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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

RUSSELL D. BRACEWELL,	)	1:08cv0423 GSA
	)	
	)	
Plaintiff,	)	ORDER REGARDING PLAINTIFF'S
	)	SOCIAL SECURITY COMPLAINT
v.	)	
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	

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**BACKGROUND**

Plaintiff Russell D. Bracewell (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for disability insurance benefits and supplemental security income pursuant to Titles II and XVI of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Gary S. Austin, United States Magistrate Judge.<sup>1</sup>

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<sup>1</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. On July 25, 2008, the action was reassigned to the Honorable Gary S. Austin for all purposes.

1 **FACTS AND PRIOR PROCEEDINGS<sup>2</sup>**

2 On or about August 31, 2004, Plaintiff filed applications alleging disability since March  
3 18, 2004, due primarily to Hepatitis-C and liver disease.<sup>3</sup> AR 43-45. His application was denied  
4 initially and on reconsideration, and Plaintiff requested a hearing before an Administrative Law  
5 Judge (“ALJ”). AR 11-14, 34-39. ALJ Mark C. Ramsey held a hearing on October 17, 2006,  
6 and issued an order denying benefits on May 24, 2007. AR 15-19, 226-259. On January 19,  
7 2008, the Appeals Council denied review. AR 5-7.

8 **Hearing Testimony**

9 \_\_\_\_\_ALJ Ramsey held a hearing on October 17, 2006, in Chico, California. Plaintiff appeared  
10 and was represented by Shirley Hull. AR 226.

11 Plaintiff testified that he was divorced. He currently lives with his girlfriend of six years  
12 in a trailer home in Chico. His girlfriend is disabled as a result of grand mal seizures. AR 229.

13 Plaintiff graduated high school and attended one year of college. He served time in the  
14 Air Force and received an honorable discharge in July 1975. AR 229-230. Thereafter, he worked  
15 in the construction industry. AR 230-231. Plaintiff also worked stocking shelves at K-Mart,  
16 where he had been employed part-time for about one year. AR 232-233. Plaintiff was fired from  
17 K-Mart for having alcohol on his breath. AR 250-251.

18 Most recently in the construction field, Plaintiff worked at Cousin Gary’s pulling the  
19 plastic sheeting off of mobile homes following transport. He quit working at Cousin Gary’s after  
20 he nearly fell from a roof in the 100 degree heat. AR 233. From September 2004 to February or  
21 March 2005, Plaintiff worked for Premier Construction part-time as a carpenter. He just could  
22 not work any longer in such a labor-intensive job. AR 234, 242-243. He was tired after an hour  
23 or two, and the pain in his legs and back precluded him from continuing. AR 243. Plaintiff also  
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25 <sup>2</sup> References to the Administrative Record will be designated as “AR,” followed by the appropriate page  
26 number.

27 <sup>3</sup>March 19, 2004, appears in the record; however, the ALJ’s decision reflects “March of 2005” as the date  
28 of onset of disability. At the administrative hearing, Plaintiff explained that he filed a previous application in 2003  
but then “dropped it” when he went to work for Premier. After leaving Premier, he filed for benefits again. See AR  
254-256.

1 worked construction at Chico Nissan, but quit because he could not communicate with his  
2 supervisor who spoke Spanish, and whom apparently referred to Plaintiff derogatorily in Spanish  
3 when Plaintiff requested the supervisor speak English. AR 232, 252.

4 Plaintiff is currently receiving general assistance and food stamps, and assistance toward  
5 the space rental for his trailer. AR 234-235.

6 Plaintiff attends to his own personal needs. He occasionally changes the sheets on the  
7 bed, does his own laundry and cooks. He does the grocery shopping on a weekly basis and is  
8 usually accompanied by his mother and/or girlfriend. His girlfriend vacuums the carpets, mops  
9 the floors, scrubs the bathroom and mows the law. AR 235-236. Plaintiff does tend to a small  
10 vegetable garden where he grows jalapeno and Serrano chilies, and occasionally will trim the  
11 trees. AR 236-237.

12 Because he does not drive, Plaintiff gets around using a bicycle or taking the bus. He  
13 does not attend church, see movies, go fishing or camping, nor does he play sports or exercise.  
14 AR 237, 249.

15 Plaintiff currently takes Norco for pain, and the natural supplement Milk Thistle for his  
16 liver. AR 238, 246-247. He has had problems with alcohol for years. Plaintiff testified that the  
17 day previous to the hearing he drank a quart of beer, but that he hadn't had any alcohol for the  
18 week and a half prior to that date. He has been advised by his doctor that he should stop drinking  
19 because it is going to kill him. AR 239. He has not quit drinking completely, but he has cut  
20 down. Plaintiff attended AA meetings when his liver problems were significant, and that is how  
21 he was able to cut down on his alcohol consumption. He will "quit for a couple weeks and then  
22 just ke[ep] it down to a bare minimum." AR 240. He stopped taking Antabuse after one dose  
23 because it made him "deathly ill." AR 240-242. Plaintiff testified that he has tried to quit  
24 drinking, but he has been unable to do so. AR 249.

25 Plaintiff's doctor advised him that the pain in his back and legs was attributed to the  
26 Hepatitis C. He sees his physician, Dr. Kurt Johnson, regularly, about every month or two  
27 months. Dr. Johnson has been treating Plaintiff for more than ten years. AR 244-245. Plaintiff  
28 rated his pain at a five or six without medication, and a three with medication. AR 248. Plaintiff

1 has not undergone a liver biopsy, and understands his liver condition is monitored with blood  
2 testing. AR 248.

3 In response to a question by his attorney, Plaintiff indicated that he could perform the  
4 duties of a cashier, however, he could not stand for extended periods of time. AR 250. His  
5 typical day includes getting up, eating breakfast, and sitting down to watch television and plan  
6 his day. AR 250. He takes a nap every afternoon. AR 250.

7 Medical Record

8 The record consists of a number of treatment notes from Kurt Johnson, M.D., covering  
9 his treatment of Plaintiff for a period beginning July 10, 2002, and ending July 19, 2006. The  
10 notes indicate that Plaintiff received treatment for complaints regarding Hepatitis C and alcohol  
11 abuse, as well as pneumonia, sinusitis and a broken bone. AR 166-169, 193, 195-198, 201.

12 On January 4, 2004, Plaintiff sought treatment at the Enloe Medical Center for three to  
13 four days of body aches with worsening symptoms. He was diagnosed with and treated for  
14 bronchitis before being released. AR 153-155.

15 Plaintiff was seen again at the Enloe Medical Center on January 8, 2004, for complaints  
16 of weakness. He wanted blood work performed and complained of muscle tightness in the legs,  
17 knees and back. Plaintiff indicated he drank a quart of alcohol daily, despite having previous  
18 periods of sobriety for as long as six months. The notes indicate he smelled of alcohol but was  
19 not grossly intoxicated. Plaintiff declined a social service consultation for treatment of his  
20 alcoholism. He was diagnosed with and treated for alcoholic hepatitis, Hepatitis C and chronic  
21 alcoholism. AR 147-152.

22 On October 25, 2004, Plaintiff was again seen at Enloe Medical Center. He reported a  
23 cough and chest and nasal congestion, with sinus pressure, for a week's time. COPD was  
24 diagnosed on this occasion and Plaintiff was treated accordingly. AR 144-146.

25 On November 22, 2004, a comprehensive psychiatric examination was performed by  
26 Keith Whitten, M.D. Plaintiff's chief complaint was Hepatitis C and the fact that he was unable  
27 to work as a result of the condition. At the time of the examination, Plaintiff was working in  
28 construction but was concerned because he was weak and easily susceptible to illness. Plaintiff

1 indicated he was an alcoholic for as long as he could remember. He quit drinking when the liver  
2 pain increased, and has taken Antabuse to treat the alcoholism. However, he relapsed three or  
3 four months prior and admitted to drinking moderately since. When his liver swells or causes  
4 pain, he discontinues the use of alcohol. Plaintiff indicated he has five years sobriety from  
5 intravenous methamphetamine drug use. He stopped the street drug use when he suffered an  
6 episode of heat stroke. AR 124-126. While Plaintiff presented “somewhat sickly” and unshaven,  
7 he was pleasant, and alert and oriented to person, place and time. Concentration and memory  
8 were fair. His abstract thinking was intact, intelligence was within normal limits and judgment  
9 was fair. The DSM-IV diagnoses were alcohol abuse, methamphetamine abuse in remission, and  
10 hepatitis. AR 127. Dr. Whitten concluded that Plaintiff was “primarily limited by his physical  
11 problems” and the mental health issues had only a mild impact otherwise. AR 127-128.

12 On January 18, 2005, Plaintiff was seen for an internal medicine evaluation by John  
13 Tendall, M.D. He complained of fatigue and weakness, and alcoholism. Plaintiff indicated that  
14 he had been bothered by the fatigue and pain off and on since 2000. At that time, Plaintiff had  
15 been hospitalized for severe pneumonia and the Hepatitis C diagnosis was made as a result.  
16 Plaintiff indicated that he quit using methamphetamine years prior, but continued to drink  
17 alcohol. He has attempted alcohol rehabilitation several times, including twice in the previous  
18 year, but he cannot give up drinking completely. AR 131. Plaintiff indicated he smokes a pack  
19 of cigarettes a day and drinks two to three quarts of whiskey a day. AR 132. He was in pleasant  
20 mood, moved easily and indicated that “most of the time” he felt “okay.” The examination  
21 revealed “a palpable liver in the right upper quadrant, slightly tender liver edge, and two firm  
22 respirable right costal margins.” AR 132-133. Dr. Tendall diagnosed Hepatitis C, chronic  
23 alcoholism, and degenerative joint disease primarily in the left shoulder. The doctor opined that  
24 Plaintiff could stand and walk six hours in a workday, sit without limitation, could lift and carry  
25 twenty pounds frequently and fifty pounds occasionally, and had no postural limitations on  
26 bending, stooping or crouching. He had some limitation on reaching over his head on the left  
27 upper extremity. AR 134-135. A related January 19, 2005, hepatic function panel revealed  
28 elevated AST and ALT findings. AR 136.

1 On February 9, 2005, Plaintiff presented at Enloe Medical Center and complained of  
2 fever, back pain and chills. He was transported to the hospital by his girlfriend after refusing the  
3 ambulance. An x-ray showed “[m]oderately dense left basilar infiltrate” and Plaintiff was  
4 diagnosed with and treated for left lower lobe pneumonia, alcoholism and alcohol induced  
5 cirrhosis. AR 137-143.

6 A February 14, 2005, Physical Residual Functional Capacity Assessment completed by  
7 Dr. Sudhir Jaituni paralleled Dr. Tendall’s assessment, with an additional limitation of occasional  
8 climbing and stooping. AR 155-162. The findings by Dr. Jaituni were affirmed by Dr. Mark  
9 Tambellini. AR 162.

10 On April 25, 2006, Dr. Johnson prepared forms entitled “Physical Residual Functional  
11 Capacity Questionnaire” and “Hepatitis C Residual Functional Capacity Questionnaire” in  
12 connection with his treatment of Plaintiff. Dr. Johnson indicated that Plaintiff had been his  
13 patient since 2000, and that he was seen for chronic fatigue, an enlarged liver, muscle and joint  
14 aches, difficulty concentrating, weakness, loss of appetite and weight loss. Dr. Johnson opined  
15 that Plaintiff may be capable of low stress jobs, could sit for two hours at a time, stand for one  
16 hour at a time, and could both sit and stand for about two hours out of an eight-hour workday.  
17 The doctor wrote in “Patient is not capable of working 8 hour work day.” Dr. Johnson indicated  
18 that Plaintiff could frequently lift less than ten pounds, occasionally lift ten pounds, rarely lift  
19 twenty pounds, and never lift fifty pounds. He indicated Plaintiff could occasionally twist, stoop,  
20 crouch and climb ladders, but should rarely climb stairs. AR 217-220. With specific regard to  
21 Plaintiff’s Hepatitis C condition, Dr. Johnson added that Plaintiff’s prognosis was poor. AR  
22 221-224.

23 In a June 19, 2006, single-page Medical Report prepared for Butte County Department of  
24 Employment and Social Services, Dr. Johnson indicated Plaintiff was permanently disabled due  
25 to chronic Hepatitis C, general fatigue, alcoholism and cellulitis. AR 194.

26 ALJ’s Findings

27 \_\_\_\_\_ The ALJ determined that Plaintiff had the severe impairments of pulmonary disease,  
28 Hepatitis C and alcoholism. It was noted that Plaintiff’s Hepatitis C was asymptomatic. The

1 pulmonary disease was not accompanied by clinical signs or findings of severity. The ALJ also  
2 noted that Plaintiff suffered from alcohol abuse and liver damage. Nonetheless, the ALJ  
3 determined these severe impairments did not meet or equal any listing impairments so as to result  
4 in a disability finding. AR 16.

5 Based on his review of the medical evidence, the ALJ determined that Plaintiff retained  
6 the residual functional capacity (“RFC”) to perform light work. He could lift and carry ten (10)  
7 pounds frequently and twenty (20) pounds occasionally, without nonexertional limitations. AR  
8 19.

9 Given this RFC, the ALJ found that Plaintiff could not return to his past work as a  
10 construction laborer as it requires a greater level of physical exertion. AR 18-19. Nevertheless,  
11 the ALJ found that Plaintiff could perform jobs that exist in significant numbers in the national  
12 economy. Lastly, in considering vocational factors such as age, education and past work  
13 experience, the ALJ applied rule 202.14. Because Plaintiff was fifty-one years of age, with a  
14 high school education and one year of college, and no transferable work skills, it was determined  
15 that Plaintiff could perform the full range of light work. AR 18-19.

#### 16 **SCOPE OF REVIEW**

17 Congress has provided a limited scope of judicial review of the Commissioner’s decision  
18 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,  
19 the Court must determine whether the decision of the Commissioner is supported by substantial  
20 evidence. 42 U.S.C. § 405 (g). Substantial evidence means “more than a mere scintilla,”  
21 *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v.*  
22 *Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is “such relevant evidence as a  
23 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at  
24 401. The record as a whole must be considered, weighing both the evidence that supports and  
25 the evidence that detracts from the Commissioner’s conclusion. *Jones v. Heckler*, 760 F.2d 993,  
26 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must  
27 apply the proper legal standards. *E.g., Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988).  
28 This Court must uphold the Commissioner’s determination that the claimant is not disabled if the

1 Secretary applied the proper legal standards, and if the Commissioner’s findings are supported by  
2 substantial evidence. *See Sanchez v. Sec’y of Health and Human Serv.*, 812 F.2d 509, 510 (9th  
3 Cir. 1987).

#### 4 REVIEW

5 In order to qualify for benefits, a claimant must establish that he is unable to engage in  
6 substantial gainful activity due to a medically determinable physical or mental impairment which  
7 has lasted or can be expected to last for a continuous period of not less than twelve months. 42  
8 U.S.C. § 1382c (a)(3)(A). A claimant must show that he has a physical or mental impairment of  
9 such severity that he is not only unable to do her previous work, but cannot, considering his age,  
10 education, and work experience, engage in any other kind of substantial gainful work which  
11 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989).  
12 The burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th  
13 Cir. 1990).

14 In an effort to achieve uniformity of decisions, the Commissioner has promulgated  
15 regulations which contain, inter alia, a five-step sequential disability evaluation process. 20  
16 C.F.R. §§ 404.1520 (a)-(f), 416.920 (a)-(f) (1994).<sup>4</sup> Applying this process in this case, the ALJ  
17 found that Plaintiff: (1) had not engaged in substantial gainful activity since March 2005;<sup>5</sup> (2) has  
18 an impairment or a combination of impairments that is considered “severe” based on the  
19 requirements in the Regulations (20 CFR §§ 416.920(b)); (3) does not have an impairment or  
20 combination of impairments which meets or equals one of the impairments set forth in Appendix  
21 1, Subpart P, Regulations No. 4; (4) cannot perform his past relevant work in the construction  
22 field; yet (5) retained the RFC to perform a wide range of light work. AR 15-19.

23 Here, Plaintiff argues that the ALJ’s findings are erroneous because the ALJ improperly  
24 rejected the opinion of Plaintiff’s treating physician Kurt Johnson, M.D., wherein Dr. Johnson  
25 found Plaintiff to be permanently disabled.

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27 <sup>4</sup>All references are to the 2002 version of the Code of Federal Regulations unless otherwise noted.

28 <sup>5</sup>See fn. 3, *ante*.

1 **DISCUSSION**

2 Whereas Plaintiff indicates in the opening brief that the issue before this Court is whether  
3 Hepatitis C causes limitations independent of those caused by alcoholism, so as to be relevant to  
4 the RFC findings, Plaintiff’s entire argument centers on his complaint that the ALJ improperly  
5 discounted his treating physician’s opinion regarding his ability to work and disability status. In  
6 rejecting that opinion, Plaintiff alleges the ALJ did not state specific and legitimate reasons  
7 supported by substantial evidence. Hence this Court’s discussion focuses on the actual argument  
8 tendered by the Plaintiff.

9 A. **Treating Physician Dr. Johnson**

10 The opinions of treating doctors should be given more weight than the opinions of  
11 doctors who do not treat the claimant. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.1998);  
12 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.1995). Where the treating doctor's opinion is not  
13 contradicted by another doctor, it may be rejected only for “clear and convincing” reasons  
14 supported by substantial evidence in the record. *Lester*, 81 F.3d at 830. Even if the treating  
15 doctor’s opinion is contradicted by another doctor, the ALJ may not reject this opinion without  
16 providing “specific and legitimate reasons” supported by substantial evidence in the record. *Id.*  
17 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.1983)). This can be done by setting out  
18 a detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
19 interpretation thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th  
20 Cir.1989). The ALJ must do more than offer his conclusions. He must set forth his own  
21 interpretations and explain why they, rather than the doctors’, are correct. *Embrey v. Bowen*, 849  
22 F.2d 418, 421-22 (9th Cir.1988).

23 In *Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007), the Ninth Circuit reiterated and  
24 expounded upon its position regarding the ALJ’s acceptance of the opinion of an examining  
25 physician over that of a treating physician. “When an examining physician relies on the same  
26 clinical findings as a treating physician, but differs only in his or her conclusions, the conclusions  
27 of the examining physician are not “substantial evidence.” *Orn*, 495 F.3d at 632; *Murray*, 722  
28 F.2d at 501-502. “By contrast, when an examining physician provides ‘independent clinical

1 findings that differ from the findings of the treating physician’ such findings are ‘substantial  
2 evidence.’” *Orn*, 496 F.3d at 632; *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir.1985).

3 Independent clinical findings can be either (1) diagnoses that differ from those offered by another  
4 physician and that are supported by substantial evidence (*see Allen v. Heckler*, 749 F.2d 577, 579  
5 (9th Cir.1985)), or (2) findings based on objective medical tests that the treating physician has  
6 not herself considered (*see Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)).

7 If a treating physician’s opinion is not giving controlling weight because it is not well  
8 supported or because it is inconsistent with other substantial evidence in the record, the ALJ is  
9 instructed by Section 404.1527(d)(2) to consider the factors listed in Section 404.1527(d)(2)-(6)  
10 in determining what weight to accord the opinion of the treating physician. Those factors include  
11 the “[I]ength of the treatment relationship and the frequency of examination” by the treating  
12 physician; and the “nature and extent of the treatment relationship” between the patient and the  
13 treating physician. 20 C.F.R. 404.1527(d)(2)(i)-(ii). Other factors include the supportability of  
14 the opinion, consistency with the record as a whole, the specialization of the physician, and the  
15 extent to which the physician is familiar with disability programs and evidentiary requirements.  
16 20 C.F.R. § 404.1527(d)(3)-(6). Even when contradicted by an opinion of an examining  
17 physician that constitutes substantial evidence, the treating physician’s opinion is “still entitled to  
18 deference.” SSR 96-2p; *Orn*, 495 F.3d at 632-633. “In many cases, a treating source’s medical  
19 opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the  
20 test for controlling weight.” SSR 96-2p; *Orn*, 495 F.3d at 633.

21 In this matter, the ALJ relied mainly on the record as a whole, the absence of medical and  
22 laboratory reports in support of Dr. Johnson’s findings, Plaintiff’s own daily activities, and the  
23 opinion of consulting physician Dr. Tendall in rejecting the treating physician’s opinion. The  
24 ALJ’s reasons are both specific and legitimate. Additionally, those reasons are supported by  
25 substantial evidence in the record.

26 More specifically, the ALJ stated:

27 The undersigned has considered Dr. Johnson’s medical source statements,  
28 including the April 2006 assessment indicating the claimant was presently limited  
to standing 1 hour at a time and about 2 hours of standing/walking per 8 hour

1 workday and to occasional lifting and carrying up to 10 pounds. However, the  
2 medical source statement is given minimal weight in view of the minimal medical  
3 signs and laboratory findings contained in either Dr. Johnson’s own treatment  
4 records or the record viewed as a whole [citation]. Although the claimant may  
5 experience some fatigue and weakness and other effects of his hepatitis[,] his own  
6 testimony and the record viewed as a whole indicate that his activities of daily  
living are quite wide ranging and would be consistent with the demands for a full  
range of “light” exertion, e.g., he performs household chores, cooking, shopping,  
and bicycling. However, his testimony that he spends most of his days lying  
down while taking naps during the afternoon are not shown to be the result of his  
impairment(s) but rather appear to be due to his own chosen lifestyle.

7 AR 17. The ALJ properly set out a detailed and thorough summary of the facts and conflicting  
8 clinical evidence, stated his interpretation thereof, and made findings. *Magallanes v. Bowen*,  
9 881 F.2d at 751.

10 Dr. Johnson’s own treatment records are brief and conclusory, with the exception of an  
11 entry dated May 23, 2005. AR 199-200. On that occasion, the physical examination performed  
12 by Dr. Johnson revealed that Plaintiff denied a “history of increased fatigue,” denied “joint or  
13 muscle pain, or back pain,” and Plaintiff’s liver was not tender or palpable. His gait, balance and  
14 motor skills were all normal and intact. Dr. Johnson concluded that Plaintiff’s Hepatitis C was  
15 asymptomatic. AR 199-200. The related laboratory results show elevated AST and ALT levels,  
16 as well as a number of other elevated findings, including cholesterol levels. AR 214.

17 Plaintiff cites to the elevated AST and ALT levels in support of his position. Yet,  
18 Plaintiff’s Albumin and Bilirubin levels were within the normal range on July 5, 2005, despite  
19 elevated AST and ALT results, and it was noted that Plaintiff’s “liver function [was] adequate.”  
20 AR 174. On a number of other occasions, where the AST and ALT levels were elevated, the  
21 Albumin and Bilirubin levels were also within the normal range. AR 142, 151, 174, 203, 210,  
22 212.

23 Dr. Tendall’s report specifically notes that Plaintiff strode “into the examination room  
24 with a smile,” “moved quite easily,” and told Dr. Tendall, “most of the time I’m okay.” AR  
25 132. Plaintiff’s coordination and gait were normal. AR 133. He could touch his toes. His range  
26 of motion was sufficient, with noted limitation in the left shoulder. Plaintiff had “no  
27 paravertebral muscle spasms, tenderness, crepitus, effusion, deformities or trigger points.” He  
28 exhibited “[n]ormal muscle bulk and tone. Strength is 5/5 in upper and lower extremities and

1 lower extremities including grip strength.” AR 133-134. In short, Dr. Tendall’s independent  
2 clinical findings are substantial evidence. *Orn*, 496 F.3d at 632. Moreover, Dr. Tendall’s  
3 findings comport with the assessment performed by Dr. Jaituni and later affirmed by Dr.  
4 Tambellini. *Cf.* AR 131-136 to AR 155-162. *See Tonapetyan v. Haler*, 242 F.3d 1144, 1149  
5 (9th Cir. 2001) (consultive examiner’s opinion may constitute substantial evidence because it is  
6 based on examiner’s independent findings and observations).

7 Dr. Johnson’s treatment notes for the period between his examination of May 23, 2005,  
8 and the disability forms he completed on April 25, 2006, fail to even mention the “fatigue” that  
9 Dr. Johnson used so readily throughout. In fact, the period between May 2005 and April 2006  
10 establishes that the reason Plaintiff most often sought treatment from Dr. Johnson related directly  
11 to his alcoholism, and, secondarily, to various respiratory ailments. *See* AR 193, 195, 197-198.

12 Notably too, on the April 25, 2006,<sup>6</sup> disability forms, Dr. Johnson failed to even complete  
13 the portion of the document that sought the “clinical findings and objective signs” that  
14 corresponded to the diagnoses or symptoms he identified as causing Plaintiff’s disability. *See*  
15 AR 217 at No. 6.

16 In sum, the ALJ declined to assign Dr. Johnson’s opinion controlling weight because it  
17 was inconsistent with the record as a whole and was based upon “minimal medical signs and  
18 laboratory findings.” *See Orn v. Astrue*, 496 F.3d at 632; *Allen v. Heckler*, 749 F.2d at 579. The  
19 ALJ did not err.

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26 <sup>6</sup>The day prior, on April 24, 2006, Plaintiff was seen by Dr. Johnson for treatment of  
27 bronchitis following a visit to the emergency room. He also complained of knee pain and sought  
28 a referral to an orthopedist. Plaintiff also admitted to drinking again. There was no complaint of  
fatigue. AR 196.

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**CONCLUSION**

Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial evidence in the record as a whole and is based on proper legal standards. Accordingly, this Court DENIES Plaintiff's appeal from the administrative decision of the Commissioner of Social Security. The clerk of this Court is DIRECTED to enter judgment in favor of Defendant Michael J. Astrue, Commissioner of Social Security and against Plaintiff, Russell D. Bracewell.

IT IS SO ORDERED.

**Dated: April 23, 2009**

**/s/ Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE