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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RAY LEE BRAY,)	Case No. EDCV 14-1772-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	AFFIRMING COMMISSIONER
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
_____)	

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner’s final decision denying his application for Social Security disability insurance benefits (“DIB”) and supplemental security income benefits (“SSI”). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties’ Joint Stipulation, filed July 23, 2015, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner’s decision is affirmed.

1 **II. BACKGROUND**

2 Plaintiff was born in 1964. (Administrative Record ("AR")
3 141.) In a Disability Report he stated that he completed one
4 year of college and worked in construction. (AR 160.)¹

5 On February 9, 2011, Plaintiff filed applications for DIB
6 and SSI (AR 141, 145), alleging that he had been unable to work
7 since April 11, 2009, because of severe asthma and ankle and back
8 problems (AR 159). After his applications were denied initially
9 and on reconsideration, he requested a hearing before an
10 Administrative Law Judge. (AR 79.) A hearing was held on
11 September 17, 2012, at which Plaintiff, who was represented by
12 counsel, testified, as did a vocational expert. (AR 39-59.) In
13 a written decision issued September 27, 2012, the ALJ found
14 Plaintiff not disabled. (AR 19-32.) On May 13, 2014, the
15 Appeals Council denied Plaintiff's request for review. (AR 4.)
16 This action followed.

17 **III. STANDARD OF REVIEW**

18 Under 42 U.S.C. § 405(g), a district court may review the
19 Commissioner's decision to deny benefits. The ALJ's findings and
20 decision should be upheld if they are free of legal error and
21 supported by substantial evidence based on the record as a whole.
22 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
23 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
24 evidence means such evidence as a reasonable person might accept
25 as adequate to support a conclusion. Richardson, 402 U.S. at

26
27 ¹ At the hearing before the ALJ, however, Plaintiff stated
28 that he completed seven years of college total at two different
schools but didn't graduate from either. (AR 41.)

1 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
2 It is more than a scintilla but less than a preponderance.
3 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
4 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
5 substantial evidence supports a finding, the reviewing court
6 "must review the administrative record as a whole, weighing both
7 the evidence that supports and the evidence that detracts from
8 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
9 720 (9th Cir. 1996). "If the evidence can reasonably support
10 either affirming or reversing," the reviewing court "may not
11 substitute its judgment" for that of the Commissioner. Id. at
12 720-21.

13 **IV. THE EVALUATION OF DISABILITY**

14 People are "disabled" for purposes of receiving Social
15 Security benefits if they are unable to engage in any substantial
16 gainful activity owing to a physical or mental impairment that is
17 expected to result in death or has lasted, or is expected to
18 last, for a continuous period of at least 12 months. 42 U.S.C.
19 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
20 1992).

21 A. The Five-Step Evaluation Process

22 The ALJ follows a five-step sequential evaluation process to
23 assess whether a claimant is disabled. 20 C.F.R.
24 §§ 404.1520(a)(4), 416.920(a)(4); Lester v. Chater, 81 F.3d 821,
25 828 n.5 (9th Cir. 1995) (as amended Apr. 9, 1996). In the first
26 step, the Commissioner must determine whether the claimant is
27 currently engaged in substantial gainful activity; if so, the
28 claimant is not disabled and the claim must be denied.

1 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

2 If the claimant is not engaged in substantial gainful
3 activity, the second step requires the Commissioner to determine
4 whether the claimant has a "severe" impairment or combination of
5 impairments significantly limiting his ability to do basic work
6 activities; if not, the claimant is not disabled and his claim
7 must be denied. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

8 If the claimant has a "severe" impairment or combination of
9 impairments, the third step requires the Commissioner to
10 determine whether the impairment or combination of impairments
11 meets or equals an impairment in the Listing of Impairments
12 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix
13 1; if so, disability is conclusively presumed.

14 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

15 If the claimant's impairment or combination of impairments
16 does not meet or equal an impairment in the Listing, the fourth
17 step requires the Commissioner to determine whether the claimant
18 has sufficient residual functional capacity ("RFC")² to perform
19 his past work; if so, he is not disabled and the claim must be
20 denied. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant
21 has the burden of proving he is unable to perform past relevant
22 work. Drouin, 966 F.2d at 1257. If the claimant meets that
23 burden, a prima facie case of disability is established. Id.

24 If that happens or if the claimant has no past relevant
25 work, the Commissioner then bears the burden of establishing that

26
27 ² RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. §§ 404.1545, 416.945; see Cooper
v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 the claimant is not disabled because he can perform other
2 substantial gainful work available in the national economy.
3 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); Drouin, 966 F.2d at 1257.
4 That determination comprises the fifth and final step in the
5 sequential analysis. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v);
6 Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d at 1257.

7 B. The ALJ's Application of the Five-Step Process

8 At step one, the ALJ found that Plaintiff had not engaged in
9 substantial gainful activity since April 11, 2009, the alleged
10 onset date. (AR 21.) At step two, he concluded that Plaintiff
11 had the severe impairment of degenerative disc disease of the
12 lumbar spine with radiculopathy.³ (Id.) At step three, the ALJ
13 determined that Plaintiff's impairments did not meet or equal a
14 listing. (AR 24.) At step four, he found that Plaintiff had the
15 RFC to perform light work with additional restrictions. (AR 24-
16 25.) Specifically, Plaintiff could lift, carry, push, or pull 20
17 pounds occasionally and 10 pounds frequently. (AR 24.) He could
18 stand and walk for at least two hours and sit for about six hours
19 of an eight-hour day. (Id.) He could occasionally perform
20 postural activities such as climbing, balancing, stooping,
21 kneeling, crouching, and crawling but could not climb ladders,
22 ropes, or scaffolds. (Id.) He was also to "avoid even moderate
23 exposure to irritants such as fumes, odors, dusts and gases."
24 (AR 25.) Based on the VE's testimony, the ALJ concluded that
25 Plaintiff could not perform his past relevant work as a
26

27 ³ The ALJ found that Plaintiff's other alleged impairments
28 were not severe (AR 21-24), which Plaintiff does not challenge.

1 construction superintendent. (AR 29-30.) At step five, the ALJ
2 found that Plaintiff could perform jobs existing in significant
3 numbers in the national economy. (AR 30.) Accordingly, he found
4 him not disabled. (AR 31.)

5 **V. DISCUSSION**

6 Plaintiff claims that the ALJ erred in assessing the
7 opinions of two treating physicians and Plaintiff's credibility.
8 (J. Stip. at 4.) For efficiency, the Court addresses Plaintiff's
9 contentions in reverse order.

10 A. The ALJ Properly Assessed Plaintiff's Credibility

11 1. Applicable law

12 An ALJ's assessment of symptom severity and claimant
13 credibility is entitled to "great weight." See Weetman v.
14 Sullivan, 877 F.2d 20, 22 (9th Cir. 1989) (as amended); Nyman v.
15 Heckler, 779 F.2d 528, 531 (9th Cir. 1985) (as amended Feb. 24,
16 1986). "[T]he ALJ is not 'required to believe every allegation
17 of disabling pain, or else disability benefits would be available
18 for the asking, a result plainly contrary to 42 U.S.C.
19 § 423(d)(5)(A).'" Molina v. Astrue, 674 F.3d 1104, 1112 (9th
20 Cir. 2012) (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir.
21 1989)).

22 In evaluating a claimant's subjective symptom testimony, the
23 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
24 at 1035-36. "First, the ALJ must determine whether the claimant
25 has presented objective medical evidence of an underlying
26 impairment '[that] could reasonably be expected to produce the
27 pain or other symptoms alleged.'" Id. at 1036 (quoting Bunnell
28 v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). If

1 such objective medical evidence exists, the ALJ may not reject a
2 claimant's testimony "simply because there is no showing that the
3 impairment can reasonably produce the degree of symptom alleged."
4 Smolen v. Chater, 80 F.3d 1273, 1282 (9th Cir. 1996) (emphasis in
5 original).

6 If the claimant meets the first test, the ALJ may discredit
7 the claimant's subjective symptom testimony only if he makes
8 specific findings that support the conclusion. See Berry v.
9 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
10 affirmative evidence of malingering, the ALJ must provide "clear
11 and convincing" reasons for rejecting the claimant's testimony.⁴
12 Brown-Hunter v. Colvin, ___ F.3d ___, No. 13-15213, 2015 WL
13 6684997, at *5 (9th Cir. Nov. 3, 2015); Treichler v. Comm'r of
14 Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014); Ghanim v.
15 Colvin, 763 F.3d 1154, 1163 & n.9 (9th Cir. 2014). The ALJ may
16 consider, among other factors, (1) ordinary techniques of
17 credibility evaluation, such as the claimant's reputation for
18 lying, prior inconsistent statements, and other testimony by the
19 claimant that appears less than candid; (2) unexplained or
20 inadequately explained failure to seek treatment or to follow a
21 prescribed course of treatment; (3) the claimant's daily
22 activities; (4) the claimant's work record; and (5) testimony
23 from physicians and third parties. Rounds v. Comm'r Soc. Sec.
24 Admin., 795 F.3d 1177, 1186 (9th Cir. 2015); Thomas v. Barnhart,

25
26 ⁴ Defendant objects to the clear-and-convincing standard but
27 acknowledges that her argument was rejected in Burrell v. Colvin,
28 775 F.3d 1133, 1136-37 (9th Cir. 2014). (J. Stip at 29 n.7); see
Brown-Hunter v. Colvin, ___ F.3d ___, No. 13-15213, 2015 WL
6684997, at *5 (9th Cir. Nov. 3, 2015) (reaffirming Burrell).

1 278 F.3d 947, 958-59 (9th Cir. 2002). If the ALJ's credibility
2 finding is supported by substantial evidence in the record, the
3 reviewing court "may not engage in second-guessing." Thomas, 278
4 F.3d at 959.

5 2. Relevant background

6 At the hearing, Plaintiff testified that he had had lower-
7 back pain for several years before February 2009, when he hurt
8 his back trying to lift a manhole cover off a truck at a
9 construction site. (AR 47-48.) After the incident, he could not
10 get out of bed and took Oxycontin twice a day for 30 days, which
11 seemed to help. (AR 48.)

12 Plaintiff testified that he had lower-back pain every day,
13 and it lasted all day but at different levels. (AR 49.) On a
14 scale of zero to 10, level three was a "good day" and he could
15 "handle" level five, but he had a "hard time" when the pain was
16 "severe," at level seven. (Id.) He testified that he could sit
17 for a maximum of two hours and stand for an hour or two. (AR
18 44.) He stated that he could "lift anything" but would "pay for
19 it" in pain. (AR 45.) The farthest he could walk was a block
20 around his house. (AR 44-45.)

21 Plaintiff also testified that he had shooting pain down his
22 right leg, and if he used his feet, he had pain down his left leg
23 and in his lower back. (AR 53.) He also experienced sudden
24 lower-back spasms. (AR 54.)

25 Plaintiff testified that he was taking several pain
26 medications, including oxycodone, Soma, Norvasc, fentanyl
27 patches, and Meloxicam but was going to discontinue Meloxicam
28 because it wasn't helping. (AR 49-50, 55.) He wanted to change

1 his doctor because he thought his medications weren't managing
2 his pain. (AR 50.) Other than feeling groggy and being unable
3 to concentrate to read, he did not have any side effects from his
4 pain medication. (AR 52.) He testified that his doctors had
5 discussed surgery with him, but he did not want it because they
6 told him there was a 70 percent chance it would not be
7 successful. (AR 46-47.)

8 Plaintiff appeared at the hearing in a wheelchair, and he
9 testified that he used it when he knew he would be "up" for two
10 to three hours, which happened about five times a month. (AR
11 42.) He had difficulty showering and bathing but sometimes tried
12 to help with housework, cleaning, and grocery shopping. (AR 42-
13 43.)

14 3. Analysis

15 The ALJ found Plaintiff "partially credible because he has
16 some limitations, but not to the extent alleged." (AR 25.) As
17 discussed below, he provided clear and convincing reasons for
18 doing so.

19 The ALJ discounted Plaintiff's testimony because his alleged
20 symptoms and limitations were "inconsistent with the objective
21 medical evidence, which indicates an attempt by [Plaintiff] to
22 exaggerate the severity of his symptoms." (AR 25.) He first
23 noted that the record contained no treatment notes from April
24 2009, the alleged onset date, to mid-2010. (AR 26.) Further,
25 although treatment records from July 2010 to August 2012 showed
26 that Plaintiff had tenderness and decreased range of motion in
27 his lower extremities, they also documented many instances of
28 negative or only mildly positive straight-leg raises, normal

1 motor strength, and only mildly reduced sensation. For example,
2 every treatment note from Plaintiff's physician at Global Pain
3 Care from November 2011 to August 2012 indicated that Plaintiff
4 had motor strength of five of five and was negative for straight-
5 leg raise in both legs. (AR 535, 538, 541, 544, 547, 550, 553,
6 556, 559, 562, 565.) Additionally, Plaintiff's three visits to
7 the neurosurgery clinic at Arrowhead Regional Medical Center, in
8 October 2011, April 2012, and August 2012, showed motor strength
9 of five of five in upper and lower extremities (AR 484, 506,
10 567), "very mildly reduced" sensation in the right leg (AR 484),
11 and negative or only mildly positive results for straight-leg
12 raising (AR 506 (mildly positive in right, negative in left), 567
13 (negative in right and left)). The ALJ also noted that despite
14 Plaintiff's "extreme" description of the severity of his pain,
15 there was no evidence of muscle atrophy in the record. (AR 26);
16 see Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (as
17 amended) (affirming ALJ's discounting of claimant's allegations,
18 including that claimant "did not exhibit muscular atrophy");
19 Spurlock v. Colvin, No. EDCV 14-01521-JEM, 2015 WL 1735196, at *8
20 (C.D. Cal. Apr. 16, 2015) (finding that lack of muscle atrophy is
21 legitimate consideration in evaluating claimant's credibility).
22 The ALJ was entitled to consider the lack of objective medical
23 evidence in assessing Plaintiff's credibility. See Burch v.
24 Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of
25 medical evidence cannot form the sole basis for discounting pain
26 testimony, it is a factor that the ALJ can consider in his
27 credibility analysis."); Carmickle v. Comm'r, Soc. Sec. Admin.,
28 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the

1 medical record is a sufficient basis for rejecting the claimant's
2 subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in
3 determining credibility, ALJ may consider "whether the alleged
4 symptoms are consistent with the medical evidence").

5 The ALJ also discredited Plaintiff's allegations because the
6 record showed that he received "routine conservative treatment
7 for complaints [of] back and leg pain." (AR 26.) Specifically,
8 the "lack of more aggressive treatment such as surgical
9 intervention suggest[ed] [Plaintiff's] symptoms and limitations
10 were not as severe as he alleged." (Id.) Indeed, in June 2011,
11 a physician at the orthopedic clinic told Plaintiff that surgical
12 intervention was "not appropriate" and advised him to continue
13 his pain-management regimen with his primary-care physician. (AR
14 525.) In October 2011, Plaintiff went to the neurosurgery clinic
15 for surgery evaluation, but examination results were generally
16 unremarkable, and the physician noted that Plaintiff needed a new
17 MRI because the most recent MRI was a year old and his symptoms
18 were "waxing and waning." (AR 506.) But Plaintiff did not get
19 another MRI until five months later, on March 14, 2012 (AR 502),
20 which he presented at his next visit to the neurosurgery clinic,
21 on April 5, 2012 (AR 484). Even after reviewing the MRI's
22 results of multilevel degenerative disc disease and posterior
23 degenerative facet-joint disease (AR 502), the neurosurgery
24 specialist concluded that "no neurosurgery intervention is
25 indicated" and that Plaintiff required "strenuous physical
26 therapy" instead (AR 485). He further noted that the physical
27 therapy Plaintiff had tried "was not professional physical
28 therapy and it was only done through [Plaintiff's] friend." (AR

1 484.) He also indicated that Plaintiff appeared "very strong"
2 and that "since [Plaintiff] is an athlete, physical therapy can
3 truly be beneficial to him." (AR 484-85.) Four months later, in
4 August 2012, a different physician at the same neurosurgery
5 clinic noted that Plaintiff had failed to do the physical therapy
6 that was prescribed at his last visit.⁵ (AR 567.) As before,
7 the doctor did not recommend surgery and instead advised
8 Plaintiff to do physical and occupational therapy and to continue
9 treatment with pain medication. (AR 567-68.) As the ALJ noted,
10 this evidence contradicted Plaintiff's testimony that his doctors
11 had recommended surgery but he declined to pursue it because
12 there was a 70 percent chance it would not be successful. (AR
13 46-47.)

14 Plaintiff also states that he "was not a candidate for
15 surgery because of his other multiple problems." (J. Stip. at
16 25.) Although an orthopedic specialist advised against surgery
17 in June 2011 because of Plaintiff's unspecified "multiple
18 problems" (AR 525), later, in April and August 2012, neurosurgery
19 specialists did not mention any such issues in concluding that
20 surgery was not appropriate (see AR 485, 567). Instead, they
21 noted "no neurosurgical lesion at this time amenable with
22 surgery" (AR 567), prescribed continued conservative treatment
23 with pain medication, physical therapy, and possible injections
24 (AR 485, 567), and concluded that Plaintiff did "not need any
25 further neurosurgical followup" (AR 567). See Riddell v. Astrue,
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28 ⁵ Plaintiff told the doctor he never received the referral
for physical therapy. (AR 567.)

1 No. 3:11-CV-381-BR, 2012 WL 1151585, at *8 (D. Or. Apr. 5, 2012)
2 (ALJ properly based credibility determination on conservative
3 treatment when no physician recommended surgery, including
4 neurosurgeon who found that claimant was "neurologically intact"
5 and "no instability in the cervical spine" accounted for his neck
6 pain); Martinez v. Colvin, No. CV 13-6741-SH, 2014 WL 2533784, at
7 *3 (C.D. Cal. June 5, 2014) (ALJ properly discounted claimant's
8 testimony based on conservative treatment when no physician
9 recommended surgery and claimant was treated with "pain
10 management" and epidural injections).

11 The ALJ also stated that although Plaintiff testified that
12 he needed to use a wheelchair five times a month, there was no
13 evidence in the record that a physician ever actually prescribed
14 one. (AR 26; see AR 42.) In fact, a doctor apparently ordered a
15 wheelchair for Plaintiff. (See AR 414, 423, 430, 456.) But the
16 doctor who ordered the wheelchair is the same doctor whose
17 assessments of Plaintiff's condition the ALJ properly rejected,
18 as explained in the next section, and thus any error in the ALJ's
19 statement was harmless. See Stout v. Comm'r, Soc. Sec. Admin.,
20 454 F.3d 1050, 1055 (9th Cir. 2006) (error harmless when it is
21 "inconsequential to the ultimate nondisability determination");
22 see also Molina, 674 F.3d at 1115.

23 Finally, as the ALJ noted, although Plaintiff's
24 prescriptions for "strong narcotic medication weigh[ed] in [his]
25 favor," the record indicates that his medications were
26 "relatively effective in controlling [his] symptoms with
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1 occasional adjustments," which was contrary to his testimony.⁶
2 (AR 26; see, e.g., AR 537, 540, 543, 549, 552, 558, 561.)
3 Plaintiff also received epidural injections and radiofrequency
4 neurotomies, which were sometimes helpful.⁷ (See AR 252
5 (Plaintiff reporting "marked improvement" after Dec. 2010
6 radiofrequency neurotomy), 271 (in Sept. 2010, Plaintiff
7 reporting that epidural injections in past several years had
8 relieved pain), 322 (June 2011 injection provided 30 percent pain
9 relief), 555 (Jan. 2012 injection provided 20 to 30 percent pain
10 relief for two weeks), 558 (Dec. 2011 injection provided 20 to 30
11 percent pain relief for two weeks).)

12 That orthopedic and neurosurgery specialists recommended
13 treatment with only pain medication and physical therapy was a
14 clear and convincing basis on which to discount Plaintiff's
15

16 ⁶ Several physicians expressed suspicion that Plaintiff
17 might be abusing or diverting his narcotic pain medication. (See
18 AR 207-08 (on Aug. 19, 2010, emergency-room physician writing,
19 "need to get DOJ report" in notes and noting that Plaintiff was
20 "very aggressive" in requesting "refill of narcotics" given two
21 weeks earlier because he had allegedly lost them), 203 (on Sept.
22 3, 2010, physician refusing to refill pain medication and
23 explaining to Plaintiff that he had received several pain
24 medications in August), 201 (on Sept. 17, 2010, physician
reminding Plaintiff to see only one doctor for change in
medication), 272 (on Sept. 27, 2010, nurse practitioner telling
Plaintiff he would receive no early refills and advising him not
to engage in further "diversional behavior"), 522 (on July 3,
2011, emergency-room physician advising Plaintiff that "ER is not
the place for chronic pain [treatment] or refills").)

25 ⁷ Radiofrequency neurotomy is a procedure for reducing back
26 and neck pain using heat generated by radio waves to interfere
27 with nerves' ability to transmit pain signals. See
28 Radiofrequency neurotomy, Mayo Clinic, [http://www.mayoclinic.org/
tests-procedures/radiofrequency-neurotomy/basics/definition/
PRC-20013452?p=1](http://www.mayoclinic.org/tests-procedures/radiofrequency-neurotomy/basics/definition/PRC-20013452?p=1) (last updated Nov. 26, 2014).

1 complaints of disabling pain. See Tommasetti v. Astrue, 533 F.3d
2 1035, 1040 (9th Cir. 2008) (that claimant "did not seek an
3 aggressive treatment plan" and had favorable response to
4 conservative treatment with physical therapy, transcutaneous-
5 electrical-nerve-stimulation unit, lumbosacral corset, and anti-
6 inflammatory medication undermined allegations of disabling
7 impairment); Parra, 481 F.3d at 751 (evidence of conservative
8 treatment sufficient to discount claimant's testimony regarding
9 severity of impairment); Walter v. Astrue, No. EDCV 09-1569 AGR,
10 2011 WL 1326529, at *3 (C.D. Cal. Apr. 6, 2011) (ALJ permissibly
11 discredited claimant's allegations based on conservative
12 treatment consisting of medication, physical therapy, and
13 injection). Even if Plaintiff's injections and narcotic pain
14 medication constituted nonconservative care, any error was
15 harmless given the ALJ's reliance on Plaintiff's inconsistent
16 statements about surgery and his daily activities, as explained
17 below, and the neurosurgeons' prescribed conservative care. See
18 Carmickle, 533 F.3d at 1162-63 (finding error harmless when ALJ
19 cited other reasons to support credibility determination).

20 Additionally, the ALJ refused to credit Plaintiff's
21 allegations that his daily activities were "fairly limited"
22 because they could not "be objectively verified with any
23 reasonable degree of certainty" and it was "difficult to
24 attribute that degree of limitation to [Plaintiff's] medical
25 condition, as opposed to other reasons, in view of the relatively
26 weak medical evidence and other factors discussed." (AR 26.)
27 Plaintiff may be correct that the ALJ improperly discounted his
28 testimony concerning his daily activities because it could not be

1 objectively verified. See Altamirano v. Colvin, No. ED CV 12-
2 1862-PLA, 2013 WL 3863956, at *7 (C.D. Cal. July 24, 2013)
3 (noting that “[o]bjective verifiability to a reasonable degree of
4 certainty is not a requirement imposed by law” (citation
5 omitted)); Baxla v. Colvin, 45 F. Supp. 3d 1116, 1128 (D. Ariz.
6 2014) (“that “a fact cannot be verified objectively provides
7 little evidence to support the conclusion that the individual is
8 not being truthful about such fact in any particular instance””
9 (citation omitted)), appeal docketed, No. 14-17222 (9th Cir. Nov.
10 7, 2014). But he correctly found that Plaintiff’s daily
11 activities do not appear to have been as limited as he alleged.
12 As the ALJ noted in particular, in October 2011, Plaintiff
13 reported that he was “extremely involved in sports” but had been
14 “taking it easy” in the last six weeks, and as a result, his pain
15 had improved. (AR 506.) The doctor advised that he “take
16 precaution when doing excessive physical activity, including
17 fighting, jujitsu, walking, or any other physical activities that
18 he states he does for an extended period of time.” (AR 506-07.)
19 Moreover, in April 2012, Plaintiff reported that he could
20 exercise for 25 minutes and that he used to run three miles but
21 now was capable only of walking six miles. (AR 484.) Less than
22 six months later, Plaintiff testified that he could walk no more
23 than around the block. (AR 44-45.)

24 As discussed above, the ALJ was entitled to discount
25 Plaintiff’s allegations based on a lack of objective medical
26 evidence, the inconsistent statements surrounding his surgery and
27 daily activities, and, possibly, the conservative treatment
28 regimen prescribed by Plaintiff’s physicians. In sum, the ALJ

1 provided clear and convincing reasons for finding Plaintiff
2 partially credible. Because those findings were supported by
3 substantial evidence, this Court may not engage in
4 second-guessing. See Thomas, 278 F.3d at 959. Plaintiff is not
5 entitled to remand on this ground.

6 B. The ALJ Properly Assessed the Treating Physicians'
7 Opinions

8 Plaintiff contends that the ALJ erred in assessing the
9 opinions of treating physicians Andres de la Llana and Nasrin
10 Lopa. (J. Stip. at 4-10.) For the reasons discussed below,
11 remand is not warranted.

12 1. Applicable law

13 Three types of physicians may offer opinions in Social
14 Security cases: (1) those who directly treated the plaintiff, (2)
15 those who examined but did not treat the plaintiff, and (3) those
16 who did neither. Lester, 81 F.3d at 830. A treating physician's
17 opinion is generally entitled to more weight than an examining
18 physician's, and an examining physician's opinion is generally
19 entitled to more weight than a nonexamining physician's. Id.

20 This is true because treating physicians are employed to
21 cure and have a greater opportunity to know and observe the
22 claimant. Smolen, 80 F.3d at 1285. If a treating physician's
23 opinion is well supported by medically acceptable clinical and
24 laboratory diagnostic techniques and is not inconsistent with the
25 other substantial evidence in the record, it should be given
26 controlling weight. §§ 404.1527(c)(2), 416.927(c)(2). If a
27 treating physician's opinion is not given controlling weight, its
28 weight is determined by length of the treatment relationship,

1 frequency of examination, nature and extent of the treatment
2 relationship, amount of evidence supporting the opinion,
3 consistency with the record as a whole, the doctor's area of
4 specialization, and other factors. §§ 404.1527(c)(2)-(6),
5 416.927(c)(2)-(6).

6 When a treating physician's opinion is not contradicted by
7 other evidence in the record, it may be rejected only for "clear
8 and convincing" reasons. See Carmickle, 533 F.3d at 1164 (citing
9 Lester, 81 F.3d at 830-31). When it is contradicted, the ALJ
10 must provide only "specific and legitimate reasons" for
11 discounting it. Id. (citing Lester, 81 F.3d at 830-31).
12 Furthermore, "[t]he ALJ need not accept the opinion of any
13 physician, including a treating physician, if that opinion is
14 brief, conclusory, and inadequately supported by clinical
15 findings." Thomas, 278 F.3d at 957; accord Batson v. Comm'r of
16 Soc. Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004).

17 2. Relevant background

18 Dr. de la Llana treated Plaintiff for his lower-back pain
19 from April to June 2011. (AR 319-35.) On April 18, 2012, nearly
20 a year later, he completed an Authorization to Release Medical
21 Information form, apparently in connection with Plaintiff's
22 application for state welfare benefits. (AR 442.) On the form,
23 he checked a box indicating that Plaintiff was unable to work.
24 (Id.) In an attached Physical Capacities form, Dr. de la Llana
25 opined that Plaintiff could sit and stand or walk no more than
26 two hours each a day. (AR 443.) Plaintiff was not restricted in
27 using his hands or fingers for repetitive motions but was
28 restricted in using his feet for such motions because of muscle

1 spasms caused by prolonged standing and operating of foot
2 controls. (Id.) Dr. de la Llana opined that Plaintiff could not
3 lift or carry even 10 pounds and could not climb, stoop, kneel,
4 crouch, crawl, or reach from below knees to chest. (AR 444.) He
5 could occasionally balance and reach from chest to above
6 shoulders. (Id.)

7 The ALJ gave "less weight" to Dr. de la Llana's opinion
8 because it reported "extremely severe limitations, but his
9 treatment notes fail to reveal the type of significant clinical
10 and laboratory abnormalities one would expect if [Plaintiff] were
11 in fact disabled." (AR 28.) The ALJ noted that Dr. de la
12 Llana's opinion "contrasts sharply with the other evidence of
13 record and is without substantial support from the other evidence
14 of record." (Id.)

15 Plaintiff saw Dr. Lopa on February 16, 2011, for a referral
16 to a pain-management specialist. (AR 339-41.) He saw her again
17 on February 24, 2011, for follow-up on lab work and requested
18 that she fill out a form for "social service cash aid." (AR
19 336.) That form was an Authorization to Release Medical
20 Information form identical to the one completed by Dr. de la
21 Llana. (AR 447.) On the form, Dr. Lopa checked boxes indicating
22 that Plaintiff was unable to work and had functional limitations
23 that affected his ability to work. (Id.) Unlike Dr. de la
24 Llana, however, Dr. Lopa did not attach a Physical Capacities
25 form specifying what those limitations were.

26 3. Analysis

27 Dr. de la Llana's opinion was contradicted by the opinions
28 of the nonexamining state-agency physicians, who opined that

1 Plaintiff could lift or carry 20 pounds occasionally and 10
2 pounds frequently and could stand or walk for at least two hours
3 of an eight-hour workday, among other limitations.⁸ (AR 303,
4 355.) Dr. de la Llana was also contradicted by one of the
5 neurosurgery specialists who examined Plaintiff, who told
6 Plaintiff to "take precaution when doing excessive physical
7 activity" but did not limit him in any daily activity. (AR 506-
8 07.) Thus, the ALJ was required to give specific and legitimate
9 reasons supported by substantial evidence for rejecting Dr. de la
10 Llana's opinion, see Carmickle, 533 F.3d at 1164, which he did.

11 The ALJ properly gave "less weight" to Dr. de la Llana's
12 opinion because it was not supported by his treatment notes,
13 which did not document "the type of significant clinical and
14 laboratory abnormalities one would expect if [Plaintiff] were in
15 fact disabled." (AR 28.) Indeed, in the five times Dr. de la
16 Llana saw Plaintiff from April to June 2011, he reviewed only one

17
18 ⁸ Plaintiff asserts that the nonexamining state-agency
19 physicians found him capable only of sedentary work, not light
20 work. (J. Stip. at 5.) Although the state-agency physician on
21 initial consideration did indicate a sedentary RFC in his Case
22 Analysis (AR 309), he also opined on a separate Physical Residual
23 Functional Capacity Assessment form that Plaintiff was capable of
24 lifting or carrying 20 pounds occasionally and 10 pounds
25 frequently (AR 303), which was consistent with the Social
26 Security Administration's definition of light work, see
27 §§ 404.1567(b), 416.967(b) ("Light work involves lifting no more
28 than 20 pounds at a time with frequent lifting or carrying of
objects weighing up to 10 pounds."); §§ 404.1567(a), 416.967(a)
("Sedentary work involves lifting no more than 10 pounds at a
time"). The state-agency physician on reconsideration
affirmed the "prior physical RFC as written" but did not resolve
the discrepancy. (AR 355.) The discrepancy appears to have been
a clerical error. Indeed, the ALJ reasonably interpreted the
state-agency physicians' findings as determining that Plaintiff
could perform light work, not sedentary work. (See AR 29.)

1 imaging test: a year-old MRI of his lower back, which showed a
2 herniated disc at L5-S1 with mass effect on sacral nerve roots
3 but no significant central-canal stenosis of the lumbar spine.
4 (See AR 322.) Other than observations that Plaintiff had
5 significant tenderness on palpation of his lower back and had
6 intact knee reflexes, Dr. de la Llana did not record any clinical
7 findings in his treatment notes supporting the functional
8 limitations he assessed. (See AR 320, 324, 328, 331-32, 334-35.)
9 Indeed, his treatment of Plaintiff consisted mainly of refilling
10 his pain medication while he continued treatment at a pain-
11 management clinic (AR 324, 329) and referring him to specialists
12 in neurosurgery and orthopedics (AR 321, 324, 332). Accordingly,
13 the ALJ's finding that Dr. de la Llana's opinion was not
14 supported by his own treatment notes was specific and legitimate
15 and supported by substantial evidence. See §§ 404.1527(c)(3),
16 416.927(c)(3) (more weight given "[t]he more a medical source
17 presents relevant evidence" and "[t]he better an explanation" it
18 provides to support its opinion); Connett v. Barnhart, 340 F.3d
19 871, 875 (9th Cir. 2003) (treating physician's opinion properly
20 rejected when treatment notes "provide[d] no basis for the
21 functional restrictions he opined should be imposed on
22 [claimant]"); Thomas, 278 F.3d at 957 ("The ALJ need not accept
23 the opinion of any physician, including a treating physician, if
24 that opinion is . . . inadequately supported by clinical
25 findings.").

26 The ALJ also accorded less weight to Dr. de la Llana's
27 opinion because it "contrast[ed] sharply with" and was not
28 supported by other evidence in the record. (AR 28.) Indeed, as

1 the ALJ noted, other evidence in the record showed "relatively
2 benign findings." (Id.) For example, as discussed in Section
3 V.A, numerous treatment notes in the record indicated that
4 Plaintiff had straight-leg raises that were negative or only
5 mildly positive, normal motor strength, and very mildly reduced
6 sensation in his lower extremities. (See AR 484, 506, 535, 538,
7 541, 544, 547, 550, 553, 556, 559, 562, 565, 567.) Thus, the
8 ALJ's finding that Dr. de la Llana's opinion was inconsistent
9 with the record was specific and legitimate and supported by
10 substantial evidence. See §§ 404.1527(c)(4), 416.927(c)(4) (more
11 weight given "the more consistent an opinion is with the record
12 as a whole"); Batson, 359 F.3d at 1195 ("an ALJ may discredit
13 treating physicians' opinions that are conclusory, brief, and
14 unsupported by the record as a whole . . . or by objective
15 medical findings").

16 Plaintiff argues that the ALJ erred in failing to address
17 the opinion of treating physician Lopa. (J. Stip. at 7-10 & n.2;
18 see AR 447.) Although the ALJ erred by not doing so, the error
19 was harmless. See Marsh v. Colvin, 792 F.3d 1170, 1172-73 (9th
20 Cir. 2015) (holding that ALJ errs if he "totally ignore[s]"
21 treating-physician opinion but harmless-error analysis applies).
22 Dr. Lopa's one-page opinion consisted only of checked-off boxes
23 indicating that Plaintiff was not able to work and had functional
24 limitations, without specifying what those limitations were. (AR
25 447); cf. Molina, 674 F.3d at 1111 (ALJ may "permissibly reject
26 check-off reports that do not contain any explanation of the
27 bases of their conclusions" (alterations and citation omitted)).
28 Further, Dr. Lopa completed the form after seeing Plaintiff only

1 two times total, over a two-week period, beginning about a week
2 after Plaintiff filed his Social Security applications. (AR 339-
3 41 (on Feb. 16, 2011, Plaintiff requesting "referral to pain
4 management"), 336 (on Feb. 24, 2011, Plaintiff requesting "form
5 fill out for social service cash aid")); see Dominquez v. Colvin,
6 927 F. Supp. 2d 846, 858-59 (C.D. Cal. 2013) (ALJ properly
7 rejected treating-source opinion when physician completed
8 medical-source statement after seeing claimant only twice); cf.
9 Marsh, 792 F.3d at 1171-72 (error not harmless because ALJ failed
10 to mention progress notes spanning three years). And, as with
11 Dr. de la Llana, Dr. Lopa's treatment of Plaintiff in those two
12 sessions consisted only of referring him to a pain-management
13 specialist, refilling his medications, and prescribing
14 "conservative therapy" with massage, a warm compress, and
15 exercise as tolerated. (AR 338, 341.) Indeed, Dr. Lopa
16 recommended that Plaintiff perform "brisk walking" for 30 minutes
17 a day at least five days a week (along with other exercise) (AR
18 341), contradicting Plaintiff's testimony that he could walk only
19 around the block. Thus, her treatment notes failed to provide
20 any clinical support for the functional limitations she assessed
21 on the Authorization to Release Medical Information form. See
22 §§ 404.1527(c)(3), 416.927(c)(3); Connett, 340 F.3d at 875;
23 Thomas, 278 F.3d at 957. Accordingly, the ALJ's failure to
24 address Dr. Lopa's opinion was harmless.

25 Plaintiff is not entitled to remand on this ground.⁹

26 _____
27 ⁹ Plaintiff claims that the ALJ should have ordered a
28 consultative examination. (J. Stip. at 9.) An ALJ has broad
(continued...)

1 **VI. CONCLUSION**

2 Consistent with the foregoing, and under sentence four of 42
3 U.S.C. § 405(g),¹⁰ IT IS ORDERED that judgment be entered
4 AFFIRMING the decision of the Commissioner, DENYING Plaintiff's
5 request for remand, and DISMISSING this action with prejudice.
6 IT IS FURTHER ORDERED that the Clerk serve copies of this Order
7 and the Judgment on counsel for both parties.

8
9 DATED: November 17, 2015


10 _____
11 JEAN ROSENBLUTH
12 U.S. Magistrate Judge
13
14
15
16

17 _____
18 ⁹ (...continued)
19 discretion in determining whether to order a consultative
20 examination and may do so when "ambiguity or insufficiency in the
21 evidence . . . must be resolved." Reed v. Massanari, 270 F.3d
22 838, 842 (9th Cir. 2001) (citation omitted); §§ 404.1519a(b),
23 416.919a(b). Here, the ALJ found the evidence sufficient to
24 support a decision. (See AR 29.) He determined that Plaintiff
25 was capable of a limited range of light work after reviewing
26 medical-opinion evidence not only from Dr. de la Llana and the
27 nonexamining state-agency physicians but also from Jamshid
28 Mistry, a neurosurgery specialist, and from a physician's
assistant to Zoheir El-Hajjanoi, M.D., who both concluded only
that Plaintiff should reduce excessive physical activity. (See
AR 226, 506-07.) Thus, the ALJ was not required to order a
consultative examination.

¹⁰ That sentence provides: "The [district] court shall have
power to enter, upon the pleadings and transcript of the record,
a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."