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

EDWARD P.,<sup>1</sup>

Plaintiff,

v.

ANDREW M. SAUL,  
Commissioner of Social Security,  
Defendant.

Case No. 5:19-cv-01794-MAA

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

On September 18, 2019, Plaintiff filed a Complaint seeking review of the Social Security Commissioner's partially favorable decision granting in part his application for Supplemental Security Income pursuant to Title XVI of the Social Security Act. This matter is fully briefed and ready for decision. For the reasons discussed below, the Commissioner's decision is affirmed, and this action is dismissed with prejudice.

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<sup>1</sup> Plaintiff's name is partially redacted in accordance with Federal Rule of Civil Procedure 5.2(c)(2)(B) and the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States.

## PROCEDURAL HISTORY

1  
2 On June 15, 2015, Plaintiff protectively filed an application for Supplemental  
3 Security Income, alleging disability beginning on November 4, 2014.

4 (Administrative Record [AR] 27, 77, 90.) Plaintiff alleged disability due to  
5 “[l]ower back fracture, neck, and hip.” (AR 67, 79.) After his application was  
6 denied initially and on reconsideration, Plaintiff requested a hearing before an  
7 Administrative Law Judge (“ALJ”). (AR 27, 109-11.) At a hearing held on July  
8 16, 2018, at which Plaintiff appeared with counsel, the ALJ heard testimony from  
9 Plaintiff and a vocational expert. (AR 47-66.)

10 In a decision issued on July 31, 2018, the ALJ issued a partially favorable  
11 decision. (AR 27-41.) The ALJ found that Plaintiff was disabled for the period  
12 beginning on November 4, 2014 through November 18, 2015, but was no longer  
13 disabled beginning on November 19, 2015 through the date of the ALJ’s decision  
14 on July 31, 2018. (*Id.*)

15 For the period of disability from November 4, 2014 through November 18,  
16 2015, the ALJ made the following findings pursuant to the Commissioner’s  
17 evaluation of disability. (AR 30-35.) Plaintiff had not engaged in substantial  
18 gainful activity since his disability onset date of November 4, 2014. (AR 30.) He  
19 had severe impairments consisting of “status post motor vehicle accident with L1  
20 compression fracture status post kyphoplasty; C6 vertebral body avulsion; bilateral  
21 pelvic fractures; right lateral orbital fracture; and lumbar, cervical, and thoracic  
22 problems/pain/radiculopathy (20 CFR 416.920(c)).” (*Id.*) He did not have an  
23 impairment or combination of impairments that met or medically equaled the  
24 requirements of one of the impairments from the Commissioner’s Listing of  
25 Impairments. (AR 31-32.) He had a residual functional capacity for light work  
26 with several additional limitations. (AR 32.) Plaintiff had no past relevant work.  
27 (AR 34.) He could not perform any other work in the national economy. (AR 34-  
28 35.) Thus, Plaintiff was disabled for that period. (AR 35.)

1 For his finding of non-disability beginning on November 19, 2015 to the date  
2 of his decision on July 31, 2018, the ALJ made the following findings pursuant to  
3 the Commissioner’s evaluation of continuing disability. (AR 35-40.) Plaintiff did  
4 not have an impairment or combination of impairments that met or medically  
5 equaled the requirements of one of the impairments from the Commissioner’s  
6 Listing of Impairments. (AR 35-36.) Medical improvement had occurred as of  
7 November 19, 2015. (AR 36.) The medical improvement was related to the ability  
8 to work because there had been an increase in Plaintiff’s residual functional  
9 capacity. (AR 37.) Plaintiff had a residual functional capacity for light work with  
10 several additional limitations in standing, walking, postural activities, and  
11 environmental exposure. (AR 37.) Plaintiff had no past relevant work. (AR 39.)  
12 However, beginning on November 19, 2015, Plaintiff was able to perform other  
13 work in the national economy, in the light occupations of ticket seller, information  
14 clerk, marker, as well as in the sedentary occupations of foundation maker, eye  
15 glass polisher, and painter. (AR 40.) Thus, the ALJ found that Plaintiff’s disability  
16 had ended on November 19, 2015 and that he did not become disabled again since  
17 that date. (AR 41.)

18 On August 8, 2019, the Appeals Council denied Plaintiff’s request for  
19 review. (AR 1-4.) Thus, the ALJ’s decision became the final decision of the  
20 Commissioner.

### 21 22 **DISPUTED ISSUE**

23 The parties’ disputed issue is whether the ALJ properly considered Plaintiff’s  
24 testimony. (ECF No. 23, Parties’ Joint Stipulation [“Joint Stip.”] at 6.)

### 25 26 **STANDARD OF REVIEW**

27 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner’s final  
28 decision to determine whether the Commissioner’s findings are supported by

1 substantial evidence and whether the proper legal standards were applied. *See*  
2 *Treichler v. Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir.  
3 2014). Substantial evidence means “more than a mere scintilla” but less than a  
4 preponderance. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter*  
5 *v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007). Substantial evidence is “such  
6 relevant evidence as a reasonable mind might accept as adequate to support a  
7 conclusion.” *Richardson*, 402 U.S. at 401. The Court must review the record as a  
8 whole, weighing both the evidence that supports and the evidence that detracts from  
9 the Commissioner’s conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is  
10 susceptible of more than one rational interpretation, the Commissioner’s  
11 interpretation must be upheld. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir.  
12 2007).

## 13 14 **DISCUSSION**

### 15 **A. Legal Standard.**

16 An ALJ must make two findings in assessing a claimant’s pain or symptom  
17 allegations. SSR 16-3P, 2017 WL 5180304, at \*3; *Treichler*, 775 F.3d at 1102.  
18 “First, the ALJ must determine whether the claimant has presented objective  
19 medical evidence of an underlying impairment which could reasonably be expected  
20 to produce the pain or other symptoms alleged.” *Treichler*, 775 F.3d at 1102  
21 (citation omitted). “Second, if the claimant has produced that evidence, and the ALJ  
22 has not determined that the claimant is malingering, the ALJ must provide specific,  
23 clear and convincing reasons for rejecting the claimant’s testimony regarding the  
24 severity of the claimant’s symptoms” and those reasons must be supported by  
25 substantial evidence in the record. *Id.*; *see also Marsh v. Colvin*, 792 F.3d 1170,  
26 1174 n.2 (9th Cir. 2015).

27 “A finding that a claimant’s testimony is not credible ‘must be sufficiently  
28 specific to allow a reviewing court to conclude the adjudicator rejected the

1 claimant’s testimony on permissible grounds and did not arbitrarily discredit a  
2 claimant’s testimony regarding pain.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493  
3 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991)  
4 (*en banc*)).

5 Beginning on March 28, 2016, SSR 16-3P rescinded and superseded the  
6 Commissioner’s prior rulings as to how the Commissioner will evaluate a  
7 claimant’s statements regarding the intensity, persistence, and limiting effects of  
8 symptoms in disability claims. *See* SSR 16-3P, 2017 WL 5180304, at \*1. Because  
9 the ALJ’s decision in this case was issued on July 31, 2018, it is governed by SSR  
10 16-3P. *See id.* at \*13 and n.27. In pertinent part, SSR 16-3P eliminated the use of  
11 the term “credibility” and clarified that the Commissioner’s subjective symptom  
12 evaluation “is not an examination of an individual’s character.” SSR 16-3P, 2017  
13 WL 5180304, at \*2; *see also Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir.  
14 2017). These changes are largely stylistic, and the new rule is consistent in  
15 substance with Ninth Circuit precedent that existed before the effective date of  
16 SSR16-3P. *See Trevizo*, 871 F.3d at 678 n.5.

17  
18 **B. Background.**

19 On November 4, 2014, Plaintiff was hit by a vehicle while he was riding a  
20 bicycle without a helmet. (AR 550.) He suffered injuries to the forehead, right  
21 lateral orbit, pelvis, and several places along the spine. (AR 452, 454-55, 457-60.)  
22 Plaintiff required two hospitalizations. (AR 514-15). Magnetic resonance imaging  
23 showed abnormalities of the cervical, thoracic, and lumbar spine. (AR 689-99.)  
24 After the hospitalizations, Plaintiff underwent treatments for back pain that  
25 included physical therapy (AR 660), a TENS unit (AR 687), kyphoplasty (AR 639-  
26 42), and epidural steroid injections (AR 739-44).

27 At the July 2018 administrative hearing, Plaintiff testified as follows about  
28 his functioning since the time of the accident to the time of the hearing:

1 He can sit in a car only “for so long until [his] back starts really acting up.”  
2 (AR 54.) He turns his neck “a little bit slower than I used to.” (*Id.*) He bends his  
3 hip more “slowly” than before. (*Id.*) He also has a “forget[s] a lot” of things. (*Id.*)

4 He can stand for 30 minutes to an hour at a time before needing to sit down.  
5 (AR 54-55.) He can sit for 30 minutes to an hour at a time, but perhaps for less  
6 time if he is sitting in a car with deep seats. (AR 55.) Lifting anything weighing  
7 between 20 to 50 pounds would be too heavy for him. (AR 56.) He needs to lie  
8 down 5 to 10 times per day, for 15 to 30 minutes at a time. (*Id.*)

9  
10 **C. Analysis.**

11 The ALJ found that Plaintiff was disabled for the period from November 4,  
12 2014 through November 18, 2015. (AR 35.) For the period beginning on  
13 November 19, 2015, the ALJ first found that Plaintiff’s medically determinable  
14 impairments could reasonably be expected to produce the alleged symptoms. (AR  
15 37.) However, the ALJ next found that Plaintiff’s statements concerning the  
16 intensity, persistence, and limiting effects of these symptoms were not entirely  
17 consistent with the medical evidence and other evidence in the record. (*Id.*) As  
18 support, the ALJ stated four reasons not to credit Plaintiff’s subjective symptom  
19 allegations about his limitations beginning on November 19, 2015. (AR 38.) The  
20 Court considers each reason in turn.

21  
22 **1. Inconsistency with physical therapy notes.**

23 The ALJ first found that Plaintiff’s allegations of disabling limitations that  
24 would preclude all basic work activities were inconsistent with Plaintiff’s prior  
25 statements to physical therapists indicating improvement. (AR 38.) In particular,  
26 the ALJ cited a November 2015 therapy note that stated Plaintiff “felt he was  
27 improving and demonstrated improved flexibility” (AR 736, 738) and a January  
28 2016 therapy note in which Plaintiff “reported to his physical therapist that he was

1 able to perform his typical activities of daily living and home exercise program  
2 without limitation” (AR 726). (AR 38.)

3 One of the factors that an ALJ may considering in weighing a claimant’s  
4 subjective symptom testimony is inconsistencies between that testimony and the  
5 claimant’s statements to others. *See Morgan v. Commissioner of Social Sec.*  
6 *Admin.*, 169 F.3d 595, 599-600 (9th Cir. 1999). Here, the ALJ cited substantial  
7 evidence from Plaintiff’s prior statements to his physical therapists that were  
8 inconsistent with Plaintiff’s later hearing testimony that his symptoms were  
9 disabling and precluded all basic work activities. Plaintiff’s statement to the  
10 therapists that his flexibility had improved and that he could perform his typical  
11 activities of daily living and home exercise program without limitation  
12 demonstrated a clear and convincing inconsistency with his hearing testimony that  
13 he had trouble with several aspects of functioning such as turning his neck,  
14 bending, standing, walking, sitting, and lifting.

15 Plaintiff argues that such improvement with treatment does not mean that he  
16 can function effectively in a workplace. (Joint Stip. at 12-13.) The ALJ, however,  
17 was not required to find that the physical therapy notes conclusively demonstrated  
18 Plaintiff’s ability to function effectively in a workplace. It was sufficient for the  
19 ALJ to find that Plaintiff’s statements to his physical therapists were inconsistent  
20 with his later testimony claiming disabling limitations. *See Valentine v.*  
21 *Commissioner Social Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009) (“The ALJ  
22 recognized that this evidence did not suggest [the claimant] could return to his old  
23 job . . . , but she thought it did suggest that [the claimant’s] later claims about the  
24 severity of his limitations were exaggerated.”). The inconsistency by itself was a  
25 clear and convincing reason to reject Plaintiff’s subjective symptom testimony.

26 Plaintiff further argues that the ALJ mischaracterized the evidence of his  
27 daily activities. (Joint Stip. at 13-14.) The Court perceives no mischaracterization.  
28 Plaintiff reported to his physical therapists that he was able to perform his typical

1 activities of daily living and home exercise program without limitation. (AR 726.)  
2 The ALJ accurately characterized this report and reasonably found it was  
3 inconsistent with Plaintiff's hearing testimony that he was significantly limited in  
4 several basic areas of physical functioning. (AR 38.)

5 Plaintiff further argues that, in finding the inconsistency, the ALJ committed  
6 legal error by failing to connect any specific portions of Plaintiff's testimony to the  
7 relevant parts of the record. (Joint Stip. at 16.) An ALJ "must identify what  
8 testimony is not credible and what evidence undermines the claimant's complaints."  
9 *Brown-Hunter*, 806 F.3d at 493. The ALJ complied with this standard. The ALJ  
10 first identified Plaintiff's testimony about disabling limitations precluding all work  
11 limitations, specifically, Plaintiff's testimony about suffering limitations in several  
12 basic areas of physical functioning (AR 37), and then identified the physical  
13 therapy notes that undermined that testimony (AR 38). Given this analysis, the  
14 ALJ did not commit reversible legal error by failing to explain his reasoning with  
15 requisite specificity. Rather, the ALJ's "path may be reasonably be discerned."  
16 *See Brown-Hunter*, 806 F.3d at 492.

## 18 **2. Inconsistency with other portions of Plaintiff's hearing testimony.**

19 The ALJ next found that Plaintiff's allegations of disabling limitations that  
20 would preclude all basic work activities were inconsistent with his own hearing  
21 testimony that he experienced "some improvement following his surgeries,  
22 referring to an L1 kyphoplasty in August 2015 and lumbar epidural steroid  
23 injections in December 2015." (AR 38.)

24 One of the factors that an ALJ may considering in weighing a claimant's  
25 subjective symptom testimony is "any inconsistent statements in [his] testimony."  
26 *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (citing *Fair v.*  
27 *Bowen*, 885 F.2d 597, 602, 604 n.5 (9th Cir. 1989)). Here, the portion of the  
28 hearing testimony apparently referenced by the ALJ as evidence of improvement



1 consisted of Plaintiff’s testimony that his surgeries “did help out my back  
2 somewhat but I still have back issues.” (AR 53-54.) Later, Plaintiff similarly  
3 testified that, after the kyphoplasty, “it helped, it helped quite a bit, but after that  
4 like I didn’t think, I truly believed that it wasn’t going to get any better than that. I  
5 mean because there was days to where like I’d be in tears.” (AR 57-58.)

6 Unlike the other inconsistency identified from the physical therapy notes, the  
7 particular inconsistency identified here from Plaintiff’s own hearing testimony  
8 about improvement from treatment was not a valid reason to reject his testimony  
9 about disabling limitations. Plaintiff’s own hearing testimony about improvement  
10 was more vague than the physical therapy notes about what the improvement  
11 enabled him to do and, thus, did not clearly demonstrate an inconsistency with his  
12 overall testimony about disabling limitations. Plaintiff’s vague hearing testimony  
13 that, despite improvement, his pain still leaves him “in tears” was not clearly  
14 inconsistent with his overall allegations that he has disabling limitations that would  
15 preclude all basic work activities. Thus, this was not a clear and convincing reason  
16 to reject Plaintiff’s subjective symptom testimony. For the reasons discussed  
17 elsewhere in this opinion, however, the error was harmless because the ALJ stated  
18 other valid reasons to reject Plaintiff’s testimony. *See Carmickle v. Commissioner,*  
19 *Social Sec. Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008).

### 21 **3. Inconsistency with orthopedic examination findings.**

22 The ALJ next found that a November 2015 orthopedic examination “was  
23 mostly normal.” (AR 38.) An ALJ may reject a claimant’s subjective symptom  
24 allegations because it is inconsistent with objective medical evidence, as long as it  
25 is not the sole reason. *See Rollins v. Massanari*, 261 F.3d at 853, 857 (9th Cir.  
26 2001) (“While subjective pain testimony cannot be rejected on the sole ground that  
27 it is not fully corroborated by objective medical evidence, the medical evidence is  
28 still a relevant factor in determining the severity of the claimant’s pain and its

1 disabling effects.”); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005)  
2 (“Although lack of medical evidence cannot form the sole basis for discounting  
3 pain testimony, it is a factor that the ALJ can consider in his credibility analysis.”).  
4 As used here, “objective medical evidence” consists of evidence “that provides  
5 signs or laboratory findings.” *See* SSR 16-3P, 2017 WL 5180304, at \*3; *see also*  
6 20 C.F.R. § 416.929(a) (2011). More specifically, “signs” are defined as  
7 abnormalities that can be shown by “medically acceptable clinical diagnostic  
8 techniques.” *See* 20 C.F.R. § 416.928(b) (2006).

9       During Plaintiff’s orthopedic examination, which the ALJ accurately  
10 summarized as “mostly normal,” the examining physician recorded the following  
11 objective signs: full range of motion in the neck, no tenderness on palpation of the  
12 thoracic spine, mild tenderness with no paravertebral spasm of the lumbar spine,  
13 normal range of motion of the thoracic and lumbar spine, the ability to heel and toe  
14 walk, negative straight leg raise tests, no tenderness on palpation of the hips, and  
15 full and painless range of motion of the hips. (AR 36-37 (citing AR 704-05).)

16       The ALJ was entitled to consider these mostly normal signs from Plaintiff’s  
17 orthopedic examination as a factor, among others, in rejecting Plaintiff’s testimony  
18 that he has trouble with physical functioning such as turning his neck and bending  
19 at the hip. *See Burch*, 400 F.3d at 681; *see also Tidwell v. Apfel*, 161 F.3d 599, 602  
20 (9th Cir. 1998) (holding that an ALJ properly rejected a claimant’s testimony in  
21 part because tests of her back were normal). Because the ALJ’s finding from the  
22 objective medical evidence was supported by substantial objective evidence in the  
23 record, it was a clear and convincing reason to reject Plaintiff’s testimony.

#### 24 25       **4. Lack of treatment after 2016.**

26       Finally, the ALJ found it “[m]ost revealing” that, according to Plaintiff’s own  
27 testimony and the medical record, Plaintiff had received no treatment, including  
28 pain medication, after 2016. (AR 38.) The ALJ found that Plaintiff’s “lack of

1 treatment for such a lengthy period, two years, is inconsistent with allegations of  
2 significant limitations from pain and other symptoms.” (*Id.*)

3 In general, a claimant’s pain testimony can be called into doubt by “an  
4 unexplained, or inadequately explained, failure to seek treatment or follow a  
5 prescribed course of treatment.” *See Fair*, 885 F.2d at 603. Here, however,  
6 Plaintiff waived any challenge to the ALJ’s finding in this regard by failing to argue  
7 it in his brief. Accordingly, the Court does not address the merits of the finding.  
8 *See Carmickle*, 533 F.3d at 1161 n.2 (“We do not address this finding because [the  
9 claimant] failed to argue this issue with any specificity in his briefing.”) (citation  
10 omitted); *see also Ford v. Saul*, 950 F.3d 1141, 1158 n.12 (9th Cir. 2020) (claimant  
11 forfeits an argument that was not raised before the district court) (citation omitted).  
12

13 **D. Conclusion.**

14 The ALJ stated one reason that was not a clear and convincing reason based  
15 on substantial evidence to reject Plaintiff’s subjective symptom testimony. This  
16 error was harmless because the ALJ otherwise stated two valid reasons for his  
17 assessment. Moreover, Plaintiff waived his challenge to the ALJ’s final reason for  
18 his assessment. In sum, the ALJ’s rejection of Plaintiff’s subjective symptom  
19 testimony does not warrant reversal.  
20

21 **ORDER**

22 It is ordered that Judgment be entered affirming the decision of the  
23 Commissioner of Social Security and dismissing this action with prejudice.  
24

25 DATED: December 03, 2020

26   
27 \_\_\_\_\_  
28 MARIA A. AUDERO  
UNITED STATES MAGISTRATE JUDGE