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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETER ANTHONY SPOTO,)	Case No. CV 15-1314-JPR
)	
Plaintiff,)	
)	MEMORANDUM DECISION 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 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 April 25, 2016, 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 1959. (Administrative Record ("AR")
3 127.) He completed 11th grade and worked as a house painter and
4 handyman. (AR 36-37.)

5 On December 11, 2008, Plaintiff filed for SSI, alleging that
6 he had been unable to work since May 1, 2006 (AR 65, 127),
7 because of lower-back and tail-bone problems (AR 66, 135). After
8 his applications were denied initially and on reconsideration, he
9 requested a hearing before an Administrative Law Judge. (AR 66,
10 72, 88.) A hearing was held on November 2, 2010, at which
11 Plaintiff, who was represented by counsel, testified, as did a
12 vocational and a medical expert. (AR 32-63.) In a written
13 decision issued December 9, 2010, the ALJ found Plaintiff not
14 disabled. (AR 18-25.)

15 On October 3, 2011, Plaintiff sought review of the
16 Commissioner's decision in this Court. (AR 316-18.) On July 10,
17 2012, a magistrate judge found that the ALJ had erred in relying
18 on the VE's testimony that Plaintiff could perform jobs requiring
19 constant or frequent reaching notwithstanding his residual
20 functional capacity ("RFC")¹ for only occasional work above the
21 shoulder. (AR 293-300.) The magistrate judge remanded the case
22 for further proceedings. (AR 300.)

23 On September 25, 2012, the Appeals Council vacated the ALJ's
24 decision and remanded the case for further proceedings consistent
25 with the Court's order. (AR 321.) On April 23, 2013, a second
26

27 ¹ RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. § 416.945; see Cooper v.
Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 ALJ held a hearing, at which Plaintiff, who was represented by
2 counsel, testified, as did a second VE. (AR 260-91.) In a
3 written decision issued July 22, 2013, the ALJ found Plaintiff
4 not disabled. (AR 247-54.) On May 5, 2015, the Appeals Council
5 denied review, specifically finding that the ALJ had "properly
6 evaluated the evidence of record and provided good reasons for
7 affording less or no weight to certain medical opinions." (AR
8 221.) Plaintiff then filed this action, which was assigned to
9 the undersigned magistrate judge because of the unavailability of
10 the first magistrate judge.

11 **III. STANDARD OF REVIEW**

12 Under 42 U.S.C. § 405(g), a district court may review the
13 Commissioner's decision to deny benefits. The ALJ's findings and
14 decision should be upheld if they are free of legal error and
15 supported by substantial evidence based on the record as a whole.
16 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
17 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
18 evidence means such evidence as a reasonable person might accept
19 as adequate to support a conclusion. Richardson, 402 U.S. at
20 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
21 It is more than a scintilla but less than a preponderance.
22 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
23 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
24 substantial evidence supports a finding, the reviewing court
25 "must review the administrative record as a whole, weighing both
26 the evidence that supports and the evidence that detracts from
27 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
28 720 (9th Cir. 1996). "If the evidence can reasonably support

1 either affirming or reversing," the reviewing court "may not
2 substitute its judgment" for the Commissioner's. Id. at 720-21.

3 **IV. THE EVALUATION OF DISABILITY**

4 People are "disabled" for purposes of receiving Social
5 Security benefits if they are unable to engage in any substantial
6 gainful activity owing to a physical or mental impairment that is
7 expected to result in death or has lasted, or is expected to
8 last, for a continuous period of at least 12 months. 42 U.S.C.
9 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
10 1992).

11 A. The Five-Step Evaluation Process

12 The ALJ follows a five-step sequential evaluation process to
13 assess whether a claimant is disabled. 20 C.F.R.
14 § 416.920(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir.
15 1995) (as amended Apr. 9, 1996). In the first step, the
16 Commissioner must determine whether the claimant is currently
17 engaged in substantial gainful activity; if so, the claimant is
18 not disabled and the claim must be denied. § 416.920(a)(4)(i).

19 If the claimant is not engaged in substantial gainful
20 activity, the second step requires the Commissioner to determine
21 whether the claimant has a "severe" impairment or combination of
22 impairments significantly limiting her ability to do basic work
23 activities; if not, the claimant is not disabled and the claim
24 must be denied. § 416.920(a)(4)(ii).

25 If the claimant has a "severe" impairment or combination of
26 impairments, the third step requires the Commissioner to
27 determine whether the impairment or combination of impairments
28 meets or equals an impairment in the Listing of Impairments

1 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix
2 1; if so, disability is conclusively presumed.

3 § 416.920(a)(4)(iii).

4 If the claimant's impairment or combination of impairments
5 does not meet or equal an impairment in the Listing, the fourth
6 step requires the Commissioner to determine whether the claimant
7 has sufficient RFC to perform his past work; if so, he is not
8 disabled and the claim must be denied. § 416.920(a)(4)(iv). The
9 claimant has the burden of proving he is unable to perform past
10 relevant work. Drouin, 966 F.2d at 1257. If the claimant meets
11 that burden, a prima facie case of disability is established.
12 Id. If that happens or if the claimant has no past relevant
13 work, the Commissioner then bears the burden of establishing that
14 the claimant is not disabled because he can perform other
15 substantial gainful work available in the national economy.
16 § 416.920(a)(4)(v); Drouin, 966 F.2d at 1257. That determination
17 comprises the fifth and final step in the sequential analysis.
18 § 416.920(a)(4)(v); Lester, 81 F.3d at 828 n.5; Drouin, 966 F.2d
19 at 1257.

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

21 At step one, the ALJ found that Plaintiff had not engaged in
22 substantial gainful activity since December 11, 2008, the
23 application date. (AR 249.) At step two, he concluded that
24 Plaintiff had severe impairments of degenerative disc disease
25 with radiculopathy and chronic neck and shoulder pain of
26 undetermined cause. (Id.) At step three, he determined that
27 Plaintiff's impairments did not meet or equal a listing. (AR
28 250.)

1 At step four, the ALJ found that Plaintiff had the RFC to
2 perform a range of medium work (id.), which is defined as
3 "lifting no more than 50 pounds at a time with frequent lifting
4 or carrying of objects weighing up to 25 pounds."² § 416.967(c).
5 Plaintiff could stand, walk, or sit for six hours in an eight-
6 hour workday and occasionally stoop, bend, or work above shoulder
7 level. (AR 250.) He was precluded from climbing ladders,
8 working at heights, and balancing, and he had no reliable grip
9 strength in his left, nondominant hand. (Id.)

10 Finally, based on the VE's testimony, the ALJ concluded that
11 Plaintiff could not perform his past relevant work as a house
12 painter but could perform other work in the regional economy.
13 (AR 252-53.) Accordingly, he found him not disabled. (AR 254.)

14 **V. DISCUSSION**

15 Plaintiff alleges that the ALJ (1) erred in assessing the
16 opinion of Dr. Isaias Paja and (2) failed to articulate legally

17 _____
18 ² The ALJ stated that Plaintiff could perform "medium work
19 as defined in 20 CFR 416.967(c)" and was "able to lift or carry
20 up to 25 pounds on occasion and up to 50 pounds frequently." (AR
21 250.) As the Commissioner notes (J. Stip. at 12 n.2.), it
22 appears that this was a scrivener's error given that the correct
23 definition for medium work is "lifting no more than 50 pounds at
24 a time with frequent lifting or carrying of objects weighing up
25 to 25 pounds," § 416.967(c)(2), and given that the ALJ gave
26 significant weight to Drs. Philip Wirganowicz's and Thu N. Do's
27 opinions that Plaintiff could lift and carry 25 pounds frequently
28 and 50 pounds occasionally. (AR 173, 177, 252.) In any event,
any error in stating that Plaintiff could lift and carry "up to
50 pounds frequently" was harmless because the ALJ ultimately
concluded that Plaintiff could perform only certain medium- and
light-work jobs. (AR 253); § 416.967(b) ("Light work involves
lifting no more than 20 pounds at a time with frequent lifting or
carrying of objects weighing up to 10 pounds."); see also Stout
v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006)
(nonprejudicial or irrelevant mistakes harmless).

1 sufficient reasons for rejecting Plaintiff's subjective symptom
2 testimony. (J. Stip. at 4, 25.)

3 A. The ALJ's Assessment of the Medical Evidence

4 Plaintiff argues that the ALJ "failed to articulate specific
5 and legitimate reasons for rejecting" Dr. Paja's opinions. (Id.
6 at 9.) For the reasons discussed below, remand is not warranted
7 on this ground.

8 1. Applicable law

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

16 This is true because treating physicians are employed to
17 cure and have a greater opportunity to know and observe the
18 claimant. Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996).
19 If a treating physician's opinion is well supported by medically
20 acceptable clinical and laboratory diagnostic techniques and is
21 not inconsistent with the other substantial evidence in the
22 record, it should be given controlling weight. § 416.927(c)(2).
23 If a treating physician's opinion is not given controlling
24 weight, its weight is determined by length of the treatment
25 relationship, frequency of examination, nature and extent of the
26 treatment relationship, amount of evidence supporting the
27 opinion, consistency with the record as a whole, the doctor's
28 area of specialization, and other factors. § 416.927(c)(2)-(6).

1 When a treating physician's opinion is not contradicted by
2 other evidence in the record, it may be rejected only for "clear
3 and convincing" reasons. See Carmickle v. Comm'r, Soc. Sec.
4 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (citing Lester, 81
5 F.3d at 830-31). When it is contradicted, the ALJ must provide
6 only "specific and legitimate reasons" for discounting it. Id.
7 (citing Lester, 81 F.3d at 830-31). Furthermore, "[t]he ALJ need
8 not accept the opinion of any physician, including a treating
9 physician, if that opinion is brief, conclusory, and inadequately
10 supported by clinical findings." Thomas v. Barnhart, 278 F.3d
11 947, 957 (9th Cir. 2002); accord Batson v. Comm'r of Soc. Sec.
12 Admin., 359 F.3d 1190, 1195 (9th Cir. 2004).

13 2. Relevant background

14 On March 1, 2009, Dr. Philip Wirganowicz, an orthopedic
15 surgeon, performed an orthopedic evaluation of Plaintiff at the
16 agency's request. (AR 169-73.) Dr. Wirganowicz reviewed
17 Plaintiff's April 2006 lumbar-spine x-ray, noting that it showed
18 first-degree spondylolisthesis at L5-S1.³ (Id.; see also AR 194
19 (Apr. 2006 x-ray report).) Plaintiff did not use any assistive
20 devices or take any medications for pain. (AR 169.) He had full
21 range of motion of the lumbar spine; normal range of motion of
22 all joints in the upper and lower extremities, including the
23 shoulders; and no limp. (AR 171-72.) He had "slight weakness"

24
25 ³ Spondylolisthesis is a condition in which one vertebra
26 slips out of place onto the vertebra below it.
27 Spondylolisthesis, Cleveland Clinic, http://my.clevelandclinic.org/health/diseases_conditions/hic_your_back_and_neck/hic_Spondylolisthesis (last accessed Aug. 4, 2016). "Grade I" is
28 the lowest degree of spondylolisthesis, indicating a one- to 25-
percent slippage. Id.

1 in the ankle and toe but otherwise "5/5" strength in all
2 extremities and intact sensation. (AR 172.) Plaintiff did not
3 have muscular atrophy or asymmetry. (Id.) Dr. Wirganowicz
4 diagnosed chronic lower-back pain with radiculopathy. (Id.) He
5 opined that Plaintiff could lift 25 pounds frequently and 50
6 pounds occasionally; sit, stand, or walk for six hours in a
7 normal workday with appropriate breaks; and use his upper
8 extremities for gross-motor and fine manipulative movements. (AR
9 173.)

10 On April 1, 2009, Dr. Thu N. Do, a general practitioner,⁴
11 reviewed the record and completed an RFC assessment. (AR 176-
12 82.) Dr. Do opined that Plaintiff could lift and carry 25 pounds
13 frequently and 50 pounds occasionally; sit or stand and walk for
14 six hours in a eight-hour workday with normal breaks; and perform
15 unlimited pushing and pulling with his upper and lower
16 extremities. (AR 177.)

17 On May 2, 2013, Dr. Paja, who specialized in family medicine
18 (AR 427), completed three medical-opinion forms: a "medical
19 source statement of ability to do work-related activities
20 (mental)," an "evaluation form for mental disorders," and an RFC
21 questionnaire. (AR 427-33.) In the medical-source-statement
22 form, Dr. Paja checked boxes indicating that Plaintiff had
23 "moderate" restriction on his ability to maintain attendance and
24 punctuality; perform at a consistent pace; interact appropriately
25

26 ⁴ Dr. Do's signature line included a medical-consultant code
27 of 12, indicating "[f]amily or [g]eneral [p]ractice." (AR 180);
28 see Program Operations Manual System (POMS) DI 24501.004, U.S.
Soc. Sec. Admin. (May 5, 2015), <http://policy.ssa.gov/poms.nsf/lnx/0424501004>.

1 with the public, supervisors, and coworkers; sustain an ordinary
2 routine without special supervision; and respond appropriately to
3 changes in a routine work setting. (AR 427.) In the space for
4 listing "[w]hat supports [his] assessment," he cited Plaintiff's
5 "self assessment of work."⁵ (Id.) Dr. Paja also noted that
6 Plaintiff's memory was decreased "secondary to med[ication]."
7 (Id.)

8 In the mental-disorders-evaluation form, Dr. Paja listed
9 Plaintiff's complaints as chronic lower-back, left-shoulder, and
10 neck pain. (AR 429.) Dr. Paja wrote that Plaintiff was able to
11 perform activities of daily living but only with his right hand
12 because his left shoulder was weak. (AR 431.) He wrote that
13 "when [Plaintiff] takes medication it can impair [his] memory."
14 (Id.)

15 In the RFC questionnaire, Dr. Paja opined that Plaintiff
16 could sit for less than 30 minutes at a time for a total of less
17 than two hours in an eight-hour day and walk for about 30 minutes
18 at a time for a total of about four hours in an eight-hour day.
19 (AR 432.) He had "no significant limit" on his ability to stand.
20 (Id.) He could lift and carry up to 10 pounds occasionally and
21 up to 20 pounds rarely but never more than that, and he could
22 occasionally bend or stoop. (Id.) Plaintiff could use his hands
23 for handling frequently and for pushing, pulling, and fine
24 manipulation occasionally. (Id.) He could never be exposed to
25 unprotected heights, marked temperature changes, noise, dust, or
26 fumes. (AR 433.)

27
28 ⁵ Some of Dr. Paja's writing in this section is illegible.

1 Under "objective signs of pain," Dr. Paja cited Plaintiff's
2 April 2011 left-shoulder x-ray findings of moderate to severe
3 degenerative changes to left acromioclavicular joint and his
4 April 2011 lumbar-spine x-ray showing a bilateral pars defect at
5 L5, grade I anterior spondylolisthesis at L5-S1, mild to moderate
6 disc-space narrowing, and small anterior osteophytes. (AR 433;
7 see AR 420-21 (x-rays).) Dr. Paja believed that Plaintiff's pain
8 was "marked" and that he was unable to reach with his left
9 shoulder. (AR 433.) Dr. Paja opined that Plaintiff's lower-back
10 pain limited his range of motion and ambulation and required pain
11 medication with a "sedating effect." (Id.) Finally, Dr. Paja
12 remarked that Plaintiff was "very limited in activities of daily
13 living." (Id.)

14 3. Analysis

15 The ALJ accorded "significant weight" to Drs. Wirganowicz's
16 and Do's opinions and "no weight" to Dr. Paja's.⁶ (AR 252.)
17 Because Dr. Paja's opinions were contradicted by Drs.
18 Wirganowicz's and Do's, the ALJ had to give only specific and
19 legitimate reasons for rejecting them. See Carmickle, 533 F.3d
20 at 1164. As discussed below, the ALJ did so.

21 First, the ALJ found that "no evidence" indicated that Dr.
22 Paja had "even personally examined [Plaintiff] or reviewed" the
23 medical evidence of record. (AR 252.) Indeed, Dr. Paja's name
24

25 ⁶ The ALJ also accorded "reduced weight" to treating
26 physician Kurt Frauenpreis's opinion because his findings were
27 "not supported by either the consultative examination, the
28 objective tests contained in the record, or by [Plaintiff's] own
work history." (AR 252.) Plaintiff has not challenged that
portion of the ALJ's decision.

1 appeared on only one of Plaintiff's progress notes, which was
2 dated March 7, 2013 (AR 407), less than two months before Dr.
3 Paja rendered his opinions, on May 2, 2013 (see AR 427, 433).
4 Other than basic findings like weight, height, and blood
5 pressure, the progress note – which appears to be in two
6 different handwritings – lists only "disability paperwork" and
7 Plaintiff's subjective complaints. (AR 407.) In the section for
8 listing "Systems Examined," someone checked only the box for
9 indicating that Plaintiff's general appearance was normal; he did
10 not check boxes indicating that anyone had examined Plaintiff's
11 back, extremities, "neuro," neck, or any other system, nor did he
12 record any examination findings or prescribe any medication or
13 other treatment. (Id.) And nothing indicates that Dr. Paja
14 examined Plaintiff when he completed the opinion forms in May
15 2013; rather, it appears that Plaintiff simply faxed the forms to
16 Dr. Paja's office and that Dr. Paja then filled them out. (See
17 AR 426 (fax cover sheet).) Indeed, Dr. Paja left blank the
18 section of the forms for listing "date patient first examined,"
19 "date of most recent examination," and "frequency of visits."
20 (AR 429.) Nor does anything in the forms or treatment note
21 indicate that Dr. Paja reviewed Plaintiff's medical records other
22 than the April 2011 x-rays. Thus, it is not clear that Dr. Paja
23 was in fact a treating or even examining doctor.⁷

25 ⁷ Plaintiff's counsel asserts that Plaintiff "testified that
26 he treats with Dr. Paja." (J. Stip. at 7 (citing AR 274).) That
27 is not accurate. All that Plaintiff said was, "What I did do was
28 go to Dr. Paja," never clarifying how often or for what purpose.
In light of the evidence discussed above showing that Plaintiff
had very little if any interaction with Dr. Paja, this statement

1 The ALJ properly relied on the apparent lack of treatment
2 history and examination findings to discount Dr. Paja's opinion.
3 See § 416.927(c)(2)(i) ("[l]ength of the treatment relationship"
4 and "frequency of examination" are relevant factors in assessing
5 treating-source opinion); Edlund v. Massanari, 253 F.3d 1152,
6 1157 & n.6 (9th Cir. 2001) (as amended) (same); see also
7 § 416.927(c)(6) (extent to which doctor is familiar with record
8 is relevant factor in deciding weight to give opinion).

9 Next, the ALJ found that Dr. Paja's mental-health
10 limitations were "without foundation in the record." (AR 252.)
11 Indeed, Plaintiff's medical records don't reflect any diagnosis
12 of or treatment for any mental-health problems. (See AR 191-206,
13 405-24.) And Dr. Paja cited no medical or clinical findings to
14 support his findings of moderate mental limitations; instead, he
15 noted that they were based on Plaintiff's "self assessment of
16 work." (See AR 427.) Although Dr. Paja asserted that
17 Plaintiff's medication caused memory problems (id.), Plaintiff
18 testified that his medication didn't cause any side effects (AR
19 276). Plaintiff, moreover, now "concedes that the record is more
20 support[ive] of [his alleged] physical impairments" than his
21 mental ones. (J. Stip. at 8.) The inconsistency between the
22 record and Dr. Paja's opinion was a permissible reason to reject
23 it. See Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012)
24 (ALJ may permissibly reject check-off reports that do not contain
25 explanation of basis for conclusions); Connett v. Barnhart, 340
26 F.3d 871, 875 (9th Cir. 2003) (treating physician's opinion
27 _____
28 is at best ambiguous.

1 properly rejected when treatment notes "provide[d] no basis for
2 the functional restrictions he opined should be imposed on
3 [plaintiff]"); Batson, 359 F.3d at 1195 ("an ALJ may discredit
4 treating physicians' opinions that are conclusory, brief, and
5 unsupported by the record as a whole . . . or by objective
6 medical findings").⁸

7 The ALJ also found that Dr. Paja's opinion regarding
8 Plaintiff's physical limitations was "not consistent with
9 [Plaintiff's] current work status." (AR 252.) Indeed, Plaintiff
10 testified at the April 2013 hearing that he had been working part
11 time as a bagger at Vons grocery store for 10 months. (AR 265-
12 66.) Plaintiff took the bus to and from the grocery store and
13 worked four-hour shifts for a total of 16 hours a week. (AR 266,
14 269.) At work, he would place three or four canned items in bags
15 and boxes, vegetables, and bread items on top and then place the
16 bagged groceries in the customer's cart (AR 267, 278); he
17 sometimes helped customers take bags out to their car (AR 266).
18 Plaintiff testified that the job required "a lot of hustling" in
19 that he would have to "run from one end of the store to the next
20 to find items for someone." (AR 270.) Even despite Plaintiff's
21 testimony that he could take extra breaks at work (id.),
22 supposedly didn't lift anything weighing more than five or 10
23 pounds (AR 268-69, 277-78), and never packed grocery bags so that
24 they weighed more than eight pounds (AR 278), his ability to

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26 ⁸ In denying Plaintiff's request for review, the Appeals
27 Council specifically noted that the record showed that Plaintiff
28 "received very limited[] personal treatment" from Dr. Paja and
that "[t]here is also no indication from the record that
[Plaintiff] alleged any mental limitations." (AR 221.)

1 perform such an active job appears inconsistent with Dr. Paja's
2 limitations. Indeed, Dr. Paja found that Plaintiff could lift
3 and carry up to 10 pounds only "occasionally," which is defined
4 as "up to 2 hours," and 11 to 20 pounds only "rarely," which is
5 defined as "30 minutes or less" (AR 432), but Plaintiff
6 apparently lifted groceries and bags of groceries for most of his
7 four-hour shift. As such, the ALJ did not err in relying on this
8 factor to discount Dr. Paja's opinion. See Rollins v. Massanari,
9 261 F.3d 853, 856 (9th Cir. 2001) (ALJ's finding that doctor's
10 "restrictions appear to be inconsistent with [plaintiff's] level
11 of activity" was specific and legitimate reason for discounting
12 opinion); Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595,
13 601-02 (9th Cir. 1999) (ALJ permissibly rejected treating
14 physician's opinion when it conflicted with plaintiff's
15 activities); see also Fisher v. Astrue, 429 F. App'x 649, 652
16 (9th Cir. 2011) (conflict between doctor's opinion and claimant's
17 daily activities was specific and legitimate reason to discount
18 opinion).⁹

19 The ALJ was also entitled to rely on Drs. Wirganowicz's and
20 Do's opinions instead of Dr. Paja's. Dr. Wirganowicz was a
21 board-certified orthopedic surgeon (AR 173), whereas Dr. Paja

23 ⁹ Plaintiff contends that Dr. Paja's opinion was not
24 inconsistent with Plaintiff's work status because Dr. Paja stated
25 that Plaintiff could work part time. (J. Stip. at 9; see also AR
26 432.) It is true that some of Dr. Paja's limitations might be
27 consistent with Plaintiff's description of his job duties. But
28 even if the ALJ somehow erred in relying on Plaintiff's work
status to discount Dr. Paja's opinion, it was harmless because
the ALJ provided other specific and legitimate reasons for his
assessment. See Stout, 454 F.3d at 1055 (nonprejudicial or
irrelevant mistakes harmless).

1 practiced family medicine (AR 427). See § 416.927(c)(5) ("We
2 generally give more weight to the opinion of a specialist about
3 medical issues related to his or her area of specialty than to
4 the opinion of a source who is not a specialist."). Dr.
5 Wirganowicz performed a complete orthopedic evaluation of
6 Plaintiff, finding that he had full range of motion in all
7 joints, a normal gait, full motor strength in all joints except
8 his ankle and toe, and intact sensation (AR 171-72). Because Dr.
9 Wirganowicz personally observed and examined Plaintiff and his
10 findings were consistent with the objective evidence, his opinion
11 constitutes substantial evidence supporting the ALJ's decision.
12 See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)
13 (finding that examining physician's "opinion alone constitutes
14 substantial evidence, because it rests on his own independent
15 examination of [plaintiff]"); Andrews v. Shalala, 53 F.3d 1035,
16 1041 (9th Cir. 1995) (opinion of nontreating source based on
17 independent clinical findings may itself be substantial
18 evidence). This is particularly true given Dr. Paja's limited
19 relationship with Plaintiff. See Lester, 81 F.3d at 830-31.

20 Dr. Do's opinion also constitutes substantial evidence
21 because he relied on Dr. Wirganowicz's objective medical
22 findings. (AR 181-82 (listing Dr. Wirganowicz's RFC assessment
23 under "significant objective findings)); see Tonapetyan, 242 F.3d
24 at 1149 (non-examining physician's opinion constituted
25 substantial evidence because it rested on examining physician's
26 objective findings); Thomas, 278 F.3d at 957 ("The opinions of
27 non-treating or non-examining physicians may also serve as
28 substantial evidence when the opinions are consistent with

1 independent clinical findings or other evidence in the record.”).

2 Plaintiff argues that the ALJ ignored medical records
3 showing that Plaintiff would eventually need surgery on his left
4 shoulder.¹⁰ (J. Stip. at 8 (citing AR 417).) But the ALJ
5 specifically discussed Plaintiff’s April 2011 shoulder x-ray,
6 which showed moderate to severe degenerative changes of the left
7 acromioclavicular joint (AR 251 (citing AR 420)), and he
8 expressly stated that Plaintiff’s medical records “noted that
9 [Plaintiff] would eventually require surgery on the left
10 shoulder” (AR 251 (citing AR 417)).¹¹ Plaintiff also argues that

12 ¹⁰ Contrary to Plaintiff’s assertion (see J. Stip. at 23),
13 it is not clear that a doctor made this assessment. Nothing on
14 the progress note stated that the provider was a doctor, and he
15 did not check a box in his signature line for indicating whether
16 he was an “MD,” “DO,” “PA,” or “NP.” (AR 417; compare AR 407
17 (progress note signed by Dr. Paja with notation “Paja md, Isaias”
18 and “MD” box checked).) Indeed, several of Plaintiff’s progress
19 notes were completed by providers who were not doctors. (See,
20 e.g., AR 202 (note completed by Calvin Pramann “DC,” or doctor of
chiropractic), 408 (note completed by Sam Som “NP,” or nurse
practitioner), 409 (note completed by Joyce Kusuma “NP,” or nurse
practitioner).) Neither nurse practitioners nor doctors of
chiropractic are acceptable medical sources. See SSR 06-03p, 2006
WL 2329939, at *2 (Aug. 9, 2006); § 416.913(d).

21 ¹¹ The ALJ erroneously stated elsewhere in his opinion that
22 Plaintiff’s “medical evidence of record” from a particular
23 provider ended on March 15, 2011, and “no more contemporaneous
24 evidence is in the record.” (AR 252.) The record in fact
25 contains treatment notes from that provider from June, July, and
26 August 2011; January, February, April, June, and November 2012;
27 and January, February, and March 2013. (AR 407-20.) Several of
28 those notes concerned Plaintiff’s treatment for bronchitis, sore
throat, or other complaints not related to his allegedly
disabling conditions. (AR 409, 412-15.) The ALJ may have been
confused by Plaintiff’s testimony seeming to indicate that he
stopped going to that provider in 2010. (See AR 274.) But in
any event, the ALJ apparently reviewed the more recent notes,
because he specifically noted that one of them, from August 2011,

1 "[t]he ALJ's reliance on Drs. Wirganowicz and Do does not seem to
2 take into account the significance of [Plaintiff's] left arm
3 impairments" (J. Stip. at 19-20), but the ALJ in fact
4 accommodated Plaintiff's left-shoulder condition by stating in
5 his RFC that Plaintiff had "no reliable grip strength in his
6 left, non-dominant hand" and could perform only occasional work
7 above shoulder level. (AR 250.) As such, remand is not
8 warranted.

9 B. The ALJ Properly Assessed Plaintiff's Credibility

10 Plaintiff argues that the ALJ "failed to articulate legally
11 sufficient reasons for rejecting" his testimony. (J. Stip. at
12 25.) For the reasons discussed below, remand is not warranted.

13 1. Applicable law

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

22 In evaluating a claimant's subjective symptom testimony, the
23 _____
24 indicated that Plaintiff needed left-shoulder surgery. (AR 251
25 ("It was noted that [Plaintiff] would eventually require surgery
26 on the left shoulder." (citing AR 417)), 417 (Aug. 2011 note).)
27 Plaintiff does not point to any specific evidence in the other
28 notes that the ALJ should have considered but didn't. Cf. Howard
ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)
("the ALJ is not required to discuss evidence that is neither
significant nor probative"). Thus, any error was harmless.

1 ALJ engages in a two-step analysis. See Lingenfelter, 504 F.3d
2 at 1035-36. "First, the ALJ must determine whether the claimant
3 has presented objective medical evidence of an underlying
4 impairment [that] could reasonably be expected to produce the
5 pain or other symptoms alleged." Id. at 1036. If such objective
6 medical evidence exists, the ALJ may not reject a claimant's
7 testimony "simply because there is no showing that the impairment
8 can reasonably produce the degree of symptom alleged." Smolen,
9 80 F.3d at 1282 (emphasis in original).

10 If the claimant meets the first test, the ALJ may discredit
11 the claimant's subjective symptom testimony only if he makes
12 specific findings that support the conclusion. See Berry v.
13 Astrue, 622 F.3d 1228, 1234 (9th Cir. 2010). Absent a finding or
14 affirmative evidence of malingering, the ALJ must provide "clear
15 and convincing" reasons for rejecting the claimant's testimony.
16 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (as
17 amended); Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090,
18 1102 (9th Cir. 2014). The ALJ may consider, among other factors,
19 (1) ordinary techniques of credibility evaluation, such as the
20 claimant's reputation for lying, prior inconsistent statements,
21 and other testimony by the claimant that appears less than
22 candid; (2) unexplained or inadequately explained failure to seek
23 treatment or to follow a prescribed course of treatment; (3) the
24 claimant's daily activities; (4) the claimant's work record; and
25 (5) testimony from physicians and third parties. Rounds v.
26 Comm'r Soc. Sec. Admin., 807 F.3d 996, 1006 (9th Cir. 2015) (as
27 amended); Thomas, 278 F.3d at 958-59. If the ALJ's credibility
28 finding is supported by substantial evidence in the record, the

1 reviewing court "may not engage in second-guessing." Id. at 959.

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3
4 2. Relevant background

5 In an undated disability report, Plaintiff wrote that
6 "[l]ower back and tail bone problems" limited his ability to work
7 and that he could "not lift anything because the doctor tol[d] me
8 I could be paralyzed [sic]." (AR 135.) Plaintiff wrote in
9 another undated disability report that he had an x-ray to "prove
10 his disability" and that if he lifted the "wrong way" he would be
11 paralyzed from the "waist down." (AR 152.)

12 In an October 9, 2009 disability report, Plaintiff stated
13 that his "condition ha[d] worsened with the pain moving into the
14 middle and upper back," and he had "severe pain and numbness in
15 [his] arms and neck" and "severe headaches." (AR 158.) He was
16 unable to run or jog, could walk only with "great hardship," and
17 was in "constant pain." (Id.) He listed his current medication
18 as "Motrin 800mg." (AR 161.)

19 At the April 2013 supplemental ALJ hearing following remand,
20 Plaintiff testified that he had worked as a part-time bagger at
21 Vons grocery store for the preceding 10 months. (AR 265-66.) He
22 worked four-hour shifts and was given the option of taking a
23 break when he was "wanting to sit down." (AR 269-70.) Plaintiff
24 testified that in each grocery bag he placed three or four cans
25 and then boxes, vegetables, and bread items, and that he had
26 "gotten in trouble for putting less items into a bag because of
27 the weight, concerning the bag could rip." (AR 266-67.)
28 Plaintiff lived alone in a motor home and didn't use any shelves

1 or cabinets that were above shoulder level. (AR 271-72.) He
2 took the bus to and from work. (AR 274.)

3 Plaintiff testified that his left arm was "basically" numb
4 and he did not have "a lot of function in [his] left hand," but
5 he could still bag groceries with his right, dominant hand. (AR
6 267.) He could use his left hand to button a shirt, tie a pair
7 of shoes, and put on a belt. (AR 267-68.) He could touch the
8 top of his head with his left hand. (AR 268.) With his right
9 arm, Plaintiff could "pick up [a] five-pound gallon of milk and
10 then put it away."¹² (AR 269; see also AR 277 (stating that with
11 his right arm he could "hold a cup," "hold a five, seven, eight-
12 pound back [sic] of something," and lift about "five to ten"
13 pounds for "[n]ot very long").) Plaintiff testified that he had
14 "gotten in trouble" at work "for using too many bags for smaller
15 items" and didn't pack grocery bags to weigh more than eight
16 pounds because he had trouble picking them up and putting them in
17 the cart. (AR 278.) His legs "cramp[ed] out a lot," and the
18 "bone [was] snapping [his] hips out of place." (AR 273.)

19 Plaintiff could sit for "[m]aybe about five to ten minutes,
20 15 at the most." (AR 275.) He couldn't stand "too much" because
21 his legs were weak. (Id.) Plaintiff didn't have any side
22 effects from his medication. (AR 276.)

23 3. Analysis

24 The ALJ found that Plaintiff could perform medium work that
25 required no more than occasional stooping, bending, or work above
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27 ¹² A gallon of milk actually weighs approximately eight
28 pounds. Hernandez v. Colvin, No. 1:12-CV-00330-SMS, 2013 WL
4041862, at *9 n.4 (E.D. Cal. Aug. 8, 2013).

1 shoulder level; never required climbing ladders, working at
2 heights, or balancing; and that accommodated Plaintiff's lack of
3 any "reliable grip strength" in his left hand. (AR 250.) In
4 doing so, the ALJ credited some of Plaintiff's asserted
5 limitations, including his claim that he had difficulty reaching
6 above shoulder level and could not use his left hand. As
7 discussed below, to the extent the ALJ rejected Plaintiff's
8 complaints (see AR 252 (according "reduced weight" to Plaintiff's
9 subjective complaints)), he provided clear and convincing reasons
10 for doing so.

11 The ALJ found that the "objective medical evidence of
12 record" was inconsistent with Plaintiff's allegedly disabling
13 functional limitations. (AR 252.) Indeed, Plaintiff claimed
14 that he couldn't lift anything with his left arm (AR 267-68) and
15 could lift only five to 10 pounds with his right arm for "not
16 very long" (AR 278), could sit for only five to 15 minutes at a
17 time (AR 275), couldn't stand "too much" (AR 275), and could walk
18 only with "great hardship" (AR 158). Yet Dr. Wirganowicz found
19 that Plaintiff had full range of motion in all joints, full motor
20 strength in all joints except his ankle and toe, no muscle
21 atrophy or asymmetry, and intact sensation. (AR 170-72.) Drs.
22 Wirganowicz and Do both believed that Plaintiff could lift 25
23 pounds frequently and 50 pounds occasionally; sit for six hours;
24 and stand and walk for six hours. (AR 173, 177.) And even Dr.
25 Paja believed that Plaintiff had "no significant limit" on his
26 ability to stand and could lift 10 pounds "occasionally," or for
27 up to two hours, and 20 pounds "rarely," or for up to 30 minutes.
28 (AR 432.) Moreover, nothing in the medical records supported

1 Plaintiff's allegations that his doctors believed that if he
2 lifted "anything" he could be paralyzed (AR 135, 152) or that his
3 hip bones were out of place (AR 273). And as the ALJ noted (AR
4 251), an April 2011 lumbar-spine x-ray showed only "mild
5 degenerative changes of the lumbar spine" at L1 to L3, "mild-to-
6 moderate disc-space narrowing" at L5-S1, a bilateral pars defect
7 at L5, and "grade I anterior spondylolisthesis" at L5-S1 (AR
8 421).¹³ The ALJ was entitled to consider the lack of objective
9 medical evidence in assessing Plaintiff's subjective complaints
10 and his credibility. See Burch v. Barnhart, 400 F.3d 676, 681
11 (9th Cir. 2005) ("Although lack of medical evidence cannot form
12 the sole basis for discounting pain testimony, it is a factor
13 that the ALJ can consider in his credibility analysis.");
14 Carmickle, 533 F.3d at 1161 ("Contradiction with the medical
15 record is a sufficient basis for rejecting the claimant's
16 subjective testimony."); Lingenfelter, 504 F.3d at 1040 (in
17 determining credibility, ALJ may consider "whether the alleged
18 symptoms are consistent with the medical evidence").

19 Plaintiff contends that the ALJ "failed to articulate what
20 evidence undermines [Plaintiff's] testimony." (J. Stip. at 23.)
21 The ALJ is required to "specifically identify the testimony [from
22 a claimant] she or he finds not to be credible and . . . explain
23 what evidence undermines the testimony." Treichler v. Comm'r of

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25 ¹³ "Degenerative changes in the spine are those that cause
26 the loss of normal structure and/or function." Degenerative Back
27 Conditions, Cleveland Clinic, [http://my.clevelandclinic.org/
services/orthopaedics-rheumatology/diseases-conditions/
degenerative-back-conditions](http://my.clevelandclinic.org/services/orthopaedics-rheumatology/diseases-conditions/degenerative-back-conditions) (last accessed Aug. 5, 2016).
28 "Nearly everyone experiences some disc degeneration after age
40." Id.

1 Soc. Sec. Admin., 775 F.3d 1090, 1102 (9th Cir. 2014)
2 (alterations in original, citing Holohan v. Massanari, 246 F.3d
3 1195, 1208 (9th Cir. 2001)); see also Brown-Hunter v. Colvin, 806
4 F.3d 487, 493 (9th Cir. 2015); SSR 96-7p, 1996 WL 374186, at *4
5 (July 2, 1996) (decision "must be sufficiently specific to make
6 clear to the individual and to any subsequent reviewers the
7 weight the adjudicator gave to the individual's statements and
8 the reasons for that weight"). Here, the ALJ summarized
9 Plaintiff's testimony that he had a limited ability to use his
10 left arm to lift and carry, lift either arm above shoulder level,
11 and sit or stand for extended periods of time. (AR 251.) He
12 found that those statements were "not entirely credible" (id.),
13 summarized the medical evidence (AR 251-52), and found that it
14 "strongly indicate[d]" that Plaintiff could perform "some work"
15 despite his limitations (AR 252). The ALJ therefore did not err.
16 See Treichler, 775 F.3d at 1103 (ALJ's analysis "need not be
17 extensive" as long as he "provide[s] some reasoning in order for
18 [the court] to meaningfully determine whether the ALJ's
19 conclusions were supported by substantial evidence").

20 The ALJ also discounted Plaintiff's account of his
21 limitations because his "part time work . . . strongly
22 indicate[d] that [he] remain[ed] capable of performing some work,
23 despite his limitations." (AR 252.) Plaintiff claimed that he
24 was unable to run or jog, could walk only with "great hardship,"
25 was in "constant pain" (AR 158), and couldn't stand "too much"
26 because his legs were weak (AR 275). But Plaintiff testified
27 that he took the bus to and from work (AR 274) and worked four-
28 hour shifts at a grocery store (AR 269-70), where he bagged

1 groceries, lifted the bags into carts, occasionally helped take
2 the groceries to a customer's car (AR 266-67, 278), and had to
3 "hustl[e]" and "run from one end of the store to the next to find
4 items for someone" (AR 270). The ALJ did not err in discounting
5 Plaintiff's credibility because such activities were inconsistent
6 with his subjective symptom testimony. See Molina, 674 F.3d at
7 1112 (ALJ may discredit claimant's testimony when "claimant
8 engages in daily activities inconsistent with the alleged
9 symptoms" (citing Lingenfelter, 504 F.3d at 1040)); id. ("Even
10 where those [daily] activities suggest some difficulty
11 functioning, they may be grounds for discrediting the claimant's
12 testimony to the extent that they contradict claims of a totally
13 debilitating impairment."); Bray v. Comm'r of Soc. Sec. Admin.,
14 554 F.3d 1219, 1227 (9th Cir. 2009) (ALJ properly discounted
15 plaintiff's credibility when she had "recently worked as a
16 personal caregiver for two years, and has sought out other
17 employment since then"); Foster v. Astrue, No. EDCV 11-1077-OP,
18 2012 WL 243253, at *10 (C.D. Cal. Jan. 23, 2012) (finding that
19 ALJ properly considered plaintiff's "ability to perform part-time
20 work" when assessing credibility).

21 Plaintiff argues that the ALJ erred in discounting his
22 credibility based on his ability to work part time because "[a]n
23 individual can work and qualify for benefits." (J. Stip. at 23-
24 24.) But as discussed above, Plaintiff performed what the ALJ
25 described as "ongoing, physical work" (AR 252) that was
26 inconsistent with his asserted functional limitations; as such,
27 the ALJ permissibly discounted Plaintiff's credibility.
28 Plaintiff points to regulations allowing people who are already

1 receiving benefits to undergo a "trial work period" without
2 having their benefits terminated (J. Stip. at 24 (citing
3 § 404.1592)), but that regulation does not apply to Plaintiff
4 because he was never found to be disabled and awarded benefits.
5 Plaintiff also cites the regulations for determining whether a
6 claimant has performed substantial gainful activity (J. Stip. at
7 24), but here the ALJ specifically found at step one that
8 Plaintiff "ha[d] not engaged in substantial gainful activity
9 since December 11, 2008"¹⁴ (AR 249).

10 In sum, the ALJ provided clear and convincing reasons for
11 finding Plaintiff only partially credible. Because those
12 findings were supported by substantial evidence, this Court may
13 not engage in second-guessing. See Thomas, 278 F.3d at 959.
14 Plaintiff is not entitled to remand on this ground.


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20 ¹⁴ Plaintiff, however, apparently did work enough in 2013
21 and 2014 to meet the substantial-gainful-activity level. In
22 denying review of the ALJ's July 2013 decision, the Appeals
23 Council noted that "updated earnings records document that
24 [Plaintiff] continued to work at the substantial gainful activity
25 level in 2013 and 2014, which evidence further supports the
26 [ALJ's] decision." (AR 221 (Appeals Council's May 5, 2015
27 order).) Because the Council denied review, however, this Court
28 reviews only the ALJ's decision for substantial evidence. (See
AR 221 (Appeals Council noting that ALJ's "decision is the final
decision of the Commissioner")); Brewes v. Comm'r of Soc. Sec.
Admin., 682 F.3d 1157, 1161-62 (9th Cir. 2012) ("[w]hen the
Appeals Council declines review, 'the ALJ's decision becomes the
final decision of the Commissioner,' and the district court
reviews that decision for substantial evidence, based on the
record as a whole" (citations omitted)).

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VI. CONCLUSION

Consistent with the foregoing, and under sentence four of 42 U.S.C. § 405(g),¹⁵ IT IS ORDERED that judgment be entered AFFIRMING the decision of the Commissioner, DENYING Plaintiff's request for remand, and DISMISSING this action with prejudice. IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment on counsel for both parties.

DATED: August 8, 2016



JEAN ROSENBLUTH
U.S. Magistrate Judge

¹⁵ 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."