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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SETURNINO VARGAS,)	1:06-cv-001148-LJO-SMS
)	
Plaintiff,)	FINDINGS AND RECOMMENDATION RE:
v.)	PLAINTIFF'S SOCIAL SECURITY
)	COMPLAINT (Doc. 1)
MICHAEL J. ASTRUE,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	
)	

Plaintiff is proceeding in forma pauperis with an action seeking judicial review of a final decision of the Commissioner of Social Security (Commissioner) denying Plaintiff's applications for disability insurance benefits (DIB) pursuant to Title II of the Social Security Act (Act) and supplemental security income (SSI) pursuant to Title XVI of the Act. Plaintiff is represented by counsel. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule 72-302(c)(15).

I. Procedural History

In June 2001, Plaintiff applied for disability insurance benefits (DIB) and supplemental security income (SSI), alleging

1 disability since November 1, 1995, primarily based on arthritis
2 and diabetes mellitus. (A.R. 3,¹ 23, 90-92.) After Plaintiff's
3 claim was denied initially and on reconsideration, and after a
4 hearing before an administrative law judge (ALJ) on October 7,
5 2002, a partially unfavorable decision issued on December 18,
6 2002, in which it was determined that Plaintiff was disabled as
7 of January 28, 2002, but not before that date. (A.R. 57-61, 62-
8 65, 68-71.) The Appeals Council remanded the matter for a new
9 hearing and decision with directions to obtain updated records
10 from Plaintiff's treating sources, to obtain an orthopedic
11 consultative examination if necessary, to evaluate medical
12 records, to evaluate Plaintiff's credibility in light of the
13 additional evidence, and to inquire of a vocational expert (VE)
14 whether the VE's testimony was consistent with the Dictionary of
15 Occupational Titles. (A.R. 81-83.)

16 On February 3, 2005, a hearing was held before the Honorable
17 James P. Berry. (A.R. 23.) Plaintiff appeared with an attorney
18 and testified in the presence of an interpreter. (A.R. 23.) On
19 April 6, 2005, the ALJ partially denied Plaintiff's application
20 for benefits, concluding that although Plaintiff could perform a
21 broad range of medium work from November 1995 to October 14,
22 2001, including his past relevant work as a farm laborer, as of
23 October 14, 2001, Plaintiff could not perform his past relevant
24 medium work, and thus he was disabled as of that date and
25 thereafter. (A.R. 23-28.) After the Appeals Council denied
26 Plaintiff's request for review on June 8, 2006 (A.R. 6-8),
27

28 ¹ The administrative transcript's index indicates that the application for SSI was not available for inclusion.
(A.R. 4.)

1 Plaintiff filed the complaint in this action on August 19, 2006.
2 Briefing commenced on May 3, 2007, with the filing of Plaintiff's
3 opening brief, and was completed on June 15, 2007, when Defendant
4 filed a brief in opposition.

5 II. Standard and Scope of Review

6 Congress has provided a limited scope of judicial review of
7 the Commissioner's decision to deny benefits under the Act. In
8 reviewing findings of fact with respect to such determinations,
9 the Court must determine whether the decision of the Commissioner
10 is supported by substantial evidence. 42 U.S.C. § 405(g).

11 Substantial evidence means "more than a mere scintilla,"
12 Richardson v. Perales, 402 U.S. 389, 402 (1971), but less than a
13 preponderance, Sorenson v. Weinberger, 514 F.2d 1112, 1119, n. 10
14 (9th Cir. 1975). It is "such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion."

16 Richardson, 402 U.S. at 401. The Court must consider the record
17 as a whole, weighing both the evidence that supports and the
18 evidence that detracts from the Commissioner's conclusion; it may
19 not simply isolate a portion of evidence that supports the
20 decision. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir.
21 2006); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). It
22 is immaterial that the evidence would support a finding contrary
23 to that reached by the Commissioner; the determination of the
24 Commissioner as to a factual matter will stand if supported by
25 substantial evidence because it is the Commissioner's job, and
26 not the Court's, to resolve conflicts in the evidence. Sorenson
27 v. Weinberger, 514 F.2d 1112, 1119 (9th Cir. 1975).

28 In weighing the evidence and making findings, the

1 Commissioner must apply the proper legal standards. Burkhart v.
2 Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must
3 review the whole record and uphold the Commissioner's
4 determination that the claimant is not disabled if the
5 Commissioner applied the proper legal standards, and if the
6 Commissioner's findings are supported by substantial evidence.
7 See, Sanchez v. Secretary of Health and Human Services, 812 F.2d
8 509, 510 (9th Cir. 1987); Jones v. Heckler, 760 F.2d at 995. If
9 the Court concludes that the ALJ did not use the proper legal
10 standard, the matter will be remanded to permit application of
11 the appropriate standard. Cooper v. Bowen, 885 F.2d 557, 561 (9th
12 Cir. 1987).

13 III. Disability

14 In order to qualify for benefits, a claimant must establish
15 that she is unable to engage in substantial gainful activity due
16 to a medically determinable physical or mental impairment which
17 has lasted or can be expected to last for a continuous period of
18 not less than twelve months. 42 U.S.C. §§ 416(i), 1382c(a)(3)(A).
19 A claimant must demonstrate a physical or mental impairment of
20 such severity that the claimant is not only unable to do the
21 claimant's previous work, but cannot, considering age, education,
22 and work experience, engage in any other kind of substantial
23 gainful work which exists in the national economy. 42 U.S.C.
24 1382c(a)(3)(B); Quang Van Han v. Bowen, 882 F.2d 1453, 1456 (9th
25 Cir. 1989). The burden of establishing a disability is initially
26 on the claimant, who must prove that the claimant is unable to
27 return to his or her former type of work; the burden then shifts
28 to the Commissioner to identify other jobs that the claimant is

1 capable of performing considering the claimant's residual
2 functional capacity, as well as her age, education and last
3 fifteen years of work experience. Terry v. Sullivan, 903 F.2d
4 1273, 1275 (9th Cir. 1990).

5 The regulations provide that the ALJ must make specific
6 sequential determinations in the process of evaluating a
7 disability: 1) whether the applicant engaged in substantial
8 gainful activity since the alleged date of the onset of the
9 impairment, 20 C.F.R. § 404.1520 (2005);² 2) whether solely on the
10 basis of the medical evidence the claimed impairment is severe,
11 that is, of a magnitude sufficient to limit significantly the
12 individual's physical or mental ability to do basic work
13 activities, 20 C.F.R. § 404.1520(c); 3) whether solely on the
14 basis of medical evidence the impairment equals or exceeds in
15 severity certain impairments described in Appendix I of the
16 regulations, 20 C.F.R. § 404.1520(d); 4) whether the applicant
17 has sufficient residual functional capacity, defined as what an
18 individual can still do despite limitations, to perform the
19 applicant's past work, 20 C.F.R. §§ 404.1520(e), 404.1545(a); and
20 5) whether on the basis of the applicant's age, education, work
21 experience, and residual functional capacity, the applicant can
22 perform any other gainful and substantial work within the
23 economy, 20 C.F.R. § 404.1520(f).

24 With respect to SSI, the five-step evaluation process is
25 essentially the same. See 20 C.F.R. § 416.920.

26 Here, the ALJ concluded that Plaintiff, who was fifty-five
27

28 ² All references are to the 2005 version of the Code of Federal Regulations unless otherwise noted.

1 years old at the time of decision with no formal education and an
2 inability to communicate in English, and who had past relevant
3 work as a farm laborer, had severe impairments of diabetes
4 mellitus and arthritis that did not meet or equal a listed
5 impairment; Plaintiff could perform a broad range of medium work
6 from November 1995 to October 14, 2001, including his past
7 relevant work as a farm laborer; as of October 14, 2001,
8 Plaintiff could not perform his past relevant medium work, and
9 thus he was disabled as of that date and thereafter. (A.R. 23-
10 28.)

11 IV. Plaintiff's Subjective Complaints

12 Plaintiff argues that the ALJ inadequately reviewed
13 Plaintiff's subjective complaints and failed to state specific,
14 convincing reasons for rejecting Plaintiff's subjective
15 statements. Without specification of precise defects, Plaintiff
16 argues that the ALJ failed to consider all relevant criteria and
17 misstated unspecified testimony. (Brief. p. 6.)

18 The court in Orn v. Astrue, 495 F.3d 625, 635 (9th Cir.
19 2007), summarized the pertinent standards for evaluating the
20 sufficiency of an ALJ's reasoning in rejecting a claimant's
21 subjective complaints:

22 An ALJ is not "required to believe every
23 allegation of disabling pain" or other non-exertional
24 impairment. See Fair v. Bowen, 885 F.2d 597, 603 (9th
25 Cir.1989). However, to discredit a claimant's testimony
26 when a medical impairment has been established, the ALJ
27 must provide " 'specific, cogent reasons for the
28 disbelief.' " Morgan, 169 F.3d at 599 (quoting Lester,
81 F.3d at 834). The ALJ must "cit[e] the reasons why
the [claimant's] testimony is unpersuasive." Id. Where,
as here, the ALJ did not find "affirmative evidence"
that the claimant was a malingerer, those "reasons for
rejecting the claimant's testimony must be clear and
convincing." Id.

1 Social Security Administration rulings specify the
2 proper bases for rejection of a claimant's testimony.
3 See S.S.R. 02-1p (Cum. Ed.2002), available at Policy
4 Interpretation Ruling Titles II and XVI: Evaluation of
5 Obesity, 67 Fed.Reg. 57,859-02 (Sept. 12, 2002); S.S.R.
6 96-7p (Cum. Ed.1996), available at 61 Fed.Reg.
7 34,483-01 (July 2, 1996). An ALJ's decision to reject a
8 claimant's testimony cannot be supported by reasons
9 that do not comport with the agency's rules. See 67
10 Fed.Reg. at 57860 ("Although Social Security Rulings do
11 not have the same force and effect as the statute or
12 regulations, they are binding on all components of the
13 Social Security Administration, ... and are to be
14 relied upon as precedents in adjudicating cases."); see
15 Daniels v. Apfel, 154 F.3d 1129, 1131 (10th Cir.1998)
16 (concluding that ALJ's decision at step three of the
17 disability determination was contrary to agency
18 regulations and rulings and therefore warranted
19 remand). Factors that an ALJ may consider in weighing a
20 claimant's credibility include reputation for
21 truthfulness, inconsistencies in testimony or between
22 testimony and conduct, daily activities, and
23 "unexplained, or inadequately explained, failure to
24 seek treatment or follow a prescribed course of
25 treatment." Fair, 885 F.2d at 603; see also Thomas, 278
26 F.3d at 958-59.

15 The factors to be considered in weighing credibility are set
16 forth in the regulations and pertinent Social Security rulings.
17 They include the claimant's daily activities; the location,
18 duration, frequency, and intensity of the claimant's pain or
19 other symptoms; factors that precipitate and aggravate the
20 symptoms; the type, dosage, effectiveness, and side effects of
21 any medication the claimant takes or has taken to alleviate the
22 symptoms; treatment, other than medication, the person receives
23 or has received for relief of the symptoms; any measures other
24 than treatment the claimant uses or has used to relieve the
25 symptoms; and any other factors concerning the claimant's
26 functional limitations and restrictions due to pain or other
27 symptoms. 20 C.F.R. §§ 404.1529, 416.929; S.S.R. 96-7p.

28 With respect to the course of analysis directed by the

1 regulations, the ALJ is first obligated to consider all symptoms
2 and the extent to which the symptoms can reasonably be accepted
3 as consistent with the objective medical evidence and other
4 evidence. 20 C.F.R. §§ 404.1529(a), 416.929(a). Once it is
5 determined that there is a medically determinable impairment that
6 could reasonably be expected to produce the claimant's symptoms,
7 the ALJ must then evaluate the intensity and persistence of the
8 symptoms to determine how the symptoms limit the capacity for
9 work. §§ 404.1529(b), (c); 416.929(b), (c). The ALJ will consider
10 all available evidence. To the extent that the claimant's
11 symptoms can be reasonably accepted as consistent with the
12 objective medical evidence and other evidence, the symptoms will
13 be determined to diminish the claimant's capacity for basic work
14 activities. §§ 404.1529(c)(4); 416.929(c)(4). A claimant's
15 statements will not be rejected solely because unsubstantiated by
16 the available objective medical evidence. §§ 404.1529(c)(2);
17 416.929(c)(2).

18 Further, the pertinent Social Security Ruling provides in
19 pertinent part that an ALJ has an obligation to articulate the
20 reasons supporting the analysis:

21 ...When evaluating the credibility of an individual's
22 statements, the adjudicator must consider the entire
23 case record and give specific reasons for the weight
24 given to the individual's statements.

25 The finding on the credibility of the individual's
26 statements cannot be based on an intangible or
27 intuitive notion about an individual's credibility. The
28 reasons for the credibility finding must be grounded in
the evidence and articulated in the determination or
decision. It is not sufficient to make a conclusory
statement that "the individual's allegations have been
considered" or that "the allegations are (or are not)
credible." It is also not enough for the adjudicator
simply to recite the factors that are described in the

1 regulations for evaluating symptoms. The determination
2 or decision must contain specific reasons for the
3 finding on credibility, supported by the evidence in
4 the case record, and must be sufficiently specific to
5 make clear to the individual and to any subsequent
6 reviewers the weight the adjudicator gave to the
7 individual's statements and the reasons for that
8 weight. This documentation is necessary in order to
9 give the individual a full and fair review of his or
10 her claim, and in order to ensure a well-reasoned
11 determination or decision.

12 S.S.R. 96-7p at 4.

13 Here, the ALJ noted Plaintiff's testimony, including his
14 complaint that he quit work in 1995 because of pain, which had
15 improved somewhat in all his joints but remained in his bilateral
16 ankles, elbows, and shoulders; he experienced stiffness in the
17 hand and wrist; his blood sugar levels were better, but he had
18 blurred vision for an hour or two daily and low energy; and he
19 had to use a cane four days a week, could lift ten pounds, stand
20 three hours, and sit one to two hours. (A.R. 25-26.)

21 The ALJ expressly concluded that Plaintiff's subjective
22 complaints before October 14, 2001, were not entirely consistent
23 with the medical evidence because there were significant gaps in
24 treatment; however, after that date, consistent objective medical
25 evidence established the presence of impairments that could
26 reasonably be expected to produce the symptoms and limitations
27 alleged. Thus, Plaintiff's subjective complaints had been given
28 substantial weight in evaluating his RFC along with the findings
of Dr. Chang, a consultative examiner. (A.R. 26.) The ALJ had
considered the medical opinions and stated that he gave greater
weight to Dr. Chang's opinion of a light RFC than to the state
agency physicians' assessment of a more medium work capacity
because of the additional findings of Dr. Chang. (A.R. 26.) The

1 ALJ also referred to Dr. Lugo's assessments of Plaintiff's
2 disability, which in April and June 2001 were for temporary
3 disability only (two months in April, and two months in June),
4 and which did not indicate preclusion from all work activity or
5 specify any work-related limitations or any medical evidence to
6 support any limitation. (A.R. 24.) The ALJ rejected the opinion
7 of consulting examiner Dr. Gonzales, whose examination of
8 Plaintiff in August 2001 revealed only some discomfort with
9 ambulation and mild tenderness to palpation of the knees, and
10 some decreased handgrip and shoulder strength, and decreased
11 elbow, wrist, hip, and knee flexion and extension, but an absence
12 of joint effusions or joint deformities; the ALJ stated that Dr.
13 Gonzales' assessment of capacity to lift or carry ten pounds,
14 stand and walk two hours, and sit six hours, with occasional
15 bending, stooping, and crouching was overly restrictive because
16 the examination did not reveal any significant physical
17 limitations. (A.R. 25.) The ALJ noted that Dr. Gonzales relied
18 mostly on Plaintiff's subjective complaints. (Id.)

19 Contrary to Plaintiff's assertion, the ALJ's summary of
20 Plaintiff's testimony concerning his subjective complaints,
21 although not completely accurate,³ was essentially fair and
22 correct. (A.R. 25-26, 299-306.)

23 Likewise, the ALJ expressly stated reasons. He discounted
24 Plaintiff's subjective complaints during the time before October
25

26 ³ Plaintiff complained of pain in all his joints; he testified he could stand and walk longer than thirty minutes
27 each, with the longest standing time being an hour or forty minutes, or an hour and one-half, with an ability to walk
28 longer yet with difficulty; he had to rest his hands after using them for about fifteen minutes; his blurry vision lasted
about an hour or sometimes less, but happened almost every day; he could walk about four hundred meters; he could
lift about fourteen pounds but did not know how much weight he could carry; he could sit an hour or so; his
medications helped him, but he had no side-effects. (A.R. 299, 300-302, 304-06.)

1 14, 2001, because they were inconsistent with the medical record
2 of treatment, and because they were inconsistent with the medical
3 experts' opinions as to the extent of Plaintiff's functional
4 capacities and limitations. (A.R. 26.)

5 It is established that in rejecting subjective complaints,
6 it is permissible to rely upon opinions of physicians concerning
7 the nature, severity, and effect of the symptoms of which the
8 claimant complains. Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th
9 Cir. 2002). Included in the factors that an ALJ may consider in
10 weighing a claimant's credibility are the claimant's reputation
11 for truthfulness; inconsistencies either in the claimant's
12 testimony or between the claimant's testimony and the claimant's
13 conduct, daily activities, or work record; and testimony from
14 physicians and third parties concerning the nature, severity, and
15 effect of the symptoms of which the claimant complains. Thomas v.
16 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). The ALJ may
17 consider whether the Plaintiff's testimony is believable or not.
18 Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999). Although
19 the inconsistency of objective findings with subjective claims
20 may not be the sole reason for rejecting subjective complaints of
21 pain, Light v. Chater, 119 F.3d 789, 792 (9th Cir. 1997), it is
22 one factor which may be considered with others, Moisa v.
23 Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); Morgan v.
24 Commissioner 169 F.3d 595, 600 (9th Cir. 1999). It is appropriate
25 for an ALJ to draw an inference that Plaintiff did not have
26 ongoing pain based on a general lack of medical care between two
27 periods of treatment. Flaten v. Secretary of Health & Human
28 Services, 44 F.3d 1453, 1464 (9th Cir. 1995) (gap between two

1 surgeries).

2 Substantial evidence supported the ALJ's finding that there
3 was a gap in treatment before the date on which disability was
4 found to commence. Plaintiff does not dispute that there was no
5 evidence of any significant treatment after October 26, 1996,
6 until approximately April 2001. As the ALJ detailed in the
7 decision (A.R. 24-26), Plaintiff's left knee was injured in
8 November 1995; x-rays showed only very minimal degenerative
9 changes with probable internal derangement; it was diagnosed as
10 effusion and treated conservatively with Naprosyn, home exercise,
11 and a knee support, and it improved with Prednisone in February
12 1996. (A.R. 25, 223, 192-93, 281.) Further, Plaintiff was
13 diagnosed with diabetes mellitus in December 1995, but it was
14 under good control. (A.R. 223.) Plaintiff's arthritis clinically
15 improved and was stable according to progress notes in 1996.
16 (A.R. 252-53, 275, 277.)

17 In December 1995, Dr. Smith granted Plaintiff disability
18 first only to December 11, 1995, and then again only to January
19 15, 1996, and he did not state any functional limitations or
20 restrictions pertinent to Plaintiff. (A.R. 186, 179.)

21 In April 2001, Dr. Lugo noted that Plaintiff wanted
22 disability to be sent to SSI, but Dr. Lugo extended Plaintiff's
23 disability for two months only. (A.R. 126.) Plaintiff suffered
24 poor diabetes control in May 2001, and medicine compliance was
25 noted as part of the plan. (A.R. 125.) In June 2001, Plaintiff's
26 general relief disability was extended only two months. (A.R.
27 122.) There were no work-related or other limitations placed on
28 Plaintiff in connection with the extensions of temporary

1 disability.

2 Further, in August 2001, Dr. Gilbert Gonzales, Jr.,
3 performed a comprehensive internal medical evaluation and found
4 some discomfort with ambulation, mild tenderness to palpation on
5 the medial aspect of the knees, but no joint effusions or
6 deformities; Plaintiff had decreased hand grip and shoulder
7 strength at 4/5 and decreased elbow, wrist, hip, and knee flexion
8 and extension; the sensory exam was within normal limits, and
9 reflexes were +2 in the bilateral upper and lower extremities.
10 Although Dr. Gonzales limited Plaintiff's RFC, the record
11 supports the ALJ's conclusion that the examination did not reveal
12 any significant physical limitations. (A.R. 129-33.)

13 The ALJ also detailed the evidence in September and November
14 2001, and thereafter, revealing increased pain in the knee, leg,
15 and shoulder; worsening lower extremity weakness in 2002 and poor
16 control of diabetes in December 2003; and Dr. Chang's orthopedic
17 consultative examination in September 2003, which included
18 findings of decreased range of motion in the cervical and lumbar
19 spine, crepitus at the bilateral knees, tenderness to palpation
20 in multiple aspects of the knees and bilateral shoulders,
21 decreased grip and muscle strength of the hands, shoulders, and
22 elbows, with an RFC for essentially light work assessed with some
23 postural and manipulative limitations. (A.R. 25, 232-35.)

24 The Court concludes that the ALJ cited clear and convincing
25 reasons for rejecting Plaintiff's subjective complaints of pain
26 to the extent alleged for the pertinent period, and that the
27 ALJ's reasons were properly supported by the record and
28 sufficiently specific to allow this Court to conclude that the

1 ALJ rejected the claimant's testimony on permissible grounds and
2 did not arbitrarily discredit Plaintiff's testimony.

3 V. Severity of Impairment

4 Plaintiff argues that the ALJ erred in not finding that
5 Plaintiff's left knee internal derangement was severe between
6 December 31, 1999 (the date Plaintiff was last insured) and
7 October 2001 because the evidence reflected that Plaintiff had
8 knee effusion, tenderness, and a need for a knee support. (A.R.
9 189-92.) Further, the ALJ erred in ignoring Plaintiff's obesity
10 and not finding that it was severe. (A.R. 130.) Finally, the ALJ
11 should have attempted to re-contact the treating physician to
12 clarify an opinion regarding disability.

13 With respect to Plaintiff's knee condition, the records
14 noted by Plaintiff are from Dr. Larsen at Valley Family Health
15 Center from November 1995, and Dr. Smith in December 1995. (A.R.
16 182-93.) The records are only partially legible; the copies
17 affirmatively indicate that they are the best copies possible.
18 Dr. Smith in December found mild tenderness, full extension, and
19 only some limits of flexion; an MRI was ordered. (A.R. 187.) Dr.
20 Smith put Plaintiff on disability for one week in early December
21 1995 with medication and an elastic knee brace; disability was
22 extended for one month until January 15, 1996. (A.R. 179, 186.)
23 Plaintiff was suffering increasing pain; there was an effusion.
24 (A.R. 186.)

25 At step two, the Secretary considers if claimant has "an
26 impairment or combination of impairments which significantly
27 limits his physical or mental ability to do basic work
28 activities." 20 C.F.R. §§ 404.1520(c), 416.920(c). This is

1 referred to as the "severity" requirement and does not involve
2 consideration of the claimant's age, education, or work
3 experience. Id. The step-two inquiry is a de minimis screening
4 device to dispose of groundless claims. Bowen v. Yuckert, 482
5 U.S. 153-54 (1987). The Secretary is required to "consider the
6 combined effect of all of the individual's impairments without
7 regard to whether any such impairment, if considered separately,
8 would be of [sufficient medical] severity." 42 U.S.C. §
9 1382c(a)(3)(F).

10 Basic work activities include the abilities and aptitudes
11 necessary to do most jobs, such as physical functions of walking,
12 standing, sitting, lifting, pushing, pulling, reaching, carrying,
13 or handling; capacities for seeing, hearing, and speaking;
14 understanding, carrying out, and remembering simple instructions;
15 use of judgment; responding appropriately to supervision, co-
16 workers and usual work situations; and dealing with changes in a
17 routine work setting. 20 C.F.R. §§ 404.1521(b), 416.921(b).

18 An impairment or combination thereof is not severe when
19 medical evidence establishes only a slight abnormality or a
20 combination of slight abnormalities which would have no more than
21 a minimal effect on an individual's ability to work. An
22 impairment is not severe if it does not significantly limit a
23 claimant's physical or mental ability to do basic work
24 activities. 20 C.F.R. §§ 404.1521(a), 416.921(a); Soc. Sec.
25 Ruling 85-28; Smolen v. Chater, 80 F.3d 1273, 1289-90 (9th Cir.
26 1996).

27 The evidence on which Plaintiff relies tends to show some
28 limitation of function for a short period of time during which

1 Plaintiff was considered temporarily disabled by his treating
2 physicians, but the extent of the apparently temporary
3 dysfunction was unclear because the treating sources did not
4 assign specific functional limitations to the Plaintiff at that
5 time or make any reference to specific clinical findings or tests
6 that supported any precise limitations. To the extent that
7 evidence is inconsistent, conflicting, or ambiguous, it is the
8 responsibility of the ALJ to resolve any conflicts and ambiguity.
9 Morgan v. Commissioner, 169 F.3d 595, 603 (9th Cir. 1999). Because
10 the ALJ has authority to interpret ambiguous medical opinions and
11 to resolve conflicts, Matthews v. Shalala, 10 F.3d 678, 680 (9th
12 Cir. 1993), the Court must defer to the ALJ's decision.

13 Here, the ALJ took a longitudinal view of Plaintiff's
14 overall treatment, which reflected a gap of about five years with
15 respect to treatment or any restriction due to Plaintiff's
16 condition. Further, the ALJ considered the development of
17 Plaintiff's knee symptoms and reasonably inferred, based on more
18 complete and comprehensive data and expert opinions, that
19 Plaintiff's condition worsened towards the end of 2001, and at
20 that point Plaintiff's RFC changed. It is established that a more
21 recent opinion may be entitled to greater deference than an older
22 opinion, as may an opinion which describes or considers more
23 significant medical events or conditions. Orn v. Astrue, 495 F.3d
24 625, 633-34 (9th Cir. 2007). Regulations provide that generally
25 more weight is given by the Social Security Administration (SSA)
26 to opinions from treating sources because they are likely to be
27 most able to provide a detailed, longitudinal picture of a
28 claimant's medical impairments and may bring a unique perspective

1 to the medical evidence that cannot be obtained from the
2 objective medical findings alone or from reports of individual
3 examinations, such as consultative examinations or brief
4 hospitalizations. 20 C.F.R. §§ 404.1527(d)(1), 416.927(d)(1).
5 Although the ALJ here relied on sources other than treating
6 physicians, he appropriately evaluated the expert opinions
7 concerning Plaintiff's capacities over an extended period of
8 time. Although Plaintiff used a brace and took medications, the
9 evidence supported the ALJ's implicit conclusion that any knee
10 effusion was of limited duration and not severe.

11 With respect to Plaintiff's claim that the ALJ ignored
12 Plaintiff's obesity, Plaintiff points to Dr. Gonzales'
13 consultative comprehensive internal medicine examination of
14 August 2001, where Dr. Gonzales stated that Plaintiff, who
15 weighed 171 pounds and was five feet four inches in height, was
16 overweight but in no acute distress. (A.R. 130.) The limitations
17 addressed by Dr. Gonzales were Plaintiff's slight weakness of the
18 extremities, difficulty with ambulation and standing or walking,
19 and his use of a cane, which Dr. Gonzales opined affected his
20 ability to stand, walk, lift and carry, and take certain
21 postures, although the physical examination was essentially
22 normal. (A.R. 132.) Plaintiff does not point to any evidence of
23 any functional limitations having been assigned to Plaintiff as a
24 result of his being overweight. Further, the ALJ considered all
25 the pertinent expert opinions concerning Plaintiff's limitations
26 and appropriately evaluated them and explained the weight he put
27 on them; the ALJ relied on additional findings and opinions in
28 rejecting Dr. Gonzales' more restrictive RFC.

1 The present case is not one in which the ALJ overlooked any
2 limitations of function discretely attributed to obesity. This
3 case is unlike Celaya v. Halter, 332 F.3d 1177 (9th Cir. 2003), in
4 which it was held that the ALJ erred in not considering obesity.
5 Here, in contrast, Plaintiff had counsel at the hearing and
6 throughout the administrative and judicial process; there is no
7 evidence that Plaintiff's weight was close to listing criteria;
8 and Plaintiff had the opportunity to obtain evaluation and
9 treatment from multiple sources who considered Plaintiff's total
10 physical condition and opined concerning the accompanying
11 functional limitations, so there was no need to develop the
12 record. The record does not reflect functional limitations as a
13 result of Plaintiff's weight, and Plaintiff has not presented
14 such evidence or attempted to establish equivalence to a listing.
15 Under such circumstances, it is not reversible error not to
16 consider obesity at step two of the sequential analysis. Burch v.
17 Barnhart, 400 F.3d 676, 682-84 (9th Cir. 2005). In addition, there
18 is no error at step three where, as here, there is no evidence
19 that Plaintiff's weight condition met or medically equaled the
20 pertinent listing, and further, Plaintiff does not propound a
21 theory as to how the impairments combined to equal a listing. Id.
22 at 682-83. Finally, there is no error at step five where the ALJ
23 considers all the pertinent evidence regarding Plaintiff's
24 functional limitations and formulates Plaintiff's RFC pursuant to
25 the correct legal framework. Burch v. Barnhart, 400 F.3d at 683-
26 84.

27 Accordingly, the Court concludes that the ALJ did not err
28 with respect to severity findings concerning Plaintiff's knee or

1 weight conditions.

2 Further, with respect to Plaintiff's contention that it was
3 necessary for the ALJ to re-contact the treating physician, an
4 ALJ is required to re-contact a doctor only if the doctor's
5 report is ambiguous or insufficient for the ALJ to make a
6 disability determination. 20 C.F.R. §§ 404.1512(e), 416.912(e);
7 Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005). The ALJ,
8 with support in the record, proceeded to determine Plaintiff's
9 disability status and implicitly found the evidence adequate to
10 make a determination regarding Plaintiff's disability. The Court
11 accordingly concludes that the ALJ did not have a duty to re-
12 contact Plaintiff's treating physician to clarify the earlier
13 disability opinions.

14 VI. Plaintiff's RFC

15 Plaintiff argues that the RFC assigned to Plaintiff by the
16 ALJ was not supported by substantial evidence; the ALJ did not
17 review the evidence that was favorable to Plaintiff.

18 Social Security regulations define residual functional
19 capacity as the "maximum degree to which the individual retains
20 the capacity for sustained performance of the physical-mental
21 requirements of jobs." Reddick v. Chater, 157 F.3d 715, 724 (9th
22 Cir. 1998) (citing 20 C.F.R. 404, Subpt. P, App. 2 § 200.00(c)
23 and Lester v. Chater, 81 F.3d 821, 833 (9th Cir. 1995)). The
24 Commissioner must evaluate the claimant's "ability to work on a
25 sustained basis." Id. (citing 20 C.F.R. § 404.1512(a)); Lester,
26 81 F.3d at 833); see 20 C.F.R. § 416.945. A "regular and
27 continuing basis" means eight hours a day, five days a week, or
28 an equivalent work schedule. S.S.R. 96-8p at 1, 2. The process

1 involves an assessment of physical abilities and then of the
2 nature and extent of physical limitations with respect to the
3 ability to engage in work activity on a regular and continuing
4 basis. 20 C.F.R. § 404.1545(b). In assessing a claimant's RFC, it
5 is necessary to consider the limiting effects of all the
6 claimants impairments, even those that are not severe. 20 C.F.R.
7 § 404.1545(a), (e); 20 C.F.R. § 416.945(a), (e); Soc. Sec. Ruling
8 96-8p at 4; Reddick v. Chater, 157 F. 3d 715, 724 (9th Cir. 1998)
9 (failure to consider non-exertional factor of fatigue that could
10 affect stamina); Beecher v. Heckler, 756 F.2d 693, 694-95 (9th
11 Cir. 1985) (failure to consider a psychiatrist's report regarding
12 a mental impairment). The ALJ must consider all factors that
13 might have a significant impact on an individual's ability to
14 work, including the side effects of medications as well as
15 subjective evidence of pain; it is improper to focus on a single
16 disease when other significant conditions exist. Varney v.
17 Secretary of HHS, 846 F.2d 581, 585 (9th Cir.), relief modified,
18 859 F.2d 1396 (1988).

19 The pertinent standards for evaluation of expert medical
20 opinions have been recently summarized:

21 The opinions of treating doctors should be given
22 more weight than the opinions of doctors who do not
23 treat the claimant. Lester [v. Chater], 81 F.3d 821, 830
24 (9th Cir.1995) (as amended).] Where the treating
25 doctor's opinion is not contradicted by another doctor,
26 it may be rejected only for "clear and convincing"
27 reasons supported by substantial evidence in the
28 record. Id. (internal quotation marks omitted). Even
if the treating doctor's opinion is contradicted by another
doctor, the ALJ may not reject this opinion without
providing "specific and legitimate reasons" supported by
substantial evidence in the record. Id. at 830, quoting
Murray v. Heckler, 722 F.2d 499, 502 (9th Cir.1983).
This can be done by setting out a detailed and thorough
summary of the facts and conflicting clinical evidence,

1 stating his interpretation thereof, and making findings.
2 Magallanes [v. Bowen, 881 F.2d 747, 751 (9th Cir.1989).]
3 The ALJ must do more than offer his conclusions. He must
4 set forth his own interpretations and explain why they,
5 rather than the doctors', are correct. Embrey v. Bowen, 849
6 F.2d 418, 421-22 (9th Cir.1988).

7
8 Reddick v. Chater, 157 F.3d 715, 725 (9th Cir.1998);
9 accord Thomas, 278 F.3d at 957; Lester, 81 F.3d at
10 830-31.

11 Orn v. Astrue, 495 F.3d 625, 632 (9th Cir. 2007).

12 Here, the ALJ explained his reasoning in concluding that
13 Plaintiff had a RFC for essentially medium work until October 14,
14 2001. (A.R. 25, 27.)

15 The ALJ considered Dr. Lugo's granting two-month periods of
16 temporary disability to Plaintiff in April and June 2001, and he
17 further considered Plaintiff's diabetes having been in poor
18 control with a need for Plaintiff to take diabetic medication
19 consistently. (A.R. 24.) The ALJ reasonably interpreted the
20 records as reflecting temporary disability only; further,
21 substantial evidence supports the ALJ's finding that Dr. Lugo did
22 not indicate a permanent, total work disability and did not
23 specify work-related limitations or any medical evidence to
24 support such limitations. (A.R. 24, 122-26.) These factors are
25 appropriately considered and constitute specific and legitimate
26 reasons. An ALJ may reject a treating physician's opinion that is
27 brief and conclusionary in form with little in the way of
28 clinical findings to support its conclusion. Magallanes v. Bowen,
881 F.2d 747, 751 (9th Cir. 1989). Further, the ultimate question
of whether or not a claimant is disabled is entrusted to the ALJ,
who need not accept a medical opinion on such an issue.

Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989). Finally,

1 the ALJ is entitled to draw inferences logically flowing from the
2 evidence. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982).

3 The ALJ adverted to the opinion of consulting examiner Dr.
4 Gonzales but put little weight on his limitations of
5 lifting/carrying ten pounds, standing and walking two hours, and
6 only occasional bending and stooping because there were no
7 significant physical limitations in his examination, and it
8 appeared that Dr. Gonzales relied mostly on Plaintiff's
9 subjective complaints. (A.R. 25.) Substantial evidence supports
10 this conclusion because Dr. Gonzales noted that Plaintiff's
11 physical examination was essentially normal with respect to range
12 of motion; Plaintiff's systems were within normal limits; there
13 was mild tenderness in the knees, greater on the right; strength
14 in all areas tested was only slightly diminished at 4/5;
15 Plaintiff was able to move with a widened stance and short steps
16 without a single-point cane, but had some difficulty and/or pain
17 doing so. (A.R. 130-32.). It was within the appropriate scope of
18 the ALJ's determination to conclude that such severe limitations
19 based on only somewhat limited motor strength and Plaintiff's use
20 of a cane were not justified by significant physical limitations.
21 Greater weight will be given to opinions based on or supported by
22 relevant evidence, such as medical signs and laboratory findings.
23 20 C.F.R. § 404.1527(d) (3); 20 C.F.R. § 416.927(d) (3).

24 Likewise, the ALJ concluded that the doctor was relying on
25 Plaintiff's subjective complaints as distinct from discrete,
26 objective clinical findings. (A.R. 25.) Where the record supports
27 an ALJ's rejection of the claimant's credibility as to subjective
28 complaints, the ALJ is free to disregard a doctor's opinion that

1 was premised upon the claimant's subjective complaints.

2 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001).

3 Further, the ALJ considered the opinions of the state agency
4 medical consultants who concluded on October 14, 2001, and
5 January 28, 2002, that Plaintiff retained the RFC to lift and/or
6 carry fifty pounds occasionally and twenty-five pounds frequently
7 and stand, walk and sit six hours in an eight-hour workday with
8 no frequent forceful pushing and pulling of the lower left
9 extremity and with only occasional kneeling, crawling, and
10 climbing of ladders, ropes, and scaffolds. (A.R. 26, 141-48, 154-
11 63.) The ALJ expressly concluded that at the time the opinions
12 were rendered, they were consistent with the objective medical
13 evidence and were entitled to significant weight. (A.R. 26.)

14 The first state agency medical consultant, Dr. Lavanya
15 Bobba, explained that she considered the consultant's limits of
16 lifting ten pounds and standing and walking two hours to be
17 unsupported by the minimal findings; the range of motion tests
18 and well as motor strength tests were based on effort, and the
19 findings and x-rays did not support such restrictions; Dr. Bobba
20 believed that there was no medical indication for an assistive
21 device, and a medium RFC with limited kneeling was more
22 appropriate. (A.R. 148.)

23 The second state agency medical consultant also considered
24 the consultive examiner's limit to sedentary work but concluded
25 that the objective findings did not support the restriction; the
26 x-ray of the knee was within normal limits, and the use of the
27 case was not shown to be necessary for ambulation; hence lifting
28 and carrying were not as restricted as the consulting examiner

1 opined. (A.R. 160.)

2 The ALJ concluded:

3 The Administrative Law Judge finds that, reasonably
4 considering the claimant's subjective complaints in light
5 of the minimal objective physical findings, at the
6 time the opinions of the state agency medical consultants
7 were consistent with the objective medical evidence
8 and were entitled to significant weight. However, new
9 evidence from consultative examiner Dr. Chang who
10 concluded that the claimant could perform light work
11 is given greater weight. Therefore, I adopt Dr. Chang's
12 limitations.

13 (A.R. 26.) The ALJ's reliance on the opinions of the state agency
14 physicians as of the time the opinions were rendered was based on
15 substantial evidence. The opinion of a nontreating, nonexamining
16 physician can amount to substantial evidence as long as it is
17 supported by other evidence in the record, such as the opinions
18 of other examining and consulting physicians, which are in turn
19 based on independent clinical findings. Andrews v. Shalala, 53
20 F.3d 1035, 1041 (9th Cir. 1995).

21 The ALJ considered and put great weight on the opinion of
22 consulting orthopedic examiner Dr. Chang, who examined Plaintiff
23 in September 2003. (A.R. 25, 232-35.) Dr. Chang considered
24 Plaintiff's multiple joint pain involving his shoulders, knees,
25 back, and neck. Plaintiff reported no physical therapy, surgery,
26 or injections. Dr. Chang recorded antalgic gait with difficulty
27 with walking on the toes and heels, reduced range of motion in
28 the cervical and lumbar spine with mild tenderness to percussion
over the posterior cervical paraspinal muscles, and reduced
motion in the shoulders and knees; straight leg raising was
negative to eighty degrees bilaterally without pain; there was
crepitus at bilateral knees with tenderness to palpation there

1 and at the shoulders; grip strength was 4/5 bilaterally,
2 bilateral shoulder muscle strength was 4+/5, elbows 4/5, and hip
3 and knee flexors and extensors were 5-/5; muscle bulk and tone
4 were normal and without atrophy, and sensation was normal. The
5 impression was multiple joint pains likely from osteoarthritis.
6 Dr. Chang opined that Plaintiff had the RFC to perform light work
7 (lift and carry twenty pounds occasionally and ten pounds
8 frequently, stand and walk six hours out of eight with normal
9 breaks), sit without restriction, with only occasional kneeling,
10 squatting, climbing stairs, handling, fingering, pushing and
11 pulling, and no repetitive bending and heavy lifting. (A.R. 235.)

12 The ALJ expressly put greater weight on this opinion because
13 it was new, or recent, and it reflected the developing status of
14 Plaintiff's condition. (A.R. 26.) The ALJ noted the consistent
15 evidence of worsening symptoms, including progress reports in
16 September and November 2001 reflecting increasing pain in the
17 right knee and leg, and imaging studies reflecting suspicion of
18 joint effusion and the presence of a cyst in the right head of
19 the humerus; he also noted reports in June 2002 of increased
20 arthritis in all extremities with worsening lower extremity
21 weakness for four months. (A.R. 25, 136-37, 151-52, 174-75.)
22 Substantial evidence in the form of records of Plaintiff's
23 treating sources supports the ALJ's conclusion that the
24 longitudinal medical record reflected worsening symptoms and
25 increasing restrictions around the pertinent time.

26 Thus, the ALJ properly assessed Plaintiff's RFC, which was
27 supported by substantial evidence. Plaintiff's RFC before October
28 14, 2001, was a medium RFC, and thus Plaintiff could perform his

1 past relevant work, which a vocational expert (VE), Ms. Chandler,
2 had previously testified was medium, unskilled work which
3 Plaintiff could perform with a medium RFC, but not with the light
4 RFC which the ALJ assessed as of October 14, 2001. (A.R. 308-09.)
5 The ALJ thus properly concluded that given Plaintiff's age,
6 education, and work experience and his RFC after October 14,
7 2001, Plaintiff was then disabled pursuant to 20 C.F.R., Part
8 404, Subpt. P, App. 2, Rule 202.09.

9 Plaintiff complains of times when Plaintiff's diabetes was
10 poorly controlled. However, later evidence from 2004 revealed
11 that Plaintiff had been checking his blood sugar every other day
12 and his diabetes was well controlled. (A.R. 263.) Plaintiff
13 admitted at hearing that his doctor said that the blood
14 monitoring revealed that Plaintiff's diabetes was getting better.
15 (A.R. 303-04.)

16 VII. Recommendation

17 Pursuant to the foregoing analysis, it is concluded that
18 Plaintiff's arguments should be rejected. The ALJ's decision was
19 reached by the use of proper legal standards and is supported by
20 substantial evidence.

21 Accordingly, it IS RECOMMENDED that

- 22 1. Plaintiff's social security complaint BE DENIED; and
- 23 2. Judgment for Defendant Michael J. Astrue, Commissioner of
24 Social Security, and against Plaintiff Seturnino Vargas, BE
25 ENTERED.

26 This report and recommendation is submitted to the United
27 States District Court Judge assigned to the case, pursuant to the
28 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the

1 Local Rules of Practice for the United States District Court,
2 Eastern District of California. Within thirty (30) days after
3 being served with a copy, any party may file written objections
4 with the court and serve a copy on all parties. Such a document
5 should be captioned "Objections to Magistrate Judge's Findings
6 and Recommendations." Replies to the objections shall be served
7 and filed within ten (10) court days (plus three days if served
8 by mail) after service of the objections. The Court will then
9 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
10 (b) (1) (C). The parties are advised that failure to file
11 objections within the specified time may waive the right to
12 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
13 1153 (9th Cir. 1991).

14 IT IS SO ORDERED.

15 Dated: February 5, 2008

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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