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

| | | |
|---|---|-------------------------------------|
| ADRIAN MIRANDA, |) | NO. EDCV 16-00018 KS |
| Plaintiff, |) | |
| v. |) | MEMORANDUM OPINION AND ORDER |
| |) | |
| CAROLYN W. COLVIN, Acting |) | |
| Commissioner of Social Security, |) | |
| Defendant. |) | |
| |) | |

INTRODUCTION

Plaintiff, Adrian Miranda (“Plaintiff”), filed a Complaint on January 5, 2016 seeking review of the denial of period of disability and disability insurance benefits (“DIB”). (ECF No. 1.) On June 10, 2016, the parties filed a Joint Stipulation (“Joint Stip.”) in which Plaintiff seeks an order reversing the Commissioner’s final decision and awarding immediate payment of benefits. (ECF No. 16, Joint Stip. 22-23.) The Commissioner requests that the Court uphold the ALJ’s decision or, should the Court reverse the decision, remand to the agency for further administrative proceedings. (*Id.* at 22.) On January 29 and February 22, 2016, the parties consented, pursuant to 28

1 U.S.C. § 636(c), to proceed before the undersigned United States Magistrate Judge.
2 (ECF Nos. 11-12.) Having reviewed the parties' respective contentions, the Court has
3 taken the matter under submission for decision without oral argument.
4

5 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

6

7 Plaintiff filed his initial applications for DIB on November 19, 2007, with an
8 alleged disability onset date of July 31, 2006 due to injuries sustained after falling
9 four stories through a skylight while doing maintenance work. (Administrative
10 Record ("AR") 159-168.) On March 4, 2009, Administrative Law Judge Phillip J.
11 Simon, issued a decision in which he concluded that Plaintiff "has been under a
12 disability as defined in the Social Security Act since July 31, 2006, the alleged onset
13 date of disability." (AR 89.) On August 12, 2011, the Social Security Administration
14 ("Agency") notified Plaintiff that the Agency had concluded that Plaintiff was "no
15 longer disabled as of 08/2011" based on a determination that Plaintiff's condition had
16 significantly improved since March 4, 2009. (AR 95, 113.) On August 19, 2011,
17 Plaintiff sought reconsideration of the disability cessation decision (AR 99-100) and
18 on March 14, 2012, Plaintiff testified at hearing before a Disability Hearing Officer.
19 (AR 110-115.) On March 16, 2012, the hearing officer found Plaintiff to be "not
20 disabled." (AR 120.)
21

22 On March 29, 2012, Plaintiff requested a hearing before an Administrative Law
23 Judge ("ALJ"). (AR 124.) Plaintiff appeared, without representation of counsel,
24 before ALJ Jesse J. Pease on June 14, 2012. (AR 57-77.) Also appearing at the
25 hearing was Vocational Expert ("VE") Troy L. Scott. (AR 72-77.) ALJ Pease issued
26 an adverse decision denying Plaintiff's claim on July 10, 2012 based on medical
27 improvement. (AR 20-41.) Plaintiff filed a timely request for review of ALJ Pease's
28

1 decision. (AR 18-19.) The Appeals Council denied review in a written notice dated
2 July 30, 2013 (AR 13-15) and again on November 23, 2015 (AR 1-7). This timely
3 request for judicial review followed.

4

5 **SUMMARY OF ADMINISTRATIVE DECISION**

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7 At the time of the hearing before ALJ Pease, Plaintiff was 35 years old, which is
8 defined under agency regulations as a “younger individual” (age 18-49), on the
9 alleged onset date. (*Id.* at 22; *see also* 20 CFR § 404.1563, 416.963.)¹ Plaintiff’s
10 prior relevant work experience was as school custodian and heating and air
11 conditioning technician. (*Id.* at 72-73.) Because the ALJ was tasked with
12 determining whether Plaintiff continued to be disabled, the ALJ applied an eight step
13 evaluation process under 20 C.F.R. 404.1594. (AR 23.)

14

15 As an initial matter, the ALJ identified March 4, 2009 as the “comparison point
16 decision” or CPD, meaning the most recent favorable medical decision finding
17 Plaintiff disabled. (AR 24.) The ALJ next determined that at the time of the CPD,
18 Plaintiff had the following medically determinable impairments:

19

20 A history of multiple fractures of the wrists bilaterally, status-post multiple
21 surgeries; a history of a right forearm and elbow fracture, status-post multiple
22 surgeries; hypertension; degenerative disc disease of the lumbosacral spine; a
23 history of a sacral fracture, healed; history of pelvic fractures; a history of aortic
24 root dissection; mitral valve disease; anxiety disorder; and a history of alcohol
25 dependence, in remission.

26

27 ¹ Plaintiff’s date of birth is August 23, 1976. (AR 87.)

1
2 (AR 25.) Based on these impairments at the time of the CPD, the ALJ determined
3 Plaintiff had the residual functional capacity (“RFC”) to

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5 lift up to ten pounds occasionally and frequently; stand and walk for two hours
6 of an eight-hour workday; sit for less than six hours per day; operation of arm
7 controls is limited to occasionally with the left upper extremity and precluded
8 with the right upper extremity; never climb ladders, ropes, and scaffolds or
9 crawl[l]; occasionally climb ramps and stairs, balance, stoop, kneel, and crouch;
10 never perform gross or fine manipulation with the right upper extremity;
11 occasionally perform gross and fine manipulation with the left upper extremity;
12 avoid work involving heights, dangerous moving machinery, or similar hazards;
13 limited to work requiring no more than simple tasks and instructions; and not
14 able to work on a regular and continuous basis.

15
16 (*Id.*)

17
18 The ALJ found that Plaintiff had not engaged in substantial gainful activity
19 through August 1, 2011, the date Plaintiff’s disability ended. (AR 25.) The ALJ next
20 found that Plaintiff did not develop any additional impairments after the CPD through
21 August 1, 2011 and, therefore, had the same impairments that he had at the time of the
22 CPD. (*Id.*) The ALJ further noted that the medical records indicate that Plaintiff
23 “continued routine, conservative treatment for his multiple impairments from the CPD
24 through August 1, 2011,” but his physical symptoms improved and “his mental
25 impairments no longer caused significant limitations.” (*Id.*)

1 The ALJ determined that since August 1, 2011, Plaintiff did not have an
2 impairment or combination of impairments that met or medically equaled the severity
3 of any impairments listed in 20 C.F.R. part 404, subpart P, Appendix 1 (20 C.F.R. §§
4 404.1525, 404.1526 and 404.1526). (*Id.*) The ALJ also found that medical
5 improvement occurred and specifically, as of August 1, 2011 “there had been a
6 decrease in medical severity of [Plaintiff’s] symptoms.” (*Id.*) The ALJ concluded
7 that “the medical evidence records . . . support improvement in both the [Plaintiff’s]
8 physical and mental impairments.” (*Id.*)
9

10 After considering the entire record, including Plaintiff’s testimony and
11 testimony from the VE, the ALJ determined that Plaintiff had the residual functional
12 capacity (“RFC”) to perform less than the full range of “light work” as defined in 20
13 C.F.R. §§ 404.1567(b). (AR 26.) Specifically, Plaintiff could
14

15 Lift, carry, push, or pull twenty pounds occasionally and ten pounds frequently;
16 the right upper extremity is limited to occasional push or pull and five pounds
17 maximum; [Plaintiff] is limited to occasional fine manipulation and frequent
18 gross manipulation with the right dominant hand; [Plaintiff] is limited to
19 frequent gross and fine manipulation with the left hand; . . . cannot perform
20 forceful gripping or torquing with either hand; . . . can stand and/or walk for
21 four hours out of an eight-hour workday; . . . sit for six hours out of an eight-
22 hour workday; . . . perform postural activities on an occasional basis, except no
23 crawling or climbing of ladders, ropes, and scaffolds; and . . . must avoid
24 hazardous machinery and unprotected heights.
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1 (AR 26.) Based on this RFC and the testimony of the VE, the ALJ concluded that
2 Plaintiff could not perform his past relevant work as a school custodian, DOT²
3 382.664-010, a medium, semi-skilled occupation, or as a heating and air-conditioning
4 technician, DOT 637.261-014, a medium, skilled occupation. (AR 35.)
5

6 After considering Plaintiff's age, education,³ work experience and RFC, the ALJ
7 determined that Plaintiff can perform other jobs "that exist in significant numbers in
8 the national economy," including the work of tollbooth worker, (DOT 211.462-038);
9 ticket taker (DOT 344.667-010) and information clerk (DOT 237.367-046). (AR 36.)
10 The ALJ consequently concluded that Plaintiff's disability ended as of August 1,
11 2011. (AR 37.)
12

13 STANDARD OF REVIEW

14

15 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
16 determine whether it is free from legal error and supported by substantial evidence in
17 the record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). "Substantial
18 evidence is 'more than a mere scintilla but less than a preponderance; it is such
19 relevant evidence as a reasonable mind might accept as adequate to support a
20 conclusion.'" *Gutierrez v. Comm'r of Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014)
21 (internal citations omitted). "Even when the evidence is susceptible to more than one
22 rational interpretation, we must uphold the ALJ's findings if they are supported by
23 inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1110
24 (9th Cir. 2012).
25

26
27 ² *Dictionary of Occupational Titles* (U.S. Department of Labor, 1991).
28 ³ Plaintiff has a high school education and is literate in English (AR 35.)

1 Although this Court cannot substitute its discretion for the Commissioner's, the
2 Court nonetheless must review the record as a whole, "weighing both the evidence
3 that supports and the evidence that detracts from the [Commissioner's]
4 conclusion." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal
5 quotation marks and citation omitted); *Desrosiers v. Sec'y of Health and Hum. Servs.*,
6 846 F.2d 573, 576 (9th Cir. 1988). "The ALJ is responsible for determining
7 credibility, resolving conflicts in medical testimony, and for resolving
8 ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).

9
10 The Court may review only the reasons stated by the ALJ in his decision "and
11 may not affirm the ALJ on a ground upon which he did not rely." *Orn*, 495 F.3d at
12 630; *see also Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Court will
13 not reverse the Commissioner's decision if it is based on harmless error, which exists
14 if the error is "'inconsequential to the ultimate nondisability determination,' or if
15 despite the legal error, 'the agency's path may reasonably be discerned.'" *Brown-*
16 *Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (internal citations omitted).

17
18 **DISPUTED ISSUES**
19

20 Plaintiff raises two disputed issues, arguing that the Commissioner's decision
21 should be reversed and immediate benefits should be awarded because:

- 22
23 (1) in making the RFC assessment, the ALJ erred in his evaluation of the
24 opinions of the treating, examining, and reviewing physicians; and
25 (2) The ALJ erred in his evaluation of Plaintiff's credibility and subjective
26 complaints of pain.
27
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1 (Joint Stip. at 4.)
2

3 For the reasons discussed below, the Court finds no legal error in the ALJ’s
4 decision and concludes the Commissioner’s decision must be affirmed.
5

6 DISCUSSION 7

8 **I. The ALJ’s Evaluation of the Medical Opinions** 9

10 Plaintiff contends that the ALJ erred in rejecting the opinions and assessments
11 of Plaintiff’s treating physician, Dr. Paveloff in favor of the opinions of the non-
12 examining State-agency physician and the consultative evaluator. (Joint Stip. at 7-8.)
13 Defendant responds that the ALJ’s evaluation of the medical opinions is supported by
14 substantial evidence in the medical record and the ALJ did not err in giving limited
15 weight to the opinion of treating physician Daniel Paveloff because his opinion was
16 inconsistent with the overall record. (*Id.* at 8.)
17

18 **A. Applicable Law** 19

20 “The ALJ is responsible for translating and incorporating clinical findings into
21 a succinct RFC.” *Rounds v. Comm’r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir.
22 2015). In doing so, the ALJ must articulate a “substantive basis” for rejecting a
23 medical opinion or crediting one medical opinion over another. *Garrison v. Colvin*,
24 759 F.3d 995, 1012 (9th Cir. 2014); *see also Marsh v. Colvin*, 792 F.3d 1170, 1172-73
25 (9th Cir. 2015) (“an ALJ cannot in its decision totally ignore a treating doctor and his
26 or her notes, without even mentioning them”). An ALJ errs when he discounts a
27 treating or examining physician’s medical opinion, or a portion thereof, “while doing
28

1 nothing more than ignoring it, asserting without explanation that another medical
2 opinion is more persuasive, or criticizing it with boilerplate language that fails to offer
3 a substantive basis for his conclusion.” *See Garrison*, 759 F.3d at 1012-13 (citing
4 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996)).

5
6 The opinion of a treating source is generally entitled to greater weight than the
7 opinion of doctors who do not treat the claimant because treating sources are “most
8 able to provide a detailed, longitudinal picture” of a claimant’s medical impairments
9 and bring a perspective to the medical evidence that cannot be obtained from
10 objective medical findings alone. *See Garrison*, 759 F.3d at 1012; *see also* 20 C.F.R.
11 §§ 404.1527(c)(2), 416.927(c)(2). Thus, if a treating physician’s opinion is well-
12 supported by medically acceptable clinical and laboratory diagnostic techniques and is
13 not inconsistent with the other substantial evidence in the record, it is entitled to
14 controlling weight. *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th Cir. 2014). If, on the
15 other hand, the Commissioner determines that a treating physician’s opinion does not
16 meet this test for controlling weight, the treating physician’s opinion is still entitled to
17 deference and may be rejected only if the ALJ articulates “clear and convincing”
18 reasons supported by substantial evidence for doing so. *Id.* at 1160-61; *Lester v.*
19 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

20
21 Nevertheless, an ALJ does not commit legal error *per se* by according greater
22 weight to the opinion of a nonexamining State agency physician than to the
23 contradictory opinion of a treating physician. *See, e.g., Morgan v. Comm’r of. Soc.*
24 *Sec. Admin.*, 169 F.3d 595, 600-03 (9th Cir. 1999). Instead, an ALJ may reject the
25 contradicted opinion of a treating physician if the ALJ articulates “specific and
26 legitimate” reasons for doing so and those reasons are supported by substantial
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1 evidence in the record. *Garrison*, 759 F.3d at 1012; *Hill v. Astrue*, 698 F.3d 1153,
2 1159-60 (9th Cir. 2012).

3 4 **B. The ALJ Did Not Err in Evaluating the Physician Opinions**

5 6 **i. Treating Physician Dr. Paveloff**

7
8 Dr. Daniel Paveloff treated Plaintiff in connection with his workers'
9 compensation claim resulting from work-related injuries Plaintiff suffered in a four-
10 story fall through a skylight on July 31, 2006. (AR 272.) On March 4, 2009, Plaintiff
11 was found to be under a disability since July 31, 2006. (AR 78-89.) In determining
12 whether Plaintiff continued to be disabled after August 1, 2011, ALJ Pease gave Dr.
13 Paveloff's opinion little weight, concluding that Dr. Paveloff's opinion was "not
14 supported by objective evidence and it is inconsistent with the record as a whole."
15 (AR 32.) The ALJ provided clear and convincing reasons for not giving controlling
16 weight to this treating physician's opinions.

17
18 First, the ALJ rejected Dr. Paveloff's opinion that Plaintiff was unable to work.
19 (*Id.*) Although a treating physician's opinion is generally entitled to deference, the
20 question of whether Plaintiff can work is one that is reserved exclusively to the
21 Commissioner. 20 C.R.F. § 404.1527(e)(1); *and see McLeod v. Astrue*, 640 F.3d 881,
22 885 (9th Cir. 2010) ("The law reserves the disability determination to the
23 Commissioner.") The ALJ also explained that "Dr. Paveloff primarily summarized the
24 claimant's subjective complaints, diagnoses and treatment, but he did not provide
25 objective clinical or diagnostic finding to support the functional assessment." (AR 32.)
26 The ALJ's conclusions are well supported by the record.

1 Dr. Paveloff provided a single narrative report in which he summarized the
2 history of Plaintiff's injuries and treatment from the 2006 work accident to 2012. (AR
3 399-406.) The remainder of Dr. Paveloff's report recites Plaintiff's subjective
4 symptoms, but does not include any clinical observations, evidence of test results, or
5 specific diagnoses. (*See, e.g.*, AR 403.) The ALJ also found Dr. Paveloff's opinions
6 were "inconsistent with the record as a whole." (AR 32.)
7

8 This conclusion too is supported by the record where, for example, Dr. Paveloff
9 describes Plaintiff as unable "to complete an entire eight-hour workday with sitting,
10 standing or a combination of each on a sustained basis" (AR 404), while other
11 evidence in the record indicates that Plaintiff regularly attends church (AR 197),
12 daily goes outside, accompanies his son to and from school, shops for groceries and
13 clothes (with help lifting things from his wife and/or son) (AR 204), and he goes to
14 eat or "hang out" 2-3 times per week (AR 205).⁴ In addition, the ALJ found Dr.
15 Paveloff's opinion inconsistent with opinions rendered by consultative examiner Dr.
16 Sophon.

17 **ii. Consultative Examiner Dr. Sophon**
18

19 At the Agency's request, Dr. Sophon conducted a "complete orthopedic
20 evaluation" of Plaintiff and provided a report dated July 22, 2011. (AR 332-39.) Dr.
21 Sophon did not review any medical records (AR 332), but based his findings on a
22 "formal physical examination procedures and observation of the [Plaintiff's]
23

24 ⁴ The ALJ also explained that he discounted Dr. Paveloff's opinions because the physician was paid for his
25 services in connection with Plaintiff's efforts to secure worker's compensation benefits. (AR 32.) The Court does not
26 find this reason for discounting Dr. Paveloff's opinions clear or convincing. As Plaintiff points out, the State agency's
27 medical consultant and consultative evaluator were also paid for their services and yet the ALJ did not find the mere fact
28 of payment to be a reason to discount their opinions. (*See Joint Stip. 5.*) Indeed, as the Ninth Circuit has emphasized,
"The purpose for which medical reports are obtained does not provide a legitimate basis for rejecting them." *Lester*, 81
F.3d at 832. Nonetheless, for the reasons discussed above, the Court finds this error harmless because the remaining
reasons given by the ALJ for discounting Dr. Paveloff's opinions are supported by the record and without legal error.

1 movements and actions during the taking of the history and physical examination.”
2 (AR 333.) The ALJ gave Dr. Sophon’s opinion “significant weight,” explaining that
3 Dr. Sophon “personally observed and examined the claimant.” (AR 33.)
4

5 Dr. Sophon noted that although Plaintiff brought a cane, he “demonstrated a
6 normal gait without using the cane” and Plaintiff could perform “a 50 percent squatting
7 maneuver.” (AR 334.) Dr. Sophon diagnosed an open fracture of the right forearm
8 and right wrist, status post open reduction and internal fixation, and closed fracture of
9 the left wrist, status post open reduction and internal fixation. (AR 336.) Based on his
10 examination, Dr. Sophon concluded that Plaintiff “is capable of lifting and carrying 20
11 pounds occasionally, 10 pounds frequently” and had no restriction in sitting, standing,
12 or walking. (AR 337.) He found Plaintiff restricted to only occasional pushing or
13 pulling with his right hand, no postural limitation, and no manipulative limitation.
14 (*Id.*) In contrast to Dr. Paveloff’s opinion that “straight leg raise testing elicited
15 increased low back pain, with reduced range of motion in all planes tested of both the
16 thoracic and lumbar spine,” (AR 404), Dr. Sophon’s straight leg raising examination
17 showed “[n]egative both sitting and supine bilaterally.” (AR 334.) Further, Dr.
18 Sophon’s examination of Plaintiff’s thoracic and lumbar spine revealed, “there is a full
19 range of motion of the lumbar spine.” (AR 334.) Notwithstanding these findings, the
20 ALJ nonetheless concluded that “the more restrictive residual function capacity
21 assessed by the State agency physical medical consultant on initial review is more
22 consistent with the evidence as a whole.” (*Id.*)
23

24 **iii. Agency Consultant Dr. G. Spellman, M.D. (non-examining)**
25

26 Lastly, the ALJ gave “significant, but not great, weight” to State agency
27 physical medical consultant on reconsideration, Dr. Haaland, who opined that Plaintiff
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1
2 can lift and/or carry twenty pounds occasionally and ten pounds
3 frequently; . . . can stand and/or walk six hours in an eight hour workday;
4 . . . can sit for six hours in an eight-hour workday; . . . can never climb
5 ladders, ropes, or scaffolds, but he can perform all other postural activities
6 on an occasional basis; . . . is limited to frequent gross manipulation, but
7 has no other manipulative limitations, . . . has no visual, communicative,
8 or environmental limitations.
9

10 (AR 32 (citing AR 374-379).) While the ALJ found Dr. Haaland’s opinions “not
11 inconsistent” with the RFC in the decision, the ALJ found “the more restrictive finding
12 of the State agency physical medical consultant on initial review,” Dr. Spellman, to be
13 “more consistent with the evidence as a whole.” (AR 33.)
14

15 Plaintiff argues that the ALJ’s reliance on Dr. Spellman was misplaced and that
16 the ALJ “cherry picked” from Dr. Spellman’s finding. (Joint Stip. at 7.) Specifically,
17 Plaintiff contends that the ALJ did not include in the RFC determination Dr.
18 Spellman’s finding that Plaintiff as limited in reaching in all directions with his right
19 upper extremity and limited in feeling (skin receptors with his right upper extremity”
20 and did not explain why he rejected these findings. (*Id.*) Defendant responds that
21 Dr. Spellman’s postural limitations are consistent with the ALJ’s finding. (Joint Stip.
22 at 10.) The Court agrees. Dr. Spellman’s finding that Plaintiff’s ability to push and/or
23 pull is “limited in upper extremities” (AR 349) is reflected in the RFC, which provides
24 that “the right upper extremity is limited to occasional push or pull.” (AR 26.) The
25 RFC also provides that Plaintiff “cannot perform forceful gripping or torquing with
26 either hand.” (*Id.*)
27
28

1 Accordingly, after review of the record as a whole, the Court finds that the ALJ
2 provided specific, clear and convincing reasons for discounting the opinion of Dr.
3 Paveloff and affording greater weight to the opinions of Dr. Sophon and Dr.
4 Spellman. Even if reasonable minds might disagree as to the weight the ALJ gave to
5 Dr. Paveloff’s opinions, given the inconsistencies in the record evidence between Dr.
6 Paveloff’s findings and those of Drs. Sophon and Spellman, reasonable inferences
7 support the ALJ’s determination and the Court “must uphold the ALJ’s findings if
8 they are supported by inferences reasonably drawn from the record.” *Molina*, 674
9 F.3d at 1110.

11 **II. Plaintiff’s Credibility and Subjective Pain Testimony**

12
13 Plaintiff also argues that reversal is warranted because the ALJ, in finding that
14 Plaintiff was “partially credible,” did not properly assess Plaintiff’s credibility as to
15 the severity of his subjective symptoms. (Joint Stip. at 14-17.) Defendant responds
16 that, based on the medical evidence, the ALJ reasonably found Plaintiff’s allegations
17 of “extreme and disabling symptoms” not credible and the ALJ provided “multiple
18 valid reasons” in support of his adverse credibility determination. (*Id.* at 17.) For the
19 reasons discussed below, the Court finds that the ALJ did not err in discounting
20 Plaintiff’s credibility.

21 22 **A. Applicable Law**

23
24 It is the ALJ’s obligation to determine credibility, resolve conflicts in the
25 testimony, and resolve ambiguities in the record. *Treichler v. Comm’r of Soc. Sec.*
26 *Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014) (internal citation omitted). If the ALJ
27 finds no evidence of malingering, and the claimant has provided objective medical
28

1 evidence of an underlying impairment which might reasonably produce the pain or
2 other symptoms alleged, “the ALJ can reject the claimant’s testimony about the
3 severity of her symptoms only by offering specific, clear and convincing reasons for
4 doing so.” *Lingenfelter v. Astrue*, 504 F. 3d 1028, 1036 (9th Cir. 2007) (citing *Smolen*
5 *v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)). The Ninth Circuit, in *Brown-Hunter*
6 *v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015), recently re-emphasized the “clear and
7 convincing” requirement for finding a claimant’s testimony not credible.⁵

8
9 Further, the ALJ “must identify what testimony is not credible and what
10 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834. A
11 credibility finding must be “sufficiently specific to permit the court to conclude that
12 the ALJ did not arbitrarily discredit the claimant’s testimony.” *Thomas v. Barnhart*,
13 278 F.3d 947, 958 (9th Cir. 2002) (internal citation omitted). The governing statute
14 and agency regulations do not permit an award of disability benefits based solely on a
15 claimant’s own statements about her symptoms. Indeed, Congress expressly provided
16 that

17
18 An individual’s statement as to pain or other symptoms shall not alone be
19 conclusive evidence of disability as defined in this section; there must be
20 medical signs and findings, established by medically acceptable clinical or
21 laboratory diagnostic techniques, which show the existence of a medical
22 impairment that results from anatomical, physiological, or psychological
23 abnormalities which could reasonably be expected to produce the pain or other
24 symptoms alleged[.]

25
26 ⁵ Defendant concedes in a footnote that the Ninth Circuit has required clear and convincing reasons for rejecting a
27 claimant’s testimony, but the agency maintains “this standard is inconsistent with the deferential substantial evidence
28 standard set forth in 42. U.S.C. § 405(g)” and with the agency’s regulations. (Joint Stip. at 11, n.2) The Court does not
reach that issue here.

1
2 42 U.S.C. § 423(a)(5)(A); *and see* 20 C.R.R. §§ 404.1529(a), 416.929(a).
3

4 **B. The ALJ Provided Sufficiently Specific, Clear, and Convincing**
5 **Reasons, Supported by the Record for Finding Plaintiff Not Fully**
6 **Credible**
7

8 Here, the ALJ engaged in the appropriate two-step process for evaluating
9 Plaintiff's symptoms. First, he determined that there were underlying medically
10 determinable physical impairments that could reasonably be expected to produce
11 Plaintiff's pain and/or symptoms and Plaintiff "continued to have the same
12 impairments that he had at the time of CPD." (AR 25.) The ALJ noted that "with
13 regard to [Plaintiff's] physical impairments, there remained evidence of significant
14 limitations in his ability to perform basic work-related activities, but not to the same
15 extent he once was limited." (*Id.* at 26.) Next, the ALJ evaluated the "intensity,
16 persistence, and limiting effects of Plaintiff's symptoms "to determine the extent to
17 which they limited the [Plaintiff's] ability to do basic work activities." (*Id.* at 27.)
18

19 Plaintiff testified that he has difficulty sitting, standing or walking for prolonged
20 periods. (AR 63.) He also stated he can only sit for about 30 minutes and cannot sit
21 for four hours per day. (AR 64.) He takes strong prescription narcotics for chronic
22 pain that makes him sleepy and nauseous. (AR 65.) He also testified he has limited
23 movement in his wrist and has difficulty grasping things; his left hand is "better" but
24 he had arthritis in it. (AR 67.) At the hearing, he testified "I'm, not an invalid but I
25 can – I could still do some things but it's just it takes me quite a while to do things. . .
26 My back, it bothers me if, like walking or standing so basically, you know, I have to
27 take a lot of breaks . . . I can't carry anything heavy, obviously." (AR 68.) He stated
28

1 he has four to five bad days per week, about 20 in a month. (AR 65.) The ALJ found
2 Plaintiff “partially credible because he has some limitations, but not to the extent he
3 has alleged.” (AR 27.)
4

5 The ALJ based this determination on several factors reflected in the record.
6 First, he found that the office visit notes reflected “numerous occasions on which the
7 “Plaintiff did not specify any particular complaint” and the ALJ believed this to be
8 inconsistent with Plaintiff’s claims of ongoing, disabling symptoms. (AR 27.)
9 Specifically, the ALJ pointed to Plaintiff’s complaint of sleeping a lot and found no
10 evidence in the medical record of this complaint “until his most recent treatment, just
11 prior to the hearing” and the ALJ noted that “numerous records prior to that . . .
12 indicate he has no problems with sleep.” (*Id.*) Second, the ALJ considered the third
13 party function reports provided by Plaintiff’s wife and mother, but concluded that
14 their statements essentially repeat Plaintiff’s subjective complaints about his
15 condition, including references to his need for naps. (*See, e.g.*, AR 194, 219.) The
16 ALJ noted that “the repetition of [Plaintiff’s] complaints through his mother and wife
17 does not make them any more credible.” (AR 28.) The ALJ found that the opinions
18 of Plaintiff’s mother and wife were not unbiased because of their financial interest in
19 seeing Plaintiff receive benefits. (*Id.*) Moreover, the ALJ emphasized that the
20 statements in the third party function reports “are not supported by the clinical or
21 diagnostic medical evidence.” (*Id.*)
22

23 Third, the ALJ determined that Plaintiff had not “generally received the type of
24 medical treatment one would expect for a totally disabled individuals.” (AR 28.) In
25 particular, the ALJ pointed to a “significant gap” in Plaintiff’s treatment history
26 between July 1, 2011 and May 21, 2012 and he found that the treatment prior to that
27 period was “generally routine and conservative in nature.” (*Id.*) Overall, the ALJ
28

1 found the treatment history was inconsistent with the alleged severity of Plaintiff's
2 symptoms. (*Id.*)
3

4 Lastly, the ALJ supported his conclusion that Plaintiff was not fully credible on
5 the additional grounds that Plaintiff had “engaged in a somewhat normal level of daily
6 activity and interaction, including driving his son to school, doing light household
7 chores, walking his dog, cooking and running errands. (*Id.*) While a claimant is not
8 required “to vegetate in a dark room” in order to be found disabled, “the ALJ may
9 discredit a claimant’s testimony when the claimant reports participation in everyday
10 activities indicating capacities that are transferable to a work setting.” *Molina*, 674
11 F.3d at 1112. Moreover, “[e]ven where those activities suggest some difficulty
12 functioning, they may be grounds for discrediting the claimant’s testimony to the
13 extent that they contradict claims of a totally debilitating impairment. *Id.* at 1113
14 (internal citations omitted). Here, the record reflects that Plaintiff engages in a variety
15 of daily activities that do not support his claim of total disability, including helping
16 with household chores, accompanying his son to and from school, walking his dog,
17 attending church regularly, grocery shopping, and going out with friends. (AR 197,
18 204-05.)
19

20 The Court does not find the gap in Plaintiff’s treatment history, without some
21 indication as to why Plaintiff did not seek treatment during that period, to be an
22 adequate basis on its own for discrediting Plaintiff’s credibility. However, to the
23 extent the ALJ supported his conclusion that Plaintiff was not fully credible on other
24 grounds, including that Plaintiff’s allegations of the severity of his medical
25 impairments and symptoms are undermined by his activities of daily living and
26 generally conservative medical treatment, the Court finds that any error in relying on
27
28

1 the treatment gap is harmless because the adverse credibility determination is
2 nonetheless well supported by the record evidence.

3
4 Accordingly, because the ALJ's adverse credibility determination was supported
5 by specific, clear and convincing reasons, the Court upholds it.

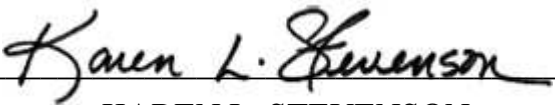
6
7 **CONCLUSION**

8
9 For the reasons stated above, IT IS ORDERED that the decision of the
10 Commissioner is AFFIRMED.

11
12 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of
13 this Memorandum Opinion and Order and the Judgment on counsel for Plaintiff and
14 for Defendant.

15
16 LET JUDGEMENT BE ENTERED ACCORDINGLY.

17
18 DATED: January 10, 2017

19
20 
21 KAREN L. STEVENSON
22 UNITED STATES MAGISTRATE JUDGE
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26
27
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