UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ISMAEL REYES, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	Case No. SACV 13-960 JC MEMORANDUM OPINION

I. SUMMARY

On July 2, 2013, plaintiff Ismael Reyes ("plaintiff") filed a Complaint seeking review of the Commissioner of Social Security's denial of plaintiff's application for benefits. The parties have consented to proceed before the undersigned United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; July 8, 2013 Case Management Order ¶ 5.

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Based on the record as a whole and the applicable law, the decision of the Commissioner is AFFIRMED. The findings of the Administrative Law Judge ("ALJ") are supported by substantial evidence and are free from material error.[1]

II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On August 19, 2008, plaintiff filed an application for Disability Insurance Benefits. (Administrative Record ("AR") 252). Plaintiff asserted that he became disabled on February 24, 2005, due to a back injury. (AR 395). The Administrative Law Judge ("ALJ") examined the medical record and heard testimony from plaintiff (who was represented by counsel) and a vocational expert on June 29, 2010. (AR 36-56). On August 20, 2010, the ALJ determined that plaintiff was not disabled through the date of the decision. (AR 109-17).

On November 10, 2011, the Appeals Council granted review, vacated the ALJ's August 20, 2010 decision, and remanded the matter for further administrative proceedings. (AR 19, 123-24).

On May 3, 2012, the ALJ again examined the medical record, and also heard testimony from plaintiff (who was represented by counsel), a medical expert, and a vocational expert. (AR 57-100).

On August 14, 2012, the ALJ again determined that plaintiff was not disabled through the date of the decision. (AR 19-29). Specifically, the ALJ found that through plaintiff's date last insured (*i.e.*, September 30, 2010): (1) plaintiff suffered from a severe impairment of multi-level degenerative disc disease of the lumbar spine and right S1 radiculopathy, and a non-severe mental impairment of adjustment disorder (AR 22); (2) plaintiff's impairments,

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[1]The harmless error rule applies to the review of administrative decisions regarding disability. See Molina v. Astrue, 674 F.3d 1104, 1115-22 (9th Cir. 2012) (discussing contours of application of harmless error standard in social security cases) (citing, *inter alia*, Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006)).

considered singly or in combination, did not meet or medically equal a listed impairment (AR 23); (3) plaintiff retained the residual functional capacity to perform sedentary work (20 C.F.R. § 404.1567(a)) with additional limitations[2] (AR 23); (4) plaintiff could not perform any past relevant work (AR 27); (5) there are jobs that exist in significant numbers in the national economy that plaintiff could perform, specifically assembler and table worker (AR 28-29); and (6) plaintiff's allegations regarding his limitations were partially not credible (AR 26).

The Appeals Council denied plaintiff's application for review. (AR 4).

III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that the claimant is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012) (quoting 42 U.S.C. § 423(d)(1)(A)) (internal quotation marks omitted). The impairment must render the claimant incapable of performing the work claimant previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is to follow a five-step sequential evaluation process:

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[2]The ALJ determined that plaintiff: (i) could push and pull within the same limits as for lifting and carrying; (ii) could occasionally climb stairs, but not ladders; (iii) could occasionally balance, stoop and kneel; (iv) could not crouch or crawl; and (v) could not work around extreme cold, at unprotected heights, or with vibrating tools or hazardous equipment. (AR 23).

(1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

(2) Is the claimant's alleged impairment sufficiently severe to limit the claimant's ability to work? If not, the claimant is not disabled. If so, proceed to step three.

(3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.

(4) Does the claimant possess the residual functional capacity to perform claimant's past relevant work? If so, the claimant is not disabled. If not, proceed to step five.

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow the claimant to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920); see also Molina, 674 F.3d at 1110 (same).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett, 180 F.3d at 1098); see also Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (claimant carries initial burden of proving disability).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal

error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

To determine whether substantial evidence supports a finding, a court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing the ALJ's conclusion, a court may not substitute its judgment for that of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

IV. DISCUSSION

A. The ALJ Properly Evaluated Plaintiff's Residual Functional Capacity

1. Pertinent Law

In order to evaluate whether a claimant is able to do past relevant work at step four and/or whether the claimant could adjust to other work that exists in significant numbers at step five, an ALJ must first determine the claimant's residual functional capacity. See 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1545; Social Security Ruling ("SSR") 96-8P at *1. Residual functional capacity represents "the most [a claimant] can still do despite [his or her] limitations." 20 C.F.R. § 404.1545(a)(1). In determining a claimant's residual functional capacity, an ALJ is required to consider all relevant evidence in the record, including medical records, lay evidence, and the effects of symptoms, including pain, that are reasonably attributed to a medically determinable impairment.

Robbins, 466 F.3d at 883 (citations omitted); see 20 C.F.R. § 404.1545(a)(1) (residual functional capacity is assessed "based on all of the relevant evidence in [the] case record.").

2. Pertinent Facts

Plaintiff underwent several surgical procedures to address his back pain, specifically: (i) on August 4, 2006, plaintiff had a total laminectomy of L4 and L5 and a partial laminectomy of L3 and S1 (AR 1029-30); (ii) since plaintiff's symptoms persisted and he subsequently developed pseudoarthritis at L5-S1, on June 13, 2008 doctors performed an anterior interbody fusion at L5-S1 and laminectomy at L3-L4 and repaired the foraminotomies at L5-S1 and L4-L5 and fusion at L5-S1 (AR 489-90); and (iii) on January 22, 2009 and January 29, 2010, plaintiff had a rhizotomy and a spinal cord stimulator implantation, respectively. (AR 1502-03, 1561-63).

Dr. Mason, the medical expert, testified that the "[e]xertional limitations that would appear to be appropriate for [plaintiff's] condition after multiple surgeries" were that plaintiff could (i) lift and/or carry 20 pounds occasionally and 10 pounds frequently; (ii) "stand and walk with normal breaks for at least two hours out of an eight hour day"; (iii) "sit with normal breaks for at least six hours in an eight hour day"; (iv) push and pull within the same limits as for lifting and carrying; (v) occasionally climb ramps and stairs, but not climb ladders, ropes or scaffolds; (vi) occasionally balance, stoop, and kneel but never crawl; and (vii) not be exposed to concentrated extreme cold or vibrating equipment, and needed to avoid exposure to unprotected heights and work in close proximity to hazardous machinery (collectively "Dr. Mason's opinions"). (AR 77-78) (emphasis added).

The ALJ gave "significant weight" to Dr. Mason's testimony and adopted Dr. Mason's opinions except for the determination that plaintiff could lift and/or carry 20 pounds occasionally and 10 pounds frequently. (Compare AR 23 with AR 77-78). Giving "all reasonable consideration" to plaintiff's subjective

complaints, the ALJ determined that plaintiff was more properly limited to work at the sedentary[3] level of exertion (AR 23, 26) – *i.e.*, work that "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools." See 20 C.F.R. § 404.1567(a).

3. Analysis

Plaintiff argues that Dr. Mason's testimony only addressed plaintiff's functional abilities for the period of time *after* plaintiff's "multiple surgeries," and, therefore, the ALJ's residual functional capacity assessment – which relied heavily on Dr. Mason's opinions – was not supported by substantial evidence for any time period *before* plaintiff's surgeries. (Plaintiff's Motion at 4-7). A reversal or remand is not warranted on this ground.

Here, substantial evidence supports the ALJ's residual functional capacity assessment for plaintiff. At the hearing, Dr. Mason essentially testified that despite multiple "inconsistencies throughout the [medical] record," his opinions regarding plaintiff's functional abilities (most of which the ALJ adopted) were reasonably based on his thorough evaluation of the medical records as informed by his "50 years of experience in orthopedic surgery." (AR 82-84). The ALJ's extensive and detailed discussion of the objective medical evidence reflects that Dr. Mason's opinions were, on the whole, supported by, and consistent with such evidence. (AR 25-26). Accordingly, Dr. Mason's opinions constituted substantial evidence supporting the ALJ's residual functional capacity assessment for plaintiff. See Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (opinions of nonexamining medical expert may serve as substantial evidence when "consistent with other independent evidence in the record"); Morgan v.

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[3]Sedentary work involves "lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools," "standing or walking . . . no more than about 2 hours of an 8-hour workday," and sitting "approximately 6 hours of an 8-hour workday." 20 C.F.R. § 404.1567(a); SSR 83-10 at *5.

Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir. 1999) ("Opinions of a nonexamining, testifying medical advisor may serve as substantial evidence when they are supported by other evidence in the record and are consistent with it.") (citation omitted). Any conflict in the properly supported medical opinion evidence was the sole province of the ALJ to resolve. See Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001) (citation omitted).

In addition, the ALJ assessed more restrictive limitations on lifting and carrying than Dr. Mason to account for plaintiff's testimony that he could lift only "[t]en [to] 15 pounds." (AR 23, 26, 77). Plaintiff's testimony – which was consistent with the opinions of his treating physicians – constituted substantial evidence supporting the ALJ's findings in this respect. (AR 26) (citing AR 67; Exhibit 3F at 3 [AR 470] ("[plaintiff] may not lift anything over 20 to 25 pounds"); Exhibit 4F at 185 [AR 655] ("Currently, [plaintiff] can lift 15 pounds."); Exhibit 4F at 804 [AR 1274] ("No lifting > 20 lbs"); Exhibit 20F at 4 [AR 1632] ("Presently, [plaintiff] is able to lift and carry 15-20 pounds comfortably.")); cf. Abreu v. Astrue, 303 Fed. Appx. 556, 558-59 (9th Cir. 2008) (claimant's own testimony was substantial evidence supporting ALJ's conclusion that claimant could perform his past relevant work); Morgan, 169 F.3d at 601-02 (ALJ may reject medical opinion that is inconsistent with other evidence of record including claimant's statements regarding daily activities).

To the extent plaintiff argues that his condition *before* the surgeries "warranted a lesser [residual functional capacity assessment]" (presumably because plaintiff's condition would have improved once the surgeries were performed) (Plaintiff's Motion at 5), his argument is not supported by the record. Specifically, the record reflects that plaintiff's symptoms "persisted" after the August 4, 2006 procedure. (AR 490). Dr. Mason also opined that he did not "see any excellent or outstanding favorable outcomes from [plaintiff's] two surgeries . . . ." (AR 84-85). In fact, plaintiff himself testified that surgery did little to

alleviate his back pain. (AR 63 [plaintiff did not "get better" from "first surgery"], AR 71 [first two surgeries "didn't do the job"; spinal cord stimulator "helps, but [] doesn't take the pain away."]). In any event, the Court will not second-guess the ALJ's reasonable determination to the contrary, even if such evidence could give rise to inferences more favorable to plaintiff. See Robbins, 466 F.3d at 882 (citation omitted).

Accordingly, a remand or reversal on this basis is not warranted.

B. The ALJ Properly Evaluated Plaintiff's Credibility

1. Pertinent Law

Questions of credibility and resolutions of conflicts in the testimony are functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006). If the ALJ's interpretation of the claimant's testimony is reasonable and is supported by substantial evidence, it is not the court's role to "second-guess" it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

An ALJ is not required to believe every allegation of disabling pain or other non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes the existence of a medically determinable impairment that could reasonably give rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as to the credibility of the claimant's statements about the symptoms and their functional effect. Robbins, 466 F.3d at 883 (citations omitted). Where the record includes objective medical evidence that the claimant suffers from an impairment that could reasonably produce the symptoms of which the claimant complains, an adverse credibility finding must be based on clear and convincing reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does not apply is when there is affirmative evidence of malingering. Id. The ALJ's credibility findings "must be sufficiently specific to allow a reviewing court to conclude the

ALJ rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony." Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004).

To find the claimant not credible, an ALJ must rely either on reasons unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal contradictions in the testimony, or conflicts between the claimant's testimony and the claimant's conduct (*e.g.*, daily activities, work record, unexplained or inadequately explained failure to seek treatment or to follow prescribed course of treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant's testimony solely because it is not substantiated affirmatively by objective medical evidence, the lack of medical evidence is a factor that the ALJ can consider in his credibility assessment. Burch, 400 F.3d at 681.

2. Analysis

Plaintiff contends that a reversal or remand is warranted because the ALJ inadequately evaluated the credibility of his subjective complaints. (Plaintiff's Motion at 7-11). The Court disagrees.

First, the ALJ properly discredited plaintiff's subjective complaints of pain due to internal conflicts within plaintiff's own statements and testimony. See Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir.), as amended (1997) (in weighing plaintiff's credibility, ALJ may consider "inconsistencies either in [plaintiff's] testimony or between his testimony and his conduct"); see also Fair, 885 F.2d at 604 n.5 (ALJ can reject pain testimony based on contradictions in plaintiff's testimony). For example, as the ALJ noted, although plaintiff testified at the hearing that he had told his doctors that he had difficulty getting dressed, and that his girlfriend would help him dress, treatment records reflect that plaintiff's reports of difficulty with self-care were infrequent. (AR 26) (citing AR 70; Exhibit 4F at 148, 163, 171, 315 [AR 618, 633, 641, 785]; Exhibit

6F at 9, 11, 29, 56 [AR 1372, 1374, 1392, 1419]; Exhibit 11F at 8, 10, 17, 20 [AR 1467, 1469, 1476, 1479]; Exhibit 12F at 2, 46, 56, 61 [AR 1482, 1526, 1536, 1541]; Exhibit 15F at 7 [AR 1570]; Exhibit 17F at 2 [AR 1599]; Exhibit 18F at 13 [AR 1617]). As the ALJ also noted, although plaintiff reported to one doctor that he had limitations in his ability to travel[4] (see AR 1617 [July 29, 2010 Pain Medicine Re-Evaluation]), other treatment records from around the same time note that plaintiff told doctors he was "going to Texas for [a] family vacation." (AR 26) (citing Exhibit 17F at 2 [AR 1599] (June 24, 2010 Pain Medicine Re-Evaluation); Exhibit 18F at 8 [AR 1612] (August 26, 2010 Pain Medicine Re-Evaluation)).

Second, the ALJ properly discounted the credibility of plaintiff's subjective complaints as inconsistent with plaintiff's daily activities and other conduct. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002) (inconsistency between the claimant's testimony and the claimant's conduct supported rejection of the claimant's credibility); Verduzco v. Apfel,188 F.3d 1087, 1090 (9th Cir. 1999) (inconsistencies between claimant's testimony and actions cited as a clear and convincing reason for rejecting the claimant's testimony). For example, as the ALJ noted, contrary to plaintiff's allegations of disabling pain, plaintiff stated that he was able to do chores (*i.e.*, wash and fold clothing, wash dishes, some vacuuming), drive a car, take his children to/from school and football practice, and do his own grocery shopping every two weeks. (AR 26) (citing Exhibits 7E at 3-4 [AR 403-04], 4F at 188 [AR 658]). Plaintiff also testified that he was able to stand and wash dishes for 15-20 minutes at a time. (AR 68)

While plaintiff correctly suggests that a claimant "does not need to be 'utterly incapacitated' in order to be disabled," Vertigan v. Halter, 260 F.3d 1044,

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[4]In a disability report, plaintiff also stated that he would "only go out when needed." (AR 416).

1050 (9th Cir. 2001) (citation omitted), this does not mean that an ALJ must find that a claimant's daily activities demonstrate an ability to engage in full-time work (*i.e.*, eight hours a day, five days a week) in order to discount the credibility of conflicting subjective symptom testimony. See Molina, 674 F.3d at 1113 ("[An] ALJ may discredit a claimant's testimony when the claimant reports participation in everyday activities indicating capacities that are transferable to a work setting . . . [e]ven where those activities suggest some difficulty functioning. . . .") (citations omitted). Here, even though plaintiff stated that he had difficulty functioning, the ALJ properly discounted the credibility of plaintiff's subjective-symptom testimony to the extent plaintiff's daily activities were inconsistent with a "totally debilitating impairment." Id.; see, e.g., Curry v. Sullivan, 925 F.2d 1127, 1130 (9th Cir. 1990) (finding that the claimant's ability to "take care of her personal needs, prepare easy meals, do light housework and shop for some groceries . . . may be seen as inconsistent with the presence of a condition which would preclude all work activity") (citing Fair, 885 F.2d at 604). While plaintiff suggests that plaintiff's "minimal activities of daily living" are not inconsistent with his allegations of disabling pain (Plaintiff's Motion at 10-11), the Court will not second-guess the ALJ's reasonable determination to the contrary, even if the evidence could give rise to inferences more favorable to plaintiff.

Third, the ALJ properly discounted plaintiff's credibility, in part, due to plaintiff's "unexplained, or inadequately explained, failure to seek treatment." See Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (en banc) (citing Fair, 885 F.2d at 603). Here, as the ALJ noted, the record reflects that, shortly after plaintiff's alleged onset date of February 24, 2005, plaintiff failed to show up for several medical appointments. For example, on March 23, March 29, and March 31, 2005, plaintiff failed to show up for physical therapy appointments. (AR 1261, 1263). On May 11, 2005, plaintiff failed to show for a medical appointment with a worker's compensation doctor. (AR 1248). A November 28, 2005

"discharge summary" noted that plaintiff had failed to show up for three physical therapy appointments and that the provider discharged plaintiff because he "[had] not returned for therapy" even after "attempt[s] to follow up on [plaintiff's] status." (AR 1108). On December 6, 2005, plaintiff failed to show up for and did not reschedule his appointment with an orthopedic surgeon. (AR 1160). In addition, on April 17, 2008 (*i.e.*, less than two months before plaintiff's second surgery), plaintiff did not show for a "pain medicine re-evaluation." (AR 1378). Plaintiff provides no explanation for the missed appointments except to say that the foregoing was "hardly indicative of [] repeated absences." (Plaintiff's Motion at 11). The Court will not, however, second guess the ALJ's reasonable determination that the missed appointments "rais[ed] the question of whether the symptoms described [were] actually as severe as [plaintiff] alleged." (AR 26).

Fourth, to the extent the ALJ discounted plaintiff's credibility because plaintiff did not receive treatment after his workers' compensation claim settled in 2011 (AR 26), any error in doing so was harmless. At the hearing plaintiff testified that he did not seek medical treatment after his workers' compensation case closed because he was unable to afford such treatment. (AR 74). An ALJ may not reject symptom testimony where, like here, a claimant provides "evidence of a good reason for not [seeking treatment]." see Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996) (citations omitted). Nonetheless, the remaining reasons identified by the ALJ for discounting the credibility of plaintiff's subjective symptom testimony are supported by substantial evidence and any such error would not negate the validity of the ALJ's ultimate credibility conclusion in this case. See Molina, 674 F.3d at 1115 (citations omitted) (Where some reasons supporting an ALJ's credibility analysis are found invalid, the error is harmless if (1) the remaining "valid" reasons provide substantial evidence to support the ALJ's credibility conclusions, and (2) "the error does not negate the validity of the ALJ's ultimate [credibility] conclusion.") (quoting Batson v. Commissioner of

Social Security Administration, 359 F.3d 1190, 1197 (9th Cir. 2004)) (citation and internal quotation marks omitted).

Finally, the ALJ properly discounted plaintiff's credibility in part because plaintiff's pain allegations were not fully corroborated by the objective medical evidence. See Rollins, 261 F.3d at 857 ("While subjective pain testimony cannot be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the medical evidence is still a relevant factor in determining the severity of the claimant's pain and its disabling effects.") (citation omitted). For example, as the ALJ noted, although plaintiff complained of "significant restrictions [in] standing and walking," one of plaintiff's pain specialists and an agreed medical examiner for plaintiff's workers' compensation case each found that plaintiff was only precluded from "prolonged standing." (AR 26) (citing Exhibits 3F at 3 [AR 170], 4F at 194 [AR 664]).

Accordingly, a remand or reversal on this basis is not warranted.

C. The ALJ Properly Evaluated the Medical Expert's Testimony

1. Pertinent Law

In Social Security cases, courts employ a hierarchy of deference to medical opinions depending on the nature of the services provided. Courts distinguish among the opinions of three types of physicians: those who treat the claimant ("treating physicians") and two categories of "nontreating physicians," namely those who examine but do not treat the claimant ("examining physicians") and those who neither examine nor treat the claimant ("nonexamining physicians"). Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996) (footnote reference omitted). A treating physician's opinion is entitled to more weight than an examining physician's opinion, and an examining physician's opinion is entitled to more weight than a nonexamining physician's opinion. See id.

"The Commissioner may reject the opinion of a nonexamining physician by reference to specific evidence in the medical record." Sousa v. Callahan, 143 F.3d

1240, 1244 (9th Cir. 1998). However, while "not bound by findings made by State agency or other program physicians and psychologists, [ALJs] may not ignore these opinions and must explain the weight given to the opinions in their decisions." SSR 96-6p; see also 20 C.F.R. §§ 404.1527(f)(2)(i), 416.927(f)(2)(i) ("State agency medical and psychological consultants and other program physicians and psychologists are highly qualified physicians and psychologists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings of State agency medical and psychological consultants or other program physicians or psychologists as opinion evidence. . . ."); Sawyer v. Astrue, 303 Fed. Appx. 453, 455 (9th Cir. 2008) ("An ALJ is required to consider as opinion evidence the findings of state agency medical consultants; the ALJ is also required to explain in his decision the weight given to such opinions.").

2. Analysis

Plaintiff testified that to alleviate his back pain he needed to lie down and elevate his legs for 45 minutes to an hour, three or four times a day, every other day. (AR 68-69). During cross-examination of the medical expert, plaintiff's attorney stated "[plaintiff] mentioned a lot of the [sic] shifting positions, the lying down, the elevating feet" and asked if plaintiff's statements "would [] be consistent with the orthopedic impairments . . . in the medical file?" (AR 87). Dr. Mason answered "Yes, I have no inconsistency with that." (AR 87).

Plaintiff argues that a reversal or remand is warranted because (1) Dr. Mason's answer on cross-examination reflected that Dr. Mason effectively adopted plaintiff's assertions that he regularly needs to shift positions, lie down and elevate his feet; and (2) the ALJ failed properly to account for such limitations found by Dr. Mason. (Plaintiff's Motion at 12). The Court disagrees.

Here, Dr. Mason's testimony that there was "no inconsistency" between plaintiff's orthopedic impairments and his alleged need for "shifting positions,"

"lying down," and "elevating feet" does not reasonably suggest that Dr. Mason adopted such subjective symptoms as the expert's own opinion about plaintiff's functional limitations. On direct examination Dr. Mason testified about plaintiff's residual functional capacity (which did not include opinions related to the alleged limitations) and punctuated the end of his opinion testimony about plaintiff's functional limitations by stating "and that's what I have to say." (AR 77-78). Even assuming Dr. Mason's testimony could be interpreted in the way plaintiff proposes, the Court will not second guess the ALJ's contrary interpretation which is also supported by the hearing transcript. It was the ALJ's exclusive role to resolve any inconsistencies in Dr. Mason's testimony. See Lewis, 236 F.3d at 509.

Accordingly, a remand or reversal on this basis is not warranted.

V. CONCLUSION

For the foregoing reasons, the decision of the Commissioner of Social Security is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 11, 2014

/s/
Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE