

1 Joint Stipulation ("Joint Stip."), setting forth their respective
2 positions regarding Plaintiff's claims. (Dkt. No. 28).

3
4 The Court has taken this matter under submission without oral
5 argument. See C.D. Cal. L.R. 7-15.

6
7 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

8
9 On January 29, 2010 and February 6, 2010, Plaintiff, formerly
10 employed as an automotive technician, (see AR 163), filed DIB and SSI
11 applications alleging an inability to work because of a disability
12 since August 11, 2009. (AR 135, 142). On November 4, 2011, an
13 Administrative Law Judge, Marti Kirby ("ALJ"), heard testimony from a
14 vocational expert and Plaintiff, who was represented by counsel.
15 (See AR 32-76). On December 6, 2011, the ALJ issued a decision
16 denying Plaintiff's applications. (See AR 12-27). The Appeals
17 Council denied Plaintiff's request to review the ALJ's decision on
18 January 31, 2013. (AR 1-4, 7). On March 28, 2013, Plaintiff
19 sought review of the decision by filing a Complaint in this Court.
20 (See Reguero v. Covin, EDCV 13-0576-AS, Dkt. No. 1). On April 30,
21 2014, the Court issued an order vacating the Commissioner's decision
22 and remanding the case for further administrative proceedings. (Id.,
23 Dkt. No. 26, 27).

24
25 On remand, the same ALJ held a hearing on February 10, 2015,
26 during which he heard testimony from another vocational expert, Lizet
27 Campos ("VE"), and Plaintiff, who was represented by counsel. (AR
28 466-504). On March 12, 2015, the ALJ issued a partially favorable

1 decision. (AR 444-60). On September 21, 2015, the ALJ issued a
2 revised decision that was "identical to the original decision except
3 for disapproval of the fee agreement, as it [was] a two-tier fee
4 agreement." (AR 423; see AR 423-39).

5
6 The ALJ applied the five-step sequential process in evaluating
7 Plaintiff's case. At step one, the ALJ determined that Plaintiff has
8 not engaged in substantial gainful activity since August 11, 2009,
9 the alleged onset date. (AR 426). At step two, the ALJ found that
10 Plaintiff has had the following severe impairments since the alleged
11 onset date: "chronic fatigue syndrome; fibromyalgia; osteoarthritis
12 in the shoulders and hands; obesity; and social anxiety disorder."
13 (Id.). The ALJ further found that since January 2, 2012, Plaintiff
14 has had the additional severe impairments of "stroke" and "left sided
15 weakness." (Id.). At step three, the ALJ found that Plaintiff's
16 impairments do not meet or equal a listing found in 20 C.F.R. Part
17 404, Subpart P, Appendix 1. (Id.).

18
19 Before proceeding to step four, the ALJ found that in the period
20 between August 11, 2009, the alleged onset date, and January 2, 2012,
21 Plaintiff had the following Residual Functional Capacity ("RFC")²:

22
23 [Plaintiff could] perform light work . . . except [he
24 could] lift, carry, push and/or pull 20 pounds occasionally
25 and 10 pounds frequently; he [could] sit, stand and/or walk

26
27 ² A Residual Functional Capacity is what a claimant can still do
28 despite existing exertional and non-exertional limitations. See 20
C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).

1 for six hours out of an eight-hour workday, but only one
2 hour at a time and would need to alternate positions every
3 15 minutes for a brief 1-3 minutes; he [could] perform
4 occasional bending, stooping, squatting, kneeling,
5 crawling, and balancing; he [could] occasionally climb
6 ramps and stairs, but [could not] climb ropes, ladders, or
7 scaffolds; he [could] occasionally perform overhead
8 reaching bilaterally; he [was] precluded from working at
9 unprotected heights or around hazardous or moving
10 machinery; he [was] limited to a non-public working setting
11 with only occasional interaction with supervisors and
12 indirect interaction with co-workers; and he [was] limited
13 to simple routine repetitive tasks.

14
15 (AR 427). The ALJ found that beginning on January 2, 2012, Plaintiff
16 has had the following RFC:

17
18 [Plaintiff can] perform light work . . . except [he] can
19 lift no more than 10 pounds; he can stand and/or walk for
20 four hours out of an eight-hour workday, but no more than
21 15 minutes at a time; he can sit for 6 hours in an 8-hour
22 workday with brief position changes after 30-45 minutes for
23 3-5 minutes at a time; he can perform occasional bending,
24 stooping, squatting, kneeling, crawling, and balancing; he
25 can occasionally climb ramps and stairs, but cannot climb
26 ropes, ladders, or scaffolds; he is precluded from working
27 at unprotected heights, moving machinery, or other hazards;
28 he must avoid concentrated exposure to walking on uneven

1 terrain, extreme temperatures, large crowds, and loud
2 noises; he is limited to non-public work with only
3 occasional non-intense interaction with supervisors or co-
4 workers; he cannot perform jobs requiring teamwork, but can
5 perform object-oriented work; he can occasionally perform
6 overhead reaching bilaterally; he can frequently perform
7 fine and gross manipulation; he cannot perform jobs that
8 require forceful gripping or grasping; he cannot
9 repetitively push and/or pull with the lower extremities,
10 such as the use of foot pedals, with the left lower
11 extremity; and he would require an additional 20-30 minute
12 break in addition to regular work breaks any time during
13 the regular workday.

14
15 (AR 434-35).

16
17 At step four, the ALJ noted that Plaintiff has been unable to
18 perform any past relevant work since August 11, 2009. (AR 435).

19
20 Relying on the VE's testimony at step five, the ALJ found that
21 before January 2, 2012, Plaintiff, with his age, education, work
22 experience, and RFC, could perform the following representative jobs
23 existing in significant numbers in the national economy: garment
24 folder (Dictionary of Occupational Titles ("DOT") 789.687-066); table
25 worker (DOT 783.687-030); and dowel inspector (DOT 669.687-014). (AR
26 437).

1 The ALJ found that beginning on January 2, 2012, Plaintiff has
2 not been able to perform any jobs existing in significant numbers in
3 the national economy. (AR 438).

4
5 Accordingly, the ALJ concluded that Plaintiff "was not disabled
6 prior to January 2, 2012, but became disabled on that date and has
7 continued to be disabled through the date of th[e] decision." (Id.).

8
9 On September 28, 2016, the Appeals Council denied Plaintiff's
10 request to review the ALJ's decision (AR 398-400, 412, 414).
11 Plaintiff now seeks judicial review of the ALJ's decision which
12 stands as the final decision of the Commissioner. See 42 U.S.C. §§
13 405(g), 1383(c).

14
15 **STANDARD OF REVIEW**

16
17 This Court reviews the Administration's decision to determine if
18 it is free of legal error and supported by substantial evidence. See
19 Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial
20 evidence" is more than a mere scintilla, but less than a
21 preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir.
22 2014). To determine whether substantial evidence supports a finding,
23 "a court must consider the record as a whole, weighing both evidence
24 that supports and evidence that detracts from the [Commissioner's]
25 conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir.
26 2001) (internal quotation omitted). As a result, "[i]f the evidence
27 can support either affirming or reversing the ALJ's conclusion, [a
28

1 court] may not substitute [its] judgment for that of the ALJ."
2 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

3
4 **PLAINTIFF'S CONTENTIONS**

5
6 Plaintiff alleges that the ALJ erred in (1) rejecting
7 Plaintiff's testimony and (2) relying on the VE's testimony regarding
8 job numbers. (See Joint Stip. at 7-36).

9
10 **DISCUSSION**

11
12 After considering the record as a whole, the Court finds that
13 the Commissioner's findings are supported by substantial evidence and
14 are free from material legal error.³

15
16 **A. The ALJ Did Not Err in Evaluating Plaintiff's Credibility**

17
18 An ALJ's assessment of a claimant's credibility is entitled to
19 "great weight." See Anderson v. Sullivan, 914 F.2d 1121, 1124 (9th
20 Cir. 1990); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1985).
21 "[T]he ALJ is not required to believe every allegation of disabling
22 pain, or else disability benefits would be available for the asking,
23 a result plainly contrary to 42 U.S.C. § 423(d)(5)(A)." Molina v.

24
25 ³ The harmless error rule applies to the review of
26 administrative decisions regarding disability. See McLeod v. Astrue,
27 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400 F.3d
28 676, 679 (9th Cir. 2005) (an ALJ's decision will not be reversed for
errors that are harmless).

1 Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012). In order to determine
2 whether a claimant's testimony is credible, the ALJ engages in a two-
3 step analysis. Garrison v. Colvin, 759 F.3d 995, 1014 (9th Cir.
4 2014).

5
6 First, the claimant "must produce objective medical evidence of
7 an underlying impairment 'which could reasonably be expected to
8 produce the pain or other symptoms alleged.'" Bunnell v. Sullivan,
9 947 F.2d 341, 344 (9th Cir. 1991) (quoting 42 U.S.C.
10 § 423(d)(5)(A)(1988)). In producing evidence of the underlying
11 impairment, "the claimant need not produce objective medical evidence
12 of the pain or fatigue itself, or the severity thereof." Smolen, 80
13 F.3d at 1282. Instead, the claimant "need only show that [the
14 impairment] could reasonably have caused some degree of the symptom."
15 Id.

16
17 Second, once the claimant has produced the requisite objective
18 medical evidence, the "ALJ may reject the claimant's testimony
19 regarding the severity of her symptoms." Id. at 1284. Absent
20 affirmative evidence of malingering, however, the ALJ may reject a
21 plaintiff's testimony only "by offering specific, clear and
22 convincing reasons for doing so." Id. In assessing a claimant's
23 alleged symptoms, an ALJ may consider the following:

- 24
25 (1) ordinary techniques of credibility evaluation, such as
26 claimant's reputation for lying, prior inconsistent
27 statements concerning the symptoms, and other testimony by
28 the claimant that appears to be less than candid; (2)

1 unexplained or inadequately explained failure to seek
2 treatment or to follow a prescribed course of treatment;
3 and (3) the claimant's daily activities.
4

5 Id. An ALJ may also consider observations of treating and examining
6 physicians and other third parties. Id.
7

8 Here, the ALJ found Plaintiff's allegations "less than fully
9 credible." (AR 429). This determination was based on the ALJ's
10 consideration of Plaintiff's daily activities, treatment history,
11 work history, and the objective medical record. (See AR 428-34).
12

13 The ALJ found that Plaintiff "has engaged in a somewhat normal
14 level of daily activity and interaction," which included "caring for
15 his own personal hygiene, preparing simple meals, completing basic
16 household chores, driving, running errands, and grocery shopping."
17 (AR 429; see AR 172-74, 283). The ALJ remarked that some of
18 Plaintiff's activities require abilities that are needed for
19 maintaining employment. (AR 429). Plaintiff's ability to perform
20 various everyday activities is a legitimate basis to discount
21 Plaintiff's credibility. See Burch v. Barnhart, 400 F.3d 676, 680-81
22 (9th Cir. 2005) (claimant's allegations of disability properly
23 discredited where claimant was able to care for her own personal
24 needs, cook, clean, shop, interact with her boyfriend, and manage
25 finances). Even if Plaintiff's activities do not show that he was
26 unimpaired, the ALJ reasonably found them inconsistent with the level
27 of impairment that Plaintiff alleges. See Molina v. Astrue, 674 F.3d
28 at 1113 ("Even where [claimant's] activities suggest some difficulty

1 functioning, they may be grounds for discrediting the claimant's
2 testimony to the extent that they contradict claims of a totally
3 debilitating impairment.").

4
5 The ALJ noted that Plaintiff "had gone on several vacations
6 since the alleged onset date, including gambling in Laughlin." (AR
7 429; see AR 48-49, 280, 304). Plaintiff contends that the ALJ
8 mischaracterized the evidence because there were only two vacations,
9 in the summers of 2010 and 2011, and "[b]oth were for a brief few
10 days which [Plaintiff] did not enjoy." (Joint Stip. at 16). At the
11 hearing in 2011, Plaintiff testified that during his camping trip
12 with his wife that summer, he "pretty much stayed in the RV" and
13 "felt anxious and sick to his stomach," but he also stated that the
14 trip was "kind of nice, because [he and his wife] were able to go on
15 a walk together." (AR 49, 68). He stated that his camping trip the
16 previous summer "just wasn't as fun" as trips in the past "because
17 [he] wasn't drinking" anymore. (AR 68). Plaintiff reported in May
18 2010 that he "won money" in Laughlin, suggesting that he was able to
19 participate in casino gambling. (AR 280, 304). In contrast,
20 Plaintiff testified at the 2011 hearing that the chief cause of his
21 inability to work was his "fear of coming outside." (AR 42).
22 Therefore, notwithstanding Plaintiff's contentions, it was reasonable
23 for the ALJ to find that Plaintiff's "decision to go on vacation,
24 particularly a vacation that placed him [in] a likely crowded casino,
25 tends to suggest that [his] symptoms and limitations may have been
26 somewhat overstated." (AR 429).

1 The ALJ also found that Plaintiff's treatment history has not
2 reflected the existence of a debilitating condition. The ALJ
3 remarked that Plaintiff has made "relatively infrequent" trips to the
4 doctor, with "significant gaps in treatment." (AR 429). Moreover,
5 the ALJ noted that Plaintiff's treatment "has been essentially
6 routine and conservative, primarily in the form of medications."
7 (Id.). Plaintiff contends that the ALJ did not "point to the record
8 to demonstrate that there was anything more the doctors wanted
9 [Plaintiff] to do." (Joint Stip. at 14). To the contrary, the ALJ
10 gave examples, including Plaintiff's failure to follow through with
11 his treating doctor's referral to physical therapy, as well as his
12 decision to discontinue mental health treatment in 2010. (AR 429-
13 30). The record supports this finding. A treatment note from
14 October 2009 states, for example, that when Plaintiff presented with
15 shoulder pain, he "opted for conservative measures but was offered
16 Specialist and [doctors] urged Physical Therapy." (AR 210).
17 Plaintiff has stated that cost was the reason why he has not done
18 physical therapy (at \$40 per session) and why he stopped his mental
19 health treatment in 2010. (See AR 56, 482-84). The ALJ acknowledged
20 this explanation but discredited, noting that Plaintiff nonetheless
21 affords a pack of cigarettes a day, as well as vacations and a
22 gambling trip in 2010, thus indicating that Plaintiff's "symptoms
23 were not as severe or as limiting as he purports." (AR 430; see AR
24 485).

25
26 The ALJ also noted that Plaintiff "stopped working due to a
27 business-related layoff rather than because of the allegedly
28 disabling impairments," and Plaintiff suggested that he would have

1 kept working but for the layoff. (AR 430; see AR 71, 283). Along
2 with the other factors, this was a persuasive basis on which to
3 discount the credibility of Plaintiff's complaints. See Brackett v.
4 Comm'r of Soc. Sec. Admin., 468 F. App'x 754, 755 (9th Cir. 2012)
5 (ALJ permissibly discounted claimant's subjective pain testimony
6 partly because claimant stopped working only when he was laid off due
7 to a plant closure); Bruton v. Massanari, 268 F.3d 824, 828 (9th Cir.
8 2001) (ALJ did not err in discrediting claimant's subjective
9 complaints where claimant "stated at the administrative hearing and
10 to at least one of his doctors that he left his job because he was
11 laid off, rather than because he was injured"); Drouin v. Sullivan,
12 966 F.2d 1255, 1256, 1258 (9th Cir. 1992) (ALJ did not err in
13 rejecting credibility partly on the basis that claimant was laid off
14 for business reasons, not impairments).

15
16 In addition, the ALJ provided a detailed review of the medical
17 evidence, (see AR 431-33), noting that, among other evidence, in
18 August 2010, Plaintiff's myalgia and myositis were under fair
19 control, and his Norco medication helped alleviate his pain, (AR 359-
20 60, 431), and that examining doctors described Plaintiff as alert and
21 oriented, not agitated or anxious, and in no apparent distress.
22 (See, e.g., AR 284, 347, 350, 354). The ALJ appropriately considered
23 such evidence in determining that the record did not support the
24 severity of Plaintiff's complaints. See Burch, 400 F.3d at 681
25 ("Although lack of medical evidence cannot form the sole basis for
26 discounting pain testimony, it is a factor that the ALJ can consider
27 in his credibility analysis.").

1 Accordingly, the ALJ properly discounted Plaintiff's credibility
2 by giving specific, clear, and convincing reasons that are supported
3 by substantial evidence in the record.

4
5 **B. The ALJ Did Not Err in Relying on the VE's Testimony at Step Five**

6
7 Plaintiff contends that the ALJ erred by relying on the VE's
8 testimony to conclude that there are a significant number of jobs
9 that Plaintiff can perform during the period between August 11, 2009
10 and January 2, 2012. (See Joint Stip. at 24-31). Plaintiff contends
11 that the job numbers that the VE provided actually represented
12 aggregates of various occupations, not simply the jobs that the ALJ
13 found Plaintiff can perform - garment folder (DOT 789.687-066706.684-
14 022); table worker (DOT 783.687-030); and dowel inspector (DOT
15 669.687-014). (See id.; AR 437).

16
17 The ALJ bears the burden at step five to establish that work
18 exists in significant numbers in the national economy that Plaintiff
19 can perform. Beltran v. Astrue, 700 F.3d 386, 389 (9th Cir. 2012).
20 An ALJ may properly rely on the testimony of a VE regarding job
21 numbers in the national economy to make this showing. Bayliss v.
22 Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005). "A VE's recognized
23 expertise provides the necessary foundation for his or her testimony.
24 Thus, no additional foundation is required." Buck v. Berryhill, 869
25 F.3d 1040, 1051 (9th Cir. 2017) (quoting Bayliss, 427 F.3d at 1218).

26
27 At the hearing on February 10, 2015, the VE testified that there
28 are approximately 427,000 garment folder jobs in the national

1 economy; approximately 426,000 table worker jobs; and approximately
2 472,000 dowel inspector jobs. (AR 491). The VE stated that these
3 job numbers "are based on occupational employment statistics," which
4 the VE obtained from "Skill Tran," apparently referring to the Skill
5 Tran source "Job Browser Pro." (AR 496). The VE explained that she
6 also collects information about job numbers as she meets with
7 individuals that she counsels, but she does not "utilize that
8 information to bring it in here [to the hearing] to compare it, no."
9 (Id.). Plaintiff's counsel asked the VE, "Does that [number]
10 represent the number of jobs that exist for those DOT individual
11 codes that [the VE] identified or does that represent like an
12 aggregate group of occupations?" (AR 498). The VE replied, "It's an
13 aggregate number." (Id.). The VE did not elaborate further, and no
14 further questions were asked about the VE's job numbers.

15
16 Plaintiff contends that it is clear that the VE "did not
17 testify that each of the three occupations had approximately 426,000-
18 427,000 each; rather the 426,000-427,000 number for each occupation
19 represents . . . the total aggregate number for a group of
20 unidentified occupations." (Joint Stip. at 26-27). Thus, Plaintiff
21 claims that the ALJ erred by relying on a mischaracterization of the
22 VE's testimony to find that the respective job numbers applied to the
23 three particular occupations. (Id. at 27). Plaintiff asserts that
24 Skill Tran actually groups each of these three jobs with hundreds of
25 other occupations, and the VE's "aggregate" job numbers should be
26 understood to apply to these larger groups. (See id. at 28-30). For
27 example, Plaintiff states that Skill Tran groups the garment folder
28 occupation with 553 other occupations in the category "Helpers -

1 Production Workers." (Id. at 28).⁴ Plaintiff points out that if the
2 VE's "aggregate" number of 427,000 jobs were divided evenly among
3 each of the 553 occupations, it would result in only 770 garment
4 folder jobs and claims that "Skill Tran demonstrates that in fact
5 only 63 full time jobs are available for the specific DOT code of
6 garment sorter." (Id.).

7
8 Plaintiff never raised this issue before the Commissioner.
9 Though he was represented by counsel, Plaintiff did not challenge the
10 basis or accuracy of the VE's job numbers during administrative
11 proceedings. Plaintiff, therefore, has waived the issue. See Shaibi
12 v. Berryhill, 883 F.3d 1102, 1109 (9th Cir. 2017) ("We now hold that
13 when a claimant fails entirely to challenge a vocational expert's job
14 numbers during administrative proceedings before the agency, the
15 claimant waives such a challenge on appeal, at least when that
16 claimant is represented by counsel."); see also Meanel v. Apfel, 172
17 F.3d 1111 (9th Cir. 1999) (holding that claimants represented by
18 counsel "must raise all issues and evidence at their administrative
19 hearings in order to preserve them on appeal").

20
21 Regardless of waiver, however, Plaintiff has failed to establish
22 any error in the ALJ's step-five finding. Notwithstanding
23 Plaintiff's contentions, the ALJ was entitled to rely on the VE's
24 testimony on job numbers, which constitutes substantial evidence.

25
26 ⁴ Plaintiff cites "Exhibit 1," but no such exhibit has been
27 filed in this action. Regardless, the absence of the referenced
28 exhibit - which presumably contains the Skill Tran data - does not
affect the Court's analysis. There is no indication that Plaintiff
ever presented such information to the ALJ or the Appeals Council.

