

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

JONATHAN CASTLE,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. 5:17-CV-02246 AFM

**MEMORANDUM OPINION AND
ORDER AFFIRMING DECISION
OF THE COMMISSIONER**

Plaintiff seeks review of the Commissioner's final decision denying his application for supplemental security income benefits. In accordance with the Court's case management order, the parties have filed memorandum briefs addressing the merits of the disputed issues. This matter is now ready for decision.

BACKGROUND

Plaintiff applied for supplemental security income in 2013, alleging that he became disabled on January 1, 1999. Plaintiff's claims were denied initially and on reconsideration. (Administrative Record ("AR") 189-195, 77-91.) A hearing was held before an Administrative Law Judge ("ALJ") on May 2, 2016, at which Plaintiff, his attorney, and Vocational Expert ("VE") were present. (AR 37-57.) The ALJ issued a decision on June 7, 2016, finding that Plaintiff suffered from the following

1 severe impairments: fibromyalgia; degenerative disc disease of the cervical and
2 lumbar spine; and left shoulder AC arthrosis. (AR 21.) The ALJ determined that
3 Plaintiff retained the RFC to perform medium work with the following limitations:
4 Plaintiff could occasionally lift and/or carry 50 pounds and frequently lift and/or
5 carry 25 pounds; push and pull within these weight limits; stand and/or walk for 6
6 hours in an 8-hour workday; sit for 6 hours in an 8-hour workday; frequently climb
7 ramps and stairs; occasionally climb ladders, ropes, and scaffolds; frequently
8 balance, stoop, kneel, crouch, and crawl; and should avoid concentrated exposure to
9 extreme cold. (AR 25.) Relying on the testimony of the VE, the ALJ concluded that
10 Plaintiff was able to perform work existing in significant numbers in the national
11 economy. Accordingly, the ALJ determined that Plaintiff was not disabled. (AR 30-
12 31.) The Appeals Council denied review, thereby rendering the ALJ’s decision the
13 final decision of the Commissioner. (AR 3-8.)

14 **DISPUTED ISSUE**

15 Whether the ALJ properly evaluated Plaintiff’s subjective complaints.

16 **STANDARD OF REVIEW**

17 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s decision to
18 determine whether the Commissioner’s findings are supported by substantial
19 evidence and whether the proper legal standards were applied. *See Treichler v.*
20 *Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014).
21 Substantial evidence means “more than a mere scintilla” but less than a
22 preponderance. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v.*
23 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant
24 evidence as a reasonable mind might accept as adequate to support a conclusion.”
25 *Richardson*, 402 U.S. at 401. Where evidence is susceptible of more than one rational
26 interpretation, the Commissioner’s decision must be upheld. *See Orn v. Astrue*, 495
27 F.3d 625, 630 (9th Cir. 2007); *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190,
28 1196 (9th Cir. 2004) (“When evidence reasonably supports either confirming or

1 reversing the ALJ’s decision, [the court] may not substitute [its] judgment for that of
2 the ALJ.”).

3 **DISCUSSION**

4 Plaintiff contends that the ALJ failed to provide legally sufficient reasons for
5 discounting his subjective complaints. As discussed below, the Court finds Plaintiff’s
6 contention lacks merit.

7 **1. Plaintiff’s Subjective Complaints**

8 Plaintiff testified that he is unable to work due to fibromyalgia, which causes
9 pain and muscle cramping over his entire body. As a result, he is unable to stand or
10 walk for longer than 30 or 40 minutes before needing to stop and stretch. (AR 41-
11 43.) After standing or walking, Plaintiff needs to rest. He requires between one hour
12 and two days of rest depending on the level of exertion. (AR 44.) Repetitive work
13 causes his condition to flare up. (AR 41.) Plaintiff’s pain “completely” and “always”
14 impacts his concentration and focus. (AR 49.) In addition, Plaintiff has difficulty
15 gripping and handling due to numbness and tingling in his hands. (AR 46-47.)

16 Plaintiff takes medication and uses a TENS unit for his symptoms. (AR 43.)
17 When his muscles knotted up, Plaintiff received treatment from a physical therapist,
18 chiropractor, or acupuncturist. (AR 46.)

19 Plaintiff stated that he lives with his parents. He has no problem with self-care,
20 and his daily activities include performing household chores, running errands,
21 preparing simple meals, grocery shopping, taking care of pets, reading, driving, and
22 listening to music. (AR 644.) Plaintiff also works out at an LA Fitness gym on a
23 regular basis. He testified that he could lift 10 pounds repetitively about 30 times.
24 Plaintiff’s exercise routine takes him about a half hour and includes bench presses,
25 chest, and bicep curls. (AR 44-45.) Plaintiff is able to drive a car for thirty minutes
26 to one hour. (AR 48, 644.)

27 **2. Relevant Law**

28 Where, as here, a claimant has presented evidence of an underlying impairment

1 that could reasonably be expected to produce pain or other symptoms, the ALJ must
2 “evaluate the intensity and persistence of [the] individual’s symptoms ... and
3 determine the extent to which [those] symptoms limit his ... ability to perform work-
4 related activities” SSR 16–3p, 2016 WL 1119029, at *4.¹ Absent a finding that
5 the claimant is malingering, an ALJ must provide specific, clear and convincing
6 reasons before rejecting a claimant’s testimony about the severity of his symptoms.
7 *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017) (citing *Garrison v. Colvin*,
8 759 F.3d 995, 1014–1015 (9th Cir. 2014)). “General findings [regarding a claimant’s
9 credibility] are insufficient; rather, the ALJ must identify what testimony is not
10 credible and what evidence undermines the claimant’s complaints.” *Burrell v. Colvin*,
11 775 F.3d 1133, 1138 (9th Cir. 2014) (quoting *Lester v. Chater*, 81 F.3d 821, 834
12 (9th Cir. 1995)). The ALJ’s findings “must be sufficiently specific to allow a
13 reviewing court to conclude the adjudicator rejected the claimant’s testimony on
14 permissible grounds and did not arbitrarily discredit a claimant’s testimony regarding
15 pain.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell*
16 *v. Sullivan*, 947 F.2d 345-46 (9th Cir. 1991) (en banc)).

17 Factors an ALJ may consider when making such a determination include the
18 objective medical evidence, the claimant’s treatment history, the claimant’s daily
19 activities, unexplained failure to pursue or follow treatment, and inconsistencies in
20 testimony. *See Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014); *Molina v.*
21 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012). If the ALJ’s credibility finding is

22 ¹ Social Security Ruling 16-3P, which became effective March 28, 2016 applies to
23 this case. SSR 16-3P rescinded and superseded the Commissioner’s prior rulings as
24 to how the Commissioner will evaluate a claimant’s statements regarding the
25 intensity, persistence, and limiting effects of symptoms in disability claims. *See* SSR
26 16-3P, 2017 WL 5180304, at *1. The Ninth Circuit has found the changes in SSR
27 16-3P to be largely stylistic and held that SSR 16-3P is consistent in substance with
28 Ninth Circuit precedent that existed before the effective date. *Trevizo v. Berryhill*,
871 F.3d 664, 678 n.5 (9th Cir. 2017). Accordingly, the Court relies upon Ninth
Circuit authority governing the proper method for assessing a claimant’s credibility.

1 supported by substantial evidence in the record, the court may not engage in second-
2 guessing. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002).

3 **3. Analysis**

4 The ALJ provided the following reasons for finding Plaintiff's subjective
5 complaints not fully credible.

6 **a. Lack of support by the objective medical evidence**

7 The ALJ summarized the objective medical evidence and concluded that it did
8 not support the extent and severity of Plaintiff's alleged symptoms. (AR 25-29.)
9 Among other things, the ALJ noted that Plaintiff's physical examinations were
10 generally unremarkable. (AR 27.)

11 The ALJ's characterization of the medical record is supported by substantial
12 evidence. Plaintiff's treatment records from 2010 to December 2015 include no
13 significant clinical findings suggesting that Plaintiff's medical impairments imposed
14 limitations on his functional abilities. Indeed, the records consistently and
15 affirmatively indicate that Plaintiff's fibromyalgia and other conditions were stable
16 and well controlled with medication. (*See* AR 327, 422-425, 443-446, 538-540, 648-
17 667, 703-708.)

18 As the ALJ noted, in 2013, Plaintiff underwent a comprehensive consultative
19 examination by Ulin Sargeant, M.D. Dr. Sargeant's clinical findings showed that
20 Plaintiff had mildly diminished grip strength, but was nevertheless able to generate
21 80 pounds of force with his right hand and 70 pounds of force with his left; his gait
22 was normal; there was some tenderness in the paracervical muscles, but Plaintiff's
23 range of motion was grossly within normal limits; there was tenderness to palpitation
24 in bilateral sternum of the chest, but no evidence of changes in the chest wall; there
25 was tenderness in the back with somewhat diminished range of motion, but straight
26 leg raising was negative and Plaintiff was able to transfer on and off the examination
27 table without difficulty; there was no clubbing, cyanosis, pedal edema, joint
28 deformity, effusion, warmth, swelling, crepitus, or laxity of any joint; Plaintiff's

1 range of motion of the bilateral shoulders, wrists, hands, hips, knees, and ankles were
2 within normal limits, although there was some tenderness with palpitation of both
3 wrists; cranial nerves were intact; there was no indication of atrophy; Plaintiff
4 demonstrated good hand coordination; and his sensation was intact throughout. (AR
5 638-641.)²

6 The ALJ also found it significant that the record contained no medical findings
7 showing diffuse muscular atrophy of the upper or lower extremities or the spine,
8 because atrophy is a common side effect of prolonged or chronic pervasive pain. (AR
9 27.) The ALJ could properly rely upon the absence of evidence of atrophy to infer
10 that Plaintiff's pain was not as debilitating as he alleged. *See Osenbrock v. Apfel*, 240
11 F.3d 1157, 1166 (9th Cir. 2001) (properly rejected subjective complaints where,
12 among other things, there was no evidence of disuse muscle atrophy from pain);
13 *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (ALJ properly discredited
14 claimant's allegations of constant excruciating pain where, among other things, there
15 was no evidence of muscular atrophy or other physical sign usually seen in an
16 "inactive, totally incapacitated individual"); *Arellano v. Colvin*, 2014 WL 1092836,
17 at *6 (C.D. Cal. Mar. 18, 2014) (ALJ properly relied upon absence of evidence of
18 "muscle wasting or atrophy that would be expected if plaintiff had "extremely weak
19 or zero grip strength" or needed to lie down throughout most of the day" to discredit
20 claimant's allegedly disabling fibromyalgia symptoms).

21 Plaintiff points out that he suffers from fibromyalgia, a disease that "is

22 ² In his decision, the ALJ erroneously stated that Dr. Sargeant's report indicated that
23 Plaintiff's "presentation of fibromyalgia symptoms was not consistent," when in fact
24 the report states that Plaintiff's "presentation does seem to be consistent." (AR 28,
25 640.) This misstatement, however, was harmless because the ALJ concluded that
26 Plaintiff's fibromyalgia was a severe medical impairment and because it does not
27 undermine the validity of any of the reasons for the ALJ's credibility determination.
28 *See Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (an
ALJ's error is harmless where it is "inconsequential to the ultimate nondisability
determination.").

1 diagnosed entirely on the basis of patients’ reports of pain and other symptoms.”
2 (ECF No. 22 at 9 (quoting *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004).)
3 Plaintiff appears to contend that given this diagnosis, the ALJ was not entitled to rely
4 upon a lack of objective medical evidence to discredit his subjective complaints.
5 Plaintiff’s argument misses the mark. In *Benecke*, the Ninth Circuit held that the ALJ
6 erroneously rejected the treating physician’s diagnosis of fibromyalgia due to a lack
7 of objective evidence. *Benecke*, 379 F.3d at 594. Here, by contrast, the ALJ accepted
8 the diagnosis of fibromyalgia. Instead, the ALJ relied on medical reports and clinical
9 findings (or a lack thereof) to conclude that Plaintiff did not exhibit limitations
10 consistent with his subjective symptoms. This was a proper consideration. *See* SSR
11 16-3P (“The intensity, persistence, and limiting effects of many symptoms can be
12 clinically observed and recorded in the medical evidence. Examples such as reduced
13 joint motion, muscle spasm, sensory deficit, and motor disruption illustrate findings
14 that may result from, or be associated with, the symptom of pain.”). As one court in
15 this District explained,

16 [t]he fact that objective medical evidence cannot prove the existence of
17 fibromyalgia does not mean it is irrelevant or cannot be used to
18 demonstrate a lack of functional limitations during clinical examination in
19 considering credibility. A diagnosis of fibromyalgia is not a free disability
20 card that renders all medical evidence irrelevant for all purposes.

21 *Melendez v. Astrue*, 2011 WL 6402287, at *6 (C.D. Cal. Dec. 20, 2011).

22 The ALJ discussed the medical evidence in the record, including the diagnostic
23 tests and clinical observations by Plaintiff’s treating physician and the consultative
24 examining physician and concluded that it revealed essentially mild impairment. The
25 ALJ’s summary of the evidence was accurate and complete. Thus, so long as it was
26 not the sole basis for his credibility determination, the ALJ was entitled to rely upon
27 the lack of objective medical evidence to discredit Plaintiff’s subjective complaints.
28 *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (“Although lack of medical

1 evidence cannot form the sole basis for discounting pain testimony, it is a factor that
2 the ALJ can consider in his credibility analysis.”); *Rollins v. Massanari*, 261 F.3d
3 853, 857 (9th Cir. 2001) (“While subjective pain testimony cannot be rejected on the
4 sole ground that it is not fully corroborated by objective medical evidence, the
5 medical evidence is still a relevant factor in determining the severity of the claimant’s
6 pain and its disabling effects.”); *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d
7 595, 600 (9th Cir. 1999) (conflicts between a claimant’s testimony and the objective
8 medical evidence in the record can undermine a claimant’s credibility). Here, the ALJ
9 did not rely solely upon the lack of objective medical evidence, but provided the
10 following additional reasons for discrediting Plaintiff’s testimony.

11 **b. Control of Plaintiff’s symptoms with medication**

12 In discounting Plaintiff’s subjective complaints, the ALJ noted that Plaintiff
13 reported being diagnosed with fibromyalgia in 1993, yet he was able to continue
14 working until 1999. (AR 26 [citing AR 646].) The ALJ remarked that nothing in the
15 record suggested that Plaintiff’s condition had progressively worsened since 1999.
16 To the contrary, the ALJ found that the record indicated that Plaintiff’s symptoms
17 had been well controlled with the use of medications. (AR 26, 28.)

18 The record confirms the ALJ’s characterization of the medical evidence. From
19 2010 to 2014, Plaintiff’s treating physicians consistently and repeatedly indicated
20 that Plaintiff’s medical conditions, including fibromyalgia, were stable and well
21 controlled with medication. (*See* AR 327, 422-425, 443-446, 538-540, 648-667, 703-
22 708.) In addition, as the ALJ pointed out, during Plaintiff’s 2013 consultative
23 evaluation, he reported taking medication, receiving physical therapy, chiropractic
24 care, and acupuncture which “helped a great deal.” (AR 637.)

25 In light of the record, the ALJ was entitled to rely upon evidence that Plaintiff’s
26 symptoms were well controlled by medication or therapy to support the inference
27 that Plaintiff’s pain was not as debilitating as Plaintiff alleged. *See Bailey v. Colvin*,
28 659 Fed. App’x 413, 415 (9th Cir. 2016) (ALJ appropriately noted that many of

1 claimant’s impairments had been alleviated by effective medical treatment, and this
2 was inconsistent with claimant’s alleged total disability); *Warre v. Comm’r of the*
3 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2005) (“Impairments that can be
4 controlled effectively with medication are not disabling.”); *Gontes v. Astrue*, 913 F.
5 Supp. 2d 913, 921 (C.D. Cal. 2012) (ALJ properly discounted subjective complaints
6 where claimant’s testimony “conflicted with the evidence that her medical conditions
7 only minimally affected her ability to work and that her pain, diabetes, and asthma
8 were well-controlled with medication and other treatments”).

9 **c. Plaintiff’s lack of treatment**

10 The ALJ also found that Plaintiff had not received the type of treatment one
11 would expect of a totally disabled individual. Specifically, the ALJ noted Plaintiff’s
12 relatively infrequent doctor’s visits and significant gaps in treatment. Further, the
13 ALJ explained, even when Plaintiff did obtain treatment, it was essentially routine
14 and conservative in nature – that is, in the form of medication and therapy. The ALJ
15 specifically noted the absence of pain injections or surgery. Thus, the ALJ found
16 Plaintiff’s treatment to be inconsistent with his allegations regarding the severity of
17 his symptoms. (AR 26-27.)

18 As the ALJ noted, the record contains no evidence of any medical treatment
19 for fibromyalgia or any other impairment in 2014. Further, the sole medical record
20 from 2015 reveals that Plaintiff’s conditions were stable on his current regime of
21 medications. (AR 692-695.) With regard to Plaintiff’s shoulder impairment, the ALJ
22 noted that in September 2015, surgery was recommended, but there was no indication
23 that Plaintiff followed up on this recommendation. (AR 28, 690.)

24 The ALJ could properly infer from these lengthy periods without any medical
25 treatment that Plaintiff’s symptoms were well controlled and not as severe as he
26 alleged. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (lack of consistent
27 medical treatment “powerful evidence” that claimant’s allegations of severe pain
28 were not credible); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (ALJ may

1 consider failure to “seek treatment or to follow a prescribed course of treatment” in
2 assessing credibility). Of course, subjective complaints should not be rejected for
3 lack of treatment when the record establishes that the claimant could not afford
4 treatment, *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir.
5 1999), but Plaintiff does not allege, and the record does not indicate, that his lack of
6 treatment was due to a financial inability.

7 Plaintiff contends that the ALJ improperly characterized his treatment as
8 conservative despite the fact that there is no surgery or other more aggressive
9 treatment available for fibromyalgia (ECF No. 22 at 12). *See Trujillo v. Astrue*, 2011
10 WL 5870080, at *5 (C.D. Cal. Nov. 22, 2011) (strong medication and twice-weekly
11 physical therapy qualify as “substantial treatment” of fibromyalgia). As an initial
12 matter, the Court notes that Plaintiff has not pointed to anything in the medical record
13 showing that he regularly attended physical therapy. Nevertheless, even assuming
14 that Plaintiff’s treatment for fibromyalgia was incorrectly characterized as
15 conservative, it was not improper for the ALJ to characterize Plaintiff’s treatment for
16 his other severe impairments – namely, degenerative disc disease of the spine and
17 shoulder arthrosis – as conservative in light of the lack of injections and the failure
18 to pursue recommended surgery. Moreover, Plaintiff does not dispute that there were
19 lengthy periods when he sought no medical attention at all.

20 **d. Plaintiff’s daily activities**

21 The ALJ noted that Plaintiff had engaged in a somewhat normal level of daily
22 activity and interaction. Specifically, the ALJ relied upon Plaintiff’s ability to
23 perform household chores, run errands, prepare simple meals, grocery shop, take care
24 of pets, read, and drive. As the ALJ explained, “[s]ome of the physical and mental
25 abilities and social interactions required in order to perform these activities are the
26 same as those necessary for obtaining and maintaining employment.” (AR 26.)

27 “Engaging in daily activities that are incompatible with the severity of
28 symptoms alleged can support an adverse credibility determination.” *Trevizo*, 871

1 F.3d at 682 (citing *Ghanim*, 763 F.3d at 1165). Nevertheless, the ALJ was required
2 to identify which particular activity he considered to be incompatible with which of
3 Plaintiff's allegations. *See Burrell*, 775 F.3d at 1138 (error where "the ALJ did not
4 elaborate on *which* daily activities conflicted with *which* part of Claimant's
5 testimony"). The ALJ did not do so here. As a result, the Court cannot determine
6 whether the ALJ's reliance upon daily activities to undermine Plaintiff's credibility
7 was supported by substantial evidence. *See Garrison*, 759 F.3d at 1016 (only if
8 claimant's level of activity were inconsistent with her claimed limitations would
9 those activities have any bearing on her credibility).

10 Nevertheless, even assuming that Plaintiff's daily activities did not constitute
11 a clear and convincing reason for rejecting his subjective complaints, any error was
12 harmless in light of the other legally sufficient reasons for the ALJ's determination.
13 *See Molina*, 674 F.3d at 1115 (where one or more reasons supporting ALJ's
14 credibility analysis are invalid, error is harmless if ALJ provided other valid reasons
15 supported by the record); *Batson*, 359 F.3d at 1197 (even if the record did not support
16 one of the ALJ's stated reasons for disbelieving a claimant's testimony, the error was
17 harmless where ALJ provided other valid bases for credibility determination).

18 *****

19 For the foregoing reasons, IT IS ORDERED that Judgment be entered
20 affirming the decision of the Commissioner and dismissing this action with prejudice.

21
22 DATED: 10/9/2018

23
24 

25 ALEXANDER F. MacKINNON
26 UNITED STATES MAGISTRATE JUDGE
27
28