) She found that as of July  
23 1, 2011, Plaintiff had the medically determinable impairments of  
24 "mild degenerative disc disease of the lumbar spine/lumbar  
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26 <sup>7</sup> The most recent favorable medical decision is also known  
27 as the comparison-point decision. See Program Operations Manual  
28 System (POMS) DI 28010.105, U.S. Soc. Sec. Admin. (June 22,  
2015), <http://policy.ssa.gov/poms.nsf/lnx/0428010105> (last  
updated Jan. 13, 2016); see also § 416.994(b)(1)(vii).

1 spondylosis and obesity." (AR 25.) She also noted Plaintiff's  
2 hypertension and alleged mental impairments but found them not  
3 severe. (Id.)

4 At step one of the seven-step process, the ALJ found that  
5 since July 1, 2011, Plaintiff's impairments had not met or  
6 equaled an impairment in Listing. (AR 25.) At step two, she  
7 found that medical improvement had occurred as of July 1, 2011.  
8 (AR 25-30.) At step three, she found that Plaintiff's medical  
9 improvement was related to his ability to work. (AR 30.) She  
10 therefore did not address step four. See § 416.994(b)(5)(iv).  
11 At step five, she concluded that since July 1, 2011, Plaintiff's  
12 impairments had "continued to be severe." (AR 30; see also AR  
13 25.) At step six, she found that beginning on July 1, 2011,  
14 Plaintiff had the RFC to perform medium work "except he can:  
15 frequently bend, stoop and twist." (AR 26.) She further found  
16 that he did not have any past relevant work. (AR 30.) At step  
17 seven, based on the VE's testimony, the ALJ concluded that  
18 beginning on July 1, 2011, Plaintiff could perform jobs existing  
19 in significant numbers in the national economy. (AR 30-31.)  
20 Accordingly, she determined that his disability ended on July 1,  
21 2011. (AR 31-32.)

22 **V. DISCUSSION**

23 Plaintiff raises eight separate issues, arguing that the ALJ  
24 erred in (1) admitting into evidence an investigation report by  
25 the Cooperative Disability Investigation ("CDI") unit,<sup>8</sup> (2)

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27 <sup>8</sup> The Social Security Administration and the SSA's Office of  
28 the Inspector General established the CDI program to investigate  
(continued...)



1 considering the "opinion of lay investigators" over Plaintiff's  
2 testimony and the opinions of his treating doctors, Michael  
3 Karapetian and Tigran I. Gervorkian, (3) relying on Plaintiff's  
4 household activities to find him not credible, (4) rejecting Dr.  
5 Karapetian's opinion based on the opinions of nontreating  
6 doctors, (5) mischaracterizing Drs. Karapetian's and Gervorkian's  
7 reports, (6) discounting Plaintiff's credibility, (7)  
8 mischaracterizing Plaintiff's testimony, and (8) relying on the  
9 VE's testimony to find that Plaintiff could perform other work.  
10 (J. Stip. at 4, 12, 20, 27, 30-32.) In essence, therefore,  
11 Plaintiff challenges the ALJ's (1) admission of the CDI report,  
12 (2) weighing of the medical-opinion evidence, (3) credibility  
13 assessment, and (4) reliance on the VE's testimony. Each of  
14 those four issues is discussed below.

15 A. The ALJ Did Not Err in Admitting the CDI Report

16 Plaintiff argues that the ALJ "erroneously admitted" the CDI  
17 report and that he should have "had an opportunity to cross  
18 examine the investigators" who wrote the report, "especially  
19 concerning allegations suggesting malingering and fraud." (J.  
20 Stip. at 4-5.)

21 1. Relevant background

22 In November 2011, Plaintiff's case was referred to the CDI  
23 unit after it began investigating Plaintiff's wife, who was  
24 apparently also receiving disability benefits (AR 148, 151) and

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25  
26 <sup>8</sup> (...continued)  
27 suspected fraud in disability claims. See Cooperative Disability  
28 Investigations (CDI), Office of the Inspector General,  
<https://oig.ssa.gov/cooperative-disability-investigations-cdi>  
(last accessed May 12, 2016).

1 was suspected of malingering. (AR 241 (noting that "other  
2 members of the same family receiving disability benefits is  
3 indicative for possible high risk for fraud and similar fault".))  
4 In January 2011, CDI investigators Michael Lavoie and Gregory  
5 Godina visited Plaintiff's residence three times and interviewed  
6 him once. (AR 242-43.) On April 5, 2011, Special Agent Glenn  
7 Roberts, a CDI-unit team leader, submitted a report with the  
8 following investigation summary:

9           On January 5, 2011, [investigators] visited  
10           [Plaintiff's] residence . . . . To reach the apartment,  
11           one is required walking [sic] up approximately 25 steps  
12           of stairs because it does not have an elevator.  
13           [Investigator] Godina saw [Plaintiff] downstairs, sitting  
14           on a chair talking to an unknown male. . . .

15           On January 8, 2011, [investigators] visited  
16           [Plaintiff's] residence . . . . [They] identified  
17           themselves and appraised [sic] [Plaintiff] as to the  
18           purpose of the visit. He understood the purpose of the  
19           interview [and] agreed to answer my questions. . . .

20           [Plaintiff] stated the following about himself: He  
21           performs all his own hygiene and grooming. He is able to  
22           prepare meals and conduct household chores including  
23           cleaning without assistance. He is able to perform  
24           grocery shopping on a weekly basis. He is able to count  
25           money and make change. He uses a county debit card to  
26           buy food. He does not own a car and does not drive. He  
27           uses public transportation to get to the county welfare  
28           office. He walks approximately six city blocks with his

1 wife, two times a week to attend church. He stated he  
2 ran out of all his medications and did not have any empty  
3 containers to show the investigators.

4 During the course of the interview, [Investigator]  
5 Godina observed the following regarding [Plaintiff]: He  
6 was well groomed with acceptable hygiene. He was alert,  
7 oriented and focused. He was able to understand and  
8 answer questions. He was able to recall information.  
9 Without difficulty, he excused himself two times to  
10 attend to other matters and returned to resume the  
11 conversation where he stopped. He did not exhibit any  
12 unusual behaviors. He was able to remain seated with no  
13 signs of pain or discomfort. He was able to stand and  
14 walk without difficulty. His gait was normal. He did  
15 not use any assistive devices to stand or walk. He did  
16 not exhibit difficulty lifting and handling items. He  
17 did not present himself in a depressed or worried manner.  
18 He did not become agitated at any time during the  
19 interview. [Investigator] Godina further observed  
20 [Plaintiff] twice, ascend and descend two flights of  
21 stairs without the aid of handrails. He climbed the  
22 stairway at a moderate to fast pace without exhibiting  
23 any signs of pain, shortness of breath, or loss of  
24 balance.

25 Subsequently on January 11, 2011, [Investigator]  
26 Godina observed the following: [Plaintiff] walked to the  
27 apartment building, alone. He was walking unassisted and  
28 at a moderate pace. He then jogged crossing the street

1 and entered the apartment building. Upon reaching the  
2 apartment building, he walked up the stairs to the second  
3 floor towards . . . Godina at a rapid pace. When he  
4 reached . . . Godina's position, he was breathing  
5 normally and showed no signs of physical distress.

6 (AR 242-43.) The CDI report was made part of the administrative  
7 record (see AR 240-43) and the ALJ relied on it in finding  
8 Plaintiff no longer disabled (see AR 28-29).

9 2. Analysis

10 The ALJ permissibly admitted the CDI investigation report  
11 into evidence and relied on it in making her nondisability  
12 determination. Indeed, in a recent unpublished opinion, the  
13 Ninth Circuit found that an ALJ may rely on evidence related to  
14 CDI unit investigations because "[t]he Social Security Act  
15 expressly authorizes the Commissioner to 'conduct such  
16 investigations and other proceedings as the Commissioner may deem  
17 necessary or proper.'" Elmore v. Colvin, 617 F. App'x 755, 757  
18 (9th Cir. 2015) (quoting 42 U.S.C. § 405(b)(1)). As the Ninth  
19 Circuit noted, "there is nothing nefarious about ensuring that  
20 only deserving claimants receive benefits." Id.

21 And although Plaintiff argues that the ALJ's consideration  
22 of the investigators' "unsworn" statements was erroneous, an ALJ  
23 in fact has an obligation to consider such third-party statements  
24 regarding a plaintiff's ability to work. See Molina v. Astrue,  
25 674 F.3d 1104, 1114 (9th Cir. 2012) ("Lay testimony as to a  
26 claimant's symptoms or how an impairment affects the claimant's  
27 ability to work is competent evidence that the ALJ must take into  
28 account."); Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009)

1 ("In determining whether a claimant is disabled, an ALJ must  
2 consider lay witness testimony concerning a claimant's ability to  
3 work." (citing Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050,  
4 1053 (9th Cir. 2006))); see also § 416.913(d) (statements from  
5 "[o]ther non-medical sources," including spouses, parents, other  
6 relatives, friends, neighbors, and clergy, can be used to show  
7 severity of impairments and effect on ability to work);  
8 § 416.929(c)(3) (in evaluating symptoms, ALJ will consider  
9 "observations by our employees and other persons"); SSR 96-7p,  
10 1996 WL 374186, at \*8 (July 2, 1996) ("In evaluating the  
11 credibility of the individual's statements, the adjudicator must  
12 also consider any observations recorded by SSA personnel who  
13 previously interviewed the individual, whether in person or by  
14 telephone."). Moreover, as Plaintiff acknowledges (J. Stip. at  
15 6), an ALJ may receive evidence at an administrative hearing even  
16 if it would be inadmissible under the rules of evidence  
17 applicable to court proceedings. See Richardson, 402 U.S. at 400  
18 ("strict rules of evidence, applicable in the courtroom, are not  
19 to operate at social security hearings so as to bar the admission  
20 of evidence otherwise pertinent"); 42 U.S.C. § 405(b)(1)  
21 ("Evidence may be received at any hearing before the Commissioner  
22 of Social Security even though inadmissible under rules of  
23 evidence applicable to court procedure."); 20 C.F.R.  
24 § 416.1450(c) ("The administrative law judge may receive evidence  
25 at the hearing even though the evidence would not be admissible  
26 in court under the rules of evidence used by the court.").

27 Plaintiff nevertheless contends that the CDI report should  
28 not have been admitted because he "did not have the opportunity

1 to cross examine the CDI investigators because the investigators  
2 did not appear at the hearing," and he was "not specifically  
3 informed that he had the right to subpoena" them. (J. Stip. at  
4 5-6.) But the record shows that the agency provided Plaintiff  
5 with the full administrative record, which presumably included  
6 the CDI report (AR 94 (Apr. 2, 2012 letter stating that "[a] CD  
7 is enclosed that contains all of the evidence in your electronic  
8 folder to date"), 89 (hearing officer's Jan. 12, 2012 decision  
9 noting that evidence considered included "CDI")), and advised him  
10 on at least three separate occasions of his right to ask the ALJ  
11 to subpoena witnesses to testify at the hearing. (See AR 38  
12 (Mar. 1, 2012 letter), 110 (Apr. 19, 2012 letter), 128-29 (Sept.  
13 12, 2012 letter), 134-35 (same)); see also § 416.1450(d) (ALJ may  
14 "on his or her own initiative or at the request of a party, issue  
15 subpoenas for the appearance and testimony of witnesses").  
16 Plaintiff cannot now complain that the investigators did not  
17 appear at the hearing when he never asked the ALJ to subpoena  
18 them. See Hubbard v. Barnhart, 225 F. App'x 721, 723 (9th Cir.  
19 2007) (finding that detective's absence from hearing did not  
20 violate due process because plaintiff "failed to avail herself"  
21 of opportunity to request subpoena).<sup>9</sup> And when the ALJ asked at  
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23 <sup>9</sup> Plaintiff attempts to distinguish Hubbard by stating, with  
24 no further explanation, that the video at issue in that case was  
25 "properly authenticated." (J. Stip. at 10-11.) But the video  
26 was simply an exhibit to a detective's investigative report and  
27 nothing shows that the report was signed under penalty of perjury  
28 or that the video was otherwise verified. See Hubbard, 225 F.  
App'x at 723; see also (J. Stip. at 11 (arguing that CDI report  
in this case should have been signed under penalty of perjury or  
"properly authenticated" with "certification" "verifying that it  
(continued...)

1 the hearing whether Plaintiff had any objection to the documents  
2 in the record, which included the CDI report, Plaintiff's  
3 representative responded, "No, Your Honor." (AR 47.) Plaintiff,  
4 moreover, was given a chance to respond to the report's findings  
5 when the ALJ questioned him about them. (See AR 50-52.)

6 As such, nothing shows that the ALJ erred in considering the  
7 CDI report. See Darmaryan v. Colvin, No. 14-CV-03551 (VEB), 2016  
8 WL 1698252, at \*8 (C.D. Cal. Apr. 27, 2016) (noting that "courts  
9 have recognized that an ALJ may consider the findings of a fraud  
10 investigation performed by the CDI when assessing a claimant's  
11 credibility" and collecting cases); Manor v. Astrue, No.  
12 C10-5944-JLR, 2011 WL 3563687, at \*5-6 (W.D. Wash. July 28, 2011)  
13 (finding ALJ's consideration of CDI report was not fundamentally  
14 unfair when plaintiff had opportunity to challenge it by  
15 objecting to its admission and requesting detectives' presence at  
16 hearing), accepted by 2011 WL 3567421 (W.D. Wash. Aug. 12, 2011).  
17 Remand is not warranted on this ground.

18 B. The ALJ Did Not Err in Assessing the Medical Opinions

19 Plaintiff argues that the ALJ erroneously discounted the  
20 opinions of her treating physicians, internist Dr. Karapetian and  
21 psychiatrist Dr. Gevorkian. (J. Stip. at 12-13, 18-20, 27-28,  
22 30-32.) Dr. Karapetian's opinion postdated the ALJ's decision by  
23 seven months, but the Appeals Council considered it in denying  
24

25 <sup>9</sup> (...continued)  
26 was a true and correct copy of a document in the Commissioner's  
27 files".) In any event, the Ninth Circuit in Hubbard found that  
28 regardless of whether the video had a "proper foundation," it was  
properly admitted under 20 C.F.R. § 404.950(c), which states that  
an ALJ may receive evidence that would not be admissible in  
court. Id.; see also § 416.1450(c).

1 review and ordered that it be made part of the administrative  
2 record. (See AR 1-5.)

3 1. Applicable law

4 Three types of physicians may offer opinions in Social  
5 Security cases: (1) those who directly treated the plaintiff, (2)  
6 those who examined but did not treat the plaintiff, and (3) those  
7 who did neither. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.  
8 1995). A treating physician's opinion is generally entitled to  
9 more weight than an examining physician's, and an examining  
10 physician's opinion is generally entitled to more weight than a  
11 nonexamining physician's. Id.

12 This is true because treating physicians are employed to  
13 cure and have a greater opportunity to know and observe the  
14 claimant. Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996).  
15 If a treating physician's opinion is well supported by medically  
16 acceptable clinical and laboratory diagnostic techniques and is  
17 not inconsistent with the other substantial evidence in the  
18 record, it should be given controlling weight. § 416.927(c)(2).  
19 If a treating physician's opinion is not given controlling  
20 weight, its weight is determined by length of the treatment  
21 relationship, frequency of examination, nature and extent of the  
22 treatment relationship, amount of evidence supporting the  
23 opinion, consistency with the record as a whole, the doctor's  
24 area of specialization, and other factors. § 416.927(c)(2)-(6).

25 When a treating physician's opinion is not contradicted by  
26 other evidence in the record, it may be rejected only for "clear  
27 and convincing" reasons. See Carmickle v. Comm'r, Soc. Sec.  
28 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (citing Lester, 81



1 F.3d at 830-31). When it is contradicted, the ALJ must provide  
2 only "specific and legitimate reasons" for discounting it. Id.  
3 (citing Lester, 81 F.3d at 830-31). Furthermore, "[t]he ALJ need  
4 not accept the opinion of any physician, including a treating  
5 physician, if that opinion is brief, conclusory, and inadequately  
6 supported by clinical findings." Thomas v. Barnhart, 278 F.3d  
7 947, 957 (9th Cir. 2002); accord Batson v. Comm'r of Soc. Sec.  
8 Admin., 359 F.3d 1190, 1195 (9th Cir. 2004).

9 Social Security Administration regulations "permit claimants  
10 to submit new and material evidence to the Appeals Council and  
11 require the Council to consider that evidence in determining  
12 whether to review the ALJ's decision, so long as the evidence  
13 relates to the period on or before the ALJ's decision." Brewes  
14 v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1162 (9th Cir.  
15 2012); see also § 416.1470(b). "[W]hen the Appeals Council  
16 considers new evidence in deciding whether to review a decision  
17 of the ALJ, that evidence becomes part of the administrative  
18 record, which the district court must consider when reviewing the  
19 Commissioner's final decision for substantial evidence." Brewes,  
20 682 F.3d at 1163; accord Taylor v. Comm'r of Soc. Sec. Admin.,  
21 659 F.3d 1228, 1232 (9th Cir. 2011); see also Borrelli v. Comm'r  
22 of Soc. Sec., 570 F. App'x 651, 652 (9th Cir. 2014) (remand  
23 necessary when "reasonable possibility" exists that "the new  
24 evidence might change the outcome of the administrative  
25 hearing").

1           2.    Relevant background

2                    i.    *Examining Physician Concepcion A. Enriquez*

3           In May 2011, Dr. Enriquez, who was "board eligible" in  
4 internal medicine, examined Plaintiff at the Social Security  
5 Administration's request. (AR 244-47.) Dr. Enriquez found that  
6 Plaintiff's lumbar spine had tenderness and decreased range of  
7 motion of 70 out of 90 degrees on trunk flexion. (AR 246.) He  
8 had no muscle spasms, and straight-leg-raising tests were  
9 negative. (Id.) Ranges of motion of the cervical spine and all  
10 other joints were normal. (Id.) Plaintiff had normal muscle  
11 tone, 5/5 strength, intact sensation, and a normal gait. (AR  
12 246-47.) An x-ray taken that day showed only mild degenerative  
13 disease at L5-S1.<sup>10</sup> (AR 248.) Dr. Enriquez opined that  
14 Plaintiff could lift and carry 100 pounds occasionally and 50  
15 pounds frequently, stand and walk for six hours and sit for six  
16 hours in an eight-hour day, and frequently bend, stoop, and  
17 twist. (AR 247.)

18                   ii.   *Examining Physician Sharmin Jahan*

19           In June 2011, Dr. Jahan, a "board eligible" psychiatrist,  
20 performed a complete psychiatric examination of Plaintiff at the  
21 Social Security Administration's request. (AR 283-88.) Dr.  
22 Jahan noted that Plaintiff had immigrated to the United States  
23 from Armenia 23 years earlier. (AR 284.) Plaintiff reported  
24 that two years before that, several of his family members had  
25 been killed in an earthquake in Armenia, and he had been trapped  
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27                   <sup>10</sup> In 1996, x-rays of Plaintiff's lumbosacral spine were  
28 normal. (AR 231.)

1 in rubble for five days before being rescued. (Id.) Since then,  
2 he reported, he had experienced depression, lack of  
3 concentration, flashbacks, numbness, bad dreams, and symptoms of  
4 disassociation. (Id.)

5 Plaintiff received Paxil<sup>11</sup> through his primary-care  
6 physician but denied ever having seen a psychiatrist or therapist  
7 or being in a psychiatric hospital. (AR 284-85.) He reported  
8 that he was able to eat, dress, and bathe independently and could  
9 "do some household chores, errands, shopping and cooking with his  
10 wife's help." (AR 285.) He managed his own money and took the  
11 bus for transportation. (Id.)

12 Upon examination, Dr. Jahan found that Plaintiff was clean,  
13 appropriately dressed, and slightly disheveled. (AR 286.) His  
14 mood was anxious and depressed, his affect was blunted, and he  
15 had poor eye contact. (Id.) All of Dr. Jahan's other findings  
16 were normal: he found that Plaintiff was calm and not restless;  
17 directable, focused, and not distractable; and alert and  
18 oriented. (Id.) Plaintiff denied hallucinations and other  
19 perceptual disturbances and had logical thoughts, intact  
20 attention and immediate recall, fairly intact past memories,  
21 average general fund of knowledge, and fair insight and judgment.  
22 (AR 286-87.) He was able to express his own personal history and  
23 was interested in the interview. (AR 286.)

24 Dr. Jahan diagnosed moderate posttraumatic stress disorder  
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26 <sup>11</sup> Paxil is a selective serotonin reuptake inhibitor used to  
27 treat depression and other conditions. Paroxetine, MedlinePlus,  
28 <https://www.nlm.nih.gov/medlineplus/druginfo/meds/a698032.html>  
(last updated Nov. 15, 2014).

1 and a global assessment of functioning ("GAF") score of 60.<sup>12</sup>  
2 (AR 287.) She believed that Plaintiff was able to understand,  
3 remember, and perform simple tasks but was moderately limited in  
4 his ability to understand and follow complex and detailed  
5 instructions; interact with coworkers, colleagues, and  
6 supervisors; and maintain concentration, attention, persistence,  
7 and pace. (Id.) She believed Plaintiff's ability to cope with  
8 workplace stress was "limited." (Id.) Dr. Jahan "expected that  
9 with continuation of treatment [Plaintiff] would be able to cope  
10 well and would be able to maintain his stability." (Id.) She  
11 believed his prognosis was "fair" and that he was capable of  
12 managing his own funds. (AR 288.)

13                   iii. *Consulting Physicians R.E. Brooks and R.*  
14                                   *Tashjian*

15           In July 2011, Dr. Brooks, who specialized in psychiatry,  
16 reviewed Dr. Jahan's evaluation and the CDI report and completed  
17 a psychiatric-review-technique form.<sup>13</sup> (AR 289-300.) Dr. Brooks  
18

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19           <sup>12</sup> A GAF score of 51 to 60 indicates moderate symptoms or  
20 difficulty in social, occupational, or school functioning. See  
21 Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV")  
22 34 (revised 4th ed. 2000). The Commissioner has declined to  
23 endorse GAF scores, Revised Medical Criteria for Evaluating  
24 Mental Disorders and Traumatic Brain Injury, Fed. Reg. 50764-65  
25 (Aug. 21, 2000) (codified at 20 C.F.R. pt. 404) (GAF score "does  
26 not have a direct correlation to the severity requirements in our  
27 mental disorders listings"), and the most recent edition of the  
28 DSM "dropped" the GAF scale, citing its lack of conceptual  
29 clarity and questionable psychological measurements in practice.  
30 Diagnostic and Statistical Manual of Mental Disorders 16 (5th ed.  
31 2012).

32           <sup>13</sup> Drs. Brooks's and Tashjian's electronic signatures  
33 include a medical specialty code of 37, indicating psychiatry.  
34 (continued...)

1 determined that Plaintiff's posttraumatic stress disorder was not  
2 severe and resulted in no restriction of activities of daily  
3 living and no difficulties in maintaining social functioning,  
4 concentration, persistence, or pace. (AR 289, 292, 297.) He  
5 opined that Dr. Jahan's "[o]ne-time" evaluation did "not give a  
6 total picture of [Plaintiff's] mental status" and that the CDI  
7 report was "given the controlling weight as it showed extensive  
8 report on [Plaintiff's] capability to function." (AR 299.)

9 In September 2011, Dr. Tashjian, who also specialized in  
10 psychiatry, reviewed the record and agreed that Plaintiff's  
11 posttraumatic stress disorder was not severe. (AR 301, 305,  
12 311.)

13 iv. *Treating Physician Gevorkian*

14 In a March 2012 note, Dr. Gevorkian, who specialized in  
15 psychiatry, stated that Plaintiff had been under his care since  
16 February 2012 and suffered from "major depression and PTSD for  
17 which [he] is taking psychotropic medications." (AR 312.)

18 In May 2012, Dr. Gevorkian completed a Mental Disorder  
19 Questionnaire, noting that he had seen Plaintiff monthly since  
20 February 1, 2012. (AR 344-49.) He stated that Plaintiff  
21 reported having low energy, decreased concentration, decreased  
22 appetite, insomnia, and feelings of hopelessness and  
23 worthlessness. (AR 344.)

24 Dr. Gevorkian noted that Plaintiff "always appears  
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26 <sup>13</sup> (...continued)  
27 (AR 289); see Program Operations Manual System ("POMS") DI  
28 24501.004, U.S. Soc. Sec. Admin. (May 5, 2015), [http://  
policy.ssa.gov/poms.nsf/lnx/0424501004](http://policy.ssa.gov/poms.nsf/lnx/0424501004).

1 depressed, sad with psychomotor retardation." (AR 348.) His  
2 speech was delayed and slow, concentration "severely impaired,"  
3 short- and long-term memories impaired, affect restricted,  
4 thought process linear but slowed, and insight and judgment  
5 impaired. (AR 346, 348.) He had "paranoid type delusions,"  
6 passive suicidal ideations, and borderline intellectual  
7 functioning. (AR 346, 348.) As a result of his symptoms,  
8 Plaintiff isolated himself, stayed home most of the time, and  
9 needed assistance with daily chores. (AR 345.) He had  
10 difficulty communicating with family members and did not interact  
11 with neighbors or friends. (Id.) Plaintiff understood simple  
12 oral and written directions but was unable to carry them out  
13 because he was depressed. (Id.) Dr. Gevorkian believed that  
14 Plaintiff could not adapt to workplace stressors such as making  
15 decisions and interacting with others. (Id.) Dr. Gevorkian  
16 diagnosed major depressive disorder with paranoia, posttraumatic  
17 stress disorder, anxiety disorder, and a GAF score of 45 to 50.<sup>14</sup>  
18 (AR 347.) He believed Plaintiff's prognosis was "guarded" and  
19 that he was not competent to manage his funds. (Id.)

20 v. *Treating Physician Karapetian*

21 In March 2012, Dr. Karapetian wrote a note stating that  
22 Plaintiff had been under his care since 2003 and that his  
23 "current diagnoses" were hypertension, lumbar spondylosis,  
24 depression, anxiety, hyperlipidemia, and gastroesophageal reflux  
25 disease. (AR 313.)

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28 <sup>14</sup> A GAF score of 41 to 50 indicates "serious symptoms."  
DSM-IV 34.

1 In June 2013, seven months after the ALJ issued her opinion,  
2 Dr. Karapetian wrote a letter stating that Plaintiff had been  
3 under his care since 2003 and was disabled due to hypertension,  
4 lumbar spondylosis with neuropathy, lumbago, history of back  
5 trauma, depression, anxiety, hyperlipidemia, history of hernia,  
6 lower extremity venous insufficiency, history of  
7 nephrolithiasis,<sup>15</sup> peripheral vascular disease, aortic  
8 regurgitation, tricuspidal and mitrial valve mild stenosis, and  
9 gastroesophageal reflux disease. (AR 351.)

10 3. Analysis

11 The ALJ summarized the medical evidence and concluded that  
12 Plaintiff retained the RFC for medium work with frequent bending,  
13 stooping, and twisting. (AR 26, 30.) In doing so, she accorded  
14 "great weight" to Drs. Enriquez's, Brooks's, and Tashjian's  
15 opinions, finding that they comported with "the objective  
16 findings in the record" and Plaintiff's "statements regarding his  
17 capacity to perform daily activities." (AR 30.) The ALJ  
18 accorded "great weight" to Dr. Jahan's "clinical notes and  
19 finding" but "less weight" to her conclusion that Plaintiff had  
20 some moderate work restrictions. (AR 27-28.) The ALJ gave Dr.  
21 Gevorkian's opinion "no weight." (AR 28.) For the reasons  
22 discussed below, the ALJ did not err in assessing the medical  
23 evidence.

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26 <sup>15</sup> Nephrolithiasis is the medical term for kidney stones.  
27 Kidney Stones, Mayo Clinic, [http://www.mayoclinic.org/  
28 diseases-conditions/kidney-stones/basics/definition/con-20024829](http://www.mayoclinic.org/diseases-conditions/kidney-stones/basics/definition/con-20024829)  
(last updated Feb. 26, 2015).

1                   i.    *Dr. Karapetian*

2           After the ALJ rendered her unfavorable decision, Plaintiff  
3 submitted to the Appeals Council Dr. Karapetian's June 2013  
4 letter stating that Plaintiff was "disabled" because of 14  
5 different medical conditions. (AR 351.) Because the Appeals  
6 Council considered the June 2013 letter and made it part of the  
7 administrative record (see AR 1-5), the Court considers it in  
8 determining whether substantial evidence supports the ALJ's  
9 decision. See Brewes, 682 F.3d at 1163. As discussed below,  
10 remand is not necessary because Dr. Karapetian's brief,  
11 unsupported statement does not undermine the ALJ's determination  
12 that Plaintiff was not disabled. (See AR 351); see Boyd v.  
13 Colvin, 524 F. App'x 334, 336 (9th Cir. 2013) (remand not  
14 warranted when new evidence did not "sufficiently undermine[]"  
15 ALJ's ruling).

16           As an initial matter, Dr. Karapetian's opinion simply stated  
17 that Plaintiff was "disabled" without listing any specific  
18 functional limitations or explaining how Plaintiff's impairments  
19 limited his ability to work. A physician's conclusory statement  
20 that a person is "disabled" is not binding on the ALJ or entitled  
21 to any special significance. See § 416.927(d)(1) ("A statement  
22 by a medical source that you are 'disabled' or 'unable to work'  
23 does not mean that we will determine that you are disabled.");  
24 SSR 96-5p, 1996 WL 374183, at \*5 (treating-source opinions that  
25 person is disabled or unable to work "can never be entitled to  
26 controlling weight or given special significance").

27           Moreover, as the ALJ found, Dr. Karapetian's notes largely  
28 contained "nothing more than subjective complaints with no



1 clinical notations other than reiterations that [Plaintiff's]  
2 blood pressure was under control."<sup>16</sup> (AR 28); see Thomas, 278  
3 F.3d at 957 (ALJ "need not accept the opinion of . . . a treating  
4 physician" if it is "brief, conclusory, and inadequately  
5 supported by clinical findings"); Tonapetyan v. Halter, 242 F.3d  
6 1144, 1149 (9th Cir. 2001) (when ALJ properly discounted  
7 claimant's credibility, he was "free to disregard" doctor's  
8 opinion that was premised on claimant's subjective complaints).  
9 Indeed, Dr. Karapetian's notes are very brief, mainly noting on  
10 check-off forms Plaintiff's complaints of depressed mood, back  
11 pain, heartburn, and, occasionally, cold symptoms or heart  
12 palpitations.<sup>17</sup> In a few notes issued after the DRO's January  
13 2012 decision, Dr. Karapetian also recorded Plaintiff's  
14 complaints of anxiety, and in May 2012, he recorded Plaintiff's

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15  
16 <sup>16</sup> The ALJ stated that the record contained only four of Dr.  
17 Karapetian's treatment notes from 2011 and four from 2012 (AR  
18 28), but in fact, the record contains five notes from 2011 (see  
19 AR 271-81, 340) and four from 2012 (AR 336-39) as well as seven  
20 from 2010 (AR 258-70).

21 <sup>17</sup> (See AR 259 (Jan. 2010, feels better but complains of  
22 depressed mood), 258 (Feb. 2010, feels better but complains of  
23 depressed mood), 260 (Mar. 2010, complains of low-back pain and  
24 depressed mood), 264 (May 2010, complains of depressed mood and  
25 low-back pain "off and on"), 262 (July 2010, complains of  
26 depressed mood, low-back pain, and "brittle fingernail"), 268  
27 (Oct. 2010, complains of depressed mood that was improving with  
28 treatment, back pain, heartburn, and nausea), 269 (Dec. 2010,  
feels "well" but complains of depressed mood, heartburn, back  
pain), 271 (Jan. 2011, complains of depressed mood, back pain,  
heartburn, bloating, cough, and heart palpitation), 274 (Mar.  
2011, complains of depressed mood, back pain, bloating, and  
heartburn), 277 (Apr. 2011, complains of back pain, heart  
palpitations, depression, and heartburn), 280 (June 2011,  
complains of back pain, depression, and heartburn), 340 (Sept.  
2011, complains of back pain, depression, and heartburn).)

1 complaints of muscle pain, muscle spasm, and decreased range of  
2 motion of the back.<sup>18</sup> Dr. Karapetian recorded very few  
3 supporting clinical findings; he generally indicated in the  
4 "objective" section of his notes only that Plaintiff had varicose  
5 veins and spine tenderness. (See AR 258-60, 262, 264, 267, 270,  
6 278, 281; see also AR 272 (noting spine tenderness and cold  
7 symptoms); cf. AR 275 (Mar. 2011, noting spine tenderness and  
8 decreased range of motion).)

9 Dr. Karapetian's June 2013 letter also conflicts with his  
10 March 2012 letter and his own treatment notes. See Valentine v.  
11 Comm'r, Soc. Sec. Admin., 574 F.3d 685, 692-93 (9th Cir. 2009)  
12 (contradiction between treating physician's opinion and his  
13 treatment notes constitutes specific and legitimate reason for  
14 rejecting treating physician's opinion). Dr. Karapetian's June  
15 2013 letter listed 14 medical conditions and stated that  
16 Plaintiff was disabled (AR 351), but his March 2012 letter listed  
17 only six medical conditions – hypertension, lumbar spondylosis,  
18 depression, anxiety, hyperlipidemia, and gastroesophageal reflux  
19 disease – and didn't set out any limitations or conclude that he  
20 was disabled (AR 313). Dr. Karapetian's treatment notes also  
21 fail to reflect some of the additional conditions listed in the  
22  
23  
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25 <sup>18</sup> (See AR 336 (Jan. 2012, complains of back pain, anxiety,  
26 heart palpitation, heartburn, and depression), 338 (Feb. 2012,  
27 complains of back pain, anxiety, depression, and heartburn), 339  
28 (Feb. 2012, complains of anxiety, depression, and heartburn), 337  
(May 2012, complains of back pain, decreased range of motion of  
back, muscle spasm, muscle pain, anxiety, and depression).)

1 June 2013 letter.<sup>19</sup> Indeed, given that the June 2013 letter  
2 postdates the ALJ's November 2012 decision by seven months and  
3 includes diagnoses that were not reflected anywhere in the  
4 earlier notes, it likely does not show Plaintiff's condition  
5 during the relevant time period. As such, it is minimally  
6 relevant. See Quesada v. Colvin, 525 F. App'x 627, 630 (9th Cir.  
7 2013) (finding that "district court properly concluded that the  
8 additional evidence [plaintiff] submitted to the Appeals Council  
9 would not have changed the outcome in the case because it  
10 post-dated the ALJ's decision and therefore was not relevant").

11 Finally, Dr. Enriquez's opinion provides ample support for  
12 the ALJ's finding that Plaintiff could perform a limited range of  
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14 <sup>19</sup> Dr. Karapetian's June 2013 letter stated that Plaintiff  
15 suffered from, among other things, neuropathy, history of hernia,  
16 lower extremity venous insufficiency, history of nephrolithiasis,  
17 peripheral vascular disease, aortic regurgitation, and  
18 tricuspidal and mitrial valve mild stenosis. (AR 351.) These  
19 diagnoses don't appear in any of Dr. Karapetian's treatment  
20 notes. (See AR 259 (Jan. 2010, hypertension, hyperlipidemia,  
21 lumbar spondylosis, gastroesophageal-reflux disease, and  
22 depression), 258 (Feb. 2010, same), 260 (Mar. 2010, same but  
23 adding "[f]ingemail [sic] deformity"), 264 (May 2010,  
24 hypertension, hyperlipidemia, lumbar spondylosis, and  
25 depression), 262 (July 2010, depression, fingernail deformity,  
26 hypertension, hyperlipidemia, lumbar spondylosis,  
27 gastroesophageal-reflux disease), 268 (Oct. 2010, no diagnosis  
28 listed), 270 (Dec. 2010, hypertension, "GERD," depression, lumbar  
spondylosis, and other illegible conditions), 272 (Jan. 2011,  
palpitation, depression, common cold, "GERD," lumbar spondylosis,  
and other illegible conditions), 275 (Mar. 2011, hypertension,  
depression, "GERD," lumbar spondylosis, and another illegible  
condition), 278 (Apr. 2011, palpitation, hypertension,  
depression, "GERD," lumbar spondylosis, and another illegible  
condition), 281 (June 2011, hypertension, depression, "GERD,"  
lumbar spondylosis, and another illegible condition), 340 (Sept.  
2011, no diagnosis listed), 336 (Jan. 2012, same), 338 (Feb.  
2012, same), 339 (Feb. 2012, same), 337 (May 2012, same).)

1 medium work. Dr. Enriquez examined Plaintiff and found that he  
2 had tenderness in the lumbosacral spine area and decreased range  
3 of motion on trunk flexion. (AR 246.) All other findings were  
4 normal – for example, Plaintiff had a normal gait, intact  
5 sensation, 5/5 strength, and normal ranges of motion of all other  
6 joints. (AR 246-47.) And an x-ray taken that day showed only  
7 mild degenerative disease at L5-S1. (AR 248.) Consistent with  
8 those findings, Dr. Enriquez opined that Plaintiff could lift 100  
9 pounds occasionally and 50 pounds frequently and stand and walk  
10 for six hours and sit for six hours in an eight-hour day. (AR  
11 247.) The ALJ credited Dr. Enriquez’s opinion but gave Plaintiff  
12 “some benefit of the doubt” and limited him to medium work. (AR  
13 30.) Because Dr. Enriquez personally observed and examined  
14 Plaintiff and her findings were consistent with the objective  
15 evidence, her opinion constitutes substantial evidence supporting  
16 the ALJ’s decision. See Tonapetyan, 242 F.3d at 1149 (finding  
17 that examining physician’s “opinion alone constitutes substantial  
18 evidence, because it rests on his own independent examination of  
19 [claimant]”); Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir.  
20 1995) (opinion of nontreating source based on independent  
21 clinical findings may itself be substantial evidence).

22 Plaintiff challenges the ALJ’s asserted failure to credit  
23 Dr. Karapetian’s June 2013 opinion (see, e.g., J. Stip. at 12-13,  
24 19 (arguing that ALJ should not have credited CDI report over Dr.  
25 Karapetian’s June 2013 opinion that Plaintiff was totally  
26 disabled), 28 (stating that ALJ erroneously “did not give any  
27 weight to the findings of Dr. Karapetian who treated the  
28 Plaintiff for over 12 years”); see also id. at 30-31), but as

1 discussed above, that opinion was never before the ALJ. Rather,  
2 it postdated the ALJ's decision by seven months and was submitted  
3 directly to the Appeals Council. (AR 1-5.) As such, the Court  
4 has considered whether the ALJ's decision was supported by  
5 substantial evidence notwithstanding that report. Because  
6 substantial evidence still supports the ALJ's assessment of the  
7 medical evidence, remand is not warranted. See Sullivan v.  
8 Colvin, 588 F. App'x 725, 726-27 (9th Cir. 2014) (declining to  
9 remand based on new evidence submitted to Appeals Council because  
10 even though "the new evidence supported [plaintiff's] disability  
11 allegations, substantial evidence still supported the ALJ's  
12 nondisability determination").

13 ii. *Dr. Gevorkian*

14 Dr. Gevorkian's opinion conflicted with Dr. Jahan's clinical  
15 findings and Drs. Brooks's and Tashjian's opinions that  
16 Plaintiff's alleged psychiatric impairment was not severe. As  
17 such, the ALJ was required to provide only specific and  
18 legitimate reasons for rejecting the opinion, which she did.

19 As the ALJ noted (AR 28), Dr. Gevorkian first saw Plaintiff  
20 in February 2012 – less than a month after the DHO denied  
21 Plaintiff's request for continued benefits – and he saw Plaintiff  
22 only a couple more times before rendering his opinion, in May  
23 2012.<sup>20</sup> (AR 347.) The ALJ was entitled to consider Dr.

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24  
25 <sup>20</sup> The ALJ stated that Dr. Gevorkian had been treating  
26 Plaintiff for only two months before rendering his opinion (AR  
27 28), but it was actually just over three. (AR 347 (stating that  
28 first examination was on Feb. 1, 2012, last examination was on  
May 16, 2012, and frequency of visits was "monthly").) Because  
(continued...)

1 Gevorkian's brief, three-month treatment relationship with  
2 Plaintiff when weighing his opinion. See § 416.927(c)(2)(i)  
3 (stating that ALJ will consider "[l]ength of the treatment  
4 relationship and the frequency of examination"). The ALJ also  
5 noted that Dr. Gevorkian's opinion was not supported by any  
6 treatment notes (AR 28), which was another permissible reason for  
7 discounting it. See Thomas, 278 F.3d at 957 (ALJ "need not  
8 accept the opinion of . . . a treating physician" if it is  
9 "brief, conclusory, and inadequately supported by clinical  
10 findings"); § 416.927(c)(3) ("The more a medical source presents  
11 relevant evidence to support an opinion, particularly medical  
12 signs and laboratory findings, the more weight we will give that  
13 opinion.").

14 The ALJ also properly discounted Dr. Gevorkian's opinion  
15 because he "essentially took [Plaintiff's] words as reasons to  
16 support his claim [that Plaintiff] was disabled." (AR 28); see  
17 Tonapetyan, 242 F.3d at 1149 (when ALJ properly discounted  
18 claimant's credibility, he was "free to disregard" doctor's  
19 opinion that was premised on claimant's subjective complaints).  
20 Given that minimal objective medical evidence in the record  
21 supported Dr. Gevorkian's assessed limitations, the ALJ  
22 reasonably found that his opinion was based primarily on  
23 Plaintiff's subjective complaints. As discussed in Section C  
24 below, moreover, the ALJ provided clear and convincing reasons

25 \_\_\_\_\_  
26 <sup>20</sup> (...continued)  
27 this was still a very brief treatment history that encompassed  
28 only a handful of visits, any error in the ALJ's statement was  
harmless. See Stout, 454 F.3d at 1055 (nonprejudicial or  
irrelevant mistakes harmless).

1 for finding Plaintiff not credible.

2 Finally, the ALJ was entitled to rely on Dr. Jahan's  
3 clinical findings and Drs. Brooks's and Tashjian's opinions  
4 instead of Dr. Gevorkian's. The ALJ found that the examining and  
5 consulting doctors' opinions "agree[d] with the objective  
6 findings in the record, as well as [Plaintiff's] statements  
7 regarding his capacity to perform daily activities." (AR 30.)  
8 Indeed, Dr. Jahan's only abnormal examination findings were that  
9 Plaintiff had an "anxious and depressed" mood, blunted affect,  
10 and poor eye contact. (AR 286-87.) Dr. Jahan found that  
11 Plaintiff was otherwise normal: he was calm, directable, focused,  
12 cooperative, and oriented, and he had spontaneous and fluent  
13 speech; intact attention, recall, and memories; logical and  
14 sequential thoughts; an average general fund of knowledge; and  
15 fair insight and judgment. (Id.) He did not have "paranoid  
16 ideation" or delusions. (AR 286.) Drs. Brooks's and Tashjian's  
17 findings that Plaintiff's alleged psychological condition was not  
18 severe were consistent with Dr. Jahan's clinical findings and the  
19 CDI report, which showed that Plaintiff was alert, oriented,  
20 focused, and well-groomed and able to answer questions and recall  
21 information, perform chores and prepare meals without assistance,  
22 shop for groceries, use public transportation, use a county debit  
23 card to buy food, and attend church twice a week. (AR 242-43.)  
24 As such, the ALJ was entitled to rely on Dr. Jahan's clinical  
25 findings and Drs. Brooks's and Tashjian's opinions. See  
26 Tonapetyan, 242 F.3d at 1149 (although "contrary opinion of a  
27 non-examining medical expert does not alone constitute a  
28 specific, legitimate reason for rejecting a treating or examining

1 physician's opinion, it may constitute substantial evidence when  
2 it is consistent with other independent evidence in the record").

3 Plaintiff argues that the ALJ should have credited Dr.  
4 Gevorkian's opinion because it was supported by "clinical  
5 observations." (J. Stip. at 31-32.) But as discussed above, Dr.  
6 Gevorkian's findings – such as that Plaintiff had "delayed" and  
7 slow speech, "severely impaired" concentration, paranoid  
8 delusions, slow thought process, impaired short- and long-term  
9 memories, impaired insight and judgment, borderline intellectual  
10 functioning, and psychomotor retardation and needed help with  
11 daily chores (AR 345-46, 348) – conflicted with Dr. Jahan's  
12 clinical findings, the CDI investigators' observations, and  
13 Plaintiff's own reports of his daily activities. As such, and in  
14 light of the ALJ's other stated reasons, the ALJ did not err in  
15 crediting the other doctors' medical opinions over Dr.  
16 Gevorkian's.

17 Remand is not warranted on this ground.

18 C. The ALJ Did Not Err in Discounting Plaintiff's  
19 Credibility

20 Plaintiff contends that the ALJ erred in discounting his  
21 credibility. (J. Stip. at 12-13, 20-21, 25-26, 32-36.)

22 1. Applicable law

23 An ALJ's assessment of symptom severity and claimant  
24 credibility is entitled to "great weight." See Weetman v.  
25 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (as amended); Nyman v.  
26 Heckler, 779 F.2d 528, 531 (9th Cir. 1985) (as amended Feb. 24,  
27 1986). "[T]he ALJ is not 'required to believe every allegation  
28 of disabling pain, or else disability benefits would be available



1 for the asking, a result plainly contrary to 42 U.S.C.  
2 § 423(d)(5)(A).'" Molina, 674 F.3d at 1112 (quoting Fair v.  
3 Bowen, 885 F.2d 597, 603 (9th Cir. 1989)).

4 In evaluating a claimant's subjective symptom testimony, the  
5 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d  
6 at 1035-36. "First, the ALJ must determine whether the claimant  
7 has presented objective medical evidence of an underlying  
8 impairment '[that] could reasonably be expected to produce the  
9 pain or other symptoms alleged.'" Id. at 1036 (quoting Bunnell  
10 v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). If  
11 such objective medical evidence exists, the ALJ may not reject a  
12 claimant's testimony "simply because there is no showing that the  
13 impairment can reasonably produce the degree of symptom alleged."  
14 Smolen, 80 F.3d at 1282 (emphasis in original).

15 If the claimant meets the first test, the ALJ may discredit  
16 the claimant's subjective symptom testimony only if he makes  
17 specific findings that support the conclusion. See Berry v.  
18 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or  
19 affirmative evidence of malingering, the ALJ must provide "clear  
20 and convincing" reasons for rejecting the claimant's testimony.  
21 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (as  
22 amended); Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090,  
23 1102 (9th Cir. 2014). The ALJ may consider, among other factors,  
24 (1) ordinary techniques of credibility evaluation, such as the  
25 claimant's reputation for lying, prior inconsistent statements,  
26 and other testimony by the claimant that appears less than  
27 candid; (2) unexplained or inadequately explained failure to seek  
28 treatment or to follow a prescribed course of treatment; (3) the

1 claimant's daily activities; (4) the claimant's work record; and  
2 (5) testimony from physicians and third parties. Rounds v.  
3 Comm'r Soc. Sec. Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (as  
4 amended); Thomas, 278 F.3d at 958-59. If the ALJ's credibility  
5 finding is supported by substantial evidence in the record, the  
6 reviewing court "may not engage in second-guessing." Thomas, 278  
7 F.3d at 959.

8 2. Relevant background

9 In a February 4, 2011 disability report, Plaintiff wrote  
10 that he was unable to work because of back pain, right-leg pain,  
11 an eye injury, and anxiety. (AR 164.) In a function report  
12 completed that same day, he wrote, "I have back pain and I cannot  
13 stay on my feet and I cannot work." (AR 175.) His daily  
14 activities included taking medicine, "do[ing] household chores,"  
15 napping for one or two hours, watching T.V. for one or two hours,  
16 showering, and eating meals. (AR 176.) He later wrote that his  
17 only household chore was to take out the trash every other day,  
18 which took about 10 minutes. (AR 177.) He did not prepare his  
19 own meals because he "d[id] not know how to cook." (Id.) He had  
20 no problems with personal care, handling money, or paying bills.  
21 (AR 176, 178.) He went outside twice a day, traveled by walking  
22 or using public transportation, and shopped in stores for  
23 groceries two or three times a week for 30 minutes at a time.  
24 (AR 178.) Plaintiff did not drive because he did not have a car.  
25 (Id.) He did not spend time with others. (AR 179.) When asked  
26 to list the places he went on a regular basis, such as "church,"  
27 he wrote that he did not leave the house unless he needed to go  
28 to the store. (Id.)

1 Plaintiff wrote that because of his back pain, he could not  
2 lift "heavy objects" and could walk for only five to seven  
3 minutes before needing to rest for five minutes. (AR 180.) He  
4 could not follow written instructions but could pay attention for  
5 one or two hours and had "no trouble" following spoken  
6 instructions. (Id.) He had no problems with authority figures  
7 or handling changes in his routine. (AR 181.) Plaintiff  
8 reported that he did not "get stressed out," was "a very calm  
9 person," and did not have any unusual behavior or fears. (Id.)

10 In June 2011, Plaintiff reported to Dr. Jahan that he could  
11 eat, dress, and bathe independently and could "do some household  
12 chores, errands, shopping and cooking with his wife's help." (AR  
13 285.) He managed his own money and took the bus for  
14 transportation. (Id.)

15 At the November 27, 2012 hearing, Plaintiff testified that  
16 he could not work because his back was "very weak" and he  
17 couldn't lift more than five pounds. (AR 50.) He testified that  
18 he was "very nervous," cried, and got "angry" and "mad." (AR  
19 51.) Plaintiff "forg[o]t stuff" and had a "memory problem"; his  
20 wife would "write[] down stuff" for him to buy at the store. (AR  
21 54-55.) He said that his "body gets weak" and "spasms." (AR  
22 55.) Every day, he took medication and would "lay down to relax"  
23 for three or four hours. (Id.)

24 When the ALJ asked Plaintiff about the CDI investigators'  
25 observations of him walking and "jogging across the street,"  
26 Plaintiff testified that he went to the store for food because he  
27 "ha[d] to eat," the store was "very close to the house," and he  
28 "ha[d] pains when [he] walk[ed]" and had to stop and rest. (AR

1 52.)

2 3. Analysis

3 The ALJ found that Plaintiff "established a foundation for  
4 his basic symptoms" but that "the cumulative medical and lay  
5 evidence shows that he can engage in sustained work activity at  
6 the level assessed" in his RFC. (AR 26; see also AR 29 (finding  
7 Plaintiff "not credible").) The ALJ provided several clear and  
8 convincing reasons for finding Plaintiff not credible.

9 The ALJ permissibly found that Plaintiff's "conflicting,  
10 contradicting statements" "adversely affect[ed] his credibility."  
11 (AR 26; see also AR 29 (discussing inconsistencies).) For  
12 example, in the February 2011 function report, Plaintiff wrote  
13 that he did not make his own meals, his only household chore was  
14 to take out the trash every other day (AR 177), he did "not leave  
15 the house unless [he] need[ed] to go to the store" (AR 179), and  
16 he couldn't take "long walks" (AR 180). But just one month  
17 earlier, in January 2011, Plaintiff had told CDI investigators  
18 that he was able to prepare meals and perform household chores,  
19 "including cleaning," without assistance and that he "walk[ed]  
20 approximately six city blocks with his wife, two times a week to  
21 attend church." (AR 242-43.) Similarly, in February 2011,  
22 Plaintiff wrote that he was "a very calm person" and did "not get  
23 stressed out" (AR 181), but in November 2012, he testified that  
24 he was "very nervous," got "angry" and "mad," cried, and couldn't  
25 "control it" (AR 51, 54). Plaintiff did not list any memory  
26 problems in the February 2011 function report (see AR 180  
27 (leaving blank boxes for indicating problems with "memory,"  
28 "completing tasks," "concentration," "understanding," and

1 "following instructions"), 177 (stating he didn't need reminders  
2 to complete chores, take medicine, or take care of personal  
3 needs)), but at the hearing he testified that he couldn't work in  
4 part because of a "memory problem" (AR 54-55). Nothing else in  
5 the record indicates that Plaintiff's symptoms or impairments  
6 worsened between February 2011 and November 2012. Plaintiff's  
7 contradictory accounts of his symptoms were a clear and  
8 convincing reason for discounting his credibility. See Thomas,  
9 278 F.3d at 958-59.

10 The ALJ found that Plaintiff's "credibility was gravely  
11 damaged by his own behavior and statements during an inquiry by  
12 the [CDI unit]." (AR 28.) Indeed, in his function report,  
13 Plaintiff claimed to be totally disabled because of back pain (AR  
14 175), stating that he couldn't walk for more than five to seven  
15 minutes before he had to rest for five minutes (AR 180). But CDI  
16 investigators observed that he had a normal gait and could stand  
17 and walk without difficulty. (AR 243.) Moreover, during one  
18 visit, they observed him twice climb and descend two flights of  
19 stairs without using handrails or showing any signs of pain, and  
20 during another visit, they observed him walking at a moderate  
21 pace, jogging across the street, and rapidly walking up two  
22 flights of stairs, all with no sign of physical distress. (Id.)  
23 Although Plaintiff claimed to suffer from debilitating  
24 psychological problems, the investigators observed that he was  
25 alert, oriented, focused, and able to understand and answer  
26 questions and recall information. (Id.) The ALJ did not err in  
27 relying on the CDI report to discount Plaintiff's credibility.  
28 See Elmore, 617 F. App'x at 757 (ALJ may rely on evidence related

1 to CDI investigations); Darmaryan, 2016 WL 1698252, at \*8 ("The  
2 courts have recognized that an ALJ may consider the findings of a  
3 fraud investigation performed by the CDI when assessing a  
4 claimant's credibility.").

5 The ALJ also found that the "record is replete with a myriad  
6 of complaints supported by little objective evidence." (AR 26.)  
7 Plaintiff claimed to be disabled by his back condition, but as  
8 the ALJ noted (AR 26-27), Dr. Enriquez examined Plaintiff and  
9 found only that he had tenderness in the spine area and some  
10 decreased range of motion. (AR 246-47.) All of her other  
11 findings were normal – for example, Plaintiff had a normal gait,  
12 intact sensation, 5/5 strength, and normal ranges of motion of  
13 all other joints. (Id.) And lumbar-spine x-rays showed only  
14 mild degenerative disease at one level. (AR 248.) Plaintiff  
15 also claimed to suffer from debilitating psychological  
16 impairments, but as the ALJ found (AR 27-28), Dr. Jahan's  
17 clinical findings were mostly normal: Plaintiff was calm,  
18 directable, focused, cooperative, and oriented, and he had  
19 spontaneous and fluent speech; intact attention, recall, and  
20 memories; logical and sequential thoughts; an average general  
21 fund of knowledge; and fair insight and judgment (AR 283, 286-  
22 87). The ALJ was entitled to consider the lack of objective  
23 medical evidence in assessing Plaintiff's subjective complaints  
24 and his credibility. See Burch v. Barnhart, 400 F.3d 676, 681  
25 (9th Cir. 2005) ("Although lack of medical evidence cannot form  
26 the sole basis for discounting pain testimony, it is a factor  
27 that the ALJ can consider in his credibility analysis.");  
28 Carmickle, 533 F.3d at 1161 ("Contradiction with the medical

1 record is a sufficient basis for rejecting the claimant's  
2 subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in  
3 determining credibility, ALJ may consider "whether the alleged  
4 symptoms are consistent with the medical evidence").

5 The ALJ also noted that although Plaintiff received Paxil  
6 from his primary-care physician (AR 27), he "never sought mental  
7 health treatment in all the 23 years he had allegedly been  
8 suffering from major mental issues" but then "conveniently sought  
9 mental health treatment for the first time a month after the  
10 January 2012 reconsideration denying his request for continuing  
11 disability benefits." (AR 28; see AR 285 (Dr. Jahan noting in  
12 June 2011 that Plaintiff denied having ever seen psychiatrist or  
13 receiving psychotherapy and did not see therapist).) Indeed, the  
14 record shows that before February 2012, Plaintiff's only  
15 treatment for his allegedly debilitating psychiatric problems was  
16 an antidepressant prescribed by his primary-care physician.

17 (See, e.g., AR 258, 260, 262-66 (Dr. Karapetian's notations that  
18 Plaintiff's medications included Zoloft or Paxil).)<sup>21</sup> But almost  
19 immediately after the DRO issued his January 12, 2012 decision  
20 finding him no longer disabled (AR 80-89), Plaintiff sought  
21 treatment from a psychiatrist, who prescribed three additional  
22 psychiatric medications (AR 345 (Dr. Gevorkian noting that  
23 Plaintiff's current medications included Seroquel XR, Cymbalta,  
24  
25

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26 <sup>21</sup> Zoloft is a selective serotonin reuptake inhibitor used  
27 to treat depression and other conditions. Sertraline,  
28 MedlinePlus, <https://www.nlm.nih.gov/medlineplus/druginfo/meds/a697048.html> (last updated Nov. 15, 2014).

1 and Atarax).<sup>22</sup> The ALJ did not err in discounting Plaintiff's  
2 credibility based on his unexplained failure to seek specialized  
3 mental-health treatment for 23 years. See Tommasetti v. Astrue,  
4 533 F.3d 1035, 1039 (9th Cir. 2008) (ALJ may discount claimant's  
5 testimony in light of "unexplained or inadequately explained  
6 failure to seek treatment or to follow a prescribed course of  
7 treatment"); SSR 96-7p, 1996 WL 374186, at \*7 (claimant's  
8 statements "may be less credible if the level or frequency of  
9 treatment is inconsistent with the level of complaints"); Molina,  
10 674 F.3d at 1114 (ALJ permissibly discounted plaintiff's  
11 credibility in part because she was advised to seek counseling  
12 but "failed to do so until after she applied for disability  
13 benefits").<sup>23</sup>

14 Plaintiff claims that the ALJ "erroneously concluded" that  
15 he "was not disabled because he could do minor household chores

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16  
17 <sup>22</sup> Seroquel XR is an antipsychotic used to treat  
18 schizophrenia. Quetiapine, MedlinePlus, <https://www.nlm.nih.gov/medlineplus/druginfo/meds/a698019.html> (last updated Apr. 15,  
19 2014). Cymbalta is a selective serotonin and norepinephrine  
20 reuptake inhibitor used to treat depression and generalized  
21 anxiety disorder. Duloxetine, MedlinePlus, [https://](https://www.nlm.nih.gov/medlineplus/druginfo/meds/a604030.html)  
22 [www.nlm.nih.gov/medlineplus/druginfo/meds/a604030.html](https://www.nlm.nih.gov/medlineplus/druginfo/meds/a604030.html) (last  
23 updated Nov. 15, 2014). Atarax is an antihistamine used to treat  
24 conditions including anxiety. Hydroxyzine, MedlinePlus, [https://](https://wwwqa.nlm.nih.gov/medlineplus/qa1/druginfo/meds/a682866.html)  
25 [wwwqa.nlm.nih.gov/medlineplus/qa1/druginfo/meds/a682866.html](https://wwwqa.nlm.nih.gov/medlineplus/qa1/druginfo/meds/a682866.html)  
26 (last updated Sept. 1, 2010).

27 <sup>23</sup> The Ninth Circuit has held that "it is a questionable  
28 practice to chastise one with a mental impairment for the  
exercise of poor judgment in seeking rehabilitation," Nguyen v.  
Chater, 100 F.3d 1462, 1465 (9th Cir. 1996) (citation omitted);  
Regennitter v. Comm'r of Soc. Sec. Admin., 166 F.3d 1294, 1299-  
300 (9th Cir. 1999), but here nothing indicates that Plaintiff's  
failure to seek treatment from a psychiatrist or therapist "was  
attributable to [his] mental impairment rather than [his] own  
personal preference," Molina, 674 F.3d at 1114.



1 such as cooking, cleaning, and grocery shopping." (J. Stip. at  
2 21.) But as discussed above, the ALJ validly discounted  
3 Plaintiff's credibility because his descriptions of his daily  
4 activities were inconsistent with each other, among other clear  
5 and convincing reasons. Plaintiff also argues that his  
6 "difficulties" in "understanding the questions presented to him  
7 at the hearing" support his account of his psychiatric symptoms.  
8 (J. Stip. at 33, 35.) But the ALJ, who observed Plaintiff during  
9 the hearing, found that Plaintiff simply "feigned confusion" and  
10 gave "vague and unresponsive answers." (AR 29.) Those findings  
11 also supported her credibility determination. See Tonapetyan,  
12 242 F.3d at 1148 (noting that ALJ may rely on his observations of  
13 plaintiff at hearing as part of overall credibility  
14 determination). In any event, a review of the hearing transcript  
15 shows that Plaintiff gave rational answers to almost all the  
16 questions and tended to hesitate primarily when the ALJ posed  
17 difficult questions about the CDI investigators' observations of  
18 him walking, jogging, and climbing stairs without difficulty.  
19 (See AR 50-56.)

20 Because substantial evidence in the record supports the  
21 ALJ's credibility determination, the reviewing court "may not  
22 engage in second-guessing." Thomas, 278 F.3d at 959. Remand is  
23 not warranted on this ground.

24 D. Any Error in the ALJ's Reliance on the VE's Testimony  
25 Was Harmless

26 Plaintiff contends that the VE's testimony did "not provide  
27 substantial evidence that [he] has the [RFC] to perform other  
28 jobs in the national economy" because the VE "was not

1 specifically asked" how many of the identified jobs "would be  
2 available for a person such as Plaintiff with a limited fluency  
3 in English, a limited educational background, and physical and  
4 mental impairments which make it difficult for [him] to follow  
5 instructions and cope with workplace stress." (J. Stip. at 37.)  
6 Plaintiff further argues that this case is analogous to Pinto v.  
7 Massanari, 249 F.3d 840 (9th Cir. 2001), because neither the ALJ  
8 nor the VE addressed the impact of Plaintiff's alleged illiteracy  
9 on his ability to perform the identified jobs. (J. Stip. at 41.)  
10 For the reasons discussed below, remand is not warranted on this  
11 ground.

12 1. Relevant background

13 Plaintiff testified with the assistance of an interpreter at  
14 the November 2012 hearing. (AR 44.) During the hearing, the ALJ  
15 questioned Plaintiff as follows:

16 Q . . . [H]ow far did you get in school?

17 A 8th grade.<sup>24</sup>

18 Q Was that in the states, or in Armenia?

19 A Armenia.

20 Q And do you understand some English?

21 A Yes.

22 Q Okay, but a little bit.

23 A Yeah.

24 (AR 56.)

25 The ALJ later presented the VE with a hypothetical "younger  
26

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27 <sup>24</sup> As previously noted, some evidence in the record shows  
28 that Plaintiff completed the 12th grade. (See AR 234.)

1 individual, with an 8th grade education, but no past relevant  
2 work" who was capable of medium work with only frequent bending,  
3 twisting, and stooping and who was "illiterate in English." (AR  
4 57.) The VE testified that such an individual could work as a  
5 hand packager, DOT 920.587-018, 1991 WL 687916; cleaner II, DOT  
6 919.687-014,<sup>25</sup> 1991 WL 687897; or industrial cleaner, DOT  
7 381.687-018, 1991 WL 673258. (AR 57-58.) The DOT provides that  
8 the hand-packager and cleaner II positions require Level 1  
9 language skills and the industrial-cleaner position requires  
10 Level 2 language skills. See DOT 920.587-018, 1991 WL 687916;  
11 DOT 919.687-014, 1991 WL 687897; DOT 381.687-018, 1991 WL 673258.  
12 After responding to three additional hypotheticals, the VE stated  
13 that his testimony was consistent with the DOT. (AR 59.)

14 In her November 2012 decision, the ALJ formulated an RFC for  
15 a limited range of medium work without including any limitations  
16 based on illiteracy. (AR 26.) Later in the opinion, she  
17 determined that Plaintiff had a "limited education" and was "able  
18 to communicate in English," citing 20 C.F.R. § 416.964. (AR 30.)  
19 She summarized the VE's testimony, found that it was "consistent  
20 with the information contained in the [DOT]," and relied on it to  
21 find that Plaintiff could perform work in the national economy.  
22 (AR 31.) She therefore determined that Plaintiff was no longer  
23 disabled. (AR 31-32.)

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24  
25  
26  
27 <sup>25</sup> Both the VE and the ALJ cited DOT 919.687-010 in  
28 reference to the cleaner II job (AR 31, 57), but the correct code  
is DOT 919.687-014.

1           2.    Applicable law

2           The DOT is the best source of information about how a job is  
3 generally performed.  See Carmickle, 533 F.3d at 1166; see also  
4 Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995);  
5 § 416.966(d)(1).  In order to rely on a VE's testimony regarding  
6 the requirements of a particular job, an ALJ must inquire whether  
7 the testimony conflicts with the DOT.  Massachi v. Astrue, 486  
8 F.3d 1149, 1152-53 (9th Cir. 2007) (citing SSR 00-4p, 2000 WL  
9 1898704, at \*4 (Dec. 4, 2000)).  When such a conflict exists, the  
10 ALJ may accept VE testimony that contradicts the DOT only if the  
11 record contains "persuasive evidence to support the deviation."  
12 Pinto, 249 F.3d at 846 (citing Johnson, 60 F.3d at 1435); see  
13 also Tommasetti, 533 F.3d at 1042 (finding error when "ALJ did  
14 not identify what aspect of the VE's experience warranted  
15 deviation from the DOT").

16           According to the DOT, a person with Level 1 language  
17 proficiency can "[r]ecognize [the] meaning of 2,500 (two- or  
18 three-syllable) words"; read "95-120 words per minute";  
19 "[c]ompare similarities and differences between words and between  
20 series of numbers"; "[p]rint simple sentences containing subject,  
21 verb, and object, and series of numbers, names, and addresses";  
22 and "[s]peak simple sentences, using normal word order, and  
23 present and past tenses."  See DOT, App. C, 1991 WL 688702.  A  
24 person with Level 2 language proficiency has a "[p]assive  
25 vocabulary of 5,000-6,000 words" and can read "190-215 words per  
26 minute"; "[r]ead adventure stories and comic books, looking up  
27 unfamiliar words in dictionary for meaning, spelling, and  
28 pronunciation"; "[r]ead instructions for assembling model cars

1 and airplanes"; "[w]rite compound and complex sentences, using  
2 cursive style, proper end punctuation, and employing adjectives  
3 and adverbs"; and "[s]peak clearly and distinctly with  
4 appropriate pauses and emphasis, correct punctuation, variations  
5 in word order, using present, perfect, and future tenses." Id.

### 6 3. Analysis

7 As an initial matter, to the extent Plaintiff contends that  
8 the ALJ erred by failing to include in her hypothetical to the VE  
9 limitations on following instructions and dealing with workplace  
10 stress (see J. Stip. at 37), that argument fails. As discussed  
11 above, the ALJ properly weighed the medical evidence and  
12 Plaintiff's credibility in determining that he retained the RFC  
13 for medium work with only frequent bending, stooping, and  
14 twisting. The ALJ was not required to include in the RFC or the  
15 VE hypothetical limitations that were permissibly discounted.  
16 See Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005)  
17 ("Preparing a function-by-function analysis for medical  
18 conditions or impairments that the ALJ found neither credible nor  
19 supported by the record is unnecessary."); Batson, 359 F.3d at  
20 1197 (ALJ not required to incorporate into RFC those findings  
21 from treating-physician opinions that were "permissibly  
22 discounted"); see also Yelovich v. Colvin, 532 F. App'x 700, 702  
23 (9th Cir. 2013) ("Because the RFC was not defective, the  
24 hypothetical question posed to the VE was proper").

25 To the extent Plaintiff challenges the ALJ's reliance on the  
26 VE's testimony that an illiterate person could perform jobs  
27 requiring levels 1 and 2 language skills, remand is not  
28 warranted. As an initial matter, a claimant is not per se

1 disabled simply because he is illiterate. See Pinto, 249 F.3d at  
2 847. Indeed, Level 1 is the lowest language level used in the  
3 DOT; thus, “[a] decision holding that illiterate individuals  
4 could not perform Level 1 jobs would mean that illiteracy was a  
5 per se disability under the DOT.” Meza v. Astrue, No.  
6 C-09-1402-EDL, 2011 WL 11499, at \*21 (N.D. Cal. Jan. 4, 2011)  
7 (citing Lawson v. Apfel, 46 F. Supp. 2d 941, 945, 947 (W.D. Mo.  
8 1998) (noting that “such a holding is illogical and would  
9 directly contradict the Social Security regulations”)); see also  
10 SSR 00-4p, 2000 WL 1898704, at \*3 (Dec. 4, 2000) (“The DOT lists  
11 maximum requirements of occupations as generally performed, not  
12 the range of requirements of a particular job as it is performed  
13 in specific settings.”).

14         Nevertheless, the VE’s testimony that an illiterate  
15 individual could perform the jobs of hand packager, cleaner II,  
16 and industrial cleaner arguably conflicted with the DOT because  
17 those jobs involve Level 1 and Level 2 language skills, which  
18 require at least the ability to recognize the meaning of 2500  
19 words, read 95 words a minute, and write very simple sentences.  
20 (AR 57-58); see DOT 920.587-018, 1991 WL 687916; DOT 919.687-014,  
21 1991 WL 687865; DOT 381.687-018, 1991 WL 673258; Pinto, 249 F.3d  
22 at 846-47 (finding conflict between DOT and VE testimony that  
23 illiterate claimant could perform jobs with Level 1 language  
24 skills); but see Meza, 2011 WL 11499, at \*21 (finding no conflict  
25 between DOT and VE testimony that illiterate non-English-speaking  
26 person could perform jobs requiring Level 1 language skills).  
27 The ALJ, moreover, failed to explain or elicit VE testimony  
28 explaining how an illiterate person could perform jobs with such

1 requirements.

2 But any error in failing to resolve that apparent conflict  
3 was harmless because the ALJ in fact never found that Plaintiff  
4 was illiterate. To the contrary, she concluded that he had a  
5 "limited education" and was "able to communicate in English,"  
6 citing § 416.964. (AR 30.) That regulation defines "illiteracy"  
7 as "the inability to read or write" and states that "[g]enerally,  
8 an illiterate person has had little or no formal schooling."  
9 § 416.964(b)(1). It defines "marginal education" as "ability in  
10 reasoning, arithmetic, and language skills which are needed to do  
11 simple, unskilled types of jobs," § 416.964(b)(3), and "limited  
12 education" as "ability in reasoning, arithmetic, and language  
13 skills, but not enough to allow a person with these educational  
14 qualifications to do most of the more complex job duties needed  
15 in semi-skilled or skilled jobs," § 416.964(b)(3).<sup>26</sup> The ALJ's  
16 explicit finding that Plaintiff had a "limited education" shows  
17 that she did not believe him to be illiterate. (AR 30.) Section  
18 416.964 also states that the "[i]nability to communicate in  
19 English" may be considered an "educational factor" because "it  
20 may be difficult for someone who doesn't speak and understand  
21 English to do a job, regardless of the amount of education the

22 \_\_\_\_\_  
23 <sup>26</sup> Section 416.964 defines one other category of educational  
24 background, "high school education and above," which

25 means abilities in reasoning, arithmetic, and language  
26 skills acquired through formal schooling at a 12th grade  
27 level or above. We generally consider that someone with  
28 these educational abilities can do semi-skilled through  
skilled work.

§ 416.964(b)(4).

1 person may have in another language." § 416.964(b)(5). The ALJ,  
2 however, specifically found that Plaintiff was able to  
3 communicate in English. (AR 30.)

4 The ALJ also pointed to evidence that supported her finding  
5 regarding Plaintiff's language skills. She noted that "[a]n  
6 Armenian interpreter was present at the hearing" but that  
7 Plaintiff "frequently answered questions before the interpreter  
8 completed the translation of the undersigned's questions, and  
9 would say 'yes' to confirm the interpreter's statements." (AR  
10 29.) She also noted that Plaintiff "spoke in English several  
11 times during the hearing." (Id.) Indeed, Plaintiff admitted at  
12 the hearing that he was able to understand "some English." (AR  
13 56.) The ALJ also noted that nothing showed that "the CDI  
14 investigative interview was conducted with the aid of an Armenian  
15 interpreter." (AR 29.) And it appears that at least one  
16 psychiatric interview might have been conducted without the  
17 assistance of an interpreter. (See AR 283 (Dr. Jahan's  
18 psychiatric report not indicating that Plaintiff was assisted by  
19 interpreter and stating that Plaintiff was "[t]he source of  
20 information for the evaluation").)

21 Although Plaintiff claims to be unable to read English or  
22 write anything other than his name in English (AR 163), the ALJ  
23 found that he generally was not credible; moreover, Plaintiff  
24 apparently was able to complete lengthy written disability and  
25 function reports on his own and in English (see AR 163-74  
26 (disability report completed in English and stating that person  
27 completing report was "[t]he person who is applying for  
28 disability"); 175-82 (function report completed in English and in



1 first person and listing Plaintiff as "person completing this  
2 form")). Thus, although some evidence shows that Plaintiff had  
3 difficulty communicating in English (see, e.g., AR 68 (DRO's  
4 checking of "no" under "ability to read/write/speak/understand  
5 English" and noting "Interpreter"), 205 (field office worker's  
6 notation that Plaintiff spoke "limited English"), 244 (Dr.  
7 Enriquez's notation that Plaintiff was assisted by interpreter)),  
8 the evidence reasonably supports the ALJ's finding regarding  
9 Plaintiff's language skills, and the Court therefore must uphold  
10 it. See Reddick, 157 F.3d at 720-21 ("If the evidence can  
11 reasonably support either affirming or reversing," reviewing  
12 court "may not substitute its judgment" for Commissioner's).

13 The descriptions of the three identified jobs further  
14 support the ALJ's conclusion that Plaintiff could perform them.

15 A person performing the hand-packager job

16 [p]ackages materials and products manually, performing  
17 any combination of following duties: Cleans packaging  
18 containers. Lines and pads crates and assembles cartons.  
19 Obtains and sorts product. Wraps protective material  
20 around product. Starts, stops, and regulates speed of  
21 conveyor. Inserts or pours product into containers or  
22 fills containers from spout or chute. Weighs containers  
23 and adjusts quantity. Nails, glues, or closes and seals  
24 containers. Labels containers, container tags, or  
25 products. Sorts bundles or filled containers. Packs  
26 special arrangements or selections of product. Inspects  
27 materials, products, and containers at each step of  
28 packaging process. Records information, such as weight,

1 time, and date packaged.

2 920.587-018, 1991 WL 687916. A person performing the cleaner II  
3 job

4 [c]leans interiors and exteriors of transportation  
5 vehicles, such as airplanes, automobiles, buses, railroad  
6 cars, and streetcars: Cleans interior of vehicle, using  
7 broom, cloth, mop, vacuum cleaner, and whisk broom.  
8 Cleans windows with water, cleansing compounds, and cloth  
9 or chamois. Replenishes sanitary supplies in vehicle  
10 compartments. Removes dust, grease, and oil from  
11 exterior surfaces of vehicles, using steam-cleaning  
12 equipment, or by spraying or washing vehicles, using  
13 spraying equipment, brush or sponge.

14 919.687-014, 1991 WL 687897. And someone performing the  
15 industrial-cleaner job

16 [k]eeps working areas in production departments of  
17 industrial establishment in clean and orderly condition,  
18 performing any combination of following duties:  
19 Transports raw materials and semifinished products or  
20 supplies between departments or buildings to supply  
21 machine tenders or operators with materials for  
22 processing, using handtruck. Arranges boxes, material,  
23 and handtrucks or other industrial equipment in neat and  
24 orderly manner. Cleans lint, dust, oil, and grease from  
25 machines, overhead pipes, and conveyors, using brushes,  
26 airhoses, or steam cleaner. Cleans screens and filters.  
27 Scrubs processing tanks and vats. Cleans floors, using  
28 water hose, and applies floor drier. Picks up reusable

1 scrap for salvage and stores in containers.  
2 381.687-018, 1991 WL 673258. Thus, it appears that the three  
3 jobs require little to no reading and writing.

4 Plaintiff's reliance on Pinto is misplaced. There, the ALJ  
5 specifically found that the plaintiff was "illiterate in  
6 English," Pinto, 249 F.3d at 843 n.1, and the ALJ's hypothetical  
7 to the VE was accordingly based on an individual who was "neither  
8 litera[te] in [E]nglish nor able to communicate in [E]nglish."  
9 Id. at 843 (alterations in original). The Ninth Circuit,  
10 moreover, found that there was "no indication that [Plaintiff  
11 knew] 2,500 words in English, the requirement to reach language  
12 level '1' in the [DOT] classifications." Pinto, 249 F.3d at 843  
13 n.1. Here, by contrast, the ALJ did not find that Plaintiff was  
14 illiterate; rather, she found that he had a "limited education"  
15 and was able to communicate in English (AR 30), and those  
16 findings were supported by substantial evidence. As such, Pinto  
17 does not apply.

18 Because the ALJ never found that Plaintiff was illiterate,  
19 her failure to resolve the conflict in the VE's testimony that an  
20 illiterate person could perform the identified jobs was  
21 harmless.<sup>27</sup> See Stout, 454 F.3d at 1055 (nonprejudicial or  
22

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23 <sup>27</sup> Even if the ALJ erred in concluding that Plaintiff could  
24 perform the industrial-cleaner job, which requires Level 2  
25 language skills, it was harmless because the other two jobs  
26 required only Level 1 skills and existed in sufficient numbers in  
27 the economy. (See AR 57-58 (VE testifying that 338,000 national  
28 and 6000 regional hand-packager jobs existed and 144,000 national  
and 2600 regional cleaner II jobs existed)); Gutierrez v. Comm'r  
of Soc. Sec., 740 F.3d 519, 529 (9th Cir. 2014) (finding 25,000  
national jobs significant); Yelovich, 532 F. App'x at 702

(continued...)

1 irrelevant mistakes harmless); see also Rivera v. Colvin, No. CV  
2 14-09217-KS, 2016 WL 94231, at \*6-8 (C.D. Cal. Jan. 7, 2016)  
3 (finding no conflict between DOT and VE's testimony that person  
4 with "somewhat limited ability to communicate in English" could  
5 perform jobs requiring Level 1 language proficiency). Remand is  
6 not warranted on this ground.

7 **VI. CONCLUSION**

8 Consistent with the foregoing, and under sentence four of 42  
9 U.S.C. § 405(g),<sup>28</sup> IT IS ORDERED that judgment be entered  
10 AFFIRMING the decision of the Commissioner, DENYING Plaintiff's  
11 request for remand, and DISMISSING this action with prejudice.  
12 IT IS FURTHER ORDERED that the Clerk serve copies of this Order  
13 and the Judgment on counsel for both parties.

14  
15 DATED: May 23, 2016

16   
17 JEAN ROSENBLUTH  
18 U.S. Magistrate Judge  
19  
20  
21

22 \_\_\_\_\_  
23 <sup>27</sup> (...continued)  
24 (finding 900 regional jobs significant); Thomas, 278 F.3d at 960  
25 (finding 1300 jobs in state significant); Meanel v. Apfel, 172  
26 F.3d 1111, 1115 (9th Cir. 1999) (finding between 1000 and 1500  
27 jobs in local area significant).

28 <sup>28</sup> That 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."