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

DARETH T.,¹

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

Case No. 2:20-cv-06913-AFM

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

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

BACKGROUND

Plaintiff filed applications for disability insurance benefits and supplemental security income, alleging disability beginning August 24, 2016. (Administrative Record (“AR”) 179-192.) Plaintiff’s applications were denied. (AR 93-98.) On

¹ Plaintiff’s name has been partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

1 July 9, 2019, Plaintiff appeared with counsel at a hearing conducted before an
2 Administrative Law Judge (“ALJ”). At the hearing, Plaintiff and a vocational expert
3 (“VE”) testified. (AR 42-68.)

4 On September 13, 2019, the ALJ issued a decision finding that Plaintiff
5 suffered from the following medically severe impairments: coronary artery disease
6 with prior myocardial infarction, status post angioplasty and stent placement. (AR
7 28.) After determining that Plaintiff’s impairments did not meet or equal a listed
8 impairment, the ALJ assessed Plaintiff as retaining the residual functional capacity
9 (“RFC”) to perform medium work with the following restrictions: Plaintiff can
10 frequently climb ramps and stairs, ladders, ropes, and scaffolds; he is able to
11 frequently balance, stoop, kneel, crouch, crawl, and work on uneven terrain; and he
12 is unable to work around heavy moving machinery. (AR 31.) Relying on the
13 testimony of the VE, the ALJ determined that Plaintiff was not able to perform his
14 past relevant work as a machine operator, but was able to perform other work existing
15 in significant numbers in the national economy – including the occupations of hand
16 packager, dining room attendant, and day worker. (AR 35-36.) Accordingly, the ALJ
17 determined that Plaintiff was not disabled from August 24, 2016 (the date of
18 Plaintiff’s application) through the date of his decision. (AR 37.) The Appeals
19 Council denied review (AR 1-6), rendering the ALJ’s decision the final decision of
20 the Commissioner.

21 **DISPUTED ISSUES**

- 22 1. Whether Plaintiff is entitled to a remand based upon the unconstitutional
23 removal procedure in effect during the tenure of Andrew Saul.
- 24 2. Whether the ALJ provided legally sufficient reasons for rejecting Plaintiff’s
25 subjective complaints.
- 26 3. Whether the ALJ provided legally sufficient reasons for rejecting lay
27 testimony.

STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to determine whether the Commissioner’s findings are supported by substantial evidence and whether the proper legal standards were applied. *See Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial evidence means “more than a mere scintilla” but less than a preponderance. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. In the social security context, the substantial evidence threshold is “not high.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019). This Court must review the record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more than one rational interpretation, the Commissioner’s decision must be upheld. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

DISCUSSION

I. Plaintiff’s Constitutional Challenge

Plaintiff contends that the final decision of the Commissioner in his case “arises from an unconstitutional administrative process.” (ECF 20 at 16.) Specifically, Plaintiff reasons that that 42 U.S.C. § 902(a)(3) – which limits the President’s authority to remove the Commissioner of Social Security without good cause – violates separation of powers. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (holding that a for-cause restriction of the President’s executive power to remove the CFPB’s single director violated the separation of powers doctrine). According to Plaintiff’s argument, the unconstitutional removal provision rendered Andrew Saul’s tenure as Commissioner (from June 17, 2019 to July 11, 2021) unconstitutional and the delegated authority of the ALJ assigned to hear his case was “tainted” because it occurred under that unconstitutional tenure. Plaintiff argues that

1 he is entitled to a de novo hearing because of this constitutional error. (ECF 20 at 16-
2 20.)

3 The Commissioner concedes that § 902(a)(3) violates the separation of powers
4 to the extent it is construed as limiting the President’s authority to remove the
5 Commissioner without cause. (ECF 27 at 9.) Nevertheless, the Commissioner argues
6 Plaintiff is not entitled to a remand because the ALJ who heard Plaintiff’s claim was
7 properly appointed by Acting Commissioner Nancy Berryhill and because Plaintiff
8 has failed to show any connection between the unconstitutional removal clause and
9 the ALJ’s decision denying him benefits. The Commissioner also argues that the
10 Court should deny Plaintiff’s request for a new hearing based upon other legal and
11 prudential considerations. (ECF 27 at 9-20.) For the following reasons, the Court
12 rejects Plaintiff’s claim.

13 Plaintiff’s argument is based upon *Lucia v. SEC*, 138 S. Ct. 2044 (2018). In
14 *Lucia*, the Supreme Court held that ALJs of the Securities and Exchange Commission
15 are Officers of the United States and must be constitutionally appointed. *Lucia*, 138
16 S. Ct. at 2055. The Court concluded that the “appropriate” remedy for an adjudication
17 tainted with an appointments violation is a new “hearing before a properly appointed”
18 official. *Lucia*, 138 S. Ct. at 2055 (citing *Ryder v. United States*, 515 U.S. 177, 182-
19 183 (1995)). Unlike *Lucia*, however, Plaintiff does not rely on an allegedly
20 unconstitutional appointment. To the contrary, he concedes that the ALJ who decided
21 his case had been properly appointed by Acting Commissioner Berryhill at the time
22 he decided Plaintiff’s disability claim. (See ECF 20 at 19-20.)² Therefore, there is no
23 Appointments Clause violation. See *Rivera-Herrera v. Kijakazi*, 2021 WL 5450230,

24 ² On July 16, 2018, responding to the decision in *Lucia*, the acting Commissioner of the SSA,
25 Nancy Berryhill ratified the appointments of ALJs and administrative appeals judges (who were
26 previously appointed by lower-level staff, rather than the Commissioner herself) to address any
27 prospective Appointments Clause concerns. See *Rivera-Herrera v. Kijakazi*, 2021 WL 5450230, at
28 *5 (E.D. Cal. Nov. 22, 2021); SSR 19-1p, 84 Fed. Reg. 9582, 9583 (2019). Plaintiff does not allege
that Acting Commissioner Berryhill’s authority was tainted by the unconstitutional removal
provision.

1 at *6 (E.D. Cal. Nov. 22, 2021) (“the ALJ who adjudicated Plaintiff’s claim on
2 September 18, 2019 was properly appointed pursuant to former Acting
3 Commissioner Berryhill’s July 16, 2018 ratification of ALJ appointments. As such,
4 there is no Appointments Clause violation.”); *Lisa Y. v. Comm’r of Soc. Sec.*, 2021
5 WL 5177363, at *5 (W.D. Wash. Nov. 8, 2021) (same); *Marrs v. Comm’r of Soc.*
6 *Sec.*, 2021 WL 4552254, at *4 (N.D. Tex. Oct. 5, 2021) (same).

7 Notwithstanding his characterization, Plaintiff’s claim is based on an allegedly
8 unconstitutional removal provision, and therefore, the controlling law is set forth in
9 *Collins v. Yellen*, 141 S. Ct. 1761 (2021). *See Decker Coal Co. v. Pehringer*, 8 F.4th
10 1123, 1137 (9th Cir. 2021) (“*Collins* is controlling with respect to the remedy for any
11 unconstitutionality in the removal provisions.”). In *Collins*, the plaintiffs sought a
12 judicial declaration invalidating prior actions by the FHFA directors, who possessed
13 removal protection and therefore headed an unconstitutionally structured agency.
14 *Collins*, 141 S. Ct. at 1787. The Supreme Court found such relief unwarranted. *Id.* at
15 1788. Rather, a plaintiff must demonstrate that the unconstitutional provision actually
16 caused him or her harm. *Id.* at 1788-1789. The Supreme Court refused to invalidate
17 the prior actions in their entirety, explaining:

18 All the officers who headed the FHFA during the time in question were
19 properly *appointed*. Although the statute unconstitutionally limited the
20 President’s authority to *remove* the confirmed Directors, there was no
21 constitutional defect in the statutorily prescribed method of appointment
22 to that office. As a result, there is no reason to regard any of the actions
23 taken by the FHFA ... as void.

24 *Id.* at 1787 (emphasis in original).

25 Accordingly, a claimant seeking relief must show that an unconstitutional
26 removal restriction actually caused her harm. *See Collins*, 141 S. Ct. at 1787-1789 &
27 n.24 (an unconstitutional removal restriction “does not mean that actions taken by
28 such an officer are void *ab initio* and must be undone”); *Decker Coal Co.*, 8 F.4th at

1 1137 (“Here, the ALJ lawfully exercised power that he possessed by virtue of his
2 appointment, which the Secretary ratified before the ALJ adjudicated the claim.
3 Absent a showing of harm, we refuse to unwind the decisions below.”).

4 Plaintiff identifies no particular harm suffered by virtue of his claim being
5 adjudicated during Commissioner Saul’s tenure by an ALJ who was otherwise
6 properly appointed. He has failed to show any connection between the
7 unconstitutional removal clause and the ALJ’s decision denying him benefits.
8 Further, nothing in the record supports the conclusion that the disability decision in
9 Plaintiff’s case is in any way traceable to Commissioner Saul. Accordingly, Plaintiff
10 is not entitled to a new hearing. *See Toni D. v. Kijakazi*, 2022 WL 423494, at *3
11 (C.D. Cal. Jan. 5, 2022) (“an ALJ’s decision is not “tainted” by an unconstitutional
12 restriction on the removability of an agency official having no direct connection to
13 the decision”); *Sean E. M. v. Kijakazi*, 2022 WL 267406, at *5 (N.D. Cal. Jan. 28,
14 2022) (because plaintiff failed to show connection between the unconstitutional
15 removal provision and denial of benefits, he was not entitled to new hearing based
16 upon constitutional challenge); *Ramos v. Comm’r of Soc. Sec.*, 2022 WL 105108, at
17 *4 (E.D. Cal. Jan. 11, 2022) (same); *Rivera-Herrera*, 2021 WL 5450230, at *8
18 (same); *Catherine J.S.W. v. Comm’r of Soc. Sec.*, 2021 WL 5276522, at *8 (W.D.
19 Wash. Nov. 12, 2021) (same); *see also Decker Coal*, 8 F.4th at 1136-1138 (plaintiff
20 not entitled to new hearing based upon allegedly unconstitutional removal provision
21 where the plaintiff failed to show make any showing of a nexus between the allegedly
22 unconstitutional removal provisions and the ALJ’s decision).

23 **II. Whether the ALJ Properly Considered Plaintiff’s Subjective Complaints**

24 Plaintiff contends that the ALJ erred in discounting his testimony regarding
25 his subjective symptoms and limitations. (ECF 20 at 5-13.)

26 **A. Plaintiff’s Subjective Complaints**

27 Plaintiff alleged that he is unable to work due to ischemic heart disease,
28 coronary heart disease, high blood pressure, hemorrhage stroke, vascular insult to the

1 brain, memory impairment, difficulty maintaining concentration, stress, and
2 intracranial pressure. (See AR 224.) At the hearing, Plaintiff testified that he
3 underwent a stent procedure for his heart in 2013. He felt “better” after his procedure
4 and was able to return to work. (AR 46-47.) Plaintiff’s primary physician prescribed
5 him medication for his heart, and that medication “keeps [him] moving.” (AR 47.)

6 Plaintiff stopped working in 2016 because he was laid off due to “lack of
7 work.” He believed that he could have continued working if he had not been laid off.
8 (AR 47.)

9 When asked to identify the primary issue preventing him from working,
10 Plaintiff testified that he suffers from “pressure” in his head. He can hear a sound
11 like “air leak[ing]” and it is “so loud in his head” that it prevents him from sleeping.
12 As a result, Plaintiff gets tired and weaker. According to Plaintiff, his doctors told
13 him that there was nothing he could do about the problem. (AR 48-52.) Plaintiff also
14 testified that he has problems with swelling in his right hand and wrist. The swelling
15 and pain increase if Plaintiff performs a lot of movement. Doctors have been unable
16 to find anything wrong with it. Other than a cream that Plaintiff rubs on it, Plaintiff
17 did not receive medication or treatment for his wrist. (AR 48-51.) In addition,
18 Plaintiff testified that he has trouble remembering things. Sometimes when he was
19 told to do something at work, he would “just forget about it.” (AR 59.)

20 As for his daily activities, Plaintiff testified that he lives with his wife and adult
21 daughter. Although he is not able to do yardwork or take out the trash, but he is able
22 to help around the house by washing the dishes “a little bit,” rolling the trashcans in
23 once they’re empty, and he “helps” his wife drive. (AR 54-55.) Plaintiff gets tired
24 after standing for four or five minutes, after which he needs to “relax.” (AR 56.)

25 Plaintiff completed a Function Report in which he indicated that he has
26 difficulty concentrating, and suffers from short-term memory loss such that he
27 requires assistance remembering instructions or what he previously said. (AR 262.)
28 Plaintiff cooks his meals throughout the day – spending less than one hour to do so –

1 relaxes, and watches television. He exercises on a bicycle every other day. (AR 263.)
2 He is able to do laundry, wash clothes, and wash his dishes. (AR 264.) He is also able
3 to drive a car and go grocery shopping, which takes an hour or two. (AR 265.)
4 Plaintiff has no problems with personal care such as grooming, toileting, or eating.
5 (AR 263.)

6 According to his Function Report, Plaintiff is able to walk less than a mile
7 before needing a ten or twenty-minute rest. His attention span is limited depending
8 upon what he is doing and he has trouble following spoken instructions – he needs
9 everything to be written down. (AR 267.) Plaintiff uses a medicine organizer to help
10 him remember to take his medication. (AR 263.) Plaintiff suffers from intracranial
11 pressure, which he described as feeling and hearing pressure inside of his head. When
12 it is quiet, Plaintiff hears the noise inside his head which makes it difficult to
13 concentrate. Plaintiff tries to distract himself by watching television. (AR 269.)

14 **B. Relevant Law**

15 Where, as here, a claimant has presented objective medical evidence of an
16 underlying impairment that could reasonably be expected to produce pain or other
17 symptoms, and the ALJ has not made an affirmative finding of malingering, an ALJ
18 must provide specific, clear, and convincing reasons before rejecting a claimant’s
19 testimony about the severity of her symptoms. *Lambert v. Saul*, 980 F.3d 1266, 1277
20 (9th Cir. 2020) (citing *Brown-Hunter v. Colvin*, 806 F.3d 487, 488-489 (9th Cir.
21 2015). “General findings [regarding a claimant’s credibility] are insufficient; rather,
22 the ALJ must identify what testimony is not credible and what evidence undermines
23 the claimant’s complaints.” *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014)
24 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); see *Lambert*, 980 F.3d
25 at 1277 (an ALJ is required to “specifically identify the testimony [from a claimant]
26 she or he finds not to be credible and ... explain what evidence undermines that
27 testimony.”) (citation omitted). The ALJ’s findings “must be sufficiently specific to
28 allow a reviewing court to conclude the adjudicator rejected the claimant’s testimony

1 on permissible grounds and did not arbitrarily discredit a claimant’s testimony
2 regarding pain.” *Brown-Hunter*, 806 F.3d at 493 (quoting *Bunnell v. Sullivan*, 947
3 F.2d 341, 345-346 (9th Cir. 1991)) (en banc).

4 Factors an ALJ may consider include conflicts between the claimant’s
5 testimony and the claimant’s conduct – such as daily activities, work record, or an
6 unexplained failure to pursue or follow treatment – as well as ordinary techniques of
7 credibility evaluation, such as internal contradictions in the claimant’s statements and
8 testimony. *See Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014). In addition,
9 although an ALJ may not disregard a claimant’s testimony solely because it is not
10 substantiated by objective medical evidence, the lack of medical evidence is a factor
11 that the ALJ can consider in making a credibility assessment. *Burch v. Barnhart*, 400
12 F.3d 676, 680-681 (9th Cir. 2005).

13 **C. Analysis**

14 Here, the ALJ concluded that Plaintiff’s impairments resulted in some
15 functional limitations, but that his allegations as to the intensity, persistence, and
16 limiting effects of his symptoms was less than fully credible. (AR 32.) The ALJ
17 provided the following reasons in support of this determination.

18 1. Lack of Objective Medical Evidence

19 The ALJ concluded that the objective medical evidence did not support the
20 severity of Plaintiff’s allegations. In reaching this conclusion, the ALJ summarized
21 and discussed the medical evidence.

22 Medical Evidence

23 Plaintiff had a history of myocardial infarction from January 2103, at which
24 time he received a stent. (AR 353.)

25 Treatment notes from Plaintiff’s treatment physician, Hor Chhay, M.D., dated
26 January 24, 2017, reveal an unremarkable physical examination. Dr. Chhay
27 diagnosed Plaintiff with unspecified essential hypertension; acute but ill-defined,
28

1 cerebrovascular disease; old myocardial infarction; and pure hypercholesterolemia.
2 (AR 313-316.)

3 In May 2017, Plaintiff complained of noise in his ears and decreased hearing
4 ability. After examination, he was diagnosed with cerumen impaction of the left ear,
5 tinnitus and hearing loss. (AR 338-339.) Plaintiff returned for a hearing examination
6 in June 2017. Left ear cerumen was removed. Results of a hearing test showed
7 moderate sloping to moderately-severe sensorineural hearing loss from 3000Hz to
8 8000Hz for the right ear and a mild sensorineural hearing loss from 3000Hz to
9 8000Hz for the left ear. It was recommended that Plaintiff return for a hearing aid
10 evaluation once medical clearance was obtained. (AR 334.) At a follow-up in
11 September 2017, Plaintiff was again assessed with tinnitus and high frequency
12 hearing loss. Plaintiff indicated that he did not want to pursue a hearing aid at that
13 time. (AR 340.)

14 In August 2017, Plaintiff complained of chronic pain in his right wrist and poor
15 memory. He requested a neurology consultation. (AR 351.) Physical examination
16 was normal except for right wrist tenderness upon palpation. (AR 353.) He was
17 referred for a neurological consultation based upon his complaints of memory
18 deficits. (AR 354.)

19 Dr. Chhay saw Plaintiff for a follow-up in March 2018. Physical examination
20 was entirely normal. Plaintiff had full range of motion in his extremities, with no
21 deformities, edema or erythema. (AR 361.) His condition was noted as “stable” and
22 he was diagnosed with pure hypercholesterolemia; acute, but ill-defined,
23 cerebrovascular disease; unspecified essential hypertension; anxiety disorder; painful
24 wrist joint; and overweight. (AR 362.)

25 In June 2018, Plaintiff was evaluated by consultative physician, Bryan H. To,
26 M.D. Plaintiff reported a history of headaches. Plaintiff also reported a history of
27 right wrist and hand pain with swelling and stiffness. He said that medication helps,
28 but “only for a short period of time.” (AR 365.) Plaintiff also reported a history of

1 depression and increasing memory loss, and said that he sees a neurologist for the
2 memory loss. (AR 365.) Physical examination showed 20/20/20 grip strength in both
3 the right and left hand. (AR 366.) Plaintiff's gait was normal and he ambulated
4 without an assistive device. (AR 366.) Cardiovascular examination was normal. (AR
5 367.) Plaintiff's muscle tone and mass were normal; there was no tenderness to
6 palpation; and range of motion was normal in all extremities, although "with
7 complaint of range of motion pain." (AR 367.) Motor function was normal and motor
8 strength was 5/5 throughout. (AR 367-368.) Dr. To observed that Plaintiff's memory
9 "appear[ed] to be intact, as [Plaintiff] is able to recall relevant data pertaining to the
10 current medical condition." (AR 367.)

11 Under "Discussion/Diagnoses:" Dr. To found the following:

- 12 1. Plaintiff had a history of hemorrhagic cerebrovascular accident in 2006.
13 After a craniotomy, Plaintiff recovered well and denied any residual
14 weakness. Plaintiff is not following up with a neurosurgeon;
- 15 2. Plaintiff was diagnosed with myocardial infarction and coronary artery
16 disease in 2013. He is status post angioplasty with the placement of three
17 stents. Plaintiff denied further chest pain and was not seeing a cardiologist.
- 18 3. Hypertension. Plaintiff's blood pressure as 160/98. There was no evidence
19 of acute end organ damage and Plaintiff denied recent history of transient
20 ischemic attack, headaches, or slurred speech.
- 21 4. Right wrist and hand pain. Physical examination revealed no evidence of
22 deformity or swelling. Plaintiff reported range of motion pain.
- 23 5. Depression and memory loss. Plaintiff is not taking any medication and
24 does not see a psychiatrist. He does see a neurologist for the memory loss
25 and he takes medication.

26 (AR 368-369.)

27 Dr. To opined that Plaintiff could push, pull, lift, and carry 50 pounds
28 occasionally and 25 pounds frequently; sit for six hours and stand/walk for six hours

1 in an eight-hour workday; can frequently perform postural movements, walk on
2 uneven terrain, climb ladders and work with heights; had no limitations on hearing,
3 seeing, use of hands for fine and gross manipulative movements; did not need
4 assistive ambulatory device; and should be restricted from working with heavy
5 moving machinery. (AR 369.)

6 Treatment notes from Dr. Chhay dated August 17, 2018, indicate that Plaintiff
7 had been to the hospital in July complaining of blurred vision and malaise and was
8 seen for a possible cerebrovascular accident. Dr. Chhay reviewed the discharge
9 report. Plaintiff reported that he now felt fine and requested a refill of his medications.
10 (AR 390.) His blood pressure was 142/83. Physical examination – including
11 examination of Plaintiff’s head, eyes, ears, nose, throat, neck, chest, lungs, heart,
12 abdomen, back, skin and a neurological evaluation – was normal. Plaintiff had full
13 range of motion in his extremities with no deformities, edema, or erythema. (AR
14 391.) In Dr. Chhay’s assessment, Plaintiff was stable and doing well. He was
15 diagnosed with hypertension; old myocardial infraction; hypertriglyceridemia; and
16 overweight. (AR 392.) According to Dr. Chhay, Plaintiff had no impairment in
17 functional or cognitive status. (AR 392.)

18 Dr. Chhay examined Plaintiff again in November 2018. Plaintiff’s blood
19 pressure was 138/79. Physical examination again was normal. His medications were
20 continued and he received an influenza vaccination. (AR 393-395.)

21 In a follow-up visit in February 2019, Dr. Chhay noted that Plaintiff had no
22 new complaints, but requested refill of his medication. Plaintiff’s blood pressure was
23 124/70. Plaintiff reported that he was “asymptomatic.” (AR 402.) Physical
24 examination was normal and Plaintiff had full range of motion in his extremities.
25 (AR 403.) Dr. Chhay indicated that he had reviewed a January 25, 2019 treadmill
26 report from Minh N. Nguyen, M.D. (AR 399.) He found the result “inconclusive due
27 to short test duration, but without evidence of [i]schemia or arrhythmia during test.”
28

1 (AR 403.) Dr. Chhay observed that Plaintiff had “no disability, no impairment” in
2 either his “functional status” or his “cognitive status.” (AR 404.)

3 The ALJ’s Discussion of the Medical Evidence

4 With regard to Plaintiff’s myocardial infraction in 2013 and coronary artery
5 disease, the ALJ observed that Plaintiff denied further chest pain and was not
6 following with a cardiologist. His chest, lungs, and cardiovascular examinations were
7 normal. (AR 33.) Similarly, with respect to Plaintiff’s history of hemorrhagic
8 cerebrovascular accident, the ALJ noted that Plaintiff denied residual weakness from
9 the event, was not following with a neurosurgeon, and there was no evidence of acute
10 end organ damage, transient ischemic attack, headaches, or slurred speech. (AR 33.)

11 With regard to Plaintiff’s subjective complaints of wrist pain and swelling, the
12 ALJ noted the absence of medical evidence showing that Plaintiff suffered from a
13 medically determinable impairment related to his wrist. (AR 32-33.) The ALJ
14 acknowledged that treatment notes from 2017 and the consultative examiner’s 2018
15 report reflected Plaintiff’s complaints of wrist pain and tenderness on palpation/range
16 of motion. However, the ALJ observed that the record lacked a “diagnostic
17 confirmation for an etiology.” (AR 31, citing AR 351, 353, 388.) Specifically, the
18 ALJ observed that Plaintiff had normal range of motion in all extremities, with
19 complaints of pain, but no evidence of deformity, swelling, or tenderness. (See AR
20 33.) Further, Plaintiff’s testimony that x-rays revealed nothing wrong with his right
21 wrist and that the doctors did not know the cause of his wrist pain. (AR 32.)

22 With regard to Plaintiff’s allegations regarding weakness and limitations – i.e.,
23 allegations that he got tired after four or five minutes of standing or was unable to
24 take out the trash when it was full – the ALJ observed that Dr. Chhay’s treatment
25 records consistently reflected normal sensory examinations, normal gait, and did not
26 reflect any problems with fatigue or musculoskeletal limitations. In addition,
27 Dr. To’s examination findings showed pain, but otherwise normal range of motion in
28

1 all extremities; normal gait; normal muscle tone and mass; and 5/5 motor strength.
2 (AR 33-34.)

3 The ALJ also found the record lacked any evidence to indicate that Plaintiff's
4 physical conditions were causing significant limitations in his memory or
5 concentration. To the contrary, the ALJ noted the evidence showing Plaintiff's
6 neurological examination was normal; he was oriented to time, place, person, and
7 purpose; his memory was intact; he had no problem with coordination; his deep
8 tendon reflexes were symmetric and 2 plus; and cranial nerves were grossly intact
9 with normal motor function. (AR 33.)

10 Plaintiff points out that the ALJ relied on what is essentially boilerplate
11 language, stating that Plaintiff's subjective statements were "not entirely consistent
12 with the medical evidence and other evidence in the record for the reasons explained
13 in this decision." (ECF 20 at 7, citing AR 32.) Further, Plaintiff correctly observes
14 that such language standing alone is "deficient"; rather, an ALJ is required to provide
15 specific, clear, and convincing reasons for his credibility assessment. *See Lambert v.*
16 *Saul*, 980 F.3d 1266, 1277 (9th Cir. 2020). Contrary to Plaintiff's contention,
17 however, the ALJ here complied with that obligation. As set forth above, the ALJ
18 specifically identified the testimony of Plaintiff that he found not credible and
19 explained what evidence undermined that testimony. *See Lambert*, 980 F.3d at 1277
20 (ALJ is required to "specifically identify the testimony [from a claimant] she or he
21 finds not to be credible and ... explain what evidence undermines that testimony")
22 (citation omitted).

23 Where, as here, the ALJ's determination is supported by substantial evidence,
24 the Court may not second guess it. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039
25 (9th Cir. 2008) ("If the ALJ's finding is supported by substantial evidence, the court
26 'may not engage in second-guessing.'") (quoting *Thomas v. Barnhart*, 278 F.3d 947,
27 959 (9th Cir. 2002)); *see also Saavedra v. Berryhill*, 2019 WL 1171271, at *4 (C.D.
28 Cal. Mar. 12, 2019) (explaining that "this Court will not second guess the ALJ's

1 reasonable determination . . . even if the evidence could give rise to inferences more
2 favorable to plaintiff”) (citing *Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir.
3 2012)). Thus, as long as this was not the sole reason for discounting Plaintiff’s
4 testimony, the ALJ properly relied upon the lack of objective medical findings
5 supporting Plaintiff’s alleged symptoms and limitations. *See Burch*, 400 F.3d at 681
6 (including lack of supporting medical evidence as one factor that an ALJ can rely on
7 in discrediting claimant testimony). In the present case, the ALJ provided additional
8 reasons for his credibility assessment.

9 Plaintiff’s Lack of Treatment

10 In weighing the credibility of a claimant’s subjective complaints, an ALJ may
11 consider “unexplained or inadequately explained failure to seek treatment or to
12 follow a prescribed course of treatment.” *Tommasetti*, 533 F.3d at 1039. Here, the
13 ALJ noted that despite his complaints of pressure in his head and extreme weakness
14 or tiredness, Plaintiff was not following up with a cardiologist or a neurosurgeon.
15 (AR 33.) The failure to seek treatment for allegedly disabling symptoms is a
16 sufficient basis for discounting a claimant’s subjective allegations. *See Orn*, 495 F.3d
17 at 638 (“Our case law is clear that if a claimant complains about a disabling pain but
18 fails to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ
19 may use such failure as a basis for finding the complaint unjustified or
20 exaggerated.”). As such, this was an appropriate basis on which the ALJ could
21 evaluate the credibility of Plaintiff’s subjective complaints.³

22 **II. Whether the ALJ Properly Considered Lay Testimony**

23 Plaintiff contends that the ALJ failed to properly consider the testimony of his
24 daughter, Ronawell Touch. (ECF 20 at 14-16.) The Commissioner disagrees, arguing
25

26
27 ³ Plaintiff argues that the ALJ could not properly rely upon his daily activities as a basis for
28 discounting his subjective complaints. (ECF 20 at 10-12.) However, the ALJ did not purport to rely
upon his daily activities in reaching his credibility determination.

1 that as he was required to do, the ALJ provided a germane reason for discounting
2 Ms. Touch’s testimony. (ECF 27 at 24.)

3 **A. Lay Testimony**

4 Ronawell Touch submitted a Third-Party Function Report. (AR 235-242.)
5 Ms. Touch indicated that she sees Plaintiff every weekend. They usually cooked, ate,
6 and went outdoors. According to Ms. Touch, Plaintiff’s cognitive functioning had
7 “become very slow” and his memory problems caused him to forget “what he needs
8 to do, why, where or when.” (AR 235.) In addition, Plaintiff had difficulty
9 concentrating or finishing what he was doing or saying. (AR 235.) Ms. Touch
10 explained that Plaintiff’s

11 inability to concentrate is affected by a pressure he feels burdened by.
12 He hears some sort of fluid pressure in his head, which gets louder when
13 the environment is quiet. The doctor had no resolution to this despite the
14 severity of the effects.

15 (AR 242.) With regard to Plaintiff’s daily activities, Ms. Touch indicated that
16 Plaintiff cooked his own meals and watched television. He also tried to exercise on a
17 stationary bicycle. He was able to wash dishes and do laundry, but otherwise did not
18 do “much housework because finishing tasks are a burden.” (AR 236-237.)

19 **B. Relevant Law**

20 “In determining whether a claimant is disabled, an ALJ must consider lay
21 witness testimony concerning a claimant’s ability to work.” *Bruce v. Astrue*, 557 F.3d
22 1113, 1115 (9th Cir. 2009) (quoting *Stout v. Comm’r Soc. Sec. Admin.*, 454 F.3d
23 1050, 1053 (9th Cir. 2006)); *see also* 20 C.F.R. §§ 404.1513(a)(4), 416.913(a)(4).
24 Friends and family members in a position to observe a symptoms and activities are
25 competent to testify as to a claimant’s condition. *See Diedrich v. Berryhill*, 874 F.3d
26 634, 640 (9th Cir. 2017). Such testimony “cannot be disregarded without comment.”
27 *Bruce*, 557 F.3d at 1115 (citation omitted). When rejecting law witness testimony, an
28

1 ALJ must give specific reasons germane for discounting the testimony. *Valentine v.*
2 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

3 C. Analysis

4 The ALJ addressed Ms. Touch's lay testimony and observed that the
5 symptoms and limitations she reported were similar to those alleged by Plaintiff. The
6 ALJ explained that the medical evidence failed to support the level of limitations she
7 described. (AR 35.)

8 Citing *Smolen v. Chater*, 80 F.3d 1273, 1288-1289 (9th Cir. 1996), Plaintiff
9 argues that the ALJ improperly relied upon the lack of medical evidence supporting
10 Ms. Touch's testimony to discount it. (ECF 20 at 15-16.) As Plaintiff points out, in
11 *Smolen*, the Ninth Circuit found that the ALJ erred in rejecting lay testimony based
12 upon a lack of medical evidence. *Smolen*, 80 F.3d at 1288-1289. *Smolen*, however,
13 is distinguishable. There, the Ninth Circuit also concluded that the ALJ erred in
14 rejecting the claimant's subjective complaints by, among other things, ignoring
15 relevant medical evidence. *Id.* at 1282-1283. Here, in contrast, the Court has
16 determined that the ALJ properly considered the medical evidence in discounting
17 Plaintiff's subjective complaints. Furthermore, and as the ALJ correctly observed,
18 Ms. Touch's testimony was nearly identical to Plaintiff's subjective complaints. In
19 light of the Court's conclusion that the ALJ provided clear and convincing reasons
20 for rejecting Plaintiff's own subjective complaints, "it follows that the ALJ also gave
21 germane reasons for rejecting her testimony." *See Valentine*, 574 F.3d at 694 (9th
22 Cir. 2009) ("In light of our conclusion that the ALJ provided clear and convincing
23 reasons for rejecting Valentine's own subjective complaints, and because
24 Ms. Valentine's testimony was similar to such complaints, it follows that the ALJ
25 also gave germane reasons for rejecting her testimony."); *Rice v. Berryhill*, 2019 WL
26 142422, at *4 (C.D. Cal. Jan. 9, 2019) (ALJ properly discounted lay testimony which
27 "parroted" the plaintiff's subjective complaints where ALJ had properly rejected the
28 plaintiff's subjective complaints); *see also Molina v. Astrue*, 674 F.3d 1104, 1122

1 (9th Cir. 2012) (although ALJ erred by failing to explain her reasons for rejecting lay
2 witnesses' testimony, the error was harmless because the ALJ had provided clear and
3 convincing reasons for rejecting the claimant's subjective testimony which described
4 the same limitations).

5 Last, Plaintiff argues that the "failure to provide any sufficient rationale to
6 reject the lay evidence is grounds for reversal." (ECF 20 at 16.) Plaintiff cites *Stout*
7 *v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054-1056 (9th Cir. 2006), in support
8 of this argument. (ECF 20 at 16.) Plaintiff's reliance on *Stout* is misplaced. In *Stout*,
9 the ALJ failed to even mention the lay testimony, and the Commissioner conceded
10 that "the ALJ's silent disregard of the lay testimony contravenes [Ninth Circuit] case
11 law and the controlling regulations." *Stout*, 454 F.3d at 1054. Here, the ALJ explicitly
12 considered, and provided sufficiently germane reasons for rejecting, Ms. Touch's
13 testimony.

14 **ORDER**

15 IT IS THEREFORE ORDERED that Judgment be entered affirming the
16 decision of the Commissioner of Social Security and dismissing this action with
17 prejudice.

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19 DATED: 3/7/2022

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22 ALEXANDER F. MacKINNON
23 UNITED STATES MAGISTRATE JUDGE
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