

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

10 DANIEL L. MILLER,) 1:09-cv-1257 SKO
11)
12 Plaintiff,) **ORDER REGARDING PLAINTIFF'S
13 v.) SOCIAL SECURITY COMPLAINT**
14 MICHAEL J. ASTRUE,)
15 Commissioner of Social Security,)
16 Defendant.)
17 _____)

BACKGROUND

20 Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (the
21 “Commissioner” or “Defendant”) denying his application for disability insurance benefits (“DIB”)
22 pursuant to Title II of the Social Security Act. 42 U.S.C. § 405(g). The matter is currently before
23 the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable
24 Sheila K. Oberto, United States Magistrate Judge.¹

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27 ¹ The parties consented to the jurisdiction of the United States Magistrate Judge. (Docs. 6, 7.) On April 7,
28 2010, the action was reassigned to the Honorable Sheila K. Oberto for all purposes. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; *see also* L.R. 301, 305.

FACTUAL BACKGROUND

Plaintiff was born in 1966, has a GED, and previously worked as a truck driver. (Administrative Record (“AR”) 58, 72, 166.) On November 27, 2006, Plaintiff filed an application for DIB, alleging disability beginning on June 13, 2006, due to chronic pain. (AR 13, 141-50, 165.)

A. Medical Evidence

On January 21, 2007, Johnson Moon, M.D., performed a consultative neurological examination of Plaintiff. (AR 353-58.) Plaintiff reported that he could walk, sit, and stand for only 20 minutes at a time and that he changed positions several times an hour. (AR 354.) Dr. Moon noted a lack of paravertebral muscle spasms, tenderness, crepitus, effusions, deformities, or trigger points. (AR 356.) Plaintiff's straight leg raising test was positive in the lying and sitting positions.² (AR 356.) Dr. Moon opined that Plaintiff would most likely be able to sit for less than two hours in an eight-hour day because of his "constant need to fluctuate between the seated and standing position," and it "would be difficult for him to do most tasks, as they would require more time than he has in a single position." (AR 357.) Dr. Moon further opined that Plaintiff could sit for less than six hours in an eight-hour day and could lift 20 pounds occasionally and ten pounds frequently. (AR 357.) Plaintiff could occasionally bend, stoop, and crouch. (AR 358.) Finally, Dr. Moon opined that Plaintiff had no visual, communicative, environmental, or manipulative limitations (except for his left hand). (AR 358.)

On March 12, 2007, I. Ocrant, M.D., a state agency physician, assessed Plaintiff's physical residual functional capacity ("RFC"). (AR 359-66.) Dr. Ocrant opined that Plaintiff could (1) occasionally lift and/or carry up to 20 pounds and frequently up to 10 pounds; (2) stand and/or walk for a total of about six hours in an eight-hour workday; (3) sit for less than six hours in an eight-hour workday, with periodic alternation between sitting and standing; and (4) perform limited pushing and/or pulling with the upper extremities. (AR 360.) Plaintiff could frequently climb ramps

² The straight leg raising test is a test done during a physical examination to determine whether a patient with low back pain has an underlying herniated disk. The straight leg raising test is positive if the patient experiences pain down the back of the leg when the leg is raised.

1 and stairs (and occasionally ladders, ropes, and scaffolds), balance, stoop, kneel, crouch, and crawl.
2 (AR 361.) Plaintiff's reaching was limited, but he had no visual, communicative, or environmental
3 limitations. (AR 361-62.)

4 On April 13, 2007, James Derbin, M.D., a state agency physician, completed a psychiatric
5 review technique form on which he found that Plaintiff's restriction of activities of daily living was
6 mild, he had mild difficulties in maintaining social functioning, and he had mild difficulties in
7 maintaining concentration, persistence, or pace. Plaintiff had no episodes of decompensation of
8 extended duration. (AR 377.) Dr. Derbin noted that a review of Plaintiff's records revealed only
9 physical diagnoses and that Plaintiff's low-grade anxiety was first recorded in 2003 and again in
10 2006 "with no evident impairment in functioning noted in the clinical notes." (AR 379.) Because
11 Dr. Derbin found that "there is data to support a low grade chronic anxiety [disorder] of limited
12 severity which does not significantly affect the functioning of [Plaintiff]," Dr. Derbin found that
13 Plaintiff's anxiety disorder was not severe. (AR 379.)

14 In a letter dated July 6, 2007, Plaintiff's family physician, Mark Tetz, M.D., expressed his
15 opinion that Plaintiff "has been disabled from work since June 12, 2006. He continues to have
16 chronic neck and back pain, and he also has difficulties in terms of concentration and mental
17 functioning as a result of pain and the pain medications he takes to control symptoms." (AR 394.)
18 Dr. Tetz, therefore, opined that Plaintiff "is totally disabled and will be unable to perform any type
19 of work for at least one year." (AR 394.)

20 On September 23, 2007, Dr. Tetz completed a "multiple impairment questionnaire" on which
21 he assessed Plaintiff's physical ability to do work-related activities. (AR 387-93.) Dr. Tetz opined
22 that Plaintiff could occasionally lift and carry up to 20 pounds, and sit, stand, and walk for a total
23 of less than two hours in an eight-hour workday. (AR 390-91.) Plaintiff's left upper extremity was
24 markedly limited in grasping, manipulating, and reaching. (AR 391-92.) Finally, Plaintiff could not
25 push, pull, kneel, bend, or stoop. (AR 393.)

On that same date, Dr. Tetz again expressed his opinion in a letter that Plaintiff “has been disabled from work since June 12, 2006.” (AR 396.) Plaintiff “can only sit for 10 to 15 minutes without getting up for breaks and can only lift 10 to 20 pounds at maximum. . . . I do not feel that he would be able to sit a minimum of six hours per day per eight[-]hour work day and could not stand or walk a minimum of six hours per eight hour work day.” (AR 395-96.)

Between April 15 and 22, 2008, Plaintiff was hospitalized because of respiratory failure and delirium due to a drug overdose in an attempt to commit suicide. (AR 17, 458.) On discharge, Plaintiff expressed remorse for the suicide attempt and a willingness to follow up with counseling, and he had “no intention of harming himself.” (AR 462.)

B. Administrative Hearing

The Commissioner denied Plaintiff's application initially and again on reconsideration; consequently, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). (AR 91-95, 97-103.) On February 10, 2009, ALJ Robert S. Chester held a hearing in which Plaintiff, a vocational expert, and a medical expert testified. (AR 34-70.)

1. Plaintiff's Testimony

Plaintiff last worked as a grocery clerk from October 2008 to January 2009 before falling down a flight of stairs and injuring himself. (AR 46-48.) Plaintiff was hospitalized in April 2008 for nine days after attempting suicide. (AR 52-53.) Plaintiff had lost weight because of a loss of appetite due to his depression. (AR 53.) Plaintiff received mental health counseling from his pastor at church, which sometimes helped. (AR 58.) Plaintiff was able to take care of his personal hygiene but did not cook. (AR 60-61.)

Further, in a function report completed on December 18, 2006, as part of his application for DIB, Plaintiff reported that his daily activities in a typical day involved showering and occasionally performing light household chores and errands such as picking up prescriptions or his children from school. (AR 185.) Plaintiff did not have any problems with his personal care. (AR 186.) Plaintiff could dust, load the dishwasher, and vacuum for 30 minutes to an hour every week. (AR 187.) He

1 could not, however, push a lawnmower because of pain. (AR 188.) Plaintiff went outside four times
2 a week, could drive a car, and shopped for household items and groceries once a week for 45 to 90
3 minutes at a time. (AR 188.) Plaintiff's social activities included visiting a friend and attending
4 Bible study on a weekly basis, regularly attending church, and fishing. (AR 181, 189.) According
5 to Plaintiff, he could walk 20 to 30 feet before needing to rest for ten to 15 minutes, and he could
6 only pay attention for ten minutes at a time. (AR 190.) Plaintiff could follow written and spoken
7 instructions, and he got along with authority figures. (AR 190-91.) Plaintiff could also handle stress
8 and changes in routine. (AR 191.) Plaintiff claimed to be "irritable more often due to pain and
9 fatigue." (AR 191.)

10 **2. Medical Expert's Testimony**

11 A medical expert testified that Plaintiff could lift 20 pounds occasionally and ten pounds
12 frequently, stand and/or walk for two hours in an eight-hour day, and sit for six hours. (AR 16-17,
13 41-46.)

14 **3. Vocational Expert's Testimony**

15 A vocational expert testified that Plaintiff's past work as a truck driver as he performed it was
16 heavy and semi-skilled.³ (AR 62.) A hypothetical person of the same age, education, and work
17 experience as Plaintiff could not perform Plaintiff's past relevant work as a truck driver if such a
18 person could (1) only lift occasionally 20 pounds and frequently ten pounds, (2) stand or walk for
19 at least two hours in an eight-hour day, (3) sit for about six hours in an eight-hour day,
20 (4) occasionally balance, stoop, kneel, crouch, crawl, and climb stairs and ladders (but never ladders,
21 ropes, or scaffolds), (5) occasionally reach overhead, (6) frequently handle and occasionally finger
22 with his left, non-dominant hand, and (7) never be exposed to unprotected heights and moving
23 mechanical parts and machinery. (AR 63.) Such a person could, however, perform other jobs such
24 as a cashier, ticket seller, production inspector, and packaging and filling machine operator. (AR

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26 ³ "Heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects
27 weighing up to 50 pounds. If someone can do heavy work, [the Commissioner] determine[s] that he or she can also do
medium, light, and sedentary work." 20 C.F.R. § 404.1567(d).

1 64-65.) A hypothetical person with the limitations set forth in Dr. Moon's January 2007 functional
2 assessment could not perform full-time employment. (AR 65-66, 357.)

3 **C. ALJ's Decision**

4 On March 9, 2009, the ALJ issued a decision finding Plaintiff not disabled since June 13,
5 2006. (AR 10-27.) Specifically, the ALJ found that Plaintiff (1) had not engaged in substantial
6 gainful activity since the alleged onset date of June 13, 2006; (2) had an impairment or a
7 combination of impairments that is considered "severe" based on the requirements in the Code of
8 Federal Regulations; (3) did not have an impairment or combination of impairments that meets or
9 equals one of the impairments set forth in 20 C.F.R. Part 404, Subpart P, Appendix 1; (4) could not
10 perform his past relevant work as a truck driver; and (5) could perform other work in the national
11 economy. (AR 15-27.) The ALJ found that Plaintiff had the RFC to perform light work, except that
12 he could (1) stand or walk for at least two hours in an eight-hour day, (2) occasionally balance, stoop,
13 kneel, crouch, crawl, and climb stairs and ladders (but never ladders, ropes, or scaffolds),
14 (3) occasionally reach overhead, and (4) frequently handle and occasionally finger with his left, non-
15 dominant hand. (AR 20.) Plaintiff would also need to avoid all exposure to unprotected heights and
16 moving mechanical parts and machinery. (AR 20.)

17 The ALJ further found mild limitations in Plaintiff's activities of daily living, social
18 functioning, and concentration, persistence, or pace, and no episodes of decompensation. (AR 18.)
19 The ALJ, therefore, found that Plaintiff's "medically determinable mental impairments of depression
20 and anxiety[] do not cause more than minimal limitation in [Plaintiff's] ability to perform basic
21 mental work activities and are therefore nonsevere." (AR 18.)

22 The ALJ found that Plaintiff's "medically determinable impairments could reasonably be
23 expected to cause the alleged symptoms; however, [Plaintiff's] statements concerning the intensity,
24 persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent
25 with the [ALJ's RFC].” (AR 23; *see also* AR 20-24.) Specifically, the ALJ found that “[t]he

1 intensity, persistence and limiting effects of [Plaintiff's] pain complaints are inconsistent with his
2 activities of daily living," further finding the following:

3 [Plaintiff] reported performing all personal care activities such as dressing, bathing,
4 shaving, feeding, and toileting without difficulty and reported performing household
5 chores such as vacuuming, dusting, loading the dishwasher and shopping for up to
6 [] 90 minutes at a time. In addition, a typical day included performing showering/personal care, light
7 household chores, running errands, picking up the children from school, and attending appointments.
[Plaintiff] also stated he attended church, Bible study, visited with friends and was reported to go
fishing on occasion. [Plaintiff] has described, on several occasions, daily activities which are not
limited to the extent expected given [Plaintiff's] pain complaints and alleged inability to perform
work-like activities.

8 (AR 23-24.)

9 Plaintiff sought review of this decision before the Appeals Council. (AR 7-9.) On May 19,
10 2009, the Appeals Council denied review. (AR 1-4.) Therefore, the ALJ's decision became the final
11 decision of the Commissioner. 20 C.F.R. § 404.981.

12 **D. Plaintiff's Contentions on Appeal**

13 On July 17, 2009, Plaintiff filed a complaint before this Court seeking review of the ALJ's
14 decision. Plaintiff contends that the ALJ erred in (1) finding that Plaintiff's mental impairments
15 were not severe and in (2) discounting the opinions of Dr. Tetz, Plaintiff's treating physician, and
16 Dr. Moon, the consultative examining neurologist.

17 **SCOPE OF REVIEW**

18 The ALJ's decision denying benefits "will be disturbed only if that decision is not supported
19 by substantial evidence or it is based upon legal error." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
20 1999). In reviewing the Commissioner's decision, the Court may not substitute its judgment for that
21 of the Commissioner. *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996). Instead, the Court must
22 determine whether the Commissioner applied the proper legal standards and whether substantial
23 evidence exists in the record to support the Commissioner's findings. *See Lewis v. Astrue*,
24 498 F.3d 909, 911 (9th Cir. 2007).

25 "Substantial evidence is more than a mere scintilla but less than a preponderance." *Ryan v.*
26 *Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008). "Substantial evidence" means "such

1 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
2 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. of N.Y. v. NLRB*,
3 305 U.S. 197, 229 (1938)). The Court “must consider the entire record as a whole, weighing both
4 the evidence that supports and the evidence that detracts from the Commissioner’s conclusion, and
5 may not affirm simply by isolating a specific quantum of supporting evidence.” *Lingenfelter v.*
6 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citation and internal quotation marks omitted).

7 **APPLICABLE LAW**

8 An individual is considered disabled for purposes of disability benefits if he is unable to
9 engage in any substantial, gainful activity by reason of any medically determinable physical or
10 mental impairment that can be expected to result in death or that has lasted, or can be expected to
11 last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A),
12 1382c(a)(3)(A); *see also Barnhart v. Thomas*, 540 U.S. 20, 23 (2003). The impairment or
13 impairments must result from anatomical, physiological, or psychological abnormalities that are
14 demonstrable by medically accepted clinical and laboratory diagnostic techniques and must be of
15 such severity that the claimant is not only unable to do his previous work, but cannot, considering
16 his age, education, and work experience, engage in any other kind of substantial, gainful work that
17 exists in the national economy. 42 U.S.C. §§ 423(d)(2)-(3), 1382c(a)(3)(B), (D).

18 The regulations provide that the ALJ must undertake a specific five-step sequential analysis
19 in the process of evaluating a disability. In the First Step, the ALJ must determine whether the
20 claimant is currently engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).
21 If not, in the Second Step, the ALJ must determine whether the claimant has a severe impairment
22 or a combination of impairments significantly limiting him from performing basic work activities.
23 *Id.* §§ 404.1520(c), 416.920(c). If so, in the Third Step, the ALJ must determine whether the
24 claimant has a severe impairment or combination of impairments that meets or equals the
25 requirements of the Listing of Impairments (“Listing”), 20 C.F.R. 404, Subpart P, App. 1. *Id.*
26 §§ 404.1520(d), 416.920(d). If not, in the Fourth Step, the ALJ must determine whether the claimant

1 has sufficient RFC despite the impairment or various limitations to perform his past work.⁴ *Id.*
2 §§ 404.1520(f), 416.920(f). If not, in Step Five, the burden shifts to the Commissioner to show that
3 the claimant can perform other work that exists in significant numbers in the national economy. *Id.*
4 §§ 404.1520(g), 416.920(g). If a claimant is found to be disabled or not disabled at any step in the
5 sequence, there is no need to consider subsequent steps. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99
6 (9th Cir. 1999); 20 C.F.R. §§ 404.1520, 416.920.

7 **DISCUSSION**

8 **A. The ALJ's Evaluation of Plaintiff's Impairments**

9 The ALJ found that Plaintiff "has the following severe impairments: degenerative disc
10 disease of the cervical spine[;] status-post surgical fusions; degenerative disc disease of the lumbar
11 spine; meralgia paresthetica⁵ of the right lower extremity; amputated left (non-dominant) middle
12 finger; and obesity." (AR 15.) The ALJ found, however, that Plaintiff's "medically determinable
13 mental impairments of depression and anxiety[] do not cause more than minimal limitation in
14 [Plaintiff's] ability to perform basic mental work activities and are therefore nonsevere." (AR 18.)
15 Plaintiff maintains that the ALJ erred in finding that his mental impairments were not severe at the
16 Second Step of the sequential evaluation process.

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19 **1. Legal Standard**

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⁴ RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in
23 a work setting on a regular and continuing basis of 8 hours a day, for 5 days a week, or an equivalent work schedule.
24 Social Security Ruling 96-8p. The RFC assessment considers only functional limitations and restrictions that result from
25 an individual's medically determinable impairment or combination of impairments. *Id.* "In determining a claimant's
RFC, an ALJ must consider all relevant evidence in the record including, *inter alia*, medical records, lay evidence, and
'the effects of symptoms, including pain, that are reasonably attributed to a medically determinable impairment.'" *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

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27 ⁵ Meralgia paresthetica is pain in the thigh caused by entrapment of the lateral femoral cutaneous nerve at the
inguinal ligament, causing paresthesia (abnormal touch sensation), pain, and numbness in the outer surface of the thigh
in the region supplied by the nerve. *Dorland's Illustrated Medical Dictionary* 1153, 1404 (31st ed. 2007).

With regard to a determination at the Second Step, “[a]n impairment or combination of impairments may be found ‘not severe only if the evidence establishes a slight abnormality that has no more than a minimal effect on an individual’s ability to work.’” *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). Thus, “[i]f an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual’s ability to do basic work activities, the sequential evaluation should not end with the not severe evaluation step.” *Id.* at 687. “Step two . . . is ‘a de minimis screening device [used] to dispose of groundless claims,’ and an ALJ may find that a claimant lacks a medically severe impairment or combination of impairments only when his conclusion is ‘clearly established by medical evidence.’” *Id.* (citation omitted).

In determining whether a plaintiff's mental impairment is severe, ALJs are to determine the degree of limitation in the following four areas: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) episodes of decompensation. If the degree of limitation in these four areas is determined to be "mild," a claimant's mental impairment is generally not severe, unless there is evidence indicating a more than minimal limitation in his ability to perform basic work activities.⁶ See 20 C.F.R. § 404.1520a(c)-(d).

2. Analysis

As an initial matter, the ALJ discounted Plaintiff's credibility in this case, relying on Plaintiff's reported daily living activities and the objective medical evidence to find that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, [Plaintiff's] statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the [ALJ's RFC].” (AR 23; *see also* AR 20-24.) Plaintiff has not challenged the sufficiency of the evidence supporting the ALJ's adverse credibility finding in this case or the adequacy of the ALJ's reasons given to explain this finding. Therefore, the Court considers the ALJ's unchallenged credibility finding to be binding.

⁶ Basic work activities include: (1) understanding, carrying out, and remembering simple instructions; (2) responding appropriately to supervision, co-workers, and usual work situations; and (3) dealing with changes in a routine work setting. See 20 C.F.R. § 404.1521(b).

1 In this case, the ALJ found mild limitations in Plaintiff's activities of daily living, social
2 functioning, and concentration, persistence, or pace, and no episodes of decompensation. (AR 18.)
3 In considering Plaintiff's daily living activities, the ALJ found that Plaintiff "has described, on
4 several occasions, daily activities which are not limited to the extent expected given [Plaintiff's] pain
5 complaints and alleged inability to perform work-like activities." (AR 24.) The ALJ noted in
6 particular Plaintiff's reports of performing all personal care activities and household chores, in
7 addition to attending appointments. (AR 24.) Further, as for Plaintiff's social functioning, the ALJ
8 found that, according to Plaintiff, he attended church and Bible study, visited friends, and
9 occasionally went fishing. (AR 24.) As for Plaintiff's limitations in concentration, persistence, or
10 pace, the ALJ noted that Plaintiff related any limitations in concentration to "pain complaints
11 stemming from his physical impairments, not to mental impairments or depressive issues." (AR 18.)
12 Finally, as for the fourth functional area of episodes of decompensation, the ALJ's finding in this
13 regard was as follows:

14 [Plaintiff] has experienced no episodes of decompensation which have been of
15 extended duration. Although [Plaintiff] was hospitalized for nine days in April 2008
16 for an apparent suicide attempt, the length of time in the hospital was for recovery
17 of physical problems associated with the attempt, respiratory failure and delirium,
18 and not for a diagnosed acute or chronic mental impairment. Therefore, such is
19 found to not be an episode of decompensation of extended duration [as] defined in
20 the Social Security Act.

21 (AR 18.) Therefore, the ALJ concluded that Plaintiff did not have severe mental impairments. *See*
22 20 C.F.R. § 404.1520a(d)(1). Plaintiff alleges, however, that the ALJ erred at the Second Step in
23 concluding that his mental impairments of depression and anxiety were not severe.

24 Plaintiff's argument misapprehends the function of the Second Step as a gatekeeping
25 mechanism to dispose of groundless claims. Once a claimant prevails at the Second Step, by
26 achieving a finding of some severe impairment, regardless of which condition is found to be severe,
27 the Commissioner proceeds with the sequential evaluation, considering at each step all other alleged
28 impairments and symptoms that may impact the claimant's ability to work. *See* 42 U.S.C.
§ 423(d)(2)(B) ("In determining whether an individual's physical or mental impairment or

1 impairments are of a sufficient medical severity that such impairment or impairments could be the
2 basis of eligibility under this section, the Commissioner of Social Security shall consider the
3 combined effect of all of the individual's impairments without regard to whether any such
4 impairment, if considered separately, would be of such severity.”).

5 In this case, the ALJ resolved the Second Step in Plaintiff's favor, concluding that Plaintiff
6 had demonstrated several impairments (including meralgia paresthetica and degenerative disc disease
7 of the cervical and lumbar spine) necessary to satisfy the Second Step. (AR 15.) Thus, the question
8 becomes whether the ALJ properly considered the functional limitations of all medically
9 determinable impairments at the remaining steps. *See Smolen v. Chater*, 80 F.3d 1273, 1290 (9th
10 Cir. 1996) (recognizing that, if one severe impairment exists, all medically determinable impairments
11 must be considered in the remaining steps of the sequential analysis). The ALJ properly continued
12 the sequential decision-making process until reaching a determination at the Fifth Step.

13 In any event, even if the ALJ had erred in finding that Plaintiff's mental impairments were
14 not severe, any such error was harmless and did not prejudice Plaintiff at the Second Step, as this
15 step was resolved in Plaintiff's favor. *See Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (any
16 error in omitting obesity from list of severe impairments at step two was harmless because step two
17 was resolved in claimant's favor). Accordingly, the ALJ did not err in concluding that Plaintiff's
18 mental impairments were not severe.

19 Plaintiff also contends that the ALJ failed to develop the record by seeking additional
20 evidence regarding his mental impairments and that the Court should, therefore, remand this case
21 for a psychological evaluation and RFC assessment from a mental health professional. Before
22 ordering a consultative examination, however, the Commissioner will consider a number of factors,
23 including the existing medical evidence, interview forms, and claimant's allegations. 20 C.F.R.
24 § 404.1519a. The ALJ has broad latitude in ordering a consultative examination. *Reed v. Masanari*,
25 270 F.3d 838, 842 (9th Cir. 2001). Furthermore, the Commissioner need only seek additional
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1 evidence or clarification from a treating physician when a medical report contains a “conflict” or an
2 “ambiguity” that must be resolved. 20 C.F.R. § 404.1512(e)(1).

3 Here, there were no conflicts or ambiguity that had to be resolved, nor did the ALJ make such
4 a finding. Therefore, the ALJ’s duty to seek additional evidence in order to develop the record was
5 not triggered. *See Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (duty not triggered where
6 ALJ did not make finding that medical report was inadequate to make disability determination);
7 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (only ambiguous evidence, or the ALJ’s
8 own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the
9 ALJ’s duty to conduct an appropriate inquiry or gather additional information). Thus, the ALJ was
10 not required to obtain any additional information in order to fulfill his duty to fully and fairly develop
11 the record.

12 **B. The ALJ’s Evaluation of the Opinions of Drs. Tetz and Moon**

13 Relying in part on *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988), Plaintiff contends
14 that the ALJ erred in discounting the opinions of Dr. Tetz, Plaintiff’s treating physician, and Dr.
15 Moon, the consultative examining physician.

16 The medical opinions of three types of medical sources are recognized in Social Security
17 cases: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat
18 the claimant (examining physicians); and (3) those who neither examine nor treat the claimant
19 (nonexamining physicians).” *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995).

20 Generally, a treating physician’s opinion should be accorded more weight than opinions of
21 doctors who did not treat the claimant, and an examining physician’s opinion is entitled to greater
22 weight than a non-examining physician’s opinion. *Id.* Where a treating or examining physician’s
23 opinion is uncontradicted by another doctor, the Commissioner must provide “clear and convincing”
24 reasons for rejecting the treating physician’s ultimate conclusions. *Id.* If the treating or examining
25 doctor’s medical opinion is contradicted by another doctor, the Commissioner must provide “specific
26 and legitimate” reasons for rejecting that medical opinion, and those reasons must be supported by
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1 substantial evidence in the record. *Id.* at 830-31; *accord Valentine v. Comm'r Soc. Sec. Admin.*, 574
2 F.3d 685, 692 (9th Cir. 2009). The ALJ can meet this burden by setting forth a detailed and
3 thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof,
4 and making findings. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008).

5 Plaintiff's reliance on *Embrey* is misplaced. In *Embrey*, the court held that an ALJ's
6 determination that sufficient objective findings do not support a treating physician's opinion is not,
7 without more, a sufficiently specific reason to reject that opinion. 849 F.2d at 421-22. In this case,
8 the ALJ found that Dr. Tetz's opinion that Plaintiff was limited to a total of less than two hours
9 sitting, standing, and walking in an eight-hour day and to no use of the left arm was not supported
10 by the doctor's own clinical findings. (AR 24.) In addition, the ALJ found that Dr. Tetz's opinion
11 was not supported by Plaintiff's hearing testimony or reports of his activities of daily living. (AR
12 24.) The ALJ further found that Dr. Tetz's opinion in July 2007 that Plaintiff was "totally disabled"
13 was not entitled to controlling weight or special significance. (AR 25.) The ALJ, therefore,
14 provided specific, legitimate reasons for discounting Dr. Tetz's opinion in addition to the lack of
15 objective findings. *See Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004)
16 (ALJ may discredit treating physicians' opinions that are conclusory, brief, and unsupported by
17 record as a whole, or by objective medical findings); *Tonapetyan*, 242 F.3d at 1148 ("Although a
18 treating physician's opinion is generally afforded the greatest weight in disability cases, it is not
19 binding on an ALJ with respect to the existence of an impairment or the ultimate determination of
20 disability."); *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995) (claimant's testimony
21 inconsistent with examining psychologist's opinions was specific, legitimate reason to reject
22 opinions); *see also Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999)
23 (claimant's daily activities provide relevant basis for rejecting treating physician's testimony). In
24 sum, the ALJ gave specific and legitimate reasons, supported by the record, for discounting Dr.
25 Tetz's opinion.

1 Plaintiff further contends that the ALJ erred in discounting the opinion of Dr. Moon, the
2 examining neurologist. The ALJ afforded “some weight” to Dr. Moon’s medical conclusions, noting
3 that “the medical findings in [Dr. Moon’s] consultative examination for purposes of [Plaintiff’s]
4 Social Security claim are more limiting than the same findings in other physical examinations
5 leading to the possibility [Plaintiff] was either not exerting full effort or was attempting to
6 manipulate the findings to appear more limited than his actual capacities.” (AR 25.) The ALJ
7 pointed to Plaintiff’s straight leg raising test upon examination by Dr. Moon that was positive for
8 pain, despite Dr. Moon’s finding of a lack of muscle spasms, tenderness, crepitus, effusions,
9 deformities, or trigger points. (AR 25.) Plaintiff apparently maintains that the ALJ improperly
10 discounted Dr. Moon’s opinion because it was based on Plaintiff’s less than credible complaints of
11 pain on examination.

12 It is appropriate for an ALJ to consider the absence of supporting findings, and the
13 inconsistency of conclusions with the physician’s own findings, in rejecting a physician’s opinion.
14 *Johnson v. Shalala*, 60 F.3d 1428, 1432-33 (9th Cir. 1995); *Matney ex rel. Matney v. Sullivan*,
15 981 F.2d 1016, 1019 (9th Cir. 1992); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).
16 Moreover, “[a] physician’s opinion . . . premised to a large extent upon the claimant’s own accounts
17 of his symptoms and limitations may be disregarded where those complaints have been properly
18 discounted.” *Morgan*, 169 F.3d at 602 (internal quotation marks omitted). Because the ALJ
19 discounted Plaintiff’s credibility regarding his limitations, the ALJ properly rejected Dr. Moon’s
20 findings to the extent they were based on Plaintiff’s subjective complaints. *See Bray v. Comm’r of*
21 *Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (ALJ properly may discount physician’s
22 opinion that is based solely upon claimant’s self-reporting if ALJ concludes claimant’s self-reporting
23 is not credible); *Tonapetyan*, 242 F.3d at 1149 (medical opinion premised on subjective complaints
24 may be disregarded where record supports ALJ in discounting claimant’s credibility); *Sandgathe v.*
25 *Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (per curiam) (affirming ALJ’s rejection of treating
26 physician’s opinion based on claimant’s self-reports, which ALJ found were not credible); *Fair v.*
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1 *Bowen*, 885 F.2d 597, 605 (9th Cir.1989) (disregarding treating physician's opinion because it was
2 premised on plaintiff's subjective complaints, which the ALJ had already discounted). Plaintiff's
3 lack of credibility was a specific and legitimate reason, supported by the record, for the ALJ to
4 discount Dr. Moon's opinion to the extent that it was based on Plaintiff's subjective complaints.
5 Accordingly, the ALJ's findings are supported by substantial evidence and are legally correct.

6 **CONCLUSION**

7 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial
8 evidence in the record as a whole and is based on proper legal standards. Accordingly, the Court
9 DENIES Plaintiff's appeal from the administrative decision of the Commissioner of Social Security.
10 The Clerk of this Court is DIRECTED to enter judgment in favor of Defendant Michael J. Astrue,
11 Commissioner of Social Security, and against Plaintiff Daniel L. Miller.

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13 IT IS SO ORDERED.

14 Dated: November 29, 2010

15 /s/ Sheila K. Oberto
16 UNITED STATES MAGISTRATE JUDGE
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