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

DANIEL MARTIN GALLUCCIO,  
  
Plaintiff,  
  
v.  
  
NANCY A. BERRYHILL,<sup>1</sup> Acting  
Commissioner of Social  
Security,  
  
Defendant.

CASE NO. CV 17-0409 SS

**MEMORANDUM DECISION AND ORDER**

**I.  
INTRODUCTION**

Daniel Martin Galluccio ("Plaintiff") brings this action seeking to overturn the decision of the Acting Commissioner of Social Security (the "Commissioner" or "Agency") denying his applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). The parties consented,

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<sup>1</sup> Nancy A. Berryhill, Acting Commissioner of Social Security, is substituted for her predecessor Carolyn W. Colvin, whom Plaintiff named in the Complaint. See 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d).

1 pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the  
2 undersigned United States Magistrate Judge. (Dkt. Nos. 7, 12, 13).  
3 For the reasons stated below, the Court AFFIRMS the Commissioner's  
4 decision.

5  
6 **II.**

7 **PROCEDURAL HISTORY**

8  
9 On January 15, 2013, Plaintiff filed applications for  
10 Disability Insurance Benefits ("DIB") and Supplemental Security  
11 Income ("SSI") pursuant to Titles II and XVI of the Social Security  
12 Act alleging a disability onset date of January 31, 2013. (AR 194-  
13 201). The Commissioner denied Plaintiff's applications initially  
14 and on reconsideration. (AR 97-101, 106-11). Thereafter,  
15 Plaintiff requested a hearing before an Administrative Law Judge  
16 ("ALJ") (AR 120-22), which took place on June 18, 2015 (AR 29-52).  
17 The ALJ issued an adverse decision on July 16, 2015, finding that  
18 Plaintiff was not disabled because he could perform his past  
19 relevant work. (AR 15-23). On December 5, 2016, the Appeals  
20 Council denied Plaintiff's request for review. (AR 1-8). This  
21 action followed on January 18, 2017.

22  
23 **III.**

24 **FACTUAL BACKGROUND**

25  
26 Plaintiff was born on September 21, 1952. (AR 31, 194, 196).  
27 He was sixty-two years old when he appeared before the ALJ on June  
28 18, 2015. (AR 15). Plaintiff has a college degree. (AR 33). He

1 is married and lives with his wife. (AR 266). Plaintiff previously  
2 worked as a sales representative. (AR 21-22). He alleges  
3 disability due to: sleep apnea, asthma, obesity, high blood  
4 pressure, limited range of motion, scoliosis, arthritis, partial  
5 deafness in left ear, and depression. (AR 266).

6  
7 **A. Plaintiff's Testimony**

8  
9 Plaintiff testified that he is unable to work because of  
10 fatigue and an inability to focus. (AR 39, 48). Because of back  
11 and hip pain, Plaintiff is unable to sit for more than thirty  
12 minutes before needing to walk around. (AR 35-36, 39-41). He can  
13 walk for only four to five blocks before needing to rest. (AR 36,  
14 44). Plaintiff also has difficulty bending and stooping. (AR 36).  
15 Because of his sleep apnea, he gets only four to five hours of  
16 interrupted sleep. (AR 37, 47). Plaintiff's edema causes swelling  
17 in both feet, which he can alleviate by raising his legs. (AR 42).

18  
19 During a typical day, Plaintiff testified that he uses the  
20 computer and reads. (AR 39). He can make his own breakfast and  
21 is sometimes able to walk the dog. (AR 39). Despite his monocular  
22 vision, Plaintiff is able to drive. (AR 38-39).

23  
24 **B. Plaintiff's Statements**

25  
26 Plaintiff completed an Adult Function Report on May 5, 2013.  
27 (AR 266-74). He asserted that he is unable to work due to lethargy  
28 and weakness from his sleep apnea and asthma. (AR 266). He suffers

1 from continuous back pain and limited range of motion due to  
2 scoliosis and arthritis. (AR 266). He is able to make breakfast,  
3 walk the dog, take out the trash, and do laundry and dishes, but  
4 has difficulty tying his shoes. (AR 267-68). He is able to shop  
5 for groceries, prescriptions and household goods and attends church  
6 on a regular basis. (AR 269-70). While Plaintiff asserts that  
7 his physical impairments affect his ability to lift, squat, bend,  
8 stand, reach, walk, sit, kneel, climb and hear, he is able to lift  
9 forty to fifty pounds and can walk one-half mile before needing to  
10 rest. (AR 271).

11  
12 Plaintiff completed a Pain Questionnaire on May 6, 2013. (AR  
13 277-79). He described suffering daily from dull to sharp pain in  
14 his back that sometimes spreads to his shoulder and hip. (AR 277).  
15 The pain is somewhat relieved by Advil or Motrin. (AR 277).  
16 Stretching and vibrating massages are also helpful in relieving  
17 the pain. (AR 278). Plaintiff has difficulty picking things up  
18 but can do errands, such as the grocery shopping, and use public  
19 transportation without assistance. (AR 279). He can lift up to  
20 forty pounds, walk less than a mile, stand five to ten minutes at  
21 a time, and sit fifteen to twenty minutes at a time. (AR 279).  
22 Plaintiff also completed an Adult Asthma Questionnaire. (AR 280-  
23 82). He asserted having monthly asthma attacks but denied and  
24 emergency room visits or hospitalizations for his asthma. (AR  
25 281).

1 **C. Plaintiff's Spouse's Statement**

2  
3 On May 5, 2013, Idamary Galluccio, Plaintiff's spouse,  
4 completed a Third Party Function Report. (AR 257-65). She asserted  
5 that Plaintiff often dozes off and has trouble concentrating. (AR  
6 257). He cannot sit for long periods. (AR 261). His physical  
7 impairments affect his ability to lift, squat, bend, stand, walk,  
8 sit, kneel, hear, climb and concentrate. (AR 262).

9  
10 Plaintiff is able to dress, bathe, care for hair, shave,  
11 feed himself and use the toilet without assistance. (AR 258). He  
12 also performs household chores, including preparing meals, doing  
13 laundry and dishes, walking the dog, shopping for groceries and  
14 taking out trash, on a regular basis. (AR 258-60). Plaintiff is  
15 able to walk, drive and use public transportation on his own. (AR  
16 260). He attends church and the senior clubhouse on a regular basis  
17 without assistance. (AR 261).

18  
19 **D. Treatment History**

20  
21 In March 2010, Plaintiff was diagnosed with severe sleep  
22 apnea, causing fatigue and depression. (AR 395); (see also AR 437)  
23 (A sleep study performed in February 2014 concluded that Plaintiff  
24 has "severe, non-positional obstructive sleep apnea."). In May  
25  
26  
27  
28

1 2010, Plaintiff reported increased energy and less fatigue while  
2 using a CPAP machine.<sup>2</sup> (AR 396).

3  
4 On May 11, 2011, Plaintiff complained of pain in his right  
5 hip, right knee, lower back and right shoulder. (AR 393). On  
6 examination, Michael A. Samuelson, M.D., found full active range  
7 of motion with no tenderness in Plaintiff's right shoulder, full  
8 range of motion with no tenderness or swelling in the right knee,  
9 and limited range of motion in the right hip. (AR 393). Dr.  
10 Samuelson also found decreased range of motion secondary to pain  
11 in the lumbar spine. (AR 393). Nevertheless, a straight leg raise  
12 was negative with normal sensation throughout the lower  
13 extremities, and Plaintiff had full strength in his quadriceps,  
14 extensor hallucis longus,<sup>3</sup> and gastro soleus.<sup>4</sup> (AR 393). Plaintiff  
15 ambulated with a slow, guarded gait. (AR 393). X-rays indicated  
16 right hip moderate arthritis, minimal arthritic changes in the  
17 lumbar spine and knees, and a normal right shoulder. (AR 393).  
18 Dr. Samuelson assessed bilateral knee and right hip osteoarthritis,  
19 lumbar degenerative disc disease and right shoulder impingement.

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20 <sup>22</sup> "Continuous positive airway pressure (CPAP) therapy is a common  
21 treatment for obstructive sleep apnea. A CPAP machine uses a hose and  
22 mask or nosepiece to deliver constant and steady air pressure."  
<[https://www.mayoclinic.org/diseases-conditions/sleep-apnea/in-  
depth/cpap/art-20044164](https://www.mayoclinic.org/diseases-conditions/sleep-apnea/in-depth/cpap/art-20044164)> (last visited Nov. 29, 2017).

23 <sup>3</sup> "The extensor hallucis longus muscle extends the foot's big toe."  
24 <[https://www.healthline.com/human-body-maps/extensor-hallucis-longus-  
muscle](https://www.healthline.com/human-body-maps/extensor-hallucis-longus-muscle)> (last visited Nov. 29, 2017).

25 <sup>4</sup> The gastro soleus is one of several muscles that flex the leg at the  
26 knee "in addition to assisting propulsion and stabilisation [sic] during  
27 the actions of walking, running and jumping."  
<<http://www.musclesused.com/gastrocnemius-soleus-calf-muscles/>> (last  
28 visited Nov. 29, 2017).

1 (AR 393). He recommended that Plaintiff undergo a lap band  
2 procedure to address Plaintiff's obesity. (AR 393).

3  
4 On January 9, 2013, Plaintiff complained of back pain, leg  
5 swelling and insomnia. (AR 312). Jimmy Soliman, M.D., diagnosed  
6 sleep apnea, morbid obesity, scoliosis, degenerative joint disease,  
7 asthma and leg edema. (AR 312). Dr. Soliman increased Plaintiff's  
8 Maxide<sup>5</sup> dosage and recommended regular exercise, leg elevation and  
9 weight loss. (AR 313).

10  
11 On June 1, 2013, John Sedgh, M.D., reviewed the medical record  
12 and performed an internal medicine consultative examination on  
13 behalf of the Agency. (AR 414-19). Plaintiff reported that his  
14 sleep apnea is improved with the use of a CPAP machine, although  
15 he still experiences some sleepiness during the day. (AR 414).  
16 He uses an inhaler for his asthma but experiences shortness of  
17 breath after walking a couple blocks. (AR 414). Plaintiff  
18 complained of pain in his mid to lower back with radiation to his  
19 hip but denied needing an assistive device. (AR 414).

20  
21 On examination, Dr. Sedgh found normal range of motion in the  
22 cervical spine, shoulders, elbows, wrists, hips, knees and ankles.  
23 (AR 416-17). The range of motion in the lumbar spine was limited  
24 with flexion at 65/90 degrees, extension 15/30 degrees and lateral  
25 flexion at 20/30 degrees. (AR 416). A straight-leg-raising test

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26 <sup>5</sup> Maxide, a common misspelling of Maxzide (hydrochlorothiazide), "is used  
27 to treat fluid retention (edema) and high blood pressure (hypertension)."  
28 <<http://www.musclesused.com/gastrocnemius-soleus-calf-muscles/>> (last  
visited Nov. 29, 2017).

1 was negative. (AR 416). Plaintiff had full motor strength in all  
2 extremities but mild to moderate edema in his lower extremities.  
3 (AR 417). Dr. Sedgh's clinical impression included hypertension,  
4 sleep apnea, asthma, scoliosis of the back and hearing loss. (AR  
5 418). He opined that Plaintiff is capable of performing a range  
6 of work at the medium exertional level subject to environmental  
7 and postural restrictions. (AR 418). Plaintiff's kneeling,  
8 crouching and stooping should be limited to frequent. (AR 418).

9  
10 On July 23, 2013, V. Phillips, M.D., a nonexamining state  
11 agency consultant, reviewed the medical record and completed a  
12 Disability Determination Explanation statement. (AR 53-64). Dr.  
13 Phillips concluded that Plaintiff is capable of performing a  
14 limited range of medium work. (AR 61-62). Plaintiff is limited  
15 to frequent climbing, balancing, stooping, kneeling, crouching and  
16 crawling and should avoid concentrated exposure to extreme cold  
17 and extreme heat. (AR 62). On December 2, 2013, B. Vaghaiwalla,  
18 M.D., another nonexamining state agency consultant, affirmed Dr.  
19 Phillips's findings. (AR 79-86).

20  
21 Farhad Contractor, M.D. performed X-rays of Plaintiff's  
22 thoracic and lumbar spine on May 2, 2014. (AR 457-58). The X-  
23 rays revealed degenerative and arthritic changes at L5-S1 and  
24 degenerative changes at T12-L1, with no nerve impact evident. (AR  
25 457-58). Dr. Contractor's clinical impression included  
26 degenerative disc disease, lumbar spondylosis, facet arthritis at  
27 L5-S1 and rotatory scoliosis due to muscle spasm. (AR 458).



1 Primary care records during May and June 2014 indicated no  
2 significant functional limitations and conservative treatment. (AR  
3 440-52). On May 30 and June 12, 2014, Plaintiff denied fatigue,  
4 joint pain, joint swelling, muscle pain, muscular weakness, limited  
5 range of motion and muscle cramps. (AR 445, 447).  
6

7 On December 17, 2014, Gerald W. Cara, M.D., conducted an  
8 orthopedic examination. (AR 460). Plaintiff complained of lumbar  
9 spine pain and stated that he has sleep apnea. (AR 460). On  
10 examination, Dr. Cara found Plaintiff to be morbidly obese, with  
11 marked restriction of motion in the lumbar spine, pitting edema in  
12 the lower extremities and areflexic deep tendon reflexes. (AR  
13 460). Dr. Cara recommended that Plaintiff be further evaluated  
14 with an MRI study. (AR 460). On January 15, 2015, Patricia  
15 Kincaid, M.D., performed an MRI of Plaintiff's lumbar spine. (AR  
16 461-62). Dr. Kincaid's clinical impression included mild-to-  
17 moderate degenerative changes at L4-S1, with 2-3mm disc protrusions  
18 causing mild canal stenosis and minimal foraminal narrowing. (AR  
19 462). On the basis of the MRI study, Dr. Cara recommended that  
20 Plaintiff be referred to a spine surgeon (AR 459), but the record  
21 documents no further treatment.  
22

#### 23 IV.

#### 24 THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS

25

26 To qualify for disability benefits, a claimant must  
27 demonstrate a medically determinable physical or mental impairment  
28 that prevents the claimant from engaging in substantial gainful

1 activity and that is expected to result in death or to last for a  
2 continuous period of at least twelve months. Reddick v. Chater,  
3 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)).  
4 The impairment must render the claimant incapable of performing  
5 work previously performed or any other substantial gainful  
6 employment that exists in the national economy. Tackett v. Apfel,  
7 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.  
8 § 423(d)(2)(A)).

9  
10 To decide if a claimant is entitled to benefits, an ALJ  
11 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The  
12 steps are:

- 13  
14 (1) Is the claimant presently engaged in substantial gainful  
15 activity? If so, the claimant is found not disabled. If  
16 not, proceed to step two.
- 17 (2) Is the claimant's impairment severe? If not, the  
18 claimant is found not disabled. If so, proceed to step  
19 three.
- 20 (3) Does the claimant's impairment meet or equal one of the  
21 specific impairments described in 20 C.F.R. Part 404,  
22 Subpart P, Appendix 1? If so, the claimant is found  
23 disabled. If not, proceed to step four.
- 24 (4) Is the claimant capable of performing his past work? If  
25 so, the claimant is found not disabled. If not, proceed  
26 to step five.

1 (5) Is the claimant able to do any other work? If not, the  
2 claimant is found disabled. If so, the claimant is found  
3 not disabled.  
4

5 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,  
6 262 F.3d 949, 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-  
7 (g) (1), 416.920(b)-(g) (1).  
8

9 The claimant has the burden of proof at steps one through four  
10 and the Commissioner has the burden of proof at step five.  
11 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an  
12 affirmative duty to assist the claimant in developing the record  
13 at every step of the inquiry. Id. at 954. If, at step four, the  
14 claimant meets his or her burden of establishing an inability to  
15 perform past work, the Commissioner must show that the claimant  
16 can perform some other work that exists in "significant numbers"  
17 in the national economy, taking into account the claimant's  
18 residual functional capacity ("RFC"), age, education, and work  
19 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at  
20 721; 20 C.F.R. §§ 404.1520(g) (1), 416.920(g) (1). The Commissioner  
21 may do so by the testimony of a VE or by reference to the Medical-  
22 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,  
23 Appendix 2 (commonly known as "the grids"). Osenbrock v. Apfel,  
24 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both  
25 exertional (strength-related) and non-exertional limitations, the  
26 Grids are inapplicable and the ALJ must take the testimony of a  
27 vocational expert ("VE"). Moore v. Apfel, 216 F.3d 864, 869 (9th  
28

1 Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir.  
2 1988)).

3  
4 **V.**

5 **THE ALJ'S DECISION**

6  
7 The ALJ employed the five-step sequential evaluation process  
8 and concluded that Plaintiff was not disabled within the meaning  
9 of the Social Security Act. (AR 22). At step one, the ALJ found  
10 that Plaintiff met the insured status requirements through  
11 September 30, 2017, and had not engaged in substantial gainful  
12 activity since January 31, 2010, the alleged disability onset date.  
13 (AR 16). At step two, the ALJ found that Plaintiff's lumbar  
14 spondylosis, herniated discs at L4-5 and L5-S1 with stenosis,  
15 morbid obesity, obstructive sleep apnea, hypertension, asthma and  
16 loss of vision in the right eye are severe impairments. (AR 18).  
17 At step three, the ALJ determined that Plaintiff does not have an  
18 impairment or combination of impairments that meet or medically  
19 equal the severity of any of the listings enumerated in the  
20 regulations. (AR 19).

21  
22 The ALJ then assessed Plaintiff's RFC and concluded that he  
23 can perform light work, as defined in 20 C.F.R. §§ 404.1567(b) and  
24 416.967(b),<sup>6</sup> except:

25  
26 \_\_\_\_\_  
27 <sup>6</sup> "Light work involves lifting no more than 20 pounds at a time with  
28 frequent lifting or carrying of objects weighing up to 10 pounds. Even  
though the weight lifted may be very little, a job is in this category  
when it requires a good deal of walking or standing, or when it involves  
sitting most of the time with some pushing and pulling of arm or leg

1 [Plaintiff] can stand and/or walk for six hours, and sit  
2 for six hours, in an eight-hour workday with normal  
3 breaks; can perform occasional postural maneuvers;  
4 cannot climb ladders, ropes or scaffolds; cannot crawl;  
5 and should have no exposure to dangerous machinery,  
6 unprotected heights, dusts, fumes, or extremes of heat  
7 or cold. [Plaintiff] is additionally limited to the  
8 performance of jobs requiring only monocular vision.

9  
10 (AR 19). At step four, the ALJ found that Plaintiff was capable  
11 of performing his past relevant work as a sales representative,  
12 which does not require the performance of work-related activities  
13 precluded by Plaintiff's RFC. (AR 21). Accordingly, the ALJ found  
14 that Plaintiff was not under a disability as defined by the Social  
15 Security Act from January 31, 2010, through the date of the ALJ's  
16 decision. (AR 22).

## 17 18 VI.

### 19 STANDARD OF REVIEW

20  
21 Under 42 U.S.C. § 405(g), a district court may review the  
22 Commissioner's decision to deny benefits. "[The] court may set  
23 aside the Commissioner's denial of benefits when the ALJ's findings  
24 are based on legal error or are not supported by substantial  
25 evidence in the record as a whole." Aukland v. Massanari, 257 F.3d

26  
27 \_\_\_\_\_  
28 controls. To be considered capable of performing a full or wide range  
of light work, you must have the ability to do substantially all of these  
activities." 20 C.F.R. §§ 404.1567(b), 416.967(b).

1 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1097); see  
2 also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing  
3 Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

4  
5 "Substantial evidence is more than a scintilla, but less than  
6 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.  
7 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant  
8 evidence which a reasonable person might accept as adequate to  
9 support a conclusion." (Id.). To determine whether substantial  
10 evidence supports a finding, the court must "'consider the record  
11 as a whole, weighing both evidence that supports and evidence that  
12 detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d  
13 at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.  
14 1993)). If the evidence can reasonably support either affirming  
15 or reversing that conclusion, the court may not substitute its  
16 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-  
17 21 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,  
18 1457 (9th Cir. 1995)).

19  
20 **VII.**

21 **DISCUSSION**

22  
23 Plaintiff contends that the ALJ erred for the following three  
24 reasons: (1) the ALJ erred in rejecting Plaintiff's testimony  
25 regarding his subjective symptoms and functional limitations; (2)  
26 the ALJ erred in the determination of Plaintiff's RFC; and (3) the  
27 ALJ erred in relying on the VE's response to the ALJ's incomplete  
28 hypothetical question. (Dkt. No. 21 at 2-14).

1 **A. The ALJ's Reasons for Discrediting Plaintiff's Subjective**  
2 **Symptom Testimony Were Specific, Clear and Convincing**

3  
4 Plaintiff asserted that he is unable to work due to lethargy  
5 and weakness from his sleep apnea and asthma. (AR 266). He suffers  
6 from continuous back pain and has limited range of motion due to  
7 his scoliosis and arthritis. (AR 266, 277). Plaintiff testified  
8 that because of his back and hip pain, he is unable to sit for more  
9 than thirty minutes before needing to move around. (AR 35-36, 39-  
10 41; see id. 279). He can walk for only four to five blocks before  
11 needing to rest. (AR 36, 44; see id. 271). He has difficulty  
12 bending, stooping and picking things up. (AR 36, 271, 279). The  
13 ALJ found Plaintiff's statements "not entirely credible insofar as  
14 they are not corroborated by the medical evidence of record and  
15 [Plaintiff's] reported and demonstrated activity level." (AR 20).

16  
17 **1. Standards**

18  
19 When assessing a claimant's credibility regarding subjective  
20 pain or intensity of symptoms, the ALJ must engage in a two-step  
21 analysis. Trevizo v. Berryhill, 874 F.3d 664, 678 (9th Cir. 2017).  
22 First, the ALJ must determine if there is medical evidence of an  
23 impairment that could reasonably produce the symptoms alleged.  
24 Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir. 2014). "In this  
25 analysis, the claimant is not required to show that her impairment  
26 could reasonably be expected to cause the severity of the symptom  
27 she has alleged; she need only show that it could reasonably have  
28 caused some degree of the symptom." Id. (emphasis in original)

1 (citation omitted). "Nor must a claimant produce objective medical  
2 evidence of the pain or fatigue itself, or the severity thereof."  
3 Id. (citation omitted).

4  
5 If the claimant satisfies this first step, and there is no  
6 evidence of malingering, the ALJ must provide specific, clear and  
7 convincing reasons for rejecting the claimant's testimony about  
8 the symptom severity. Trevizo, 874 F.3d at 678 (citation omitted);  
9 see also Smolen, 80 F.3d at 1284 ("[T]he ALJ may reject the  
10 claimant's testimony regarding the severity of her symptoms only  
11 if he makes specific findings stating clear and convincing reasons  
12 for doing so."); Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883  
13 (9th Cir. 2006) ("[U]nless an ALJ makes a finding of malingering  
14 based on affirmative evidence thereof, he or she may only find an  
15 applicant not credible by making specific findings as to  
16 credibility and stating clear and convincing reasons for each.").  
17 "This is not an easy requirement to meet: The clear and convincing  
18 standard is the most demanding required in Social Security cases."  
19 Garrison, 759 F.3d at 1015 (citation omitted).

20  
21 In discrediting the claimant's subjective symptom testimony,  
22 the ALJ may consider the following:

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



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

4  
5 Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014) (citation  
6 omitted). Inconsistencies between a claimant's testimony and  
7 conduct, or internal contradictions in the claimant's testimony,  
8 also may be relevant. Burrell v. Colvin, 775 F.3d 1133, 1137 (9th  
9 Cir. 2014); Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.  
10 1997). In addition, the ALJ may consider the observations of  
11 treating and examining physicians regarding, among other matters,  
12 the functional restrictions caused by the claimant's symptoms.  
13 Smolen, 80 F.3d at 1284; accord Burrell, 775 F.3d at 1137. However,  
14 it is improper for an ALJ to reject subjective testimony based  
15 "solely" on its inconsistencies with the objective medical evidence  
16 presented. Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1227  
17 (9th Cir. 2009) (citation omitted).

18  
19 Further, the ALJ must make a credibility determination with  
20 findings that are "sufficiently specific to permit the court to  
21 conclude that the ALJ did not arbitrarily discredit claimant's  
22 testimony." Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir.  
23 2008) (citation omitted); see Brown-Hunter v. Colvin, 806 F.3d 487,  
24 493 (9th Cir. 2015) ("A finding that a claimant's testimony is not  
25 credible must be sufficiently specific to allow a reviewing court  
26 to conclude the adjudicator rejected the claimant's testimony on  
27 permissible grounds and did not arbitrarily discredit a claimant's  
28 testimony regarding pain.") (citation omitted). Although an ALJ's

1 interpretation of a claimant's testimony may not be the only  
2 reasonable one, if it is supported by substantial evidence, "it is  
3 not [the court's] role to second-guess it." Rollins v. Massanari,  
4 261 F.3d 853, 857 (9th Cir. 2001).

5  
6 **2. Factors Supporting The ALJ's Adverse Credibility**  
7 **Determination**

8  
9 The ALJ provided two specific, clear and convincing reasons  
10 to find Plaintiff's complaints of difficulties with maneuvering  
11 and exertion not entirely credible. (AR 20-21). These reasons  
12 are sufficient to support the Commissioner's decision.

13  
14 a. Reported Symptoms Not Corroborated By Medical  
15 Record

16  
17 The ALJ found Plaintiff not entirely credible because his  
18 reported symptoms were not corroborated by the medical evidence of  
19 record. (AR 20). The ALJ identified multiple medical records with  
20 sufficient specificity that contradicted Plaintiff's allegations  
21 of significant difficulties with maneuvering and exertion. (AR 20-  
22 21).

23  
24 First, the ALJ found that Plaintiff's medical care was limited  
25 and intermittent. (AR 20). An "unexplained, or inadequately  
26 explained, failure to seek treatment may be the basis for an adverse  
27 credibility finding." Orn v. Astrue, 495 F.3d 625, 638 (9th Cir.  
28

1 2007) (citation omitted); Social Security Ruling ("SSR") 16-3p,<sup>7</sup>  
2 at \*9 (S.S.A. Oct. 25, 2017) ("if the frequency or extent of the  
3 treatment sought by an individual is not comparable with the degree  
4 of the individual's subjective complaints, . . . [the Agency] may  
5 find the alleged intensity and persistence of an individual's  
6 symptoms are inconsistent with the overall evidence of record").  
7 While Plaintiff alleges an onset of disability as of January 1,  
8 2010, the medical record is sparse prior to May 2011. (AR 20; see  
9 generally id. 309-462). Moreover, the ALJ noted significant gaps  
10 in Plaintiff's medical record. (AR 20-21) (no significant  
11 treatment records between May 2011 and January 2013, between June  
12 2014 and January 2015, and after January 2015). While Plaintiff  
13 identifies a single October 2012 medical record (Dkt. No. 21 at  
14 4), this record appears to be no more than a routine physical  
15 examination. (AR 309-11).

16  
17 Second, the ALJ found inconsistencies between Plaintiff's  
18 testimony and the objective medical evidence. (AR 20-21).  
19 "Contradiction with the medical record is a sufficient basis for  
20 rejecting the claimant's subjective testimony." Carmickle v.  
21 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1161 (9th Cir. 2008); see  
22 SSR 16-3p, at \*5 ("objective medical evidence is a useful indicator  
23 to help make reasonable conclusions about the intensity and  
24 persistence of symptoms, including the effects those symptoms may

---

25  
26 <sup>7</sup> Social Security Rulings (SSRs) "do not carry the 'force of law,' but  
27 they are binding on ALJs nonetheless." Bray, 554 F.3d at 1224. They  
28 "reflect the official interpretation of the [Agency] and are entitled to  
some deference as long as they are consistent with the Social Security  
Act and regulations." Id. (citation omitted).

1 have on the ability to perform work-related activities"). While a  
2 May 2011 orthopedic examination found decreased range of motion in  
3 Plaintiff's lumbar spine and right hip, he had full range of motion  
4 in his right shoulder and right knee. (AR 20) (citing id. 393).  
5 Further, a straight-leg-raising test was negative and Plaintiff  
6 had full strength in his lower extremities. (AR 393). In a June  
7 2013 examination, Plaintiff was in no acute distress, and he  
8 demonstrated adequate gait and maneuvering ability. (AR 20)  
9 (citing id. 416-18). While Plaintiff had reduced range of motion  
10 in his lumbar spine, he had full range of motion in his cervical  
11 spine, shoulders, elbows, wrists, hips, knees and ankles and a  
12 straight-leg-raising test was negative. (AR 416-17). Moreover,  
13 primary care records during May and June 2014 indicated that  
14 Plaintiff had no significant functional limitations. (AR 21)  
15 (citing id. 440-52). Indeed, during those visits, Plaintiff denied  
16 fatigue, joint pain or swelling, muscle pain, cramps or weakness,  
17 and limited range of motion. (AR 445, 447).

18  
19 Plaintiff contends that the ALJ "cited to isolated pieces of  
20 evidence, . . . yet failed to consider that the objective medical  
21 evidence of record supported Plaintiff's testimony regarding his  
22 subjective symptoms and functional limitations." (Dkt. No. 21 at  
23 7-8). However, in support of this assertion, Plaintiff merely  
24 reiterates that he was diagnosed with morbid obesity, severe  
25 obstructive sleep apnea, degenerative disc disease, severe lumbar  
26 spondylosis, stenosis and edema. (Id. at 7, 8-9). Other than  
27 edema, the ALJ found all of these impairments to be severe. (AR  
28 18). Plaintiff fails to identify any objective evidence, including

1 physical examination findings or diagnostic tests, that contradicts  
2 the evidence cited by the ALJ.

3  
4 Plaintiff also contends that it was "improper for the ALJ to  
5 discredit Plaintiff's testimony based merely on a lack of  
6 corroborating objective evidence." (Dkt. No. 21 at 8). While the  
7 ALJ "may not reject a claimant's subjective complaints based solely  
8 on a lack of objective medical evidence to fully corroborate the  
9 claimant's allegations," Bray, 554 F.3d at 1227, the ALJ "must  
10 consider whether an individual's statements about the intensity,  
11 persistence, and limiting effects of his or her symptoms are  
12 consistent with the medical signs and laboratory findings of  
13 record," SSR 16-3p, at \*5 (emphasis added). Here, the ALJ did not  
14 reject Plaintiff's subjective symptoms because of a lack of  
15 evidence to support Plaintiff's allegations. Instead, the ALJ  
16 discredited Plaintiff's statements because they are inconsistent  
17 with the medical signs and laboratory findings in the record.

18  
19 Finally, the ALJ noted Plaintiff's conservative treatment  
20 history. (AR 20-21). The Ninth Circuit has concluded that  
21 "evidence of conservative treatment is sufficient to discount a  
22 claimant's testimony regarding severity of an impairment." Parra  
23 v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (citation omitted);  
24 see Tommasetti, 553 F.3d at 1039-40 (ALJ may properly infer that  
25 claimant's pain "was not as all-disabling as he reported in light  
26 of the fact that he did not seek an aggressive treatment program"  
27 and "responded favorably to conservative treatment"); Meanel v.  
28 Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999), as amended (June 22,

1 1999) (“Meanel’s claim that she experienced pain approaching the  
2 highest level imaginable was inconsistent with the ‘minimal,  
3 conservative treatment’ that she received.”). In May 2011,  
4 Plaintiff’s orthopedic surgeon recommended only that Plaintiff  
5 consider lap band surgery. (AR 20) (citing id. 393). In June  
6 2013, Plaintiff’s primary care doctor merely increased Plaintiff’s  
7 edema medication and recommended regular exercise and weight loss.  
8 (AR 20) (citing id. 313). While an orthopedic surgeon in January  
9 2015 recommended that Plaintiff be evaluated by a spine surgeon,  
10 the record reflects no further treatment. (AR 21) (citing id.  
11 459). “A claimant’s subjective symptom testimony may be undermined  
12 by an unexplained, or inadequately explained, failure to follow a  
13 prescribed course of treatment.” Trevizo, 871 F.3d at 679  
14 (citation and alterations omitted).

15  
16 The ALJ properly could find, on the basis of Plaintiff’s  
17 inconsistent and conservative treatment history, that Plaintiff’s  
18 testimony and statements regarding his difficulties with  
19 maneuvering and exertion were not entirely credible.

20  
21 b. Reported Symptoms Inconsistent With Demonstrated  
22 Activity Level

23  
24 The ALJ also found Plaintiff not entirely credible because  
25 his reported symptoms were inconsistent with his acknowledged daily  
26 activities. “ALJs must be especially cautious in concluding that  
27 daily activities are inconsistent with testimony about pain,  
28 because impairments that would unquestionably preclude work and

1 all the pressures of a workplace environment will often be  
2 consistent with doing more than merely resting in bed all day.”  
3 Garrison, 759 F.3d at 1016. Nevertheless, an ALJ properly may  
4 consider the claimant’s daily activities in weighing credibility.  
5 Tommasetti, 533 F.3d at 1039. If a claimant’s level of activity  
6 is inconsistent with the claimant’s asserted limitations, it has a  
7 bearing on credibility. Garrison, 759 F.3d at 1016.

8  
9 Here, the ALJ determined that despite Plaintiff’s alleged  
10 disabling difficulties with maneuvering and exertion, he  
11 acknowledged engaging in daily activities, including self-care,  
12 housework, errands and social and leisure activities that were  
13 inconsistent with his alleged disabilities. (AR 20). Plaintiff  
14 testified that he walks his dog and is able to drive. (AR 38-39).  
15 He is able to make breakfast, take out the trash, do laundry and  
16 dishes. (AR 267-68). He shops for groceries, prescriptions and  
17 household goods, attends church on a regular basis and is able to  
18 use public transportation. (AR 269-70, 279). The discrepancy  
19 between Plaintiff’s alleged disabilities and his daily activities  
20 supports the ALJ’s determination that Plaintiff is not entirely  
21 credible.

22  
23 Plaintiff contends that the ALJ “did not elaborate on which  
24 specific activities conflicted with which part of Plaintiff’s  
25 testimony.” (Dkt. No. 21 at 10). To the contrary, the ALJ found  
26 that engaging in daily activities such as self-care, housework,  
27 walking, driving, using public transportation, shopping and social  
28 and leisure activities, to which Plaintiff acknowledged in his May

1 2013 Function Report, undermined his disabling limitations,  
2 including difficulties with maneuvering and exertion, that he  
3 claimed in his May 2013 Pain Questionnaire and to which he  
4 testified. (AR 20). The ALJ's finding is "sufficiently specific"  
5 for this Court to conclude that the ALJ rejected Plaintiff's  
6 testimony "on permissible grounds." Brown-Hunter, 806 F.3d at 493.

7  
8 Plaintiff also contends that the ALJ did not explain "how  
9 Plaintiff's activities might be transferable to a work setting."  
10 (Dkt. No. 21 at 10). "The Social Security Act does not require  
11 that claimants be utterly incapacitated to be eligible for  
12 benefits, and many home activities may not be easily transferable  
13 to a work environment where it might be impossible to rest  
14 periodically or take medication." Smolen, 80 F.3d at 1284 n.7.  
15 The ALJ properly found that Plaintiff's daily activities are  
16 inconsistent with Plaintiff's allegations of disabling  
17 limitations, and was not required to offer any further discussion  
18 of the daily activities. See Ghanim, 763 F.3d at 1163 ("ALJ may  
19 consider a range of factors in assessing credibility,  
20 including . . . prior inconsistent statements concerning the  
21 symptoms") (citation omitted).

22  
23 c. The ALJ Provided A Germane Explanation For Rejecting  
24 Plaintiff's Spouse's Statement

25  
26 Plaintiff contends that the ALJ improperly rejected the May  
27 2013 statement of his wife, Idamary Galluccio. (Dkt. No. 21 at  
28 11). "A germane explanation is required to reject lay witness



1 testimony.” Leon v. Berryhill, 874 F.3d 1130, 1134 (9th Cir.  
2 2017). Plaintiff’s spouse’s statement largely parroted Plaintiff’s  
3 allegations regarding his subjective symptoms and functional  
4 limitations. (Compare AR 257-65, with id. 266-74). Indeed,  
5 Plaintiff acknowledges that his wife merely “corroborated” his  
6 allegations. (Dkt. No. 21 at 11). The ALJ reviewed Idamary  
7 Galluccio’s statement, giving it “[l]imited weight . . . inasmuch  
8 as it essentially reiterates [Plaintiff’s] subjective allegations,  
9 which are not fully corroborated by the medical evidence as  
10 articulated herein.” (AR 21). Accordingly, the ALJ properly  
11 rejected Idamary Galluccio’s statement. Leon, 874 F.3d at 1134  
12 (“if an ALJ provided clear and convincing reasons for rejecting a  
13 claimant’s subjective complaints, and lay testimony was similar to  
14 such complaints, it follows that the ALJ also gave germane reasons  
15 for rejecting the lay witness testimony”); Valentine v. Comm’r Soc.  
16 Sec. Admin., 574 F.3d 685, 694 (9th Cir. 2009) (“In light of our  
17 conclusion that the ALJ provided clear and convincing reasons for  
18 rejecting Valentine’s own subjective complaints, and because Ms.  
19 Valentine’s testimony was similar to such complaints, it follows  
20 that the ALJ also gave germane reasons for rejecting her  
21 testimony.”).

22  
23 In sum, the ALJ offered clear and convincing reasons,  
24 supported by substantial evidence in the record, for his adverse  
25 credibility findings. Accordingly, because substantial evidence  
26  
27  
28

1 supports the ALJ's assessment of Plaintiff's credibility, no remand  
2 is required.<sup>8</sup>

3  
4 **B. The ALJ's RFC Assessment Is Supported By Substantial Evidence**

5  
6 Plaintiff contends that the ALJ's RFC assessment failed to  
7 take into account Plaintiff's lumbar spondylosis and herniated  
8 discs with stenosis, sleep apnea and morbid obesity. (Dkt. No. 21  
9 at 12-13; see also id. at 8-9). The Court disagrees.

10  
11 "A claimant's residual functional capacity is what he can  
12 still do despite his physical, mental, nonexertional, and other  
13 limitations." Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th  
14 Cir. 1989) (citing 20 C.F.R. § 404.1545). An RFC assessment  
15 requires the ALJ to consider a claimant's impairments and any  
16 related symptoms that may "cause physical and mental limitations  
17 that affect what [he] can do in a work setting." 20 C.F.R.  
18 §§ 404.1545(a)(1), 416.945(a)(1). In determining a claimant's RFC,  
19 the ALJ considers all relevant evidence, including residual  
20 functional capacity assessments made by consultative examiners,  
21 State Agency physicians and medical experts. 20 C.F.R.

22  
23  
24 <sup>8</sup> In his third argument, Plaintiff contends that the ALJ improperly relied  
25 on the VE's response to the ALJ's hypothetical question that did not  
26 include the functional limitations testified to by Plaintiff. (Dkt. No.  
27 21 at 13-14). However, because the ALJ properly discredited Plaintiff's  
28 testimony and statements, he did not need to include them in his  
hypothetical question. See Osenbrock, 240 F.3d at 1165 ("It is . . .  
proper for an ALJ to limit a hypothetical to those impairments that are  
supported by substantial evidence in the record."); accord Britton v.  
Colvin, 787 F.3d 1011, 1013 (9th Cir. 2015).

1 §§ 404.1545(a)(3), 416.945(a)(3); see also id. §§ 404.1513(c),  
2 416.913(c).

3  
4 The ALJ found that Plaintiff's lumbar spondylosis, herniated  
5 discs with stenosis, morbid obesity and sleep apnea were all severe  
6 impairments. (AR 18). Moreover, in assessing Plaintiff's RFC,  
7 the ALJ took into account Plaintiff's obesity, his limited range  
8 of motion in his lumbar spine and the x-rays and MRI that  
9 demonstrated degenerative changes at T12-L1 and L4-S1 with 2-3mm  
10 disc protrusions. (AR 20-21). Nevertheless, examinations in June  
11 2013 and May and June 2014 demonstrated adequate gait and  
12 maneuvering abilities. (AR 20-21). While Dr. Sedgh opined that  
13 Plaintiff would be capable of medium work, the ALJ limited  
14 Plaintiff to light work in deference to Plaintiff's subjective  
15 symptoms that were not inconsistent with the objective evidence.  
16 (AR 20-21).

17  
18 Plaintiff appears to confuse conditions with disabilities.  
19 For example, a "person can be depressed, anxious, and obese yet  
20 still perform full-time work." Gentle v. Barnhart, 430 F.3d 865,  
21 868 (7th Cir. 2005). As the Seventh Circuit explained:

22  
23 Conditions must not be confused with disabilities. The  
24 social security disability benefits program is not  
25 concerned with health as such, but rather with ability  
26 to engage in full-time gainful employment. This point  
27 is obscured by the tendency in some cases to describe  
28 obesity as an impairment, limitation, or disability. It

1 is none of these things from the standpoint of the  
2 disability program. It can be the cause of a disability,  
3 but once its causal efficacy is determined, it drops out  
4 of the picture. If the claimant for social security  
5 disability benefits is so obese as to be unable to bend,  
6 the issue is the effect of that inability on the  
7 claimant's capacity for work.

8  
9 Id. (citation omitted) (emphasis in original); accord Cody v.  
10 Colvin, No. 16 CV 5664, 2017 WL 218802, at \*3 (W.D. Wash. Jan. 19,  
11 2017).

12  
13 Other than his own subjective allegations, which the ALJ  
14 properly discredited, Plaintiff does not demonstrate how his lumbar  
15 spondylosis, herniated discs with stenosis, morbid obesity and  
16 sleep apnea limits his ability to work. See Mayes v. Massanari,  
17 276 F.3d 453, 459 (9th Cir. 2001) ("It was [claimant's] duty to  
18 prove that she was disabled.") (citing 20 C.F.R. § 404.1512(a));  
19 see also Terry v. Sullivan, 903 F.2d 1273, 1275 (9th Cir. 1990)  
20 ("The burden of establishing disability is . . . on the claimant,  
21 who must prove that she is unable to return to her former type of  
22 work."). He cites to no medical evidence indicating that these  
23 impairments, which the ALJ found to be severe, limit his functional  
24 capacity more than the limitations found by the ALJ. Accordingly,  
25 the ALJ's RFC assessment is supported by substantial evidence.

26  
27 Plaintiff contends that the ALJ failed to consider "the  
28 symptoms associated with Plaintiff's obesity and its limiting

