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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD BOYD COOPER,)	Case No. CV 16-08925-AS
)	
Plaintiff,)	
)	MEMORANDUM OPINION
v.)	
)	
NANCY A. BERRYHILL, ¹ Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

I. PROCEEDINGS

On December 1, 2016, Plaintiff filed a Complaint seeking review of the denial of his application for Disability Insurance Benefits. (Docket Entry No. 1). The parties have consented to proceed before the undersigned United States Magistrate Judge. (Docket Entry Nos. 11-12). On April 27, 2017, Defendant filed an Answer along with the

¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration and is substituted in for Acting Commissioner Carolyn W. Colvin in this case. See 42 U.S.C. § 205(g).

1 Administrative Record ("AR"). (Docket Entry Nos. 15-16). On
2 November 27, 2017, the parties filed a Joint Stipulation ("Joint
3 Stip."), setting forth their respective positions regarding
4 Plaintiff's claims. (Docket Entry No. 25).

5
6 The Court has taken this matter under submission without oral
7 argument. See C.D. Cal. L.R. 7-15.

8
9 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION AND PRIOR**
10 **PROCEEDINGS**

11
12 On May 17, 2011, Plaintiff, formerly employed as a therapeutic
13 counselor (see AR 38-40, 182-84), filed an application for Disability
14 Insurance Benefits, alleging a disability onset date of April 27,
15 2011. (AR 156-57). The Commissioner denied Plaintiff's application
16 initially on October 7, 2011, and on reconsideration on February 12,
17 2012.

18
19 On April 3, 2013, Administrative Law Judge Eileen Burlison ("ALJ
20 Burlison"), heard testimony from Plaintiff, who was represented by
21 counsel, and vocational expert ("VE") Valerie Williams. (See AR 35-
22 55). On May 2, 2013, ALJ Burlison issued a decision denying
23 Plaintiff's application. (See AR 14-21). The Appeals Council denied
24 Plaintiff's request to review ALJ Burlison's decision on October 21,
25 2014. (See AR 1-4, 8). On December 16, 2014, Plaintiff filed a
26 Complaint in this Court seeking review of ALJ Burlison's decision.
27 (Richard Boyd Cooper v. Carolyn W. Colvin, Case No. CV 14-9611-AS;

1 Docket Entry No. 1). On December 7, 2015, this Court vacated ALJ
2 Burlison's decision and remanded the matter based on ALJ Burlison's
3 failure to set forth the reasons for finding that Plaintiff's
4 testimony was not credible. (Id.; Docket Entry Nos. 16-17; AR 566-
5 77). On January 17, 2016, the Appeals Council vacated ALJ Burlison's
6 Decision and remanded the matter. (AR 581).

7
8 On remand, on July 12, 2016, a different ALJ, Roger E. Winkelman
9 ("ALJ"), heard testimony from Plaintiff, who was represented by
10 counsel, and VE Alan E. Cummings. (See AR 475-509). On August 4,
11 2016, the ALJ issued a decision denying Plaintiff's application.
12 (See AR 446-55). Applying the five-step sequential process, the ALJ
13 found at step one that Plaintiff has not engaged in substantial
14 gainful activity since March 31, 2011, the alleged onset date. (AR
15 448). At step two, the ALJ determined that Plaintiff had "the
16 following severe impairments: degenerative disc disease of the
17 cervical and lumbar spine, a small tear of the medial meniscus and
18 lateral meniscus of the right knee, and hepatitis C." (AR 448).
19 At step three, the ALJ determined that Plaintiff does not have an
20 impairment or combination of impairments that meet or medically equal
21 the severity of any of the listings enumerated in the regulations.
22 (AR 449). The ALJ found that Plaintiff had the Residual Functional
23 Capacity ("RFC")² to perform light work,³ except that he was "limited

24
25 ² A Residual Functional Capacity is what a claimant can still
26 do despite existing exertional and nonexertional limitations. See 20
27 C.F.R. § 404.1545(a)(1).

28 ³ "Light work involves lifting no more than 20 pounds at a time

1 to occasional performance of postural activities and should avoid
2 walking on uneven terrain." (AR 449-54). At step four, relying on
3 the VE's hearing testimony, the ALJ determined that Plaintiff could
4 perform his past relevant work as a counselor-therapist as it was
5 actually and generally performed. (AR 454). Accordingly, the ALJ
6 concluded that Plaintiff was not under a disability as defined by the
7 Social Security Act, from March 31, 2011, through June 30, 2015, the
8 date last insured. (AR 454-55).

9
10 The ALJ's decision subsequently became the final decision of the
11 Commissioner, allowing this Court to review it. See 42 U.S.C. §
12 405(g).⁴

13 14 **III. STANDARD OF REVIEW**

15
16 This Court reviews the Administration's decision to determine if
17 it is free of legal error and supported by substantial evidence. See
18 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial
19 evidence" is more than a mere scintilla, but less than a

20
21 with frequent lifting or carrying of objects weighing up to 10
22 pounds. Even though the weight lifted may be very little, a job is
23 in this category when it requires a good deal of walking or standing,
24 or when it involves sitting most of the time with some pushing and
pulling of arm or leg controls." 20 C.F.R. §§ 404.1567(b),
416.967(b).

25
26 ⁴ The Court has not been able to locate in the record
27 Plaintiff's request for the Appeals Council to review the ALJ's
Decision or the Appeals Council's denial of that request.

1 preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.
2 2014). To determine whether substantial evidence supports a finding,
3 "a court must consider the record as a whole, weighing both evidence
4 that supports and evidence that detracts from the [Commissioner's]
5 conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.
6 2001) (internal quotation omitted). As a result, "[i]f the evidence
7 can support either affirming or reversing the ALJ's conclusion, [a
8 court] may not substitute [its] judgment for that of the ALJ."
9 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

10 11 **IV. PLAINTIFF'S CONTENTIONS**

12
13 Plaintiff alleges that the ALJ failed to (1) provide specific
14 and legitimate reasons for rejecting the opinions of Plaintiff's
15 treating physicians; (2) find that Plaintiff did not meet Listed
16 Impairment 1.04A; and (3) properly consider Plaintiff's testimony.
17 (See Joint Stip. at 6-13, 23-26, 29-35).

18 19 **V. DISCUSSION**

20
21 After consideration of the record as a whole, the Court finds
22 that the Commissioner's findings are supported by substantial
23 evidence and are free from material legal error.⁵

24
25 ⁵ The harmless error rule applies to the review of
26 administrative decisions regarding disability. See McLeod v. Astrue,
27 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d
28 676, 679 (9th Cir. 2005) (an ALJ's decision will not be reversed for
errors that are harmless).

1 **A. The ALJ Properly Rejected the Opinions of Plaintiff's Treating**
2 **Physicians, Lawrence Glass, D.O., and L.I. Goldstein, M.D.**

3
4 Although a treating physician's opinion is generally afforded
5 the greatest weight in disability cases, it is not binding on an ALJ
6 with respect to the existence of an impairment or the ultimate
7 determination of disability. Batson v. Comm'r of Soc. Sec. Admin.,
8 359 F.3d 1190, 1195 (9th Cir. 2004); Magallanes v. Bowen, 881 F.2d
9 747, 751 (9th Cir. 1989). The weight given a treating physician's
10 opinion depends on whether it is supported by sufficient medical data
11 and is consistent with other evidence in the record. 20 C.F.R. §
12 404.1527(b)-(d). "Generally, a treating physician's opinion carries
13 more weight than an examining physician's, and an examining
14 physician's opinion carries more weight than a reviewing
15 physician's." Holohan v. Massanari, 246 F.3d 1195, 1202 (9th Cir.
16 2001); see also Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995).

17
18 If a treating doctor's opinion is not contradicted by another
19 doctor, the ALJ can reject the treating doctor's opinion only for
20 "clear and convincing reasons." Carmickle v. Commissioner, 533 F.3d
21 1155, 1164 (9th Cir. 2008); Lester, 81 F.3d at 830. If the treating
22 doctor's opinion is contradicted by another doctor, the ALJ must
23 provide "specific and legitimate reasons" for rejecting the treating
24 doctor's opinion. Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007);
25 Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998); Lester, 81 F.3d
26 at 830. "The ALJ can meet this burden by setting out a detailed and
27 thorough summary of the facts and conflicting clinical evidence,

1 stating his interpretation thereof, and making findings." Trevizo v.
2 Berryhill, 871 F.3d 664, 675 (9th Cir. 2017) (quoting Magallanes v.
3 Bowen, 881 F.2d 747, 751 (9th Cir. 1989)).

4
5 Plaintiff asserts that the ALJ failed to provide specific and
6 legitimate reasons for rejecting the opinions of Plaintiff's treating
7 physicians, Dr. Glass and Dr. Goldstein. (See Joint Stip. at 6-13).
8 Dr. Glass, an osteopathic physician, and Dr. Goldstein, a
9 hepatologist, treated Plaintiff for multiple years and provided
10 similar opinions of Plaintiff's limitations.

11
12 Dr. Glass, who had been treating Plaintiff monthly since
13 December 2007, completed a musculoskeletal questionnaire and a
14 medical source statement, both dated June 16, 2011. (AR 231-33, 234-
15 35). He diagnosed Plaintiff with rheumatoid arthritis and hepatitis
16 C and stated that Plaintiff's prognosis was "poor." (AR 231, 233,
17 235). He indicated that Plaintiff requires a cane for standing or
18 walking, apparently due to a "torn ACL [and] meniscus." (AR 232).
19 He opined that Plaintiff (1) can stand or walk for only "[l]ess than
20 2 hours in an 8 hour workday," due to advancing rheumatoid arthritis
21 and hepatitis C, (AR 234); (2) can sit for only one hour due to "his
22 back [and] neck pain," (id.); (3) must change position every ten to
23 twenty minutes due to his arthritis, (AR 235); (4) can lift only
24 "[l]ess than 10 pounds," for no more than five minutes per two hour
25 period, due to rheumatoid arthritis and hepatitis C, (AR 234); (5)
26 can never engage in activities involving climbing, balancing,
27 stooping, kneeling, crouching or crawling, (AR 235); (6) is limited

1 in his reaching, handling and fingering, (id.); and (7) has "severely
2 limited" range of motion in his knees, hips, wrists and shoulders,"
3 (id.). Dr. Glass concluded that Plaintiff "cannot work." (Id.).
4

5 Dr. Goldstein, who had treated Plaintiff about every three to
6 six months between 1991 and 2011, completed a medical source
7 statement on August 2, 2012. (AR 104-08). He diagnosed Plaintiff
8 with hepatitis C, with primary symptoms of fatigue, weakness and
9 increased headaches, and stated that the prognosis was poor. (AR
10 104). He rated Plaintiff's fatigue as a nine out of ten, and rated
11 Plaintiff's neck and spine pain as a nine out of ten. (Id.). He
12 opined that Plaintiff (1) can sit, stand or walk for no more than two
13 hours in an eight hour day, (AR 105); (2) does not require a cane for
14 occasional standing or walking, (id.); (3) can "Never" lift and carry
15 any weight, (AR 105); (4) has significant limitations in repetitive
16 reaching, handling, fingering or lifting, (id.); and (5) must avoid
17 stooping, pushing, kneeling, pulling and bending, (AR 106). Dr.
18 Goldstein also indicated that Plaintiff's condition interferes with
19 his ability to keep his neck in a constant position, and Plaintiff
20 cannot "do a full-time competitive job that requires that activity on
21 a sustained basis." (AR 106). He further opined that Plaintiff
22 cannot handle even low stress due to his sickliness, fatigue and poor
23 concentration. (Id.).
24

25 The ALJ gave no weight to Dr. Glass's and Dr. Goldstein's
26 opinions that Plaintiff cannot work, as this is an issue reserved for
27 the Commissioner, but otherwise gave their opinions "little weight."
28

1 (AR 451-52). One prominent reason for this assessment is that the
2 doctors' opinions were "not consistent with the longitudinal record,
3 including the activities of [Plaintiff] that included kayaking or at
4 least assisting his daughter or daughters in kayaking by lifting a
5 kayak full of water." (AR 452). The ALJ's reference to "lifting a
6 kayak full of water" appears to come from a treatment note dated
7 October 31, 2011, which states, as part of Plaintiff's medical
8 history, that Plaintiff "had a popped [sic] in his back in lifting a
9 kayak full of water recently." (AR 258). The ALJ referenced this
10 note elsewhere in the decision, remarking that "[t]his activity is
11 inconsistent with the level of limitation being claimed by
12 [Plaintiff] at that time." (AR 453).

13
14 Plaintiff contends that the ALJ "failed to develop the record
15 regarding the frequency and occurrence of activities involved in
16 kayaking." (Joint Stip. 11-12). However, further information was
17 unnecessary. The mere fact that Plaintiff was lifting a kayak full
18 of water around October 2011 - after his pain had allegedly become so
19 unbearable that he "just literally . . . couldn't work anymore," (AR
20 498) - conflicts with the opinions of Dr. Glass and Dr. Goldstein.
21 Dr. Glass opined that Plaintiff can lift only "[l]ess than 10 pounds"
22 and cannot balance, stoop, kneel or crouch. (AR 234). Dr. Goldstein
23 indicated that Plaintiff can never lift or carry any weight and must
24 avoid stooping, pushing, kneeling, pulling and bending. (AR 105,
25 106). Their opinions portray a person whose debilitating condition
26 would not permit even attempting to lift a kayak full of water or
27

1 being involved in the kind of situation in which such an activity
2 might arise.

3
4 Dr. Glass's and Dr. Goldstein's assessments of Plaintiff's
5 functional limitations conflict with other evidence in the record as
6 well, including Plaintiff's own statements. Plaintiff testified that
7 he "probably [cannot] lift more than about 10 or 15 pounds." (AR
8 487). On a form Plaintiff completed for Dr. Regan on October 27,
9 2011, Plaintiff checked a box to indicate that "[p]ain prevents [him]
10 from lifting heavy weights but [he] can manage." (AR 410).

11
12 The ALJ also discounted Dr. Glass's opinion because the doctor
13 "reported a torn right ACL, but there is no MRI or other proof of
14 such a condition." (AR 452). As noted above, Dr. Glass cited
15 Plaintiff's "torn ACL [and] meniscus" as the basis for his opinion
16 that Plaintiff requires a cane for standing or walking. (AR 232).
17 Plaintiff contends that the ALJ was impermissibly "cherry-picking" by
18 singling out this one reference to a "torn ACL" to discount Dr.
19 Glass's opinion. (Joint Stip. at 8). Plaintiff argues that the
20 right knee MRI shows other injuries, including a torn meniscus, that
21 "substantiates and supports Dr. Glass's opinion requiring a cane to
22 ambulate." (Id. (citing AR 227)). Plaintiff also suggests that the
23 ALJ may have been referring to a "torn ACL relating to the surgery
24 performed years ago." (Id.). Although there may be various possible
25 explanations for why Dr. Glass noted a torn ACL despite an absence of
26 supporting evidence, the ALJ reasonably found that the notation was

1 contradicted by objective medical evidence (the MRI) and properly
2 considered this as a basis to accord less weight to the opinion.
3

4 Other evidence in the record also undermines Dr. Glass's opinion
5 that Plaintiff required a cane. Plaintiff did not have a cane at the
6 hearing before the ALJ. He stated that he left his cane in the car.
7 (AR 490). When asked why he did not bring it in, he said, "I don't
8 have an answer." (AR 502). Pressed to explain, he stated that he
9 "knew it was right up the elevator and out the door." (AR 502).
10 Plaintiff did not have a cane when Dr. Ruben Ustaris, M.D. examined
11 him on August 30, 2011. (AR 246). Moreover, in contrast to Dr.
12 Glass, Dr. Goldstein opined that Plaintiff does not require a cane
13 for occasional standing or walking. (AR 105).
14

15 The ALJ discounted Dr. Goldstein's opinion partly because he
16 "did not support his opinion with medical reasoning based on
17 objective findings and subjective complaints consistent with the
18 findings." (AR 452). Dr. Goldstein's medical source statement
19 contains very minimal notations. (AR 104-08). The only other
20 documents that Dr. Goldstein apparently provided are a few very
21 brief, fragmented and largely illegible treatment notes and some
22 laboratory blood test data. (AR 236-43). The opinion's lack of
23 supporting reasoning and evidence was a legitimate basis to discount
24 it. See Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002) ("The
25 ALJ need not accept the opinion of any physician, including a
26 treating physician, if that opinion is brief, conclusory, and
27 inadequately supported by clinical findings.").
28

1 The ALJ also found that the severity of Dr. Goldstein's opined
2 limitations conflicted with Plaintiff's conservative pain treatment.
3 The ALJ remarked that if Plaintiff had actually been experiencing
4 "the level of pain and difficulty described by Dr. Goldstein, it
5 seems unlikely that he would postpone surgery for years, and cease
6 taking all pain medication." (AR 451). Plaintiff's decisions to
7 stop taking pain medications since as early as October 2011, (see AR
8 410 (questionnaire dated October 27, 2011), and to postpone surgery
9 for years reasonably suggest that his pain was not a nine out of ten
10 in severity, as Dr. Goldstein opined. (AR 104).

11
12 The ALJ also noted, apparently with respect to Dr. Goldstein's
13 opinion and the limitations related to hepatitis C, that Plaintiff
14 "did have some treatment [for hepatitis C], and the condition went
15 into remission according to [Plaintiff]." (AR 452). This is another
16 legitimate reason to discount Dr. Goldstein's opinion. Contrary to
17 the serious limitations that Dr. Goldstein described and apparently
18 attributed to hepatitis C, Plaintiff's hearing testimony suggests
19 that his hepatitis C was not debilitating. At the hearing on April
20 3, 2013 (before ALJ Burlison), Plaintiff testified that he was taking
21 medication only for diabetes, not hepatitis C, and the only effect
22 that he noted about his hepatitis is that it "seems to aggravate the
23 diabetes." (AR 41, 46). At the hearing on July 12, 2016, Plaintiff
24 indicated (through his counsel) that his hepatitis C condition was in
25 remission. (AR 481).

1 While giving "little weight" to the opinions of Dr. Glass and
2 Dr. Goldstein, the ALJ gave "greater weight" to the opinions of
3 consultative examiner Dr. Ruben Ustaris, M.D., and the state agency
4 medical advisors because he found them to be "far more consistent
5 with the longitudinal record." (AR 452).

6
7 Dr. Ustaris examined Plaintiff on August 30, 2011. (AR 244-48).
8 He noted that Plaintiff drove himself to the exam. (AR 245). He
9 described Plaintiff as "alert, oriented, and not in acute distress,"
10 though appearing "weak and fatigued." (AR 246). Plaintiff was
11 "walking independently, and [did] not require the use of assistive
12 device for ambulation." (AR 246). Dr. Ustaris observed, upon
13 examination, that Plaintiff had (1) "[n]o myalgias, arthralgias,
14 joint swelling or crepitus," (AR 245); (2) "[n]o weakness, numbness,
15 syncope or light-headedness," (id.); (3) "[n]o headaches or
16 difficulty with coordination," (id.); (4) "no palpable tenderness" in
17 the back, (AR 246); (5) grossly normal range of motion in shoulders,
18 elbows, wrists, hips, knees and ankles, although there was "pain on
19 full extension" in his left knee, (AR 247); (6) "[n]ormal muscle bulk
20 and tone without atrophy," with full strength "throughout without
21 focal motor deficits," (id.); and (7) intact sensation throughout,
22 (id.). He found that Plaintiff could (1) "generate 40 pounds of
23 force using the right hand, and 35 pounds of force using the left
24 hand," (AR 245); (2) "lift and carry 50 pounds occasionally and 25
25 pounds frequently," (AR 248); (3) "push and pull on a frequent
26 basis,"; (4) "walk and stand six hours out of an eight-hour workday
27 with normal breaks," (id.); (5) "sit six hours out of an eight-hour
28

1 workday with normal breaks," (id.); and (6) "climb, balance, kneel
2 and crawl occasionally," (id.).

3
4 Both the state agency non-examining consultants, Dr. Pan and Dr.
5 Chiang, reviewed the record and concluded that Plaintiff was capable
6 of light work. (AR 60-64). The ALJ found these opinions to be
7 especially consistent with the evidence, and thus appropriately
8 adopted the more restrictive limitation in the RFC. (AR 449, 452);
9 see Thomas, 278 F.3d at 957 ("The opinions of non-treating or non-
10 examining physicians may also serve as substantial evidence when the
11 opinions are consistent with independent clinical findings or other
12 evidence in the record").

13
14 The Court finds that the ALJ properly rejected Dr. Glass's and
15 Dr. Goldstein's opinions by articulating specific and legitimate
16 reasons that are supported by substantial evidence in the record.

17
18 **B. The ALJ Did Not Err in Finding that Plaintiff's Impairments or**
19 **Combination of Impairments Did Not Meet or Equal Listing 1.04A**

20
21 If a claimant suffers a severe impairment, the ALJ is required
22 to decide whether the impairment meets or equals one of the listed
23 impairments. See 20 C.F.R. § 404.1520(c), (d); Marcia v. Sullivan,
24 900 F.2d 172, 174 (9th Cir. 1990). Disability is presumed if a
25 claimant's impairment or combination of impairments meets or is
26 medically equivalent to one of the listed impairments. Id. at 175;
27 20 C.F.R. § 404.1520(d); Bowen v. Yuckert, 482 U.S. 137, 141-42

1 (1987); Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001); Barker v.
2 Secretary of Health & Human Servs., 882 F.2d 1474, 1477 (9th Cir.
3 1989). An impairment meets a listed impairment if a claimant has "a
4 medically determinable impairment(s) that satisfies all of the
5 criteria of the listing." 20 C.F.R. § 404.1525(d); see also Sullivan
6 v. Zebley, 493 U.S. 521, 531 (1990). The criteria of a listed
7 impairment cannot be met solely based on a diagnosis. 20 C.F.R. §
8 404.1525(d); see also Key v. Heckler, 754 F.2d 1545, 1549-50 (9th
9 Cir. 1985). An impairment is "medically equivalent to a listed
10 impairment . . . if it is at least equal in severity and duration to
11 the criteria of any listed impairment." 20 C.F.R. § 404.1526(a);
12 Young v. Sullivan, 911 F.2d 180, 181 (9th Cir. 1990). If an
13 impairment is not described in the listed impairments, or if the
14 combination of impairments does not meet one of the listed
15 impairments, the determination of medical equivalence is based on a
16 comparison of findings (concerning a claimant) "with those for
17 closely analogous listed impairments." 20 C.F.R. § 404.1526(b)(2),
18 (3). The decision is based on "all evidence in [a claimant's] record
19 about [his or her] impairment(s) and its effect on [a claimant] that
20 is relevant to this finding" and on designated medical or
21 psychological consultants. 20 C.F.R. § 404.1526(c).

22
23 The ALJ stated that he "considered Listings 1.02 and 1.04" and
24 concluded that "[t]he evidence does not support a finding of the
25 criteria required to meet a listing." (AR 449). Neither of the
26 state agency reviewing physicians, Dr. Pan and Dr. Chiang, found that
27 Plaintiff met any of the Listings. (AR 62, 73).

1 Plaintiff claims that he met all the criteria for Listing 1.04A.
2 (Joint Stip. at 24-26). Listing 1.04 requires "[d]isorders of the
3 spine (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal
4 stenosis, osteoarthritis, degenerative disc disease, facet
5 arthristis, vertebral fracture), resulting in compromise of a nerve
6 root (including the cauda equina) or the spinal cord." 20 C.F.R. §
7 404, Subpart P, Appendix 1, Listing of Impairments 1.04. Further,
8 Listing 1.04A specifically requires: "Evidence of nerve root
9 compression characterized by neuro-anatomic distribution of pain,
10 limitation of motion of the spine, motor loss (atrophy with
11 associated muscle weakness or muscle weakness) accompanied by sensory
12 or reflex loss and, if there is involvement of the lower back,
13 positive straight-leg raising test (sitting and supine)." Id.

14
15 According to Plaintiff, the record establishes that he suffers
16 from "motor loss and weakness," as well as "sensory or reflex loss,"
17 among the other criteria in Listing 1.04A. (Id. at 2-3). However,
18 Dr. Ustaris found upon examination on August 30, 2011 that Plaintiff
19 has full motor strength and intact sensation. (AR 247). On April 1,
20 2014, orthopedic physician Leonel A. Hunt, M.D., examined Plaintiff
21 and observed "no gross motor or sensory deficits." (AR 660).

22
23 Plaintiff also claims he had a positive straight leg raising
24 test, as required to meet Listing 1.04A based on lower back
25 impairment. (Joint Stip. at 26). However, the ALJ reasonably
26 discounted the positive test due to an inconsistency in the record

1 suggesting that the positive test was not objectively valid. (AR
2 452). The ALJ stated:

3
4 The straight-leg raising test requires a subjective input
5 from [Plaintiff], and in this August 30, 2011 examination
6 [by consultative examiner Dr. Ustaris], [Plaintiff] claimed
7 pain during the test. Two months later, on October 31,
8 2011, [Plaintiff] did not complain of pain on straight-leg
9 raising test when examined by Dr. John Regan....

10
11 (AR 453; see AR 246 (Dr. Ustaris examination); AR 258 (Dr. Regan's
12 examination)).

13
14 Plaintiff has failed to set forth sufficient evidence showing
15 that his impairments met or equaled Listing 1.04. To the contrary,
16 substantial evidence in the record supports the ALJ's finding that
17 Plaintiff did not meet this Listing.

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

20
21 An ALJ's assessment of a claimant's credibility is entitled to
22 "great weight." See Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th
23 Cir. 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985).
24 "[T]he ALJ is not required to believe every allegation of disabling
25 pain, or else disability benefits would be available for the asking,
26 a result plainly contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v.
27 Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012). To determine whether a

1 claimant's testimony is credible, the ALJ engages in a two-step
2 analysis. Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir. 2014).

3
4 First, the claimant "must produce objective medical evidence of
5 an underlying impairment 'which could reasonably be expected to
6 produce the pain or other symptoms alleged.'" Bunnell v. Sullivan,
7 947 F.2d 341, 344 (9th Cir. 1991) (quoting 42 U.S.C.
8 § 423(d)(5)(A)(1988)). In producing evidence of the underlying
9 impairment, "the claimant need not produce objective medical evidence
10 of the pain or fatigue itself, or the severity thereof." Smolen v.
11 Chater, 80 F.3d 1273, 1282 (9th Cir. 1996). Instead, the claimant
12 "need only show that [the impairment] could reasonably have caused
13 some degree of the symptom." Id.

14
15 Second, once the claimant has produced the requisite objective
16 medical evidence, the "ALJ may reject the claimant's testimony
17 regarding the severity of her symptoms." Id. at 1284. Absent
18 affirmative evidence of malingering, however, the ALJ may reject a
19 plaintiff's testimony only "by offering specific, clear and
20 convincing reasons for doing so." Id. In assessing a claimant's
21 alleged symptoms, an ALJ may consider the following:

- 22
23 (1) ordinary techniques of credibility evaluation, such as
24 claimant's reputation for lying, prior inconsistent
25 statements concerning the symptoms, and other testimony by
26 the claimant that appears to be less than candid; (2)
27 unexplained or inadequately explained failure to seek

1 treatment or to follow a prescribed course of treatment;
2 and (3) the claimant's daily activities.

3
4 Id. An ALJ may also consider "the claimant's work record and
5 observations of treating and examining physicians and other third
6 parties." Id.

7
8 The ALJ's findings supporting the credibility determination must
9 be "sufficiently specific to permit the court to conclude that the
10 ALJ did not arbitrarily discredit claimant's testimony." Thomas v.
11 Barnhart, 278 F.3d 947, 958 (9th Cir. 2002) (citing Bunnell v.
12 Sullivan, 947 F.2d 341, 345-46 (9th Cir. 1991)). "If the ALJ's
13 credibility finding is supported by substantial evidence in the
14 record, we may not engage in second-guessing." Id. at 959; see also
15 Lasich v. Astrue, 252 F. App'x 823, 825 (9th Cir. 2007) (court will
16 defer to ALJ's credibility determination when the proper process is
17 used and proper reasons for the decision are provided).

18
19 Here, the ALJ examined the Administrative Record, heard
20 testimony from Plaintiff, and determined that Plaintiff had produced
21 objective medical evidence of underlying impairments that "could
22 reasonably be expected to cause some of the alleged symptoms." (AR
23 454). However, the ALJ concluded that Plaintiff's "statements
24 concerning the intensity, persistence and limiting effects of these
25 symptoms are not entirely consistent with the medical evidence and
26 other evidence in the record for the reasons explained in th[e]
27 decision." (Id.).

1 After consideration of the record as a whole, the Court finds
2 that the ALJ provided specific, clear and convincing reasons for
3 deeming Plaintiff's testimony about the limiting effects of his
4 symptoms less than fully credible. This included the ALJ's
5 observation that Plaintiff provided contradictory or exaggerated
6 statements, suggesting that he was less than candid. Plaintiff
7 testified, for example, that he had "worked every day for 30 years[,
8 f]our days a week, 10 hours a day," (AR 499), but the ALJ found that
9 this was exaggerated. (AR 450). The ALJ explained:

10
11 Going back thirty years before he last worked in 2011,
12 we begin with 1981 (See Exhibit 70). He had no earnings
13 that year, less than \$900 in 1982, and he apparently began
14 working as an employee of others in late 1982, and during
15 the following four years earned in the range of \$20,000 and
16 a little less. He then had no earnings in 1987 and 1988.
17 Apparently, he then started his self-employment in 1989.
18 He had low earnings in 1989 and 1990. He was capable of
19 making significant earnings, as he earned over \$49,000 in
20 1991 and over \$34,000 in 1992.

21
22 He did not work at all in 1993, and earned less than
23 \$11,000 in 1994. In 1995, he had his best year, earning
24 \$61,200. During the next five years, he earned an average
25 of just over \$1,000 a year; he had zero earnings in three
26 of the years, and very little in the other two years. In
27 2001, he had his last year of significant earnings,

1 \$49,526. He had low earnings during the next eight years,
2 2002 through 2009, and no earnings in 2010. In 2011, he
3 earned a little over \$2,000 and has not worked since. The
4 record supports his testimony that when he does not have to
5 work, he does not work, as his wife is a fully employed
6 attorney (Exhibit 7D).

7
8 (AR 451).

9
10 It is therefore clear that Plaintiff blatantly exaggerated his
11 work history, claiming he had "worked every day for 30 years[, f]our
12 days a week, 10 hours a day," (AR 499), when in fact there were years
13 when he worked very little or not at all. (See AR 499 (Plaintiff
14 stating at the hearing, "You know, my wife worked and so, many times
15 if I didn't have the work, I just wouldn't work.")) This is a
16 reasonable ground for discrediting Plaintiff's allegations.
17 Moreover, as the ALJ suggested, Plaintiff's fluctuating work history
18 demonstrates a lack of motivation to work. (AR 450). The ALJ
19 properly found this "a serious issue" to consider in weighing
20 Plaintiff's claims. See Thomas, 278 F.3d at 959 (affirming the ALJ's
21 credibility finding that rested in part on the claimant's spotty work
22 history that showed she had "little propensity to work in her
23 lifetime").

24
25 The ALJ also found inconsistencies in Plaintiff's statements
26 about his alleged poor concentration. The ALJ noted that at the
27 hearing Plaintiff attributed his poor concentration to pain, which

1 caused headaches. (AR 450; see AR 484 (hearing)). However, the ALJ
2 noted that this was inconsistent with an earlier statement of
3 Plaintiff's: "[O]n September 28, 2011, [Plaintiff] said the reason he
4 had difficulty concentrating was the side effects of red interferon
5 he was then taking for his hepatitis condition; he did not mention
6 headaches or neck pain." (AR 450 (citing Exhibit 1A, p. 4); see AR
7 59). The ALJ also noted that Plaintiff "was able to stay alert and
8 respond appropriately throughout" the forty-minute hearing. (Id.).

9
10 The ALJ's summary of Plaintiff's testimony highlights additional
11 contradictions. This includes Plaintiff's statements about past drug
12 use:

13
14 Years ago, he had experience with addiction. Asked his
15 drug of choice, he said it was marijuana in the 1960s. (He
16 told Fred Poordad, M.D., he had a twenty-five year history
17 of intravenous drug use (Exhibit 8F, p. 41)).

18
19 (AR 449; see AR 522 (2013 hearing); AR 493 (2016 hearing); AR 308
20 (Dr. Poordad's report)).⁶ It also includes testimony about
21 Plaintiff's traveling since his alleged onset date:

22
23 ⁶ In 2013, Plaintiff testified that he had a drug problem
24 thirty-three years ago, "back in the sixties," and his drug of choice
25 was marijuana. (AR 522). In 2016, he testified that he had no
26 history of alcohol or substance abuse. (AR 493). On August 1, 2006,
27 Dr. Poordad completed an outpatient consultation regarding
28 Plaintiff's hepatitis C, noting that Plaintiff acquired hepatitis C
"through IV drug abuse in the 1970's," but "since then, has been
abstinent of both IV drug use as well as alcohol." (AR 308).

1 He has done no traveling since March 31, 2011. He went to
2 his older daughter's school when she graduated. He had a
3 friend drive his motor home to Santa Cruz. Since March
4 2011, he took his motor home to a camping site in Ventura
5 for a weekend.

6
7 (AR 449; see AR 490-91, 494-95 (hearing)).⁷ The ALJ's account of the
8 testimony additionally highlights a contradiction regarding
9 Plaintiff's alleged inability to operate foot controls:

10
11 He is not able to push or pull with his legs. He is not
12 able to operate foot controls. He drives an automobile.

13
14 (AR 450; see AR 489, 492 (hearing)). Such contradictions underscore
15 the questionable veracity of Plaintiff's subjective complaints.

16
17 The ALJ also reasonably determined that the objective evidence
18 did not support the extent of Plaintiff's alleged limitations.
19 (Id.). While such evidence cannot be the "sole ground" for rejecting
20 subjective pain testimony, it "is still a relevant factor in

21
22 ⁷ The ALJ specifically asked Plaintiff if he has "done any
23 traveling to visit [his daughter] in college or go to the college at
24 all since the alleged onset date." (AR 490). The ALJ then asked if
25 he has "gone anywhere within the state of California, outside the
26 state of California, [or] outside the country, since March 31, 2011."
27 (AR 491). Plaintiff simply answered no to both questions. Later in
28 the hearing, however, Plaintiff revealed that he "recent[ly]" took
his motor home to Santa Cruz for his daughter's graduation (with a
friend driving) and also "to Thornbroom camping site on the beach in
Ventura." (AR 494-95). When asked about this inconsistency,
Plaintiff explained that he "just had forgotten." (AR 504).

1 determining the severity of the claimant's pain and its disabling
2 effects." Rollins v. Massanari, 261 F.3d 853, 856, 857 (9th Cir.
3 2001); see also Robbins v. Social Security Administration, 466 F.3d
4 880, 883 (9th Cir. 2006) (ALJ may cite the medical record in concert
5 with other factors in assessing a claimant's credibility). Here, in
6 particular, Dr. Ustaris's examination findings conflicted with
7 Plaintiff's complaints. (See AR 244-48). Dr. Ustaris found, for
8 example, that Plaintiff could "generate 40 pounds of force using the
9 right hand, and 35 pounds of force using the left hand." (AR 245).
10 He described Plaintiff as "alert, oriented, and not in acute
11 distress." (AR 246). Dr. Ustaris found Plaintiff could "lift and
12 carry 50 pounds occasionally and 25 pounds frequently"; "push and
13 pull on a frequent basis"; "walk and stand six hours out of an eight-
14 hour workday with normal breaks"; "sit six hours out of an eight-hour
15 workday with normal breaks"; and "climb, balance, kneel and crawl
16 occasionally." (AR 248).

17
18 Furthermore, the ALJ reasonably discounted Plaintiff's
19 credibility because the alleged severity of his pain conflicted with
20 his conservative pain treatment, including his decisions to stop
21 taking pain medications and postpone neck surgery for years. (AR
22 451). This is an appropriate basis on which to discredit Plaintiff's
23 complaints. See Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir.
24 2008) (ALJ may discount a claimant's credibility based on an
25 "unexplained or inadequately explained failure to seek treatment or
26 to follow a prescribed course of treatment"); Social Security Ruling
27 16-3p, 2016 WL 1119029, *9 (March 16, 2016) ("[I]f the frequency or
28

1 extent of the treatment sought by an individual is not comparable
2 with the degree of the individual's subjective complaints, or if the
3 individual fails to follow prescribed treatment that might improve
4 symptoms, we may find the alleged intensity and persistence of an
5 individual's symptoms are inconsistent with the overall evidence of
6 record."). Plaintiff testified that he is in "constant pain," (AR
7 483), which he rated as a six or seven out of ten, (AR 484), and
8 stated that the pain makes it difficult to sleep or concentrate and
9 is why he had to quit working in April 2011. (AR 484, 496, 498).
10 Despite the alleged debilitating pain, Plaintiff has stated that he
11 stopped taking pain medication in 2011 and takes only Aleve, an over-
12 the-counter drug, for the pain. (AR 410, 482).

13
14 Plaintiff contends that the ALJ failed to account for the
15 reasons why Plaintiff avoided pain medication and postponed surgery.
16 (Joint Stip. at 34). Plaintiff has offered different explanations
17 for these decisions. In a questionnaire dated October 27, 2011, he
18 indicated that he stopped taking pain medications because they gave
19 him "very little relief from pain." (AR 410). At the hearing on
20 July 12, 2016, Plaintiff stated that the decision was because he does
21 not want to "put anything in [his] liver," though he acknowledged
22 that his doctor never specifically directed him to avoid the
23 medication. (AR 482, 499). Plaintiff also stated that he did not
24 like the fact that the medications made him feel "incoherent and
25 loopy," and he was "unable to do hardly anything" when on them.⁸ (AR

26
27 ⁸ Similarly, at the earlier hearing before ALJ Burlison on
28 April 3, 2013, Plaintiff stated that he cannot take pain medication

1 500). As for the surgery, Plaintiff stated at the hearing that he
2 waited until July 2014 to undergo surgery on his neck - in which two
3 titanium discs were inserted and a bone spur was "ground off" -
4 because the procedure was "very expensive," and a "dear friend" who
5 is a neurosurgeon at UCLA advised him to wait until the available
6 technology for the procedure improved. (AR 500-01).

7
8 Even taking these explanations into account, the ALJ reasonably
9 determined that Plaintiff's conservative pain management decisions
10 undermined his allegations of constant, debilitating pain. Notably,
11 Plaintiff did not point to any treating physician's recommendation to
12 explain his decisions. Moreover, though he said the surgery was
13 "expensive" and he would have to "pay 20 percent of it," (AR 500-01),
14 he did not claim that he was unable to afford it.

15
16 The ALJ also reasonably determined that Plaintiff's activities
17 of daily living did not support his allegations of total disability.
18 (AR 450, 453). An ALJ may rely on a claimant's activities of daily
19 living to show not only that Plaintiff can perform work in accordance
20 with the RFC determination, but also to undermine Plaintiff's
21 credibility when such activities are inconsistent with Plaintiff's
22 subjective allegations of disability. See Molina, 674 F.3d at 1112-
23 13; Valentine v. Astrue, 574 F.3d 685, 693 (9th Cir. 2009). Here,

24
25 because he "tr[ies] to keep [his] liver as good as [he] possibly
26 can." (AR 48). He further stated, "[Pain medication] just makes me
27 completely - I'm sensitive to it, and I don't like it. It turns me
28 into incoherent [sic]. So I just don't take it." (Id.).

1 for example, the ALJ reasonably found that Plaintiff's daily reading
2 activity undermined his claim of poor concentration. (AR 450).
3 Plaintiff testified that in a typical eight-hour day, he can focus or
4 think clearly for only about four hours, or half the time. (AR 485).
5 However, as the ALJ noted, Plaintiff also stated that he "loves to
6 read" and "reads four or five hours a day, such as neuroscience and
7 Carl Jung, and he does research on the internet." (AR 450; see AR
8 491-92 (hearing)).

9
10 Plaintiff argues that his reading four or five hours a day is
11 consistent with his allegation that he can focus for about half of an
12 eight-hour workday. (Joint Stip. at 33-34). However, Plaintiff's
13 reading choices demand a heightened lucidity. His daily habit of
14 reading hours of dense texts for pleasure belies his claim of a
15 serious concentration deficit, and reasonably suggests an ability to
16 focus for more than half a workday. Moreover, to the extent that
17 Plaintiff claims pain is the cause of his concentration deficit, the
18 pain is clearly not so constant or overwhelming that it poses a
19 serious distraction.

20
21 In addition, the ALJ found Plaintiff's alleged physical
22 limitations inconsistent with his activities that apparently included
23 "lifting a kayak full of water." (AR 258, 453). As noted above with
24 respect to the first issue, a treatment note signed by Dr. Regan on
25 October 31, 2011 states that Plaintiff "had a popped [sic] in his
26 back in lifting a kayak full of water recently." (AR 258). The ALJ

