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

IMRE SOMOGYI,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. CV 16-8819-AFM

**MEMORANDUM OPINION AND
ORDER AFFIRMING THE
DECISION OF THE
COMMISSIONER**

Plaintiff seeks review of the Commissioner’s final decision denying his applications for disability insurance benefits and supplemental security income. In accordance with the Court’s case management order, the parties have filed memorandum briefs addressing the merits of the disputed issues. This matter now is ready for decision.

BACKGROUND

On October 9, 2012, Plaintiff applied for disability insurance benefits and supplemental security income, alleging that he became disabled and unable to work on September 17, 2004. Plaintiff’s claims were denied initially and on reconsideration. An Administrative Law Judge (“ALJ”) conducted a hearing on July 2, 2015, at which Plaintiff, his attorney, and a vocational expert (“VE”) were

1 present. (Administrative Record (“AR”) 33-79.) In a July 16, 2015 written decision
2 that constitutes the Commissioner’s final decision, the ALJ found that Plaintiff
3 suffered from several severe impairments but retained the residual functional
4 capacity (“RFC”) to perform a restricted range of medium work. The ALJ further
5 determined that Plaintiff’s RFC did not preclude him from performing jobs that
6 exist in significant numbers in the national economy. Accordingly, the ALJ found
7 Plaintiff not disabled at any time from September 17, 2004 through the date of the
8 ALJ’s decision. (AR 22-28.)

9 **DISPUTED ISSUES**

- 10 1. Whether the ALJ’s Step Two and Step Three findings are supported by
11 substantial evidence.
- 12 2. Whether the ALJ’s RFC assessment is supported by substantial
13 evidence.
- 14 3. Whether the ALJ properly evaluated Plaintiff’s subjective complaints.

15 **STANDARD OF REVIEW**

16 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
17 determine whether the Commissioner’s findings are supported by substantial
18 evidence and whether the proper legal standards were applied. *See Treichler v.*
19 *Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014).
20 Substantial evidence means “more than a mere scintilla” but less than a
21 preponderance. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter*
22 *v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Substantial evidence is “such
23 relevant evidence as a reasonable mind might accept as adequate to support a
24 conclusion.” *Richardson*, 402 U.S. at 401. Where evidence is susceptible of more
25 than one rational interpretation, the Commissioner’s decision must be upheld. *See*
26 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

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DISCUSSION

1. The ALJ did not err at Step Two or Three.

Plaintiff contends that the ALJ erred by failing to find that Plaintiff's migratory arthritis was a severe impairment, failing to discuss Plaintiff's migratory arthritis diagnosis at any step of the sequential evaluation, and failing to consider whether Plaintiff's migratory arthritis met or equaled Listing 14.09 of the Listing of Impairments ("Listing"), 20 C.F.R. Pt. 404, Subpt. P, App. 1. (ECF No. 22 at 3-5.) For the following reasons, Plaintiff's contentions lack merit.

a. The ALJ's failure to discuss Plaintiff's arthritis diagnosis

The ALJ reviewed Plaintiff's medical records and found that Plaintiff had the following severe impairments: mechanical knee pain; lower extremity edema; and diabetes mellitus. (AR 24.) The ALJ found that Plaintiff's vertigo, headaches, obesity, hypertension, and hearing problems did not constitute severe impairments. (AR 25.) The ALJ stated that he considered the combined effect of each of Plaintiff's impairments, severe and non-severe, before reaching his determination that Plaintiff was not disabled. As Plaintiff correctly points out, the ALJ's decision does not discuss migratory arthritis.

In challenging the ALJ's omission, Plaintiff relies primarily upon a report from the Conejo Valley Medical Clinic dated March 19, 2010. (ECF No. 22 at 3 (citing AR 303).) An examination on that date revealed no erythema, no swelling, and a normal range of motion in Plaintiff's feet and knees. However, under "Additional Notes," the report included the following notation:

A/P: Migratory Arthritis

-- Ibuprofen 600 mg

-- labs.

(AR 303.) The only other mention of arthritis in the record is found in cursory references to "gouty arthritis" in records dated August 2014, September 2014, and April 2015. Each of these three reports includes a heading "Problem List/Past

1 Medical History,” and among the nine or ten ailments listed under that heading is
2 “Gouty arthritis NOS.” (AR 312, 317, 322.) Critically, Plaintiff cites no treatment
3 notes, physician opinions, or any other medical evidence concluding that Plaintiff’s
4 migratory arthritis caused any functional limitations. Indeed, an independent review
5 confirms that the record contains no such evidence.

6 Although an ALJ must consider all of the evidence available in a claimant’s
7 case record, *see* 42 U.S.C. § 423(d)(5)(B), an ALJ is not required to discuss every
8 piece of evidence. *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir.
9 2003) (quotations omitted); *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393,
10 1394 (9th Cir. 1984) (“The [Commissioner] need not discuss *all* evidence presented
11 to her. Rather, she must explain why significant probative evidence has been
12 rejected.”) (citations and internal quotation marks omitted.)

13 Plaintiff has not shown that the ALJ failed to consider significant probative
14 evidence. The mere diagnosis of a disorder does not support a finding of disability,
15 *Kay v. Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985), and an ALJ is not obligated to
16 discuss medical opinions that include mere diagnoses but do not shed light on any
17 specific work-related functional limitations stemming from such diagnoses. *See*
18 *Castelblanco v. Colvin*, 2014 WL 3964950, at *10 (N.D. Cal. Aug. 13, 2014) (ALJ
19 was under no obligation to specifically discuss and reject each diagnosis in the
20 medical record where diagnoses were made without explanation of the effect of the
21 impairment on claimant’s functional limitations); *Dubek v. Astrue*, 2009 WL
22 1155226, at *4 (W.D. Wash. Apr. 29, 2009) (ALJ did not err by failing to discuss
23 medical opinions that included mere diagnoses but did not shed light on any
24 specific work-related functional limitations). Because the migratory arthritis
25 diagnosis, standing alone, did not constitute probative evidence of Plaintiff’s
26 functional limitations, the ALJ’s failure to specifically discuss it in his opinion was
27 not error. *See Jones v. Berryhill*, 685 F. App’x 536, 537-38 (9th Cir. 2017) (ALJ did
28 not err in failing to discuss medical records because, among other things, the

1 records “were not supported by an explanation or clinical findings); *Remick v.*
2 *Astrue*, 2010 WL 3853081, at *10 (C.D. Cal. Sept. 29, 2010) (ALJ was not required
3 to specifically address conclusory statements from the physician assistants that
4 provided no supporting detail because they did not constitute significant probative
5 evidence).

6 Furthermore, even if omitting discussion of the migratory arthritis diagnosis
7 was error, it was harmless because Plaintiff points to nothing about that diagnosis
8 that would alter the ALJ’s ultimate disability determination.

9 Other than the diagnosis, the evidence that Plaintiff contends confirms the
10 severity of his migratory arthritis consists of the following: (a) the February 2013
11 report of consultative examining physician Dr. Sohail K. Afra, who observed
12 moderate swelling of Plaintiff’s feet and ankles, an antalgic gait, and decreased
13 range of motion in Plaintiff’s lumbar spine; (b) the September 2013 report of
14 treating physician Dr. Shilpa Jindani indicating that Plaintiff suffered from edema
15 in his lower extremities; (c) evidence of vertigo; and (d) Plaintiff’s self-reports of
16 swelling and pain in his hands and feet, dizziness, and an inability to walk. (ECF
17 No. 22 at 3 (citing AR 285-287, 293, 297, 302, 312, 317).) None of the foregoing
18 evidence, however, compels the conclusion that the ALJ’s assessment of Plaintiff’s
19 RFC was reversible error. The ALJ already considered the reports of Dr. Afra and
20 Dr. Jindani, found Plaintiff’s lower extremity edema to be a severe impairment, and
21 adopted Dr. Afra’s opinion regarding Plaintiff’s RFC. (AR 24, 26.) With regard to
22 Plaintiff’s dizziness and vertigo, Plaintiff does not allege, and it does not appear
23 from the record, that these symptoms are attributable to migratory arthritis.
24 Moreover, the ALJ considered evidence of dizziness and vertigo and found that
25 these conditions were controlled with medications, a finding that is confirmed by
26 the record and which Plaintiff does not dispute. (AR 24.) As for Plaintiff’s
27 subjective complaints of debilitating pain rendering him unable to walk, the ALJ
28

1 explicitly considered and rejected them.¹ (AR 25-26.)

2 Because there is no medical evidence indicating that Plaintiff suffered from
3 any functional limitation as a result of his migratory arthritis not already taken into
4 account by the ALJ, consideration of that diagnosis would not have affected the
5 ALJ's analysis of Plaintiff's disability claim. Accordingly, any error was harmless.
6 *See Baker v. Berryhill*, 2017 WL 6525191, at *1 (9th Cir. Dec. 21, 2017) (“[E]ven
7 if omitting discussion of this evidence was error, it would not amount to harmful
8 error that affected the outcome of the ALJ's decision because this evidence is
9 consistent with medical evidence the ALJ did discuss.”); *Valentine v. Comm'r Soc.*
10 *Sec. Admin.*, 574 F.3d 685, 692 n. 2 (9th Cir. 2009) (ALJ's omission of spine, knee,
11 and shoulder injuries was immaterial because the claimant “does not detail what
12 other physical limitations follow from the evidence of his knee and should[er]
13 injuries, besides the limitations already listed in the RFC”); *LaDuke v. Colvin*, 2013
14 WL 1100188, at *8 (D. Or. Mar. 15, 2013) (ALJ's omission of diagnoses was
15 harmless because there was no evidence that there were functional limitations
16 caused by the specific diagnosis beyond those which the ALJ adopted).

17 **b. The ALJ's failure to find arthritis a severe impairment**

18 At step two of the five-step sequential evaluation, the ALJ must determine
19 whether the claimant has a severe, medically determinable impairment or
20 combination of impairments. *See Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th
21 Cir. 1996) (citing *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987)). To determine
22 whether or not an impairment or combination of impairments is severe, the ALJ
23 must determine whether the impairments significantly limit a claimant's physical or
24 mental ability to do “basic work activities.” 20 C.F.R. §§ 404.1521 (a), 416.921(a);
25 *see Webb v. Barnhart*, 433 F.3d 683, 686-87 (9th Cir. 2005). Basic work activities

26 _____
27 ¹ Plaintiff's contention that the ALJ erred in rejecting his subjective complaints is
28 discussed separately below.

1 are the “abilities and aptitudes necessary to do most jobs,” including, among others,
2 (1) physical functions like walking, standing, sitting, lifting, pushing, pulling,
3 reaching, carrying, and handling; (2) the capacity for seeing, hearing, and speaking;
4 and (3) understanding, carrying out, and remembering simple instructions. 20
5 C.F.R. §§ 404.1521(b), 416.921(b)²; *Garcia v. Comm’r of Soc. Sec.*, 587 F. App’x.
6 367, 370 (9th Cir. 2014).

7 To begin with, a mere diagnosis does not establish a severe impairment.
8 *Febach v. Colvin*, 580 F. App’x. 530, 531 (9th Cir. 2014). Nevertheless, assuming
9 that the ALJ erred by failing to find migratory arthritis was a severe impairment, the
10 error was harmless.

11 An erroneous failure to find a specific severe impairment is harmless if the
12 claimant nonetheless prevails at Step Two, and all impairments – regardless of
13 severity – are actually considered in all subsequent steps. *Lewis v. Astrue*, 498 F.3d
14 909, 911 (9th Cir. 2007); *see also Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).
15 Here, the ALJ found that Plaintiff had severe impairments of mechanical knee pain,
16 lower extremity edema, and diabetes mellitus, and consequently considered the
17 limitations imposed by all of Plaintiff’s impairments at the other steps of the
18 sequential process. (AR 24-27.) As discussed above, Plaintiff has failed show that
19 there were limitations uniquely associated with Plaintiff’s migratory arthritis that
20 were not already considered by the ALJ. Because the ALJ considered any
21 limitations that might have been caused by Plaintiff’s migratory arthritis during the
22

23 ² Many of the relevant regulations were revised, recodified, or deleted after the date
24 of the ALJ’s decision. *See, e.g.*, Revisions to Rules Regarding the Evaluation of
25 Medical Evidence, 82 Fed. Reg. 5844 (Jan. 18, 2017) (final rules effective Mar. 27,
26 2017); Revised Medical Criteria for Evaluating Mental Disorders, 81 Fed. Reg.
27 66138 (Sept. 26, 2016) (final rules effective Jan. 17, 2017). All regulations cited
28 herein are to the historical version of the regulation that was in effect on the date of
the ALJ’s decision.

1 remainder of the sequential evaluation process, any error at Step Two was harmless.
2 *See Lewis*, 498 F.3d at 911 (failure to list bursitis as severe at step two was
3 harmless error where ALJ considered any functional limitations imposed by the
4 bursitis at step four); *Bowlin v. Colvin*, 2016 WL 5339591, at *11 (D. Or. Aug. 18,
5 2016) (any error in failing to include fibromyalgia as a severe impairment was
6 harmless where claimant relied upon records that showed “only that a diagnosis was
7 made and d[id] not speak to limitations beyond those already credited by the ALJ”),
8 *report and recommendation adopted*, 2016 WL 5339578 (D. Or. Sept. 21, 2016);
9 *Gallemore v. Colvin*, 2014 WL 5810327, at *2 (C.D. Cal. Nov. 7, 2014) (ALJ’s
10 failure to list claimant’s back condition as a severe impairment was harmless error
11 because ALJ considered any limitations that could be imposed by the back
12 condition during the remainder of the sequential evaluation process).

13 **c. The ALJ’s failure to find Plaintiff’s impairments met Listing**
14 **14.09**

15 Plaintiff contends that the ALJ should have considered whether Plaintiff’s
16 migratory arthritis met or equaled Listings 14.09A. (ECF No. 22 at 4-5.)

17 Plaintiff bears the burden of showing that he has an impairment that meets or
18 equals the criteria of a listed impairment. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th
19 Cir. 2005). To “meet” a listed impairment, a claimant must establish that his
20 condition satisfies each element of a particular listed impairment. *See Sullivan v.*
21 *Zebley*, 493 U.S. 521, 530 (1990); *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir.
22 1999). To “equal” a listed impairment, a claimant “must establish symptoms, signs,
23 and laboratory findings” at least equal in severity and duration to all of the criteria
24 for the most similar listed impairment. *Tackett*, 180 F.3d at 1099-100 (quoting 20
25 C.F.R. 404.1526); *see Sullivan*, 493 U.S. at 531.

26 The ALJ concluded that Plaintiff’s impairments “do not meet or equal any of
27 the criteria set forth in any of the listed impairments set forth in Appendix 1,
28 Subpart P, Regulations No. 4.” (AR 25.) The ALJ did not specifically address

1 Listing 14.09A. Assuming this failure was error, it was harmless because Plaintiff
2 has not pointed to medical evidence supporting a conclusion that his impairments
3 meet or equal that Listing.

4 Plaintiff's migratory arthritis diagnosis by itself does not dictate a finding
5 that he is disabled. *Young v. Sullivan*, 911 F.3d 180, 181, 183-84 (9th Cir. 1990)
6 (mere diagnosis of a listed impairment is not sufficient to sustain a finding of
7 disability); *Jones v. Comm'r of Soc. Sec.*, 2017 WL 2868451, at *5 (E.D. Cal.
8 July 5, 2017) (fact that claimant was diagnosed with disorders that appear on a
9 Listing is not sufficient to show that plaintiff meets or equals a Listing).

10 In order to be considered presumptively disabled under Listing 14.09A, the
11 medical evidence must show the claimant suffers from persistent inflammation of,
12 or persistent deformity of, one or more peripheral weight bearing joints resulting in
13 the inability to ambulate effectively. 20 C.F.R. pt. 404, Subpt. P, App. 1,
14 § 14.09(A). Listing 1.00B2b defines an "inability to ambulate effectively" as an
15 "extreme limitation of the ability to walk" and provides a non-exhaustive list of
16 examples, including "the inability to walk without the use of a walker, two crutches
17 or two canes," "the inability to walk a block at a reasonable pace on rough or
18 uneven surfaces," and "the inability to carry out routine ambulatory activities, such
19 as shopping and banking." 20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 1.02A, 1.00B2b.

20 Plaintiff has not demonstrated that his migratory arthritis rendered him
21 unable to ambulate effectively. No physician found that Plaintiff's migratory
22 arthritis – alone or in combination with any of his other impairments – met or
23 equaled a listing. In an attempt to make the requisite showing of an inability to
24 ambulate effectively, Plaintiff points to records purportedly documenting his "need
25 to use crutches" and his inability to "even get around his home." (ECF No. 22 at 4-
26 5.) The evidence Plaintiff cites, however, does not document either a medical need
27 for an assistive device or a medical opinion about Plaintiff's ability to effectively
28 ambulate. Instead, these records consist of notations recounting Plaintiff's

1 subjective complaints – namely, Plaintiff’s reports that he was “unable to walk even
2 a block without support” (AR 293), was “unable to walk even around the house”
3 (AR 317), and had been using crutches for two weeks. (AR 302.)

4 Contrary to Plaintiff’s suggestion, the record is devoid of medical evidence
5 suggesting that he is unable to ambulate effectively. Dr. Jindani observed that
6 Plaintiff’s gait was within normal limits on September 24, 2013 and again on
7 September 2, 2014. (AR 294, 318.) Although Dr. Jindani’s report memorialized that
8 Plaintiff was walking with crutches on August 25, 2014 (AR 323), it does not
9 appear that Dr. Jindani ever prescribed or recommended crutches. Furthermore,
10 Plaintiff was able to walk without them only one week later. (AR 318.) Even
11 Dr. Afra, whose observation of an antalgic gait Plaintiff relies upon to support his
12 claim, opined that Plaintiff was able to walk and stand six hours in an eight-hour
13 day without an assistive device. (AR 285-289.)

14 For the foregoing reasons, Plaintiff has not presented substantial evidence
15 proving he has an impairment that meets or equals a Listing. *See Gonzalez v.*
16 *Colvin*, 2014 WL 1725797, at *1 (C.D. Cal. Apr. 29, 2014) (claimant failed to show
17 she was unable to ambulate effectively where medical evidence showed she was
18 diagnosed with arthritis, doctor recommended that she limit ambulation for two
19 days, and another doctor found that claimant could perform a range of sedentary
20 work, including two hours of walking/standing without need of an assistive device);
21 *Graham v. Colvin*, 2014 WL 1328521, at *6 (W.D. Wash. Mar. 31, 2014) (no error
22 in finding claimant did not meet Listing where there was no objective evidence of
23 inability to ambulate effectively); *Perez v. Astrue*, 831 F. Supp. 2d 1168, 1176
24 (C.D. Cal. 2011) (claimant failed to show she was unable to ambulate effectively
25 where no physician provided an RFC assessment precluding walking, and where
26 physician concluded claimant could walk four hours in an eight-hour day).

27 Finally, Plaintiff’s attempt to demonstrate he met or equaled Listing 14.09A
28 by relying upon his self-reports of symptoms and functional limitations lacks merit.

1 Neither Plaintiff's self-reported limitations nor Plaintiff's apparently optional use of
2 crutches constitutes objective medical evidence of an inability to ambulate
3 effectively. *See Hamilton v. Astrue*, 2010 WL 3748744, at *7 (C.D. Cal. Sept. 22,
4 2010) ("Plaintiff's self-reports of symptoms and functional limitations based on hip
5 and joint pain cannot suffice to raise the severity of her related impairment to that
6 of Listing 1.02A.").

7 **2. The ALJ's RFC finding is supported by substantial evidence.**

8 Plaintiff argues that the ALJ erred by finding he could perform the walking
9 and carrying required by medium exertional work. (ECF No. 22 at 5.) The relevant
10 evidence is as follows.

11 In making his RFC assessment, the ALJ credited the opinion of Dr. Afra.
12 (AR 26.) Dr. Afra examined Plaintiff in February 2013 and found that Plaintiff had
13 grip strength of 50-50-60 on the right and 60-60-60 on the left; normal peripheral
14 pulses in the extremities; moderate swelling of the ankles and feet bilaterally;
15 normal cervical, shoulder, elbow, wrist, hand, hip, knee and ankle ranges of motion;
16 limited lumbar range of motion; a negative straight leg raise test; painful but full
17 range of motion of the feet; and no joint deformities, crepitus, effusion, tenderness,
18 or trigger points. (AR 287-288.) Plaintiff had full strength in the extremities,
19 normal muscle bulk and tone, and an intact sensory examination. Although Plaintiff
20 had an antalgic gait, he did not need or use an assistive device. (AR 288.) Plaintiff
21 had a history of chronic intermittent vertigo and took medication as needed; edema
22 of the ankle and feet; suspected metatarsalgia with mechanical-type knee pain; and
23 a subjective history of hand swelling at times with no significant abnormality upon
24 examination. (AR 288-89.) Dr. Afra opined that Plaintiff could lift and carry 50
25 pounds occasionally and 25 pounds frequently; stand and walk for six hours in an
26 eight-hour day; did not need an assistive device; had no sitting limitation; could
27 frequently perform postural and agility activities; and had no manipulative
28 limitations. (AR 289.)

1 Dr. Afra's opinion was based upon independent clinical testing and
2 examination, and constituted substantial evidence supporting the ALJ's RFC
3 finding. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The ALJ
4 found Dr. Afra's opinion to be consistent with the record. (AR 26.) For example,
5 the ALJ noted that the objective medical findings were limited, and X-rays of
6 Plaintiff's right knee and right foot were normal. Despite Plaintiff's history of
7 lower extremity edema, he had a normal gait in September 2013. No edema was
8 present at Plaintiff's April 2015 examination by his treating physician, and
9 Plaintiff's back pain was treated with over-the-counter non-steroidal anti-
10 inflammatory medication. (AR 26; *see* AR 271, 294, 295, 314, 318, 320.)

11 Plaintiff points to no medical evidence contravening Dr. Afra's opinion, and
12 the record reveals none. Dr. Afra's opinion was consistent with that of state agency
13 physician S. Amon, M.D., who reached an identical RFC assessment. (AR 104-
14 105). Indeed, considering the conclusion of state agency physician J. Zheutlin,
15 M.D., who opined that Plaintiff suffered from no severe physical impairment (AR
16 121), Dr. Afra's opinion was actually the most restrictive one in the record.

17 Plaintiff argues that the ALJ should have considered additional limitations
18 stemming from his vertigo. (ECF No. 22 at 6.) The ALJ, however, found that
19 Plaintiff's vertigo was controlled with medication, a finding that is supported by the
20 record. (AR 24; *see* AR 66.) Otherwise, Plaintiff's claim is essentially based upon
21 his subjective complaints and limitations. That is, citing evidence of edema and
22 swelling, Plaintiff alleges that he was unable to walk around the house and required
23 crutches. (ECF No. 22 at 5.) Citing swelling in his left hand, Plaintiff suggests that
24 he would be unable to perform work that required "manipulation and handling."
25 (ECF No. 22 at 5.) But the ALJ did not find Plaintiff's subjective complaints
26 credible. As discussed below, the ALJ's credibility determination was not
27 improper. Consequently, the ALJ was not required to include those subjective
28 complaints in assessing Plaintiff's RFC.

1 **3. The ALJ properly considered Plaintiff's subjective complaints.**

2 Plaintiff argues that the ALJ failed to properly consider his subjective
3 complaints about his symptoms and limitations. Specifically, Plaintiff contends that
4 the ALJ improperly rejected his testimony that he was unable to stand or walk for
5 an extended period of time, he needed crutches, and that he spent four to five hours
6 a day lying down with his legs elevated. (ECF No. 22 at 7.)

7 Plaintiff appeared at the July 2, 2015 hearing using crutches. The ALJ
8 observed that Plaintiff had initially appeared for a hearing five months earlier and at
9 that time, he was not using crutches. Plaintiff explained that on the previous date he
10 had not been experiencing pain. (AR 36.) Regarding the crutches, Plaintiff testified
11 that he has used crutches since 2004 and he had been told to do so by “numerous
12 doctors,” including Dr. Jindani. (AR 45-46.)

13 Plaintiff testified that he suffers from constant pain typically in the range of
14 seven to nine on a scale of one to ten, and that the pain moves from his hands,
15 knees, feet, elbow, and neck. (AR 43-44, 70.) There have been times when Plaintiff
16 has been confined to his bed or is unable to think clearly because of the pain. (AR
17 43, 48-49.) Plaintiff estimated that he could walk a block and a half with or without
18 crutches, he could stand or walk for about 15 to 20 minutes at a time, and he could
19 sit for about 35 to 45 minutes before needing to move. (AR 51-52, 61.) He
20 estimated that he was able to lift “maybe three to five pounds,” and had a limited
21 ability to grasp things with his left hand. (AR 52-55.) Plaintiff explained that the
22 pain in his feet prevented him from wearing shoes that cover his feet, so he wears
23 only sandals. (AR 71.)

24 Plaintiff spent four to five hours a day lying down and he elevated his feet
25 “all the time.” (AR 52.) Plaintiff was able to grocery shop, make his bed, and take
26 out the garbage. (AR 63-65.)

27 Plaintiff testified that the medicine prescribed to him for vertigo helps him,
28 and he experiences no side effects. (AR 66.)

1 When asked about the periods during which he did not seek medical
2 treatment, Plaintiff explained that there had been times when he had no medical
3 insurance. (AR 38-39.)

4 Where, as here, a claimant has presented evidence of an underlying
5 impairment and the record is devoid of affirmative evidence of malingering, the
6 ALJ's reasons for rejecting the claimant's subjective symptom statements must be
7 "specific, clear and convincing." *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir.
8 2014) (quoting *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). "General
9 findings [regarding a claimant's credibility] are insufficient; rather, the ALJ must
10 identify what testimony is not credible and what evidence undermines the
11 claimant's complaints." *Burrell*, 775 F.3d at 1138 (quoting *Lester v. Chater*, 81
12 F.3d 821, 834) (9th Cir. 1995)). The ALJ's findings "must be sufficiently specific
13 to allow a reviewing court to conclude the adjudicator rejected the claimant's
14 testimony on permissible grounds and did not arbitrarily discredit a claimant's
15 testimony regarding pain." *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir.
16 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 345-46 (9th Cir. 1991) (en banc)).

17 Factors the ALJ may consider when making such determinations include the
18 objective medical evidence, the claimant's treatment history, the claimant's daily
19 activities, and inconsistencies in testimony. *Ghanim v. Colvin*, 763 F.3d 1154, 1163
20 (9th Cir. 2014); *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). In
21 addition, conflicts between a claimant's testimony and the objective medical
22 evidence in the record can undermine a claimant's credibility. *Morgan v. Comm'r*
23 *of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999); *see generally* 20 C.F.R.
24 §§ 404.1529(a), 416.929(a) (explaining how pain and other symptoms are
25 evaluated). "When evidence reasonably supports either confirming or reversing the
26 ALJ's decision, [the court] may not substitute [its] judgment for that of the ALJ."
27 *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004).

1 The Commissioner does not allege that there was affirmative evidence of
2 malingering, and therefore the ALJ was required to articulate specific, clear and
3 convincing reasons for rejecting the alleged severity of Plaintiff’s subjective
4 symptoms. The ALJ’s reasons for finding Plaintiff’s subjective complaints not fully
5 credible were sufficient to meet that burden.

6 First, the ALJ observed that Plaintiff “has seen treating physicians only
7 infrequently for his allegedly disabling pain and dysfunction.” (AR 26.) The ALJ
8 highlighted the complete absence of treatment notes from 2011 and the sole
9 treatment note from 2012. He then concluded that Plaintiff’s failure to seek
10 treatment was inconsistent with his alleged disability. (AR 26.)

11 Where a claimant complains about debilitating pain, an unexplained, or
12 inadequately explained, failure to seek treatment may be the basis for finding the
13 complaint unjustified or exaggerated. *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir.
14 2007). The ALJ’s characterization of Plaintiff’s treatment as infrequent is borne out
15 by the record. Plaintiff alleged disability since September 2004, yet the record
16 contains no treatment notes at all until March 2010. Even after March 2010,
17 Plaintiff sought treatment infrequently at most – once in April 2010, never in 2011,
18 once in 2012, three times in 2013, twice in 2014, and once in 2015. (AR 26, 270-
19 326.)

20 In an effort to explain his failure to seek treatment, Plaintiff offers the
21 following:

22 Within the written decision, the ALJ states that Mr. Somogyi was not
23 credible because he had seen physicians “infrequently.” (AR 26). Yet,
24 he testified that he had periods of time without medical insurance. (AR
25 38-39).

26 (ECF No. 22 at 6-7.) At the hearing, Plaintiff testified only that he was uninsured at
27 the time of hearing – that is, July 2, 2015 – and that he had last been insured
28 approximately May 2014 to July 2014. (AR 39.) Plaintiff did not identify periods of

1 time between 2004 and 2014 when he was uninsured and his testimony does not
2 account for the numerous years without any medical treatment. Indeed, Plaintiff
3 obtained medical treatment at a time he allegedly was uninsured – namely, August
4 and September 2014 (AR 317-24) – a fact that suggests that his decision when to
5 seek medical care was not dependent on his insured status. This is not a case where
6 the record establishes Plaintiff’s lack of treatment was due to his inability to afford
7 it. *Cf. Regennitter v. Comm’r Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999)
8 (“we have proscribed the rejection of a claimant’s complaints for lack of treatment
9 when the record establishes that the claimant could not afford it”). Accordingly, the
10 ALJ properly relied on the fact that Plaintiff sought minimal medical treatment in
11 making his credibility determination.

12 The ALJ also relied upon the conservative treatment provided by Plaintiff’s
13 treating physicians. As the ALJ noted, Plaintiff was prescribed only over-the-
14 counter non-steroidal anti-inflammatory medication for his back pain, “suggesting
15 that [Plaintiff]’s pain was not severe enough to warrant opioid medication or a
16 referral to a specialist.” (AR 26.) The record supports the ALJ’s characterization of
17 Plaintiff’s treatment. It reveals that despite Plaintiff’s allegedly constant debilitating
18 pain, he often used only Ibuprofen to treat his pain, and in fact, there were times
19 when Plaintiff took no pain medication at all. (*See* AR 293-295, 298, 302, 310, 315,
20 317, 319, 324.) Thus, the ALJ properly relied upon Plaintiff’s conservative
21 treatment as a basis for his credibility determination. *See Tommasetti v. Astrue*, 533
22 F.3d 1035, 1039 (9th Cir. 2008) (ALJ may infer that claimant’s “response to
23 conservative treatment undermines [claimant’s] reports regarding the disabling
24 nature of his pain”); *Parra v. Astrue*, 481 F.3d 742, 751 (9th Cir. 2007) (treatment
25 with over-the-counter pain medication is sufficient to discount a claimant’s
26 testimony regarding severity of an impairment).

27 In addition, the ALJ considered the fact that no physician recommended a
28 RFC as restrictive as Plaintiff’s testimony. (AR 26.) As discussed above, Dr. Afra

1 and Dr. Amon both concluded that Plaintiff could perform medium exertional
2 work, and Dr. Zheutlin concluded that Plaintiff had no functional limitations
3 whatsoever. This was a legitimate basis for the ALJ's credibility determination. *See*
4 *Stubbs–Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008) (doctors' opinions
5 finding claimant could perform a limited range of work supported ALJ's credibility
6 determination).

7 Finally, the ALJ relied upon the minimal objective medical findings.
8 Specifically, the ALJ noted that X-rays of Plaintiff's right knee and foot were
9 normal, Plaintiff's gait was normal in September 2013, and there was no evidence
10 of edema in April 2015. (AR 26.) So long as it does not form the sole basis for a
11 credibility determination, the lack of objective medical evidence is a valid factor the
12 ALJ can consider. *See Burch*, 400 F.3d at 681 (“Although lack of medical evidence
13 cannot form the sole basis for discounting pain testimony, it is a factor that the ALJ
14 can consider in his credibility analysis.”); *Rollins v. Massanari*, 261 F.3d 853, 857
15 (9th Cir. 2001) (“While subjective pain testimony cannot be rejected on the sole
16 ground that it is not fully corroborated by objective medical evidence, the medical
17 evidence is still a relevant factor in determining the severity of the claimant's pain
18 and its disabling effects.”).

19 Finally, in his reply, Plaintiff reiterates that the ALJ erred by not crediting
20 Plaintiff's testimony that he lies down four or five hours a day and elevates his legs
21 and cites *Espinoza v. Colvin*, 2014 WL 2558926 (C.D. Cal. June 6, 2014). (ECF
22 No. 26 at 2.) In *Espinoza*, the court found the ALJ's RFC assessment was not
23 supported by substantial evidence because it failed to address the treating
24 physicians' recommendations that the plaintiff elevate her legs to relieve symptoms
25 caused by her edema. *Espinoza*, 2014 WL 2558926, at *1. *Espinoza* involved
26 rejection of a treating physician's opinion in making a RFC assessment and is
27 inapposite to Plaintiff's challenge to the ALJ's credibility determination. Plaintiff
28 does not contend that any physician recommended that he elevate his legs, and the

1 record contains no such evidence. Unlike *Espinoza*, the ALJ here did not disregard
2 the recommendation of a treating physician.

3 **ORDER**

4 For the foregoing reasons, IT IS ORDERED that Judgment be entered
5 affirming the decision of the Commissioner and dismissing this action with
6 prejudice.

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8 DATED: 2/27/2018

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11 ALEXANDER F. MacKINNON
12 UNITED STATES MAGISTRATE JUDGE
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