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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

JAMES R. SMITH,
Plaintiff,
v.
NANCY A. BERRYHILL,
Acting Commissioner of the
Social Security Administration,
Defendant.

Case No. EDCV 16-2643 SS

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

James R. Smith ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for Disability Insurance Benefits and Supplemental Security Income. The parties consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the undersigned United States Magistrate Judge.

1 (Dkt. Nos. 14-15). For the reasons stated below, the decision of
2 the Commissioner is AFFIRMED.

3
4 **II.**

5 **PROCEDURAL HISTORY**

6
7 Plaintiff filed an application for Title II Disability
8 Insurance Benefits ("DIB") and an application for Title XVI
9 Supplemental Security Income ("SSI) on May 13, 2013.
10 (Administrative Record ("AR") at 43, 144-53). He alleged a
11 disability onset date of June 1, 2012. (AR 43, 145). The Agency
12 initially denied Plaintiff's applications on November 25, 2013,
13 and upon reconsideration on January 24, 2014. (AR 83-86, 89-93).
14 On February 21, 2014, Plaintiff requested a hearing before an
15 Administrative Law Judge ("ALJ"). (AR 94-95). Plaintiff testified
16 at a hearing before ALJ Mark Greenberg on May 18, 2015 (the "ALJ
17 Hearing"). (AR 27-42). On July 23, 2015, the ALJ issued a decision
18 denying disability insurance benefits and supplement security
19 income. (AR 10-26). Plaintiff filed a request for review of the
20 ALJ's unfavorable decision on September 14, 2015, which the Appeals
21 Council denied on October 27, 2016. (AR 1-5, 8-9). Plaintiff
22 filed the instant action on December 27, 2016.

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1 III.

2 FACTUAL BACKGROUND

3
4 Plaintiff was born on October 19, 1954. (AR 144). He was 58
5 years old as of the alleged disability onset date of June 1, 2012,
6 and 60 years old at the time of ALJ Hearing. (AR 29, 144).
7 Plaintiff did not graduate from high school but he has a GED. (AR
8 29-30). Plaintiff was unemployed at the time of his alleged onset
9 date. (AR 30). Plaintiff was last employed by Powerstride Battery
10 Co. as a regional sales representative until August 11, 2011, when
11 he was "laid off for lack of work." (AR 30, 164, 179). Plaintiff's
12 earnings record indicates that his last-insured date was December
13 31, 2016. (AR 154).

14
15 Plaintiff listed his illnesses as atrial fibrillation and
16 degenerative lower lumbar spine. (AR 145, 179). The record
17 indicates Plaintiff was first diagnosed with atrial fibrillation
18 on July 21, 2012, when he was hospitalized due to a seizure and a
19 rapid heart rate. (AR 338, 352). Plaintiff first sought medical
20 attention for back pain on April 8, 2013. (AR 299). Plaintiff is
21 prescribed Digoxin, Diltiazem, and Metoprolol Tartrate for his
22 heart condition and Hydrocodone Acetaminophen and Norco¹ for his
23 back pain. (AR 251-52).

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27 _____
28 ¹ Norco is a brand-name combination of hydrocodone and
acetaminophen. See MEDLINEPLUS, [https://medlineplus.gov/
druginfo/meds/a601006.html](https://medlineplus.gov/druginfo/meds/a601006.html) (last visited July 24, 2017).

1 **A. Medical History And Treating Doctors' Opinions**

2
3 **1. Treatments For Seizures, Atrial Fibrillation, Chronic**
4 **Obstructive Pulmonary Disease, Congestive Heart Failure,**
5 **Hypertension, and Hernia**
6

7 Plaintiff first sought medical attention for seizures and
8 atrial fibrillation on July 21, 2012, when he was admitted to the
9 emergency room of Desert Regional Medical Center. (AR 338, 352).
10 On July 21, Plaintiff suffered a seizure and called an ambulance.
11 (AR 352). The hospital records also indicate that Plaintiff began
12 experiencing a rapid heart rate the day before. (AR 338). Upon
13 being admitted, Plaintiff initially reported that he was drinking
14 the day prior, but later indicated that he quit drinking two to
15 three weeks ago. (AR 349). Plaintiff specified that he drank a
16 pint of vodka every day for 25 years. (AR 352). Plaintiff has
17 also been smoking a pack of cigarettes a day for the past 40 years.
18 (AR 349).
19

20 Plaintiff remained at the hospital for four days during which
21 time doctors performed various tests. (AR 331). Plaintiff was
22 diagnosed with "[n]ew-onset atrial fibrillation, alcohol abuse,
23 [and] thrombocytopenia likely secondary to alcohol use." (Id.).
24 During the hospital stay, "[e]xtensive time was spent discussing
25 . . . alcohol cessation" and Plaintiff was "instructed to try to seek
26 help and remain sober from alcohol." (Id.). Upon discharge,
27 Plaintiff's heart rate and condition was stable. (Id.).
28

1 The record suggests Plaintiff's condition was stable between
2 the July 21, 2012 incident until September 2014. During that time,
3 the record reflects only two medical clinic visits, both for
4 prescription refills. On September 4, 2012, Plaintiff visited
5 Kerrigan Family Medical Group to obtain refills for his medication.
6 (AR 295). The progress notes indicate that Plaintiff's atrial
7 fibrillation was controlled, his COPD was stable, and his
8 alcoholism was in remission. (AR 297-98). Next, Plaintiff visited
9 Borrego Health Cathedral City ("Borrego Health") for prescription
10 refills on September 12, 2014. (AR 435). During this visit,
11 Plaintiff reported that he was not using alcohol but smoked
12 cigarettes every day. (AR 436). Plaintiff received counseling on
13 quitting smoking. (Id.).

14
15 About two weeks later, on September 26, 2014, Plaintiff was
16 hospitalized due to chest pain. (AR 336). During the consultation,
17 Plaintiff reported that he was drinking alcohol when he developed
18 chest pain, which prompted him to go to the emergency room. (AR
19 345). Plaintiff further reported that "he drinks half a pint to 1
20 pint a week of alcohol" and smokes four cigarettes a day. (Id.).
21 Plaintiff was diagnosed with "chest pain; chronic atrial
22 fibrillation; chronic obstructive pulmonary disease, stable;
23 congestive heart failure, stable; hypertension, stable; tobacco
24 abuse; alcohol abuse." (AR 328). Plaintiff's condition was
25 stabilized and he was again "strongly advised [to] quit smoking
26 [and] stop alcohol intake immediately." (AR 346).

1 Plaintiff was admitted to the emergency room for chest pain
2 once again on March 1, 2015. (AR 333). The hospital records
3 indicate that Plaintiff had been binge drinking "for the last 10
4 days." (Id.). Test results showed that Plaintiff's condition was
5 stable. (AR 326). However, Plaintiff remained at the hospital
6 for several days so he could be monitored for alcohol withdrawal
7 symptoms. (Id.). During his stay, Plaintiff reported that he
8 "drinks alcohol almost on a daily basis" and smokes one-half to
9 one pack of cigarettes daily. (AR 341). Plaintiff also reported
10 that "he does not see his physician on any regular basis." (Id.).
11 "Over the course of his hospital stay, [Plaintiff's] clinical
12 status remained stable." (AR 326). The doctor once again discussed
13 the need for Plaintiff to quit smoking. (Id.).
14

15 Lastly, Plaintiff suffered from a hernia on April 1, 2015 and
16 sought medical attention at Borrego Health. (AR 430). Health
17 screening tests showed that his respiratory and cardiovascular
18 function was normal. (AR 431). Plaintiff reported that he was an
19 "every day smoker" but "[d]enied smoking cessation support."
20 (Id.).
21

22 **2. Treatment For Degenerative Disc Of The Lumbar Spine**

23

24 Plaintiff first sought medical attention for back pain on
25 April 8, 2013. (AR 299). Plaintiff visited certified physician's
26 assistant Gregory Lancaster at Kerrigan Family Medical Group
27 alleging that he has been suffering from back pain for the past 2
28 years. (Id.). Plaintiff reported that it is difficult for him to

1 get up from a chair and the pain radiates to his thighs. (Id.).
2 Mr. Lancaster observed that Plaintiff was "unable to stand long
3 periods of time or lift over 15 pounds." (AR 301). Mr. Lancaster
4 prescribed Norco to Plaintiff and required Plaintiff to have an x-
5 ray performed in order to obtain a refill. (Id.).
6

7 Four days later, on April 12, 2013, Plaintiff had an x-ray
8 performed at Desert Medical Imaging. (AR 302). The x-ray results
9 showed that Plaintiff had "satisfactory vertebral body alignment"
10 along with "advanced multilevel disc degeneration and spondylosis
11 deformans accelerated for age." (Id.). Plaintiff also suffered
12 from "concave deformation of the superior endplate of the L5
13 vertebral body" and "facet arthropathy at L4-5 and L5-S1." (Id.).
14 However, the paraspinous soft tissues are normal. (Id.).
15

16 Mr. Lancaster, who appears to be a physician's assistant,
17 completed a physical ability form on April 29, 2014. (AR 312-18).
18 Mr. Lancaster opined that Plaintiff can lift and carry up to 10
19 pounds continuously and 11-20 pounds occasionally. (AR 312). Mr.
20 Lancaster further opined that without interruption, Plaintiff can
21 sit for 2 hours, stand for 1 hour and walk for 45 minutes. (AR
22 313). In Mr. Lancaster's opinion, in an 8-hour day, Plaintiff can
23 sit for a total of 4 hours, stand for a total of 2 hours, and walk
24 for a total of 2 hours. (Id.). According to Mr. Lancaster,
25 Plaintiff is medically required to use a cane and he can walk only
26 50 yards without a cane. (Id.). With regard to postural
27 activities, Mr. Lancaster opines that Plaintiff can never climb
28 stairs and ramps, climb ladders and scaffolds, stoop, kneel, or

1 crouch. (AR 315). Plaintiff can balance occasionally and crawl
2 frequently. (Id.). Mr. Lancaster also opines that Plaintiff
3 cannot walk a block on rough or uneven surfaces. (AR 317). Mr.
4 Lancaster based his opinion for each of the determinations above
5 on the same few medical and clinical findings: "L-spine tenderness,
6 unsteady gait, pain in low back . . . L2-S1 spondylosis. History
7 of unable to lift >20 pounds, reach overhead, reach/push/pull, and
8 has difficulty [with] balance." (See AR 312 - 15, 317) (listing
9 the medical and clinical findings in Section I and citing "As in
10 Section I" in remaining sections).

11
12 Finally, Mr. Lancaster opined that Plaintiff can never
13 tolerate exposure to unprotected heights and moving mechanical
14 parts, and that he can only occasionally tolerate exposure to
15 extreme heat, dust, odors, fumes, and pulmonary irritants. (AR
16 316). Mr. Lancaster based his opinion on the reason that Plaintiff
17 "[h]as COPD - cannot tolerate inhaled irritants." (Id.).

18
19 Plaintiff had another x-ray performed on May 1, 2014 at Desert
20 Advanced Imaging Palm Springs. (AR 320). The x-ray results
21 presented the following:

22
23 Lumbar alignment is within normal limits. There is
24 moderate multilevel degenerative disease normal lumber
25 levels L1 through L5 with disc space narrowing and
26 marginal spur formation. Minimal superior endplate
27 deformity compression and L2-L4 and L5 may be the result
28 of previous old trauma. There is arthritic disease in

1 facet joints at L3, L4, and L5. Sacroiliac joints within
2 normal limits. Paraspinous soft tissues unremarkable.

3
4 (Id.).

5
6 On November 4, 2014, Plaintiff visited Borrego Health
7 requesting a medication refill for the hydrocodone-acetaminophen.
8 (AR 433). Plaintiff reported that he has had chronic back pain
9 for the past six years, or since 2008. (Id.). A physical exam
10 indicated that that Plaintiff's musculoskeletal system was normal.
11 (AR 434). However, the examiner noted that Plaintiff had back pain
12 and limited range of motion. (Id.). When Plaintiff visited Borrego
13 Health on April 1, 2015 for a hernia, the physical test indicated
14 that his symptoms had improved. (AR 431) (physical test indicating
15 Plaintiff's musculoskeletal system was normal and that he had a
16 normal range of motion).

17
18 **B. Medical Opinion Of Consultative Examiner**

19
20 At the request of the Agency, consultative examiner Vicente
21 Bernabe, D.O., performed a complete orthopedic consultation of
22 Plaintiff on November 13, 2013. (AR 305-09). Plaintiff complained
23 of lower back pain and reported that the pain began developing in
24 May 2011. (AR 305). He described the pain as sharp, throbbing
25 pain in his back, which is exacerbated by prolonged standing,
26 walking, bending, and lifting, causing occasional numbness and
27 tingling in his legs. (Id.). Dr. Bernabe noted that Plaintiff
28 never "received any physical therapy or chiropractic treatment. He

1 did not receive any cortisone injections or surgical intervention.
2 He does not wear a brace for support. He does not use a cane to
3 ambulate." (Id.). Dr. Bernabe observed that Plaintiff drove
4 himself to the clinic and that he "moved freely in and out of the
5 office and around the examination room without the use of any
6 assistive device." (AR 306). Plaintiff's gait was normal and he
7 was able to toe and heel walk. (Id.). Plaintiff "denie[d] any
8 history of alcohol use" and reported that he "smokes eight
9 cigarettes per day." (Id.).

10
11 Dr. Bernabe's physical examination further indicated that
12 Plaintiff's spine was largely normal. (AR 306-07). In particular,
13 his "cervical spine revealed normal attitude and posture of the
14 head" and his "[r]ange of motion was full and painless." (AR 306).
15 "The inspection of the thoracic spine was unrevealing." (AR 307).
16 Plaintiff's lumbar spine had a "normal lordotic curve." (Id.).
17 However, "[t]here was tenderness at the thoracolumbar and
18 lumbosacral junction. There was paravertebral muscle spasm on the
19 right" (Id.). An examination of Plaintiff's range of motion
20 revealed "flexion of 40 degrees, extension of 15 degrees, side
21 bending of 15 degrees to the left and right, and rotation of 45
22 degrees to the left and right." (Id.). Further, the straight leg
23 raise test yielded negative results. (Id.).

24
25 Based on this examination, Dr. Bernabe diagnosed Plaintiff
26 with degenerative disc disease of the lumbar spine and lumbar
27 musculoligamentous strain. (AR 308). Dr. Bernabe opined that
28 Plaintiff is able to walk, stand and sit for 6 hours out of an 8-

1 hour day, lift and carry 50 pounds occasionally and 25 pounds
2 frequently, and push and pull without limitations. (AR 308-09).
3 Dr. Bernabe opined that Plaintiff did not have any restrictions to
4 agility and postural movements. (AR 309). Further he did not note
5 any impairment in hand use or fine fingering manipulation. (Id.).
6 Dr. Bernabe's opinion is that Plaintiff does not need an assistive
7 device. (Id.).
8

9 **C. Non-examining Physicians' Opinions**

10
11 **1. Haaland M.D.**

12
13 On November 22, 2013, State agency non-examining medical
14 consultant Dr. Haaland, M.D., reviewed Plaintiff's medical records
15 on the initial level. (AR 52-60). Dr. Haaland determined that
16 Plaintiff was not disabled. (AR 50, 59). Dr. Haaland found that
17 Plaintiff had "minimal MER [medical evidence of record] to support
18 his allegations of disability." (AR 46, 55). In particular, Dr.
19 Haaland noted that Plaintiff has "[n]o MER regarding a-fib" and
20 "[h]e has restriction of spinal ROM [range of motion] on one exam."
21 (Id.). On November 11, 2013, Dr. Haaland called Plaintiff to ask
22 about his atrial fibrillation. (AR 45, 54). Plaintiff reported
23 that "he has not had any issues with [his atrial fibrillation] and
24 that his [doctors] have told him that it is fine with the
25 medications he is taking." (Id.).
26

27 Dr. Haaland requested the orthopedic consultative examination
28 with Dr. Bernabe to obtain additional information about Plaintiff's

1 back pain. (Id.). Dr. Haaland found the results of Dr. Bernabe's
2 orthopedic consultation "quite benign." (AR 56). Dr. Haaland also
3 observed that Dr. Bernabe's test results were not consistent with
4 Mr. Lancaster's exam but noted that Mr. Lancaster's exam was "not
5 a true objective finding anyway." (Id.). Based on the above
6 information, Dr. Haaland found Plaintiff was partially credible.
7 (Id.).
8

9 Dr. Haaland found that one or more of Plaintiff's medically
10 determinable impairments could reasonably be expected to produce
11 his pain or other symptoms. (AR 56). He also found there was
12 substantiation for Plaintiff's claims about the intensity,
13 persistence and functionally limiting effects of his impairments.
14 (Id.). Dr. Haaland gave significant weight to Dr. Bernabe's
15 evaluation and opined that Plaintiff can perform medium work,
16 stand, walk and sit for 6 hours in an 8-hour day, carry and lift
17 50 pounds occasionally and 25 pounds frequently. (AR 48, 57). Dr.
18 Haaland concluded that although Plaintiff's "condition results in
19 some limitations in [his] ability to perform work related
20 activities," he had the residual function capacity ("RFC") to
21 perform his past relevant work as a route driver." (AR 50, 59).
22

23 **2. Subin, M.D.**

24

25 Dr. Subin, .M.D., the State agency medical consultant on
26 reconsideration, found Plaintiff "not disabled" On January 21,
27 2014. (AR 71, 80). Dr. Subin agreed with Dr. Haaland's
28 determinations and found that although Plaintiff was limited in

1 his ability to perform certain work activities, he had the RFC to
2 perform his past relevant work as a route driver. (Id.).

3
4 **3. Minh D. Vu, M.D.**

5
6 Following a request from the ALJ, medical expert Dr. Minh D.
7 Vu, M.D., reviewed Plaintiff's medical records. (AR 442-44). Dr.
8 Vu opined that the medical records established Plaintiff had
9 physical impairments. (AR 442). However, Dr. Vu found that
10 Plaintiff's impairments did not rise to the level of medically
11 determinable impairments. (AR 444). Plaintiff's "cardiac function
12 is essentially normal" and his seizures are infrequent. (Id.).
13 Dr. Vu also opined that Plaintiff is not disabled because of his
14 back pain since there is no significant neuromuscular deficiency.
15 (AR 443). Based on these findings, Dr. Vu opined that "a medium
16 RFC is in order." (AR 444).

17
18 **D. Vocational Expert Testimony**

19
20 Vocational Expert ("VE") Dr. Luis Mas testified at Plaintiff's
21 ALJ hearing regarding the existence of jobs that Plaintiff could
22 perform given his functional limitations. (AR 38-39). The VE
23 identified regional sales representative, warehouse manager, and
24 route driver as Plaintiff's past relevant work. (AR 39).

25
26 The ALJ posed one hypothetical to the vocational expert. The
27 ALJ described an individual with claimant's age, education, and
28 prior work experience. (Id.). The individual would be restricted

1 to "medium" work, occasional stooping, occasional ladders, ropes
2 or scaffolds, [and] otherwise frequent postural" activity. (Id.).
3 The VE opined that such an individual could work as a regional
4 sales representative and route driver. (Id.). The VE opined that
5 there were no transferrable skills to light work. (Id.).
6

7 **E. Plaintiff's Testimony**
8

9 Plaintiff testified at the ALJ Hearing. Plaintiff stated that
10 he did not finish high school, but obtained a GED. (AR 30). In
11 the past 15 years, Plaintiff worked as a regional sales
12 representative, route driver, and warehouse manager. (Id.). His
13 disability began on June 1, 2012 and that was when he last worked.
14 (Id.). Around that time, his wife had a stroke so he took six
15 weeks off to care for her. (Id.). On August 11, 2012, he returned
16 to work but "was laid off for lack of work in [his] position."
17 (Id.).
18

19 Plaintiff stated that some of his symptoms of his heart
20 condition prevent him from working. (AR 34). In particular, he
21 is prevented from working because of "chest pains, palpitations,
22 numbness in [his] upper chest quadrant, [his] upper quadrants . .
23 . just the constant chest pains." (Id.).
24

25 Plaintiff also testified that he cannot work because of his
26 back pain. (AR 30). He had back pain while employed but still
27 reported to work. (Id.). His back pain has gotten worse since he
28 was laid off. (AR 31). Plaintiff has difficulty sitting, standing

1 and walking. (Id.). He is "still able to function around the
2 kitchen." (Id.) He does his "own laundry and takes care of [his]
3 wife." (Id.). However, he cannot play golf anymore. (Id.).
4 Plaintiff can carry 20 pounds at most, stand for 20 minutes without
5 taking a break, sit for about 1 hour without taking a break, and
6 walk continuously for about 200 - 300 yards. (AR 32). Because of
7 his back condition, Plaintiff has numbness in his feet. (AR 33).
8 Plaintiff has to lay down 2 to 3 hours a day because of his back
9 pain. (Id.). He also developed a hernia which also causes him
10 pain when coughing or sneezing or doing "anything strenuous." (AR
11 35). The hernia bulges out if he has "to lift up a 20-pound dog."
12 (Id.).
13

14 Plaintiff described some of his daily activities. Plaintiff
15 walks his dog in the mornings for about 150 yards in each direction.
16 (AR 36). He will prepare breakfast or lunch. (Id.). He does some
17 light dusting, but he does not do any vacuuming, yard work, or work
18 in his garage. (AR 37). Plaintiff sits or reclines for the
19 majority of the day. (AR 36).
20

21 IV.

22 THE ALJ'S DECISION

23
24 The ALJ employed the five-step sequential evaluation process
25 and concluded that Plaintiff was not under a disability within the
26 meaning of the Social Security Act from his disability onset date
27 of June 1, 2012, through the date of the decision, July 23, 2015.
28 (AR 14). At step one, the ALJ found that Plaintiff had not engaged

1 in substantial gainful employment since June 1, 2012, the alleged
2 onset date. (AR 15). At step two, the ALJ found that Plaintiff
3 had the following severe impairments: degenerative disc disease of
4 the lumbar spine, atrial fibrillation, obesity, chronic obstructive
5 pulmonary disease, hypertension, congestive heart failure, hernia,
6 history of seizures, and alcoholism. (AR 15-16).

7
8 At step three, the ALJ found that Plaintiff did not have an
9 impairment or combination of impairments that met or medically
10 equaled the severity of one of the listed impairments in 20 C.F.R.
11 Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d),
12 404.1525, 404.1526, 416.920(d), 416.925 and 416.926). (AR 16).²
13 The ALJ observed that “[n]o physician of record has opined that
14 [Plaintiff’s] impairments satisfy a listing.” (Id.).
15 Specifically, the State agency medical consultants and the medical
16 expert all determined that Plaintiff’s “impairments did not satisfy
17 any listed criteria.” (Id.). The ALJ gave great weight to medical
18 expert Dr. Vu’s opinion, and noted that Dr. Vu opined that

19
20 [Plaintiff] did not meet/equal 11.02 in the absence of
21 EEG and of documented frequency and severity of seizure
22 attacks. Dr. Vu opined that the [Plaintiff] did not
23 meet/equal listing 1.04 for spinal impairment, not
24 having significant neuromuscular deficiency. Finally,
25 Dr. Vu opined that the [Plaintiff] did not meet/equal

26
27 ² A physical or mental impairment is considered “severe” if it
28 “significantly limits [the claimant’s] physical or mental ability
to do basic work activities.” 20 C.F.R. § 404.1520.

1 listing 4.00 because his left ventricle ejection
2 fraction was normal and his chest pain was not of
3 ischemic nature.

4
5 (AR 16-17). The ALJ noted that Plaintiff has moderate multilevel
6 degenerative disc disease, but there is "no evidence of compromise
7 of a nerve root or spinal cord and no inability to ambulate
8 effectively." (AR 17) (citations to the record omitted).

9
10 The ALJ then found that Plaintiff had the RFC "to perform the
11 full range of medium work as defined in 20 CFR 404.1567(c) and
12 416.967(c)." (Id.). The ALJ also found that Plaintiff "can
13 occasionally stoop and climb ladders, ropes, and scaffolds," and
14 "frequently perform all other postural activity." (Id.). In
15 reaching this finding, the ALJ stated that he had considered all
16 of Plaintiff's symptoms and the extent to which these symptoms can
17 reasonably be accepted as consistent with the objective medical
18 evidence and other evidence, based on the requirements of 20 C.F.R.
19 404.1529 and 416.929 and Social Security Rulings ("SSRs") 96-4p
20 and 96-7p. (Id.). The ALJ also considered opinion evidence in
21 accordance with the requirements of 20 C.F.R. § 404.1527 and
22 416.927 and SSRs 96-2p, 96-5p, 96-6p and 06-3p (Id.).

23
24 The ALJ found that Plaintiff's subjective allegations
25 regarding the intensity, persistence and limiting effects of his
26 symptoms were "less than fully credible." (AR 18). The ALJ
27 considered all the factors set forth in 20 C.F.R. 404,1529, 416.929
28 and SSR 96-7p to assess Plaintiff's credibility. (Id.). The ALJ

1 emphasized that Plaintiff's allegations are "out of proportion with
2 the medical evidence and the record as a whole." (Id.).

3
4 In terms of Plaintiff's physical complaints, the ALJ explained
5 that although Plaintiff has lumbar spine degenerative disc disease,
6 Plaintiff "has merely received routine and conservative medical
7 treatment with pain medications" not reaching the "amount of pain
8 medication typical of an individual with disabling pain levels."
9 (AR 18). Plaintiff did not report "treatment with physical
10 therapy, chiropractic adjustments, cortisone injections, or the
11 use of a cane to ambulate, or a back brace." (Id.). The ALJ noted
12 that Plaintiff did not require "surgery or frequent
13 hospitalizations" or require an assistive device to ambulate.
14 (Id.).

15
16 The ALJ specifically noted that Plaintiff's allegations were
17 inconsistent with the findings of the consultative examining
18 doctor, Dr. Bernabe. (Id.). The results of Dr. Bernabe's
19 orthopedic consultation were "unremarkable." (Id.). Dr. Bernabe
20 reported

21
22 that [Plaintiff] was in no apparent acute or chronic
23 distress and he moved freely in and out of the office
24 and around the examination room without the use of any
25 assistive device. He drove himself to the examination.
26 His gait was normal without ataxia or antalgia and he
27 was able to toe and heel walk. His lumbar spine revealed
28

1 a normal lordotic curve and the pelvis was level. He
2 had tenderness and paravertebral spasm on the right.

3
4 (Id.) (citations to the record omitted). There was some limitation
5 in Plaintiff's range of motion, but the straight leg-raising test
6 was negative. (Id.). Dr. Bernabe did not note any other
7 limitations.

8
9 The ALJ also observed that Plaintiff's allegations were
10 inconsistent with the findings of the medical expert, Dr. Vu. (AR
11 19). Specifically, Dr. Vu noted that there was "no neuro-muscular
12 deficits." (Id.). Plaintiff had a "normal range of motion, normal
13 neurological exam, and normal carnial nerves." (Id.). Further,
14 "the orthopedic examination was negative with full range of motion
15 of the neck and thoracic spine, negative straight leg raising, full
16 range of motion of the joints, and grip strength of 100lbs left and
17 right." (Id.).

18
19 The ALJ gave little weight to Mr. Lancaster's opinion. (Id.).
20 The ALJ noted that "Mr. Lancaster is a physician's assistant who
21 completed a physical ability form." (Id.). However, "[t]here are
22 no progress notes or a narrative statement to support Mr.
23 Lancaster's opinion." (Id.). The ALJ found "no support in the
24 record" for Mr. Lancaster's findings. (Id.). The ALJ emphasized
25 that "Mr. Lancaster's opinion is inconsistent with the record as a
26 whole including the opinion evidence from the State agency medical
27 consultants, Dr. Bernabe, and Dr. Vu." (Id.).

28

1 With regard to Plaintiff's COPD, hypertension, and atrial
2 fibrillation, the ALJ observed that these impairments "are stable
3 and adequately controlled with medications." (AR 18). The ALJ
4 also noted that Plaintiff "continues to smoke despite his COPD
5 impairment." (AR 19). The ALJ gave great weight to Dr. Vu's
6 opinion. (Id.). Dr. Vu found that Plaintiff's "cardiac function
7 was essentially normal." (Id.). Dr. Vu reasoned that Plaintiff's
8 "chest pain was non-ischemic and his ejection fraction as normal,
9 while his atrial fibrillation did not result in syncope or
10 shortness of breath." (Id.). Further, Plaintiff's seizures were
11 not a medically determinable impairment" due to the infrequency
12 and severity. (Id.).
13

14 At step four, the ALJ determined that Plaintiff was capable
15 of performing his past relevant work as a regional salesperson and
16 route driver. (AR 20). Therefore, the ALJ found that Plaintiff
17 was not under a disability as defined by 20 C.F.R. 404.1520(f).
18 (Id.).
19

20 V.

21 STANDARD OF REVIEW

22

23 Under 42 U.S.C. § 405(g), a district court may review the
24 Commissioner's decision to deny benefits. "The court may set aside
25 the Commissioner's decision when the ALJ's findings are based on
26 legal error or are not supported by substantial evidence in the
27 record as a whole." Aukland v. Massanari, 257 F.3d 1033,
28 1035 (9th Cir. 2001) (citing Tackett v. Apfel, 180 F.3d 1094, 1097)

1 (9th Cir. 1999); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir.
2 1996) (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).
3 However, the court must "affirm the denial of disability benefits
4 if it is supported by substantial evidence and the Commissioner
5 applied the correct legal standards." Macri v. Chater, 93 F.3d
6 540, 543 (9th Cir. 1996).

7
8 "Substantial evidence is more than a scintilla, but less than
9 a preponderance." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.
10 1998) (citing Jamerson v. Chater, 112 F.3d 1064, 1066 (9th Cir.
11 1997)). It is "relevant evidence which a reasonable person might
12 accept as adequate to support a conclusion." (Id.). To determine
13 whether substantial evidence supports a finding, the court must
14 "'consider the record as a whole, weighing both evidence that
15 supports and evidence that detracts from the [Commissioner's]
16 conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny v.
17 Sullivan, 2 F.3d 953, 956 (9th Cir. 1993). If the evidence can
18 reasonably support either affirming or reversing that conclusion,
19 the court may not substitute its judgment for that of the
20 Commissioner. Reddick, 157 F.3d at 720-21 (citing Flaten v. Sec'y,
21 44 F.3d 1453, 1457 (9th Cir. 1995)).

22 23 VI.

24 DISCUSSION

25
26 Plaintiff challenges the ALJ's decision on the ground that
27 the ALJ improperly rejected Plaintiff's credibility. (Memorandum
28 in Support of Complaint ("MSC"), Dkt. No. 24, at 2, 4). Plaintiff

1 contends that the ALJ “failed to articulate specific and legitimate
2 reason much less clear and convincing reasons in rejecting
3 [Plaintiff’s] credible testimony.” (Id. at 3).

4
5 The Court disagrees with this contention. The ALJ provided
6 clear and convincing reasons, supported by substantial evidence,
7 for rejecting Plaintiff’s testimony. Accordingly, for the reasons
8 discussed below, the ALJ’s decision must be AFFIRMED.

9
10 **A. The ALJ Offered Clear And Convincing Reasons Supported By**
11 **Substantial Evidence For Finding The Subjective Evidence Less**
12 **Than Fully Credible**

13
14 Plaintiff contends that the ALJ erred by failing to articulate
15 clear and convincing reasons for finding Plaintiff’s subjective
16 testimony less than fully credible. (MSC at 3). The Court
17 disagrees. The ALJ’s decision contains extensive citation to and
18 discussion of substantial evidence supporting his credibility
19 findings.

20
21 When assessing a claimant’s credibility, the ALJ must engage
22 in a two-step analysis. Trevizo v. Berryhill, __ F.3d __, 2017 WL
23 2925434, *9 (9th Cir. July 10, 2017) (citing Garrison v. Colvin,
24 759 F.3d 995, 1014-15 (9th Cir. 2014)). First, the ALJ must
25 determine if there is medical evidence of an impairment that could
26 reasonably produce the symptoms alleged. (Id.). “If such evidence
27 exists and there is no evidence of malingering, the ALJ can reject
28 the claimant’s testimony about the severity of her symptoms only

1 by offering specific, clear and convincing reasons for doing so.”
2 (Id.). During this inquiry, the ALJ may use “ordinary techniques
3 of credibility evaluation, such as . . . prior inconsistent
4 statements.” Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014)
5 (quoting Smolen, 80 F.3d at 1284). The ALJ may also consider any
6 inconsistencies in the claimant’s conduct and any inadequately
7 explained or unexplained failure to pursue or follow treatment.
8 Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012).

9
10 Here, at the first stage of his credibility analysis, the ALJ
11 found that Plaintiff’s medically determinable impairments could
12 reasonably be expected to cause the alleged symptoms. (AR 18).
13 At the second stage, however, the ALJ found ample evidence that
14 Plaintiff’s account of the intensity, persistence and limiting
15 effects of his symptoms was not fully credible. (Id.).

16
17 Plaintiff contends that the ALJ relied solely on objective
18 medical evidence to discount Plaintiff’s credibility. (MSC at 6).
19 Defendant argues “the ALJ appropriately considered four legally
20 valid credible factors” for dismissing Plaintiff’s testimony.
21 (Memorandum in Support of Defendant’s Answer, Dkt. No. 25, at 3).
22 According to Defendant, one factor is “the fact that Plaintiff
23 stopped working for reasons unrelated to his disability.” (Id.).
24 The Court disagrees with Defendant on this point. The ALJ did not
25 give this reason for rejecting Plaintiff’s testimony. (See AR 18-
26 19). The ALJ merely states that “[s]ince being laid off
27 [Plaintiff’s] conditions have worsened.” (AR 17). This Court is
28 “constrained to review the reasons the ALJ asserts.” Burrell v.

1 Colvin, 775 F.3d 1133, 1141 (9th. Cir. 2014). Because the ALJ did
2 clearly assert it as a reason for discrediting Plaintiff's
3 testimony, the Court exercises its discretion to rely on other
4 grounds to affirm the ALJ's decision.

5
6 The Court finds that the ALJ provided sufficient clear and
7 convincing reasons, other than Plaintiff's termination from
8 employment, to discount Plaintiff's testimony. Specifically, the
9 Court recognizes four reasons the ALJ provided for rejecting
10 Plaintiff's statements. (AR 17). First, Plaintiff failed to
11 follow basic treatment. (AR 18). Second, Plaintiff received only
12 routine and conservative treatment. (Id.). Third, Plaintiff's
13 conduct was inconsistent with the severity of the symptoms he
14 alleged. (Id.). Fourth, Plaintiff's testimony regarding his
15 symptoms are inconsistent with the medical evidence and the record
16 as a whole. (AR 18-19).

17
18 **1. Plaintiff Failed To Follow Basic Treatment Advice To**
19 **Quit Smoking**

20
21 First, the ALJ relied on Plaintiff's failure to follow basic
22 treatment when evaluating Plaintiff's credibility. "A claimant's
23 subjective symptom testimony may be undermined by an unexplained,
24 or inadequately explained, failure to ... follow a prescribed
25 course of treatment." Trevizo, 2017 WL 2925434, at *10 (citations
26 omitted). Failure to assert a reason for not following treatment
27 "can cast doubt on the sincerity of the claimant's pain testimony."
28 (Id.).

1 In Trevizo, the court found that the ALJ did not provide clear
2 and convincing reasons for rejecting credibility when relying on
3 two instances of the claimant failing to take her medication as a
4 reason to discount her testimony. First, the claimant was
5 prescribed narcotics for pain but she did not take them because of
6 a fear of becoming addicted. (Id.). Second, the claimant was
7 noncompliant with taking her diabetes medication because she feared
8 that the medication was causing severe rashes. (Id. at *11). The
9 claimant also indicated that there were periods in which she could
10 not afford her diabetes medication. (Id.). The court held that
11 the claimant provided adequate explanations in both instances.
12 Therefore, the claimant's noncompliance was not "clear and
13 convincing" evidence for rejecting her testimony. (Id. at *10-
14 11).

15
16 Here, there is substantial evidence in the record to show that
17 Plaintiff failed to follow basic treatment advice. However, unlike
18 the claimant in Trevizo, Plaintiff did not provide any explanation
19 for his noncompliance. The ALJ specifically noted that Plaintiff
20 continues to smoke despite having COPD. (AR 18). The record shows
21 that Plaintiff's doctors repeatedly advised him to quit smoking.
22 (See e.g., AR 329, 334, 346). In at least one instance, Plaintiff
23 refused assistance with smoking cessation. (AR 431). The record
24 also reflects that Plaintiff failed to quit drinking despite his
25 doctors repeatedly advised him to quit. (See e.g., AR 331, 334,
26 346). Plaintiff does not provide any explanation, let alone an
27 adequate one, for his failure to quit smoking and drinking.
28 Therefore, Plaintiff's failure to follow basic treatment advice,

1 i.e., to quit smoking, is a clear and convincing reason to reject
2 his testimony.

3
4 **2. Plaintiff Received Only Routine And Conservative**
5 **Treatment**

6
7 Second, the ALJ discredited Plaintiff's testimony because "he
8 merely received routine and conservative medical treatment with
9 pain medications." (AR 18). "A conservative course of treatment
10 can undermine allegations of debilitating pain." Carmickle v.
11 Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1162 (9th Cir. 2008)
12 (citation omitted). However, it is "not a proper basis for
13 rejecting the claimant's credibility where the claimant has good
14 reason for not seeking more aggressive treatment." (Id.).

15
16 The Court agrees that there is substantial evidence in the
17 record indicating that Plaintiff received routine and conservative
18 medical treatment. The ALJ specifically noted that Plaintiff
19 treated his back pain with only pain medications and the amount of
20 medication does not rise to the level typical for an individual
21 with disabling pain. (AR 18). The ALJ further observed that
22 Plaintiff did not require or seek "physical therapy, chiropractic
23 adjustments, [or] cortisone injections." (Id.). Plaintiff did
24 not require the use of an assistive device for ambulation or a back
25 brace. (Id.). He also did not require surgery or frequent
26 hospitalization. (Id.).

1 Indeed, the record indicates that other than to refill his
2 pain medication (or for an examination related to his request for
3 benefits), Plaintiff visited a medical professional only three
4 times for his back pain since the alleged onset date of June 1,
5 2012. Significantly, only one visit was for an examination. (See
6 AR 299). The other two visits were merely for x-rays. (See AR
7 302, 320); (see also Trevizo, 2017 WL2925434 at *2-3 (the record
8 reflected claimant underwent multiple surgeries, had at least
9 twenty-two medical visits with her primary care physician over the
10 course of four years, at least twenty-two medical visits with two
11 different specialists, and “notably” failed multiple treatments)).
12 Plaintiff fails to explain why he did not seek more aggressive
13 treatment. Therefore, the Court finds Plaintiff’s routine and
14 conservative treatment is a clear and convincing reason for the
15 ALJ to reject Plaintiff’s testimony.

16 17 **3. Inconsistent Conduct**

18
19 Third, the ALJ cited to substantial evidence of Plaintiff’s
20 conduct that was inconsistent with the severity of the symptoms he
21 alleged. See Molina, 674 F.3d at 1112 (ALJ may consider
22 inconsistencies between the claimant’s conduct and testimony to
23 evaluate credibility). The ALJ specifically noted that during the
24 visit to Dr. Bernabe’s office, Plaintiff did not appear to be in
25 “acute or chronic distress.” (AR 18). Additionally, Plaintiff
26 “moved around freely in and out of the office and around the
27 examination room without the use of any assistive device.” (Id.).
28 He drove himself to the clinic and he was able to toe and heel

1 walk. (Id.). Plaintiff's demonstrated physical abilities are
2 inconsistent with that of an individual with disabling pain.
3 Therefore, Plaintiff's inconsistent conduct is another clear and
4 convincing reason to reject Plaintiff's credibility.

5
6 **4. Plaintiff's Statements Regarding His Pain Were Not**
7 **Supported By The Record**

8
9 Finally, in addition to the reasons discussed above, the ALJ
10 explained that he discredited Plaintiff's testimony because his
11 statements are "out of proportion with the medical evidence and
12 record as a whole." (AR 18). "Although lack of medical evidence
13 cannot form the sole basis for discounting pain testimony, it is a
14 factor that the ALJ can consider in his credibility analysis."
15 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005).

16
17 a. Atrial Fibrillation

18
19 Plaintiff listed his atrial fibrillation as a disability and
20 testified that some of the symptoms of his heart condition prevent
21 him from working. (AR 34, 145). The ALJ properly found that there
22 is substantial evidence in the medical records to show that
23 Plaintiff's COPD, hypertension, and atrial fibrillation are stable.
24 (See e.g., AR 297-98) ("Atrial Flutter . . . Controlled,"
25 "[Plaintiff has history of] COPD that has been stable currently
26 asymptomatic"); (see also AR 328) ("Chronic obstructive pulmonary
27 disease, stable" "Congestive heart failure, stable" "Hypertension,
28 stable"); (see also AR 431) ("Atrial fibrillation well-

1 controlled"). Furthermore, upon reviewing Plaintiff's medical
2 records, medical expert Dr. Vu opined that Plaintiff's heart
3 condition is essentially normal. (AR 443-44).

4
5 More notably, Plaintiff himself reported to the State agency
6 consultant that he does not have any issues with his atrial
7 fibrillation and it is "fine with the medication he is taking."
8 (AR 45, 54); (see Ghanim, 763 F.3d at 1164 (ALJ did not err by
9 discrediting claimant due to inconsistencies in testimony and
10 previous statements.)). Therefore, the ALJ properly found that
11 Plaintiff's testimony regarding the limitations resulting from his
12 atrial fibrillation were out of proportion with the record as a
13 whole.

14
15 b. Degenerative Lower Lumbar

16
17 Plaintiff also listed degenerative lower lumbar as a
18 disability in his DIB and SSI applications. Plaintiff alleges an
19 inability to bend, which causes him problems with tying his shoes,
20 cutting his toenails, getting in and out of his truck, walking and
21 standing. (See e.g., AR 152 ("I do not need help with in-home
22 care, except for tying my shoes and cutting my toenails because I
23 can't bend over.)); (see also, AR 219). Plaintiff also testified
24 that due to his back pain he is limited to lifting at most 20
25 pounds, standing for 20 minutes uninterrupted, sitting for 1 hour
26 uninterrupted, and walking 200-300 yards. (AR 32). However, this
27
28

1 testimony is inconsistent with nearly all medical evidence on the
2 record, including the opinions of the State agency consultants,
3 the consultative examiner, and the medical expert.

4
5 Dr. Haaland, the State agency consultant, concluded that
6 Plaintiff is capable of medium work. (AR 47, 56). Specifically,
7 Plaintiff is capable of bending at the waist occasionally; lifting
8 and carrying 50 pounds occasionally and 20 pounds frequently; and
9 standing, walking, and sitting for 6 hours in an 8-hour day. (AR
10 48, 57). Further, Dr. Haaland noted some limitations to
11 Plaintiff's ability to climb and perform postural activity. (Id.).
12 Dr. Subin, the State agency consultant on the reconsideration level
13 agreed with all of Dr. Haaland's findings. (AR 67, 69, 76, 78).

14
15 Likewise, after performing a consultative exam, Dr. Bernabe
16 reached similar conclusions regarding Plaintiff's physical
17 ability. Dr. Bernabe found that Plaintiff can carry 50 pounds
18 occasionally and 25 pounds frequently. (AR 308). Plaintiff is also
19 able to walk, stand, and sit for 6 hours in an 8-hour day. (AR
20 309). Dr. Bernabe opined that Plaintiff did not have restrictions
21 to postural movements. (Id.).

22
23 Dr. Vu, the medical expert, also had nearly identical
24 findings. Dr. Vu opined that Plaintiff can lift and carry 50
25 pounds occasionally and 25 pounds frequently. (AR 444). Plaintiff
26 can walk and stand for 2 hours at a time for a total of 6 hours in
27 an 8-hour day, but Plaintiff was not limited in his sitting ability.

1 (Id.). Dr. Vu noted some limitation in climbing, but not for
2 postural activity. (Id.).
3

4 Mr. Lancaster's opinion is the only evidence that supports
5 Plaintiff's contentions. However, Mr. Lancaster's opinion is
6 inconsistent with all other medical evidence on record, as
7 described above. Additionally, Mr. Lancaster's opinion even
8 conflicts with Plaintiff's own testimony and conduct. (AR 32)
9 (Plaintiff testifying that he can walk about 200 to 300 yards
10 without taking a break); (AR 36) (Plaintiff testifying that on an
11 average day, he walks his dogs the mornings for a total of about
12 300 yards); (AR 306) (Plaintiff moved freely and walked without
13 the use of a cane during the consultative exam). Further, as the
14 ALJ noted, "[t]here are no progress notes or a narrative statement
15 to support Mr. Lancaster's opinion." (AR 19). Therefore, the
16 Court agrees that Plaintiff's testimony was out of proportion with
17 the record as a whole. Again, this was a clear and convincing
18 reason to reject Plaintiff's testimony.
19
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1 In sum, the ALJ offered clear and convincing reasons supported
2 by substantial evidence for finding Plaintiff's subjective
3 testimony less than fully credible.

4
5 **VII.**
6 **CONCLUSION**

7
8 Consistent with the foregoing, IT IS ORDERED that Judgment be
9 entered AFFIRMING the decision of the Commissioner. The Clerk
10 of the Court shall serve copies of this Order and the Judgment on
11 counsel for both parties.

12
13 DATED: July 31, 2017

14
15 _____ /s/
16 SUZANNE H. SEGAL
17 UNITED STATES MAGISTRATE JUDGE

18 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW, LEXIS OR**
19 **ANY OTHER LEGAL DATABASE.**