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

GABRIEL OCTAVIO TENA HERAS,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. CV 17-01935-RAO

**MEMORANDUM OPINION AND
ORDER**

I. INTRODUCTION

Plaintiff Gabriel Octavio Tena Heras (“Plaintiff”) challenges the Commissioner’s denial of his application for a period of disability, disability insurance benefits (“DIB”), and supplemental security income (“SSI”). For the reasons stated below, the decision of the Commissioner is AFFIRMED.

II. PROCEEDINGS BELOW

On June 3, 2013, Plaintiff protectively applied for SSI alleging disability beginning April 30, 2013. (Administrative Record (“AR”) 38, 43, 48-49.) His application was denied initially on July 26, 2013, and upon reconsideration on January 23, 2014. (AR 64, 75.) On January 31, 2014, Plaintiff filed a written

1 request for hearing, and a hearing was held on January 7, 2016. (AR 82.)
2 Represented by counsel and assisted by an interpreter, Plaintiff appeared and
3 testified, along with an impartial vocational expert (“VE”) and an impartial medical
4 expert. (AR 24-37.) On January 25, 2016, the Administrative Law Judge (“ALJ”)
5 found that Plaintiff had not been under a disability, pursuant to the Social Security
6 Act,¹ since April 30, 2013. (AR 18.) The ALJ’s decision became the
7 Commissioner’s final decision when the Appeals Council denied Plaintiff’s request
8 for review. (AR 1.) Plaintiff filed this action on March 10, 2017. (Dkt. No. 1.)

9 The ALJ followed a five-step sequential evaluation process to assess whether
10 Plaintiff was disabled under the Social Security Act. *Lester v. Chater*, 81 F.3d 821,
11 828 n.5 (9th Cir. 1995). At **step one**, the ALJ found that Plaintiff had not engaged
12 in substantial gainful activity since April 30, 2013, the alleged onset date (“AOD”).
13 (AR 13.) At **step two**, the ALJ found that Plaintiff has the following severe
14 impairments: arthritis, diabetes mellitus, hypertension, and coronary artery disease.
15 (*Id.*) At **step three**, the ALJ found that Plaintiff “does not have an impairment or
16 combination of impairments that meets or medically equals the severity of one of
17 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.” (AR 14.)

18 Before proceeding to step four, the ALJ found that Plaintiff has the residual
19 functional capacity (“RFC”) to:

20 [P]erform medium work . . . except this individual should not work at
21 extremes of heat or cold, can occasionally, but not frequently climb
ladders, and he should avoid working at unprotected heights.

22 (*Id.*)

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26 ¹ Persons are “disabled” for purposes of receiving Social Security benefits if they
27 are unable to engage in any substantial gainful activity owing to a physical or
28 mental impairment expected to result in death, or which has lasted or is expected to
last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A).

1 At **step four**, based on Plaintiff’s RFC and the VE’s testimony, the ALJ
2 found that Plaintiff was capable of performing past relevant work as a drywall
3 applicator, and therefore the ALJ did not proceed to **step five**. (AR 17.)
4 Accordingly, the ALJ determined that Plaintiff has not been under a disability from
5 the AOD through the date of the decision. (AR 18.)

6 **III. STANDARD OF REVIEW**

7 Under 42 U.S.C. § 405(g), a district court may review the Commissioner’s
8 decision to deny benefits. A court must affirm an ALJ’s findings of fact if they are
9 supported by substantial evidence and if the proper legal standards were applied.
10 *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). “‘Substantial evidence’
11 means more than a mere scintilla, but less than a preponderance; it is such relevant
12 evidence as a reasonable person might accept as adequate to support a conclusion.”
13 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing *Robbins v. Soc.*
14 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). An ALJ can satisfy the substantial
15 evidence requirement “by setting out a detailed and thorough summary of the facts
16 and conflicting clinical evidence, stating his interpretation thereof, and making
17 findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citation omitted).

18 “[T]he Commissioner’s decision cannot be affirmed simply by isolating a
19 specific quantum of supporting evidence. Rather, a court must consider the record
20 as a whole, weighing both evidence that supports and evidence that detracts from
21 the Secretary’s conclusion.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir.
22 2001) (citations and internal quotation marks omitted). “‘Where evidence is
23 susceptible to more than one rational interpretation,’ the ALJ’s decision should be
24 upheld.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing
25 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)); *see Robbins*, 466 F.3d at
26 882 (“If the evidence can support either affirming or reversing the ALJ’s
27 conclusion, we may not substitute our judgment for that of the ALJ.”). The Court
28 may review only “the reasons provided by the ALJ in the disability determination

1 and may not affirm the ALJ on a ground upon which he did not rely.” *Orn v.*
2 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (citing *Connett v. Barnhart*, 340 F.3d
3 871, 874 (9th Cir. 2003)).

4 **IV. DISCUSSION**

5 Plaintiff raises the following issues for review: (1) whether the ALJ properly
6 considered the medical evidence in assessing Plaintiff’s RFC; (2) whether the ALJ
7 properly discredited Plaintiff’s testimony; and (3) whether the ALJ’s conclusion at
8 step four is supported by substantial evidence. (JS 3-4.) Plaintiff contends that the
9 ALJ erred in his consideration of Plaintiff’s testimony, and that the RFC assessment
10 and “step four” findings are not supported by substantial evidence. (See JS 4, 8,
11 16.) The Commissioner disagrees. (See JS 8, 12, 20.) For the reasons below, the
12 Court agrees with the Commissioner.

13 **A. The ALJ’s Credibility Determination Is Supported By Substantial** 14 **Evidence**²

15 Plaintiff argues that the ALJ failed to properly consider Plaintiff’s subjective
16 testimony. (JS 9-10.) The Commissioner argues that the ALJ’s credibility findings
17 are supported by substantial evidence. (JS 16.)

18 **1. Plaintiff’s Testimony**

19 Plaintiff testified with the assistance of an interpreter. (AR 30.) Plaintiff
20 stated that he previously worked in construction doing framing and drywall
21 handling. (*Id.*) At his job, Plaintiff lifted and carried 50 pounds by himself without
22 using moving equipment devices. (AR 30-31.)

23 Plaintiff explained that he stopped working in 2013 because he began to feel
24 ill and suffered from fainting spells. (AR 31.) Plaintiff stated that his sugar level
25 was “out of control” and he had a lot of pain in his knees and joints. (*Id.*) Plaintiff

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27 ² Because subjective symptom testimony is one factor that the ALJ must consider
28 when assessing a claimant’s RFC, the Court addresses the issue of credibility first
before discussing the overall RFC determination.

1 also stated that he has problems with his hands, and his fingers are “twisting more
2 and more.” (AR 32.) Plaintiff can lift and carry about the weight of a gallon of
3 milk, but he cannot hold the weight very long because his joints hurt. (*Id.*)

4 Plaintiff testified that he can stand for a maximum of 50 minutes before his
5 feet begin to fall asleep and cause him pain. (*Id.*) Plaintiff explained that he also
6 has problems sitting because all of his joints hurt from his waist up to his neck, “all
7 the joints on [his] body.” (*Id.*) Plaintiff stated that he can sit for 15 to 20 minutes
8 before he needs to walk. (*Id.*) When he gets up, he feels like he is going to faint,
9 which Plaintiff thinks is due to his high blood pressure. (AR 32-33.) Plaintiff also
10 testified that he can walk for only one block before he feels a “burning sensation” in
11 his chest and needs to sit. (AR 33.) Plaintiff stated that he assumes that his chest
12 pain is caused by a problem with his heart. (*Id.*)

13 Plaintiff testified that he is taking medication for his heart, pain, cholesterol,
14 and diabetes as prescribed. (*Id.*) Plaintiff stated that he does not know if he has
15 side effects from his medications, but sometimes he feels ill because he takes a lot
16 of medication. (AR 34.) Plaintiff is not taking medication for depression, but he
17 attended six months of psychological classes that ended about a month and a half
18 before the hearing. (AR 33-34.)

19 During the day, Plaintiff takes his grandson to school, picks him up, and
20 stays at home with him while Plaintiff waits for his wife to come home. (AR 33.)

21 **2. Applicable Legal Standards**

22 “In assessing the credibility of a claimant’s testimony regarding subjective
23 pain or the intensity of symptoms, the ALJ engages in a two-step analysis.” *Molina*
24 *v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citing *Vasquez v. Astrue*, 572 F.3d
25 586, 591 (9th Cir. 2009)). “First, the ALJ must determine whether the claimant has
26 presented objective medical evidence of an underlying impairment which could
27 reasonably be expected to produce the pain or other symptoms alleged.” *Treichler*
28 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir. 2014) (quoting

1 *Lingenfelter*, 504 F.3d at 1036) (internal quotation marks omitted). If so, and if the
2 ALJ does not find evidence of malingering, the ALJ must provide specific, clear
3 and convincing reasons for rejecting a claimant’s testimony regarding the severity
4 of his symptoms. *Id.* The ALJ must identify what testimony was found not
5 credible and explain what evidence undermines that testimony. *Holohan v.*
6 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001). “General findings are
7 insufficient.” *Lester*, 81 F.3d at 834.

8 **3. Discussion**

9 “After careful consideration of the evidence,” the ALJ found that Plaintiff’s
10 “medically determinable impairments could reasonably be expected to cause some
11 of the alleged symptoms,” but found that Plaintiff’s “statements concerning the
12 intensity, persistence and limiting effects of these symptoms are not entirely
13 credible.” (AR 15.) The ALJ relied on the following reasons: (1) lack of objective
14 medical evidence to support the alleged severity of symptoms; (2) activities of daily
15 living; (3) routine and conservative treatment; and (4) lack of mental health
16 treatment. (AR 16-17.) No malingering allegation was made, and therefore, the
17 ALJ’s reasons must be “clear and convincing.”

18 **a. Reason No. 1: Lack of Objective Medical Evidence**

19 The ALJ found that the medical evidence “has not identified an impairment
20 that would correspond in severity to the claimant’s allegation.” (AR 15.) The lack
21 of supporting objective medical evidence cannot form the sole basis for discounting
22 testimony, but it is a factor that the ALJ may consider in making a credibility
23 determination. *Burch*, 400 F.3d at 681.

24 The ALJ noted that Plaintiff has a history of uncontrolled type-II diabetes
25 mellitus, osteoarthritis, joint pain involving the lower leg, and hypertensions. (AR
26 15; *see, e.g.*, AR 252-53, 262-78.) The ALJ then summarized Plaintiff’s medical
27 records. (AR 15-16.)

28 ///

1 X-rays taken in April 2012 showed generalized osteopenia, atherosclerotic
2 vessel disease, mild thoracic scoliosis, and hypertrophic degenerative changes in
3 the thoracic and lumbar spine. (AR 298.) In June 2012, x-rays of both knees were
4 negative, aside from mild spurring from the superior left patella. (AR 294.) X-rays
5 of Plaintiff's right hand revealed degenerative changes at the index, middle, and
6 little finger distal interphalangeal ("DIP") joints, most prominent in the middle
7 finger. (AR 296.) X-rays of Plaintiff's left hand also revealed degenerative
8 changes in the left index finger DIP joint. (*Id.*) A February 2013 x-ray of
9 Plaintiff's right knee revealed mild spurring at the superior aspect of the patella, but
10 no evidence of acute fracture. (AR 280.) A May 2013 lab report showed high total
11 cholesterol of 228, high glucose of 189, and hemoglobin A1c of 8.0, noted as being
12 consistent with diabetes. (AR 254.)

13 On October 17, 2013, Plaintiff was treated at High Desert Hospital for
14 multiple joint pain and medication refills. (AR 320-24.) Plaintiff was observed to
15 be alert and in no acute distress. (AR 321.) His lungs were clear to auscultation
16 bilaterally and his heart was of regular rate and rhythm with no murmurs, rubs, or
17 gallops. (*Id.*) A diabetic foot exam showed normal monofilament sensation, no
18 calluses, no ulcers, and normal pulses. (*Id.*) Examination of Plaintiff's hands
19 showed Heberden's nodes present in the DIP joints. (*Id.*)

20 In December 2013, x-rays showed very mild degenerative changes of the
21 interphalangeal joints of Plaintiff's left hand. (AR 346.) Results were otherwise
22 unremarkable in this hand. (AR 346.) Plaintiff's DIP joint of the right middle
23 finger had soft tissue swelling, moderate degenerative changes with a moderate-to-
24 large posterior osteophyte formation, and some flexion deformity. (*Id.*) Mild
25 degenerative changes of the remaining DIP joints, minimal degenerative changes of
26 the proximal interphalangeal joints, and very minimal degenerative changes of the
27 first metacarpal phalangeal joint were also observed in Plaintiff's right hand. (AR
28 347.) Plaintiff's left knee joint showed very early and very mild generative

1 changes, and his right knee showed only minimal degenerative changes. (AR 347-
2 48.)

3 On February 10, 2015, Plaintiff underwent an exercise stress test. (AR 402.)
4 Due to abnormal results and chest pains, Plaintiff was referred to Antelope Valley
5 Hospital and admitted. (AR 364, 368, 375, 382.) Upon admission, his blood
6 pressure and vital signs were largely normal. (AR 375-76, 380.) No cardiovascular
7 abnormalities were noted, and Plaintiff's cardiovascular and respiratory
8 assessments were normal. (AR 376; *see* AR 380.) A coronary angiography was
9 performed, which revealed some obstruction in the left anterior descending artery,
10 right coronary artery, and right posterior descending artery. (AR 385.) Plaintiff
11 was diagnosed with hypertension, type-II diabetes, dyslipidemia, chest pain, and
12 unstable angina, most likely secondary to coronary artery disease. (AR 377.)

13 The ALJ thoroughly considered Plaintiff's medical records and found that
14 they did not support Plaintiff's allegations of disabling symptoms and limitations.
15 *See Reddick*, 157 F.3d at 725. The ALJ was permitted to rely on the normal
16 examination results and lack of significant medical findings in assessing the
17 credibility of Plaintiff's testimony. *See Garza v. Astrue*, 380 F. App'x 672, 674
18 (9th Cir. 2010) (finding that an ALJ properly considered a claimant's normal exam
19 findings when noting a lack of objective medical evidence to support the claimant's
20 allegations).

21 The Court finds that this is a clear and convincing reason, supported by
22 substantial evidence, for discounting Plaintiff's credibility.

23 **b. Reason No. 2: Activities of Daily Living**

24 The ALJ noted that Plaintiff takes his 7-year-old grandson to school and
25 cares for him at home after school, which is "not consistent with an assertion of
26 total disability." (AR 16-17.) As part of the credibility determination, the ALJ may
27 consider inconsistencies between the claimant's testimony and his other statements,
28 conduct, and daily activities. *See Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th

1 Cir. 1997); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).
2 Inconsistencies between symptom allegations and daily activities may act as a clear
3 and convincing reason to discount a claimant’s credibility. *See Tommasetti v.*
4 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell v. Sullivan*, 947 F.2d 341, 346
5 (9th Cir. 1991). But a claimant need not be utterly incapacitated to obtain benefits.
6 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). “If a claimant is able to spend a
7 substantial part of his day engaged in pursuits involving the performance of
8 physical functions that are transferable to a work setting, a specific finding as to this
9 fact may be sufficient to discredit a claimant’s allegations.” *Morgan v. Comm’r of*
10 *Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999); *accord Vertigan v. Halter*, 260
11 F.3d 1044, 1050 (9th Cir. 2001).

12 The fact that Plaintiff cares for his grandson does not detract from his overall
13 credibility, as the record does not show that this consumed a substantial part of
14 Plaintiff’s day. Further, the mere ability to perform some tasks is not necessarily
15 indicative of an ability to perform work activities because “many home activities
16 are not easily transferable to what may be the more grueling environment of the
17 workplace, where it might be impossible to periodically rest or take medication.”
18 *Fair*, 885 F.2d at 603; *see also Molina*, 674 F.3d at 1112-13 (the ALJ may discredit
19 a claimant who “participat[es] in everyday activities indicating capacities that are
20 transferable to a work setting”). The critical difference between such activities
21 “and activities in a full-time job are that a person has more flexibility in scheduling
22 the former . . . , can get help from other persons . . . , and is not held to a minimum
23 standard of performance, as she would be by an employer.” *Bjornson v. Astrue*,
24 671 F.3d 640, 647 (7th Cir. 2012) (cited with approval in *Garrison v. Colvin*, 759
25 F.3d 995, 1016 (9th Cir. 2014)). Here, Plaintiff testified that he takes his grandson
26 to and from school, and then his grandson is with him while they wait for Plaintiff’s
27 wife to come home. (AR 33.) The ALJ assumed that caring for a young child “can
28 be quite demanding emotionally, without any particular assistance.” (AR 17.) But

1 without additional information about the nature of Plaintiff’s childcare activities,
2 this cannot be the basis for an adverse credibility finding. *See Trevizo v. Berryhill*,
3 871 F.3d 664, 682 (9th Cir. 2017) (finding that, with almost no information in the
4 record about the claimant’s childcare activities, “the mere fact that [the claimant]
5 cares for small children does not constitute an adequately specific conflict with her
6 reported limitations”).

7 The Court finds that this reason is not a clear and convincing reason,
8 supported by substantial evidence, to discount Plaintiff’s credibility.

9 **c. Reason No. 3: Routine and Conservative Treatment**

10 The ALJ also observed that Plaintiff’s treatment for physical impairments
11 “has not been so extensive or prolonged that work activity would be precluded for
12 any continuous period of twelve months” and that “treatment has been essentially
13 routine and/or conservative in nature.” (AR 17.) An ALJ may discount a
14 claimant’s credibility based on routine and conservative treatment. *See Parra v.*
15 *Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) (“[E]vidence of ‘conservative
16 treatment’ is sufficient to discount a claimant’s testimony regarding severity of an
17 impairment.”); *see also Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999)
18 (rejecting a plaintiff’s complaint “that she experienced pain approaching the highest
19 level imaginable” as “inconsistent with the ‘minimal, conservative treatment’ that
20 she received”).

21 The ALJ noted that Plaintiff’s diabetes mellitus and hypertension are poorly
22 controlled, but there is no evidence of end organ damage, kidney problems, or
23 stroke symptoms. (AR 17.) Therefore, the ALJ concluded that Plaintiff’s
24 hypertensive state has no effect on his ability to function. (*Id.*) The ALJ also noted
25 that Plaintiff’s ongoing treatment for his impairments is primarily for monitoring
26 and to refill prescriptions. (AR 17.)

27 Although Plaintiff’s diabetes was previously noted as uncontrolled, records
28 also indicated that Plaintiff did not adhere to instructions and medication

1 compliance. (See AR 262-63.) Later, during routine visits at High Desert Health
2 Systems, Plaintiff was encouraged to continue his medications and his diet and
3 exercise plans. (See AR 418-21, 429, 431-33.) Because Plaintiff's treatment
4 primarily consisted of monitoring and medication, the ALJ permissibly discounted
5 Plaintiff's credibility based on his conservative treatment plan. See *Warre v.*
6 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments
7 that can be controlled effectively with medication are not disabling for the purpose
8 of determining eligibility for SSI benefits.").

9 The Court finds that this reason is a clear and convincing reason, supported
10 by substantial evidence, to discount Plaintiff's credibility.

11 **d. Reason No. 4: Lack of Mental Health Treatment**

12 Finally, the ALJ noted that despite Plaintiff's alleged depression, he did not
13 seek treatment from psychiatrists or psychologists. (AR 17.) The ALJ also noted
14 that Plaintiff has not taken any psychotropic medication or had any inpatient or
15 outpatient mental health counseling or treatment. (*Id.*) The ALJ stated that it was
16 reasonable to assume that someone with severe mental problems would seek
17 treatment in an attempt to lessen the condition or its effects. (*Id.*) The ALJ
18 determined that Plaintiff's failure to seek treatment indicates that his limitations are
19 not as severe as alleged. (*Id.*)

20 First, the Ninth Circuit has criticized the practice of discrediting evidence
21 based on a lack of treatment "both because mental illness is notoriously
22 underreported and because it is a questionable practice to chastise one with a mental
23 impairment for the exercise of poor judgment in seeking rehabilitation."
24 *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1299-300 (9th Cir.
25 1999) (internal quotation marks omitted) (citing *Nguyen v. Chater*, 100 F.3d 1462,
26 1465 (9th Cir. 1996)).

27 Second, Plaintiff's treatment records do document some mental health
28 treatment, during which Plaintiff worked on ways to cope with his depression. (See

1 AR 414, 417, 424-26.) The ALJ was incorrect to assert that Plaintiff had not had
2 any mental health counseling or treatment. *See Gallant v. Heckler*, 753 F.2d 1450,
3 1456 (9th Cir. 1984) (error for an ALJ to ignore or misstate the competent evidence
4 in the record in order to justify his conclusion).

5 Moreover, Plaintiff primarily testified about his physical impairments and
6 limitations. (See AR 30-34.) The entirety of Plaintiff’s testimony regarding his
7 depression is contained in the following exchange between Plaintiff and his
8 counsel:

9 Q: Are you taking any medication for depression?

10 A: No, but I did have classes that lasted six months for
psychological help.

11 Q: Okay, when did that end?

12 A: Approximately a month and a half ago.

13 (AR 33-34.) Plaintiff’s limited mental health treatment is not a legitimate reason to
14 discredit his subjective complaints about his physical symptoms and limitations.

15 The Court finds that this reason is not a clear and convincing reason,
16 supported by substantial evidence, to discount Plaintiff’s credibility.

17 **4. Conclusion**

18 Because the Court found that two of the ALJ’s reasons for discounting
19 Plaintiff’s credibility—activities of daily living and lack of mental health
20 treatment—are not clear and convincing, the Court must decide whether the ALJ’s
21 reliance on those reasons was harmless error. *Carmickle v. Comm’r of Soc. Sec.*
22 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). The relevant inquiry “is not whether
23 the ALJ would have made a different decision absent any error,” but whether the
24 ALJ’s decision is still “legally valid, despite such error.” *Id.* The “remaining
25 reasoning *and ultimate credibility determination* [must be] . . . supported by
26 substantial evidence in the record.” *Id.* (emphasis in original) (citing *Batson v.*
27 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)). Here, given the
28 discussion above concerning the lack of objective medical evidence and Plaintiff’s

1 routine and conservative treatment, the Court concludes the ALJ’s credibility
2 finding is legally valid and supported by substantial evidence.

3 **B. The RFC Is Supported By Substantial Evidence**

4 Plaintiff argues that the ALJ failed to properly consider the medical evidence.
5 (JS 4.) The Commissioner argues that the evidence of record supports the ALJ’s
6 RFC assessment. (JS 6-8.)

7 **1. Applicable Legal Standards**

8 The ALJ is responsible for assessing a claimant’s RFC “based on all of the
9 relevant medical and other evidence.” 20 CFR §§ 404.1545(a)(3), 404.1546(c). In
10 doing so, the ALJ may consider any statements provided by medical sources,
11 including statements that are not based on formal medical examinations. *See*
12 20 CFR §§ 404.1513(a), 404.1545(a)(3). An ALJ’s determination of a claimant’s
13 RFC must be affirmed “if the ALJ applied the proper legal standard and his
14 decision is supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211,
15 1217 (9th Cir. 2005); *accord Morgan*, 169 F.3d at 599. “An ALJ can satisfy the
16 ‘substantial evidence’ requirement by ‘setting out a detailed and thorough summary
17 of the facts and conflicting evidence, stating his interpretation thereof, and making
18 findings.’” *Garrison*, 759 F.3d at 1012 (citation omitted).

19 **2. Discussion**

20 In determining Plaintiff’s RFC, the ALJ “considered all symptoms and the
21 extent to which these symptoms can reasonably be accepted as consistent with the
22 objective medical evidence and other evidence . . . [and] also considered opinion
23 evidence” in accordance with social security regulations. (AR 14.)

24 As discussed above, the ALJ thoroughly summarized the objective medical
25 evidence and found that it did not identify an impairment that was as severe as
26 Plaintiff alleged. (*See* AR 15-16.) The ALJ also gave “great weight” to the opinion
27 of John W. Pollard, M.D., a medical expert specializing in internal medicine, who
28 reviewed Plaintiff’s medical evidence and testified at the administrative hearing.

1 (AR 16; *see* AR 24-29.) Dr. Pollard summarized Plaintiff’s medical records and
2 found that he was capable of medium work, with occasional climbing of ladders, no
3 extremes of heat and cold, and no working at unprotected heights due to the
4 possibility of hypoglycemia. (AR 26-29.)

5 Plaintiff contends that his impairments preclude work at the medium level
6 and that he is unable to perform his previous work on a full-time basis. (JS 5.)
7 Plaintiff therefore argues that the ALJ erred by adopting the medical expert’s
8 verbatim testimony regarding Plaintiff’s limitations. (*Id.*) However, as the ALJ
9 noted, no treating physician provided an opinion on Plaintiff’s physical limitations.
10 (AR 16.) The ALJ considered the “totality of evidence” and gave the sole opinion
11 testimony “great weight.” (*Id.*) In the absence of a contrary opinion by a treating
12 physician, the ALJ was entitled to rely upon the consultative opinion of Dr. Pollard.
13 *See Morgan*, 169 F.3d at 600 (“Opinions of a nonexamining, testifying medical
14 advisor may serve as substantial evidence when they are supported by other
15 evidence in the record and are consistent with it.”) (citing *Andrews v. Shalala*, 53
16 F.3d 1035, 1041 (9th Cir. 1995)); *Ruiz v. Colvin*, 638 F. App’x 604, 606 (9th Cir.
17 2016) (finding that the ALJ did not err in giving the greatest weight to non-
18 examining state agency medical consultants because “the ALJ found their opinions
19 consistent with the greater medical record, progress and treating notes, and [the
20 plaintiff]’s description of her daily activities”); *Ortiz v. Astrue*, 2009 WL 1516320,
21 at *8 (E.D. Cal. May 29, 2009) (finding that the ALJ properly considered the
22 medical evidence when no treating physician indicated any specific functional
23 limitations and no treating physician’s opinion contradicted the opinions of the state
24 agency medical consultants).

25 “Based on the totality of the evidence,” the ALJ concluded that Plaintiff’s
26 pain is caused by degenerative changes and osteoarthritis, and Plaintiff’s
27 impairments limit his ability to climb ladders, work at extremes of heat or cold, and
28 work at unprotected heights. (AR 17.) The ALJ acknowledged that Plaintiff has

1 limitations in his ability to perform some work functions, but the ALJ determined
2 that the “evidence as a whole” did not establish that Plaintiff is unable to perform
3 work that is within the range of the RFC. (*Id.*)

4 In sum, the Court finds that the ALJ’s RFC assessment is supported by
5 substantial evidence. *See Arrieta v. Astrue*, 301 F. App’x 713, 715 (9th Cir. 2008)
6 (finding that substantial evidence supported the RFC determination when the ALJ
7 properly evaluated the opinion evidence and relied on supporting medical reports
8 and testimony).

9 **C. The ALJ’s Step Four Findings are Supported By Substantial**
10 **Evidence**

11 At step four, the ALJ relied on the VE’s testimony that Plaintiff’s past
12 relevant work as a drywall applicator was consistent with the assessed RFC. (AR
13 17.) The ALJ therefore concluded that Plaintiff was able to perform his past work
14 as it is actually and generally performed. (AR 18.)

15 Plaintiff contends that that ALJ failed to properly develop the record and
16 erred in relying on the VE’s “defective” testimony to find that Plaintiff was capable
17 of performing his past relevant work. (JS 16.) The claimant has the burden of
18 proving disability and showing that he cannot perform his past relevant work.
19 *Burch*, 400 F.3d at 679; *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001).
20 However, “the ALJ has a special duty to fully and fairly develop the record and to
21 assure that the claimant’s interests are considered,” even when the claimant is
22 represented by counsel. *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). This
23 duty to develop the record is triggered “only when there is ambiguous evidence or
24 when the record is inadequate to allow for proper evaluation of the evidence.”
25 *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001) (citing *Tonapetyan*, 242
26 F.3d at 1150).

27 In his testimony and Work History Report, Plaintiff asserted that he
28 frequently lifted 50 pounds without the assistance of equipment or devices. (AR

1 30-31, 204-13.) Plaintiff explained that he cut drywall and carried the pieces a
2 distance of up to 25 feet. (AR 205-13.) Plaintiff also provided information about
3 his job's requirements for sitting, standing, and walking, among other activities.
4 (*Id.*) Plaintiff's testimony and Work History Report therefore provide an adequate
5 record upon which the ALJ could evaluate the nature of Plaintiff's past work. *See*
6 *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (stating that a claimant's
7 own testimony about his past work is "highly probative" of the work's
8 requirements). The ALJ did not err in not further developing the record on this
9 issue. *See Mayes*, 276 F.3d at 459-60.

10 Based on Plaintiff's description, the VE stated that Plaintiff's past work was
11 consistent with the Dictionary of Occupational Titles ("DOT") listing of drywall
12 applicator. (*See* AR 34.) The ALJ posed a hypothetical to the VE that presented
13 the same limitations as contained in Plaintiff's RFC, and the VE testified that
14 someone with those limitations "should be able to" perform the work of a drywall
15 applicator. (AR 34-35.) Plaintiff's counsel declined to examine the VE or
16 challenge the requirements of this occupation. (*See* AR 35-36.)

17 Plaintiff argues that the occupation of drywall applicator is "sometimes
18 physically strenuous" and that a detailed description of a drywall applicator's duties
19 includes potential hazards, such as working at heights, that are prohibited in his
20 RFC. (JS 17.) To support this contention, Plaintiff provides a compilation of
21 information and statistics from, *inter alia*, the United States Bureau of Labor
22 Statistics. (*See* JS, ex. A, at 5-6.) But the DOT listing upon which the VE relied
23 does not present these additional hazards, and to the extent that working at heights
24 or on ladders may be required, the listing limits climbing to "occasionally." *See*
25 *DICOT 842.684-014*, 1991 WL 681861; *see also Massachusetts v. Astrue*, 486 F.3d
26 1149, 1153 (9th Cir. 2007) ("[T]he Social Security Administration relies primarily
27 on the Dictionary of Occupational Titles for 'information about the requirements of
28 work in the national economy.'" (quoting Soc. Sec. Reg. 00-4p, 2000 WL 1898704

1 at *2)). Furthermore, Plaintiff did not assert that any of these hazards were present
2 as he actually performed the job. (See AR 30-31, 204-13.) Plaintiff's own
3 description of his past work is also consistent with the limitations found in his RFC.
4 (Compare AR 14 with AR 30-31, 204-13.)

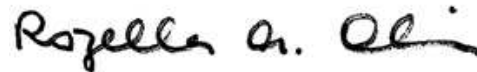
5 Accordingly, the Court finds that the ALJ did not err in relying on the VE's
6 testimony that Plaintiff could perform his past work as it was actually and generally
7 performed.

8 **V. CONCLUSION**

9 IT IS ORDERED that Judgment shall be entered AFFIRMING the decision
10 of the Commissioner denying benefits.

11 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
12 Order and the Judgment on counsel for both parties.

13
14 DATED: February 2, 2018



15 ROZELLA A. OLIVER
16 UNITED STATES MAGISTRATE JUDGE

17 **NOTICE**

18 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,**
19 **LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.**