UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DWAYNE COLLINS, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	1:10-cv-1301 LJO GSA **FINDINGS AND RECOMMENDATIONS REGARDING PLAINTIFF'S SOCIAL SECURITY COMPLAINT**

BACKGROUND

Plaintiff Dwayne Collins ("Plaintiff") seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner" or "Defendant") denying his application for disability insurance benefits pursuant to Title II of the Social Security Act. The matter is currently before the Court on the parties' briefs, which were submitted, without oral argument, to the Magistrate Judge Gary S. Austin for findings and recommendations to the District Court.[1]

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[1] Defendant consented to this Court's jurisdiction on July 28, 2010. (Doc. 14). However, on July 30, 2010, Plaintiff declined to consent. (Doc. 12). Accordingly, this case is submitted to the District Court Judge based on these Findings and Recommendations.

FACTS AND PRIOR PROCEEDINGS[2]

Plaintiff filed an application for Social Security Disability Insurance Benefits on February 26, 2007, alleging disability beginning May 13, 2006. AR12. Plaintiff's applications were denied initially and on reconsideration. AR 44, 55-58. Subsequently, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). AR 68. ALJ Stephen Webster held a hearing on April 28, 2009, and issued an order denying benefits on July 15, 2009. AR. 9-43. The Appeals Council issued a decision affirming the ALJ's order.[3] AR 1-3.

Hearing Testimony

ALJ held a hearing in Fresno, California, on April 28, 2009. Plaintiff personally appeared and was assisted by attorney Jeffrey Milam. AR 21-43. Vocational Expert ("VE") Shapiro also testified.[4]

Plaintiff was forty seven years old at the time of the hearing. AR 21. He has three adult daughters.[5] AR 23, He is married and lives with his wife, step-father, and older brother. AR 23. Plaintiff completed the ninth grade but does not have a GED. AR 25. He does not know how to read or write. AR 30. Plaintiff has a driver's license, but his wife does most of the driving because it hurts his knee and back to do so. AR 23.

Plaintiff has been in jail in the past. The longest sentence he served was for thirteen months. AR 25. The last time he was in jail was approximately five years ago for driving while intoxicated. AR 25. Plaintiff still consumes alcohol but only drinks about one twelve pack of beer a week. AR 30. Plaintiff receives no other form of public assistance. AR 26**.**

In the past, Plaintiff worked as a janitor in a nursing home performing basic janitorial duties. AR 28. On occasion, he would change light bulbs but he can no longer do that because

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[2] References to the Administrative Record will be designated as "AR," followed by the appropriate page number.

[3] The date the order was issued is not clear from the record.

[4] Mr. Shapiro's first name is not listed in the transcript.

[5] Plaintiff has one daughter and two step-daughters.

he is unable to climb a ladder. AR 28. Plaintiff also did cement work and was employed as a carpenter as well as a hospital cleaner. AR 34-35.

Plaintiff stopped working because he suffers from back pain and pain in both of his knees. AR 26. In addition to the pain, his knees swell especially after walking or standing for long periods. AR 31-32. He sees his primary care physician who prescribes pain medication every three months which helps to relieve his symptoms. AR 26. The doctors have told him that a knee replacement may be an option in the future, however, he is too young for one right now. AR 32. Plaintiff uses a heating pad on his knee and back to relieve the pain. AR 33. However, he does not wear a brace or cane. AR 32-33. He has not tried epidural treatments and he does not do exercises. AR 32-33.

As a result of these symptoms, Plaintiff is able to stand for approximately forty-five minutes and he is only able to sit for about an hour or two. AR 27. He can lift ten to fifteen pounds. AR 27. He does not use any assistive devices. AR 27. However, he elevates his legs for two to three hours a day. AR 31.

Despite these limitations, Plaintiff is able to take a shower, shave, cook, do lawn work, and helps clean the house. AR 24. In his spare time, Plaintiff watches television for six or seven hours a day and goes to church. AR 25. He does not spend much time with friends or family. AR 24-25. However, he goes grocery shopping with his wife but goes to the car after about a half hour to rest. AR 27.

VE Shapiro testified at the hearing. The VE was asked to consider a hypothetical in which an individual could lift twenty pounds on occasion and ten pounds frequently, who could sit, stand and walk for six out of eight hours, who could occasionally climb, balance, stoop, kneel, crouch or crawl, and who could occasionally use foot pedals. AR 36. The VE indicated this person would be unable to perform Plaintiff's past work. AR 36. However, VE Shapiro indicated that this person would be able to perform other light work such as a cafeteria attendant, a can filling and closing machine tender, and a housekeeping cleaner of which there are 138,000, 24,900, and 244,000 jobs available nationally. AR 36-37.

The VE was asked to consider a second hypothetical in which the factors were the same as the first hypothetical but that this person would also be required to sit and stand at will. The VE indicated that this person would still be unable to perform Plaintiff's past work. However, there would be other jobs such as a ticket seller and a parking lot attendant of which there are 45,300 and 35,300 jobs available nationally. AR 37-38.

When asked to consider a third hypothetical in which the person would be required to elevate his leg every three to four hours for a couple of hours, the VE testified that there would be no jobs available. AR 39-40.

Medical Record

The entire medical record was reviewed by the Court (AR 145-191), however, only those medical records relevant to the issues on appeal will be addressed below as needed in this opinion.

Dr. Holm, M.D.

Plaintiff saw Dr. Holm for the first time on May 12, 2006 for high blood pressure, chronic knee pain, and "disability." AR 146. He told Dr. Holm that he had been on Tiazac for his high blood pressure for at least two years but often forgets to take his medications. AR 146. He also reported he had an arthroscopic procedure performed by his orthopedist, however Plaintiff was told that he was too young for a knee replacement. AR 146. Dr. Holm indicated he would get the MRI report, refill Plaintiff's pain medication (Norco), and that he planned on extending Plaintiff's disability for six months. AR 147. It was noted that Plaintiff did not have insurance and that he smoked one pack of cigarettes a day. AR 151.

Plaintiff returned to Dr. Holm on October 25, 2006 complaining of increased pain and swelling in his lower extremities. AR 149. Dr. Holm completed a disability form for Plaintiff extending Plaintiff's disability for six months again noting that Plaintiff did not have health insurance. AR 150.

Plaintiff saw Dr. Holm again on March 15, 2007, and reported swelling and pain in his legs. He also reported that he was unable to walk to the mailbox. AR 149. Plaintiff was prescribed Norco for pain with five refills. AR 149.

Dr. Holm examined Plaintiff again on August 13, 2007. Plaintiff had difficulty standing and was stiff. Dr. Holm noted that Plaintiff's disability application had been denied. AR 177. Plaintiff also reported running out of his medication early in June and July. Dr. Holm increased Plaintiff's Norco to five tablets per day and gave him a refill for three months. AR 177. Plaintiff was advised that he needed to stay within the limits of his prescription and the doctor would not be refilling his prescription early. AR 177.

Plaintiff returned to Dr. Holm on December 13, 2007, and reported numbness in his feet and hands. On examination, Plaintiff's "air was full of tobacco." AR 176. Plaintiff requested x-rays of his knee and back. AR 176. Dr. Holm noted that Plaintiff had been seeing a disability doctor who was taking care of the disability issues, however, Plaintiff advised him that the lawyer asked Plaintiff to get an x-ray of his knee and back. AR 176. Plaintiff reported taking some of his wife's Xanax which helped to relieve his anxiety. AR 176. Plaintiff was prescribed thirty pills of Xanax to take as needed. AR 176.

Plaintiff saw Dr. Holm again on January 26, 2008, after he fell down a flight of stairs and injured his ribs. AR 175. Dr. Holm indicated that Plaintiff smelled like smoke. AR 175. Dr. Holm noted that Plaintiff was taking eight Vicodin a day and advised him that was the maximum dosage per day that he should be taking. AR 175. Dr. Holm prescribed another 240 Vicodin pills which the doctor indicated was another one month supply. AR 175.

On March 26, 2008, Dr. Holm examined Plaintiff after he complained of chest pain. Dr. Holm diagnosed Plaintiff with chronic back pain due to osteoarthritis, chronic right knee pain, and neuropathy. AR 174. Dr. Holm prescribed three months of Norco and noted that Plaintiff requested additional Xanax. AR 174. Records also reflect that Plaintiff called Dr. Holm in July and September 2008, requesting additional Norco refills which were presecribed. AR 174.

On September 25, 2008, Dr. Holm noted that Plaintiff was waiting for a court date regarding his disability application. AR 173. Dr. Holm also opined and that Plaintiff probably needed a knee replacement given the MRI but that he would wait on referring him to an orthopedist because Plaintiff had no insurance. AR 173. Dr. Holm noted that Plaintiff had fluid

on his right knee, effusion, and both lateral and medial tenderness. AR 173. The doctor prescribed Xanax and Norco with three refills. AR 173.

On December 12, 2008, Plaintiff presented to Dr. Holm with problems with his ears as well as knee pain. The doctor suggested that Plaintiff stop smoking and that he did not feel any pulse in his feet which is also evidence of peripheral artery disease. AR 172. Dr. Holm recommended an ultrasound of the arterial system in both legs and a work up for neuropathy. AR 171. Dr. Holm prescribed Norco with five refills and Xanax with three refills. AR 172.

On April 17, 2009, Dr. Holm completed a questionnaire in which he opined that Plaintiff could only sit and stand for one hour, that he could not bend, stoop or kneel. Dr. Holm indicated that he based the findings on x-rays taken on December 13, 2007, and on Plaintiff' claims of pain when walking. AR 187-188.

Dr. Fariba Vesali, M.D.

On June 7, 2007, Plaintiff was evaluated by Fariba Vesali, M.D. a state agency consultative physician who is board eligible in Physical Medicine and Rehabilitation. AR 152-155. Plaintiff complained of low back pain and right knee pain. Plaintiff presented with a limp and the doctor noted Plaintiff smelled of alcohol when he entered the examination room. AR 153.

Dr. Vesali examined Plaintiff and found that he had normal muscle tone in his upper and lower extremities. AR 154. The doctor noted that there was no obvious inflamation over Plaintiff's right knee and anterior and "posterior drawer signs were symmetrical and negative in bilateral knees." AR 154. It was noted that there was "decreased light touch to pinprick sensation over bilateral feet." AR 154. Plaintiff was advised to stop drinking and smoking because it causes decreased sensation in the distal lower extremities and the neuropathy may be related to smoking and drinking alcohol for a long period of time. AR 155.

Dr. Vesali opined that Plaintiff could walk and sit for six hours out of an eight hour day with normal breaks. The doctor further opined that Plaintiff could carry fifty pounds occasionally and twenty five pounds frequently but imposed no other limitations. AR 155.

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Dr. Khong, M.D.

Dr. A.M. Khong, M.D. a state agency physician reviewed Plaintiff's medical records on June 26, 2007. AR 158- Dr. Khong opined that Plaintiff could occasionally lift fifty pounds and frequently lift twenty five pounds; he could stand and walk for up to six hours in an eight hour day; he could use right leg controls occasionally; and perform postural activities occasionally. AR 159-162.

Dr. Fonte, M.D.

On October 25, 2007, Dr. Fonte, a non-examining state physician reviewed the medical evidence and agreed with Dr. Khong's earlier opinion. AR 166-167.

Additional Testing and Documents

X-Rays

Plaintiff had x-rays of his back and right knee taken on June 7, 2007 the day of Dr. Vesali's examination. X-rays of his lower back revealed degenerative disc changes at L4 and L5 including sclerotic changes involving the superior end plate of L4. AR 156. Marginal osteophytes and narrowing of the L4-5 and L5-S1 spaces were noted. AR 156. Dorsal alignment was maintained and mild degenerative changes were noted at L2 and L3. AR 156. Sacroiliac joints appeared intact. AR 156. An MRI for further evaluation was recommended. AR 156. X-rays of his right knee showed no acute fracture or dislocation and some mild degenerative changes. AR 157. An MRI of his knee was also recommended. AR 157.

Additional x-rays were ordered by Dr. Holm on December 13, 2007. An x-ray of Plaintiff's lumbar spine revealed some narrowing at the posterior disc spaces at L4-5; marked narrowing of the disc at L5-S1; and a bulky bridging-type osteophyte formation of the lower lumbar spine and lumbosacral junction. These osteophytes were greatest at L4-L5. The posterior elements were intact. The impression was hypertonic spondylosis, especially of L4 and L5 with multilevel degenerative disc disease primarily L3 thorugh S1. AR 168.

An x-ray of Plaintiff's thoracic spine taken on December 13, 2007, revealed mild spondylosis greatest in the lower thoracic. Some spurring of the endplates especially at the T11-T-12 was also noted. AR 169. An x-ray of Plaintiff's right knee revealed the medial

compartment of joint space was quite narrowed and moderate marginal spurring on the medial plateau, medial condyle, and the patella were noted. Marginal spurs were also present on the lateral condyle with mild soft tissue fullness of the suprapatellar bursa. Mild subchondral sclerotic change was present in the medial compartment. As a result, moderate osteoarthritis was most severe in the medial compartment. AR 170.

Records from Mercy Medical Center

A report from Mercy Medical Center in Merced, California was submitted to the Appeals Council after the hearing before the ALJ. The records reveal that Plaintiff was admitted to the hospital from October 23 through October 26, 2009, for the purpose of resolving an infection after the amputation of his second and third toe on his left foot. AR 188-190. Plaintiff was treated with antibiotics and was advised that he should refrain from excessive amounts of alcohol consumption or tobacco use. Plaintiff refused. AR 190. Plaintiff's condition including his blood pressure was stable upon release from the hospital.

ALJ Decision

Using the Social Security Administration's five-step sequential evaluation process, the ALJ determined that Plaintiff did not meet the disability standard. AR 18. More particularly, the ALJ found that Plaintiff had not engaged in substantial gainful activity from his alleged disability onset date of May 13, 2006, through the date of insured of December 31, 2009. AR 14. Further, the ALJ identified degenerative disc disease of the lumbar spine and degenerative joint disease of the right knee as severe impairments.[6] AR 14. Nonetheless, the ALJ determined the severity of Plaintiff's impairments did not meet or exceed any of the listed impairments. AR 15.

Based on his review of the entire record, the ALJ determined that Plaintiff has the residual functional capacity ("RFC") to perform light work except that he is limited to occasional climbing, balancing, stopping, kneeling, crouching or crawling, with occasional use of foot controls. AR 15. Next, the ALJ determined that Plaintiff could not perform his past work. AR 17. However, using the Medical-Vocational Rules, 20 CFR Part 404 Subpart P, Appendix 2

[6] The AL determined that Plaintiff's hypertension and neuropathy were not severe impairments. AR 14.

("the grids"), the ALJ determined Plaintiff was not disabled as defined by the Social Security Act. AR 21. Moreover, the ALJ determined that there are other jobs that exist in the national economy that Plaintiff could perform. AR 17.

SCOPE OF REVIEW

Congress has provided a limited scope of judicial review of the Commissioner's decision to deny benefits under the Act. In reviewing findings of fact with respect to such determinations, this Court must determine whether the decision of the Commissioner is supported by substantial evidence. 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla," *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The record as a whole must be considered, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion. *Jones v. Heckler,* 760 F.2d 993, 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must apply the proper legal standards. *E.g.*, *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the Commissioner's determination that the claimant is not disabled if the Secretary applied the proper legal standards, and if the Commissioner's findings are supported by substantial evidence. *See Sanchez v. Sec'y of Health and Human Serv.*, 812 F.2d 509, 510 (9th Cir. 1987).

REVIEW

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

The burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir. 1990).

In an effort to achieve uniformity of decisions, the Commissioner has promulgated regulations which contain, inter alia, a five-step sequential disability evaluation process. 20 C.F.R. §§ 404.1520 (a)-(f), 416.920 (a)-(f). Here, Plaintiff argues that when applying this process the ALJ : 1) improperly rejected Plaintiff's treating physician opinion, 2) incorrectly made an adverse credibility determination, 3) improperly rejected lay opinion testimony, and 4) failed to meet his burden at step five. In opposition, Defendant argues that the ALJ: 1) properly evaluated the physicians' opinions and the medical record, 2) correctly rejected Plaintiff's testimony, 3) properly considered the lay opinion testimony, and 3) met his burden at step five.

DISCUSSION

A. Physician Opinion Evidence

Plaintiff argues that the ALJ improperly rejected Plaintiff's treating physician opinion and instead erroneously relied upon the opinion the state agency medical consultants. Defendant contends that the ALJ's consideration of the medical opinion evidence was proper.

Cases in this circuit distinguish among the opinions of three types of physicians: (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining physicians). As a general rule, more weight should be given to the opinion of a treating source than to the opinion of doctors who do not treat the claimant. *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987). At least where the treating doctor's opinion is not contradicted by another doctor, it may be rejected only for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). Even if the treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject this opinion without providing "specific and legitimate reasons" supported by substantial evidence in the record for so doing. *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, stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.1989). The ALJ must do more than

offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors', are correct. *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.1988). Therefore, a treating physician's opinion must be given controlling weight if it is well-supported and not inconsistent with the other substantial evidence in the record. *Lingenfelter v. Astrue*, 504 F.3d 1028 (9th Cir. 2007).

In *Orn v. Astrue,* 495 F.3d 625 (9th Cir. 2007), the Ninth Circuit reiterated and expounded upon its position regarding the ALJ's acceptance of the opinion an examining physician over that of a treating physician. "When an examining physician relies on the same clinical findings as a treating physician, but differs only in his or her conclusions, the conclusions of the examining physician are not '"substantial evidence."' *Orn,* 495 F.3d at 632; *Murray*, 722 F.2d at 501-502. "By contrast, when an examining physician provides 'independent clinical findings that differ from the findings of the treating physician' such findings are 'substantial evidence.'" *Orn*, 496 F.3d at 632; *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir.1985). Independent clinical findings can be either (1) diagnoses that differ from those offered by another physician and that are supported by substantial evidence, *see Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir.1985), or (2) findings based on objective medical tests that the treating physician has not herself considered, *see Andrews*, 53 F.3d at 1041.

Here, the ALJ had four medical opinions to consider: (1) Dr. Holm, Plaintiff's treating physician, 2) Dr. Vesali, a state consultative examining physician, and 3) Drs. Khong and Fonte, two state agency non-examining physicians. Therefore, the ALJ must provide specific and legitimate reasons for rejecting Plaintiff's treating physician's opinion.

With regard to the physician evidence the ALJ stated as follows :

> In arriving at the exertional component of the above residual capacity, I credit the July and October 2007 opinions of the Disability Determination Services (DDS) medical advisor to the extent that he indicated the capacity to perform a range of work at the medium exertional level with postural limitations consistent with the above residual functional capacity ...
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> I give little weight to Dr. Holm's April 2009 assessment form indicating that claimant cannot even perform a limited range of work at the sedentary exertional level. First, I note that Dr. Holm is claimant's family practitioner and not an orthopedic specialist. Consistent with this, much of Dr. Holm's information regarding claimant's orthopedic impairments, including his allegedly being too

> young for surgery, has been received second-hand from claimant. I also note that Dr. Holm has only treated claimant symptomatically and principally with large amounts of narcotic pain medication. Finally, I note Dr. Helm's ongoing concerns with compliant with medications, as well as repeatedly urging him to stop smoking. In sum, to the extent that this opinion is inconsistent with the above residual capacity, I find Dr. Holm's opinion to be inordinately based on claimant's subjective complaints that I find not fully credible. Further, to the extent that the medical records do not support this opinion, I find that Dr. Holm is acting more as an advocate for claimant's benefits rather than as objective practitioner. (Citiations omitted). AR 16.

Thus, the ALJ gave more weight to the state agency physicians' reports and rejected Dr. Holm's opinion. These reasons are supported by the record.

First, because Dr. Vesali is board eligible in physical medicine and rehabilitation, his opinion is entitled to deference. *See*, 20 C.F.R. § 404.1527(d)(5) ("generally more weight is given to a specialist about medical issues related to his or her area of specialty that to the opinion of a source who is not a specialist). Dr. Vesali examined Plaintiff and found that there was no inflammation over the right knee and other aspects of the examination were unremarkable. AR 154. Therefore, Dr. Vesali formulated independent clinical findings that were based on his objective examination which constitutes substantial evidence.

Furthermore, Plaintiff argues that the ALJ's rejection of Dr. Holm's report was improper because Dr. Holm relied on objective tests including x-rays taken in 2008 that none of the other doctors had an opportunity to examine when they rendered their opinion. (Doc. 22 at pg. 3). Counsel implies that the other doctors had no access to x-rays when formulating their opinions. However, this is not the case. Plaintiff had two sets of x-rays taken : 1) one set was taken on June 7, 2007, the date of Dr. Vesali examination (AR 156-157), and 2) another set taken on December 13, 2007, which were ordered by Dr. Holm (AR 168-169). Dr. Vesali examined Plaintiff on the date the x-rays were taken, and Dr. Khong's review occurred on June 26, 2007, followed by Dr. Fonte's review which occurred on October 25, 2008. AR 159-162; 166, 167. Therefore, all three state agency doctors had x-rays to review at the time their opinions were rendered.

Second, the ALJ noted that much of Dr. Holm's opinion relied on Plaintiff's subjective reports of pain which the ALJ did not find credible. This is a valid reason to reject Dr. Holm's

opinion. *See, Morgan v. Commissioner of Social Security*, 169 F. 3d 595, 602 (9th Cir. 1999) (rejecting treating source opinions that 'were premised on claimant's subjective complaints'). For example, during Plaintiff's first visit to Dr. Holm, Plaintiff told Dr. Holm that he saw a doctor in Merced who told him he needed a knee replacement but was too young. AR 146. Dr. Holm indicated that he would order the MRI of Plaintiff's knee. AR 147. However, the record does not show that the MRI's or medical records from the other doctor were ever obtained. Moreover, although Dr. Holm's 2009 opinion indicates that he was basing the opinion in part on Plaintiff's x-rays, it also clearly indicates that he was basing his opinion on the Plaintiff's complaints that it hurts to walk and to get up. AR 186. These subjective complaints were not found to be credible by the ALJ as discussed in more detail below. Because the ALJ determined that Plaintiff's description of his limitation were not entirely credible, it is reasonable to discount Dr. Holm's limitations. *Bray v. Commissioner of Social Security*, 554 F. 3d 1219, 1228 (9th Cir. 2009); *See also*, *Tommasetti v. Astrue*, 533 F. 3d 1035, 1041 (9th Cir. 2008) (An ALJ may reject the treating physician's testimony if it is based largely on the subjective complaints of a non-credible claimant).

The ALJ also had some concerns that Dr. Holm was acting as Plaintiff's disability advocate which may have influenced the doctor's opinions. This finding is also supported by the record. For example, Dr. Holm extended Plaintiff's disability for six months after examining him only one time. AR 147. Dr. Holm also extended Plaintiff's disability for another six months during Plaintiff's second visit without performing any objective tests. AR 150. The fourth time Dr. Holm saw Plaintiff he commented that his disability application was denied. AR 177. Dr. Holm also only ordered x-rays on Plaintiff's behalf after Plaintiff had advised him that his lawyer needed it for his disability application. AR 176. Thus, there is support for the ALJ's conclusion that Dr. Holm's findings may be biased.

As an aside, the Court notes that the ALJ also relies on the fact that Dr. Holm only treated Plaintiff symptoms with large amounts of pain medication. As Plaintiff notes, there is evidence in the record that Plaintiff did not have health insurance which may have impacted Dr. Holm's treatment strategies. Plaintiff correctly argues that disability benefits may not be denied to a

disabled applicant because of a failure to obtain treatment that the claimant cannot afford. *Orn v. Astrue*, 459 F.3d 625, 638 (9th Cir. 2007); *Gamble v. Chater*, 68 F. 3d 319, 321 (9th Cir. 1995). However, it appears that the ALJ is not penalizing Plaintiff for not getting treatment, but instead has concerns about Dr. Holm's treatment strategies which primarily consisted of prescribing large amounts of Norco, Vicadin, and Xanax. These findings are supported by the record and are discussed in more detail below.

Finally, Plaintiff argues that the ALJ erred in failing to find that Plaintiff's peripheral neuropathy was not a severe impairment at step two. He argues that the ALJ had an obligation to develop the record regarding this condition because Plaintiff could not afford additional testing to substantiate the diagnosis. However, as noted by Defendant, the step two inquiry is a *de minimis* screening device to dispose of groundless or frivolous claims. *Bowen v. Yuckert,* 482 U.S. 137, 153-154 (1987). At step two of the sequential evaluation process, the ALJ must conclude whether Plaintiff suffers from a "severe" impairment. The regulations define a non-severe impairment as one that does not significantly limit [the claimant's] physical and mental ability to do basic work activities. An impairment is not severe "if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'" *Smolen v. Chater*, 80 F. 3d 1273, 1290 (9th Cir. 1996).

To satisfy step two's requirement of a severe impairment, the claimant must prove the existence of a physical or mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone will not suffice. 20 C.F.R. §§ 404.1508; 416.908. The effects of all symptoms must be evaluated on the basis of a medically determinable impairment which can be shown to be the cause of the symptoms. 20 C.F.R. §§ 404.1529, 416.929.

The adjudicator's role at step two is further explained by SSR 85-28:

> A determination that an impairment(s) is not severe requires a careful evaluation of the medical findings which describe the impairment(s) and an informed judgment about its (their) limiting effects on the individual's physical and mental ability(ies) to perform basic work activities; thus, an assessment of function is inherent in the medical evaluation process itself. At the second step of sequential evaluation, then, medical evidence alone is evaluated in order to assess the effects of the impairment(s) on ability to do basic work activities.

SSR 85-28.

In this case, the ALJ noted that Dr. Holm only recently diagnosed neuropathy. AR 171, 174. Moreover, nowhere in the record does Dr. Holm opine that this condition in particular prevented Plaintiff from working. In general, it is the duty of the claimant to prove to the ALJ that he is disabled. 20 C.F.R. § 404.1512(a). To this end, he must bring everything that supports a disability determination to the ALJ's attention, including medical or other evidence relating to the alleged impairment and its effect on her ability to work. *Id.* For his part the ALJ has the responsibility to develop "a complete medical history" and to "make every reasonable effort to help [the plaintiff] get medical reports." 20 C.F.R. § 404.1512(d). If this information fails to provide a sufficient basis for making a disability determination, or the evidence conflicts to the extent that the ALJ cannot reach a conclusion, he may seek additional evidence from other sources. 20 C.F.R. §§ 404.1512(e); 404.1527(c)(3), see also *Mayes v. Massanari*, 262 F.3d 963, 968 (9th Cir.2001).

Here, the ALJ conducted a thorough review of the entire record and noted there was not sufficient evidence that Plaintiff's neuropathy was limiting his ability to work. Plaintiff argues that his recent hospitalization at Mercy Medical Center substantiates a finding that this condition is severe. The Court has considered these documents and finds that the evidence is not material because the documents only reflect that Plaintiff was treated for an infection secondary to an amputation. AR 188-190. [7] There is no reference that the infection was caused by neuropathy, nor is there any indication that this condition affects his ability to work. Here, the Appeals Council considered the additional evidence submitted by Plaintiff and found no reason to alter the ALJ's decision. AR 1-3. If Plaintiff believes that his ability to work has been restricted based on the amputation of his toes, the appropriate remedy is to file a new disability application.

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[7] The Court must consider evidence added to the record by the Appeals Council even where that evidence was not before the ALJ. *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir. 1993). Pursuant to the provisions of 42 U.S.C. § 405 (g), as amended in 1980, a case may be remanded to the Secretary if the new evidence submitted is material, and there is good cause for the failure to incorporate it into the record. In order to be "material," the new evidence must be probative of the claimant's condition as it existed during the relevant time period -- on or before the administrative hearing. *Sanchez v. Secretary of Health and Human Services*, 812 F.2d 509, 511 (9th Cir. 1987).

It would be improper for this Court to make new findings based on injuries occurring after the ALJ's decision.

B. Credibility

Plaintiff argues that the ALJ failed to provide clear and convincing reasons for rejecting his testimony. Defendant argues that the ALJ's credibility finding is supported by substantial evidence.

A two step analysis applies at the administrative level when considering a claimant's subjective symptom testimony. *Smolen v. Chater*, 80 F.3d at 1281. First, the claimant must produce objective medical evidence of an impairment that could reasonably be expected to produce some degree of the symptom or pain alleged. *Id*. at 1281-1282. If the claimant satisfies the first step and there is no evidence of malingering, the ALJ may reject the claimant's testimony regarding the severity of his symptoms only if he makes specific findings that include clear and convincing reasons for doing so. *Id*. at 1281. The ALJ must "state which testimony is not credible and what evidence suggests the complaints are not credible." *Mersman v. Halter*, 161 F.Supp.2d 1078, 1086 (N.D. Cal. 2001), quotations & citations omitted ("The lack of specific, clear, and convincing reasons why Plaintiff's testimony is not credible renders it impossible for [the] Court to determine whether the ALJ's conclusion is supported by substantial evidence"); Social Security Ruling ("SSR") 96-7p (ALJ's decision "must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and reasons for that weight").

An ALJ can consider many factors when assessing the claimant's credibility. *See Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). The ALJ can consider the claimant's reputation for truthfulness, prior inconsistent statements concerning his symptoms, other testimony by the claimant that appears less than candid, unexplained or inadequately explained failure to seek treatment, failure to follow a prescribed course of treatment, claimant's daily activities, claimant's work record, or the observations of treating and examining physicians. *Smolen v. Chater*, 80 F.3d at 1284; *Orn v. Astrue*, 495 F.3d 625, 638 (2007).

The first step in assessing Plaintiff's subjective complaints is to determine whether Plaintiff's condition could reasonably be expected to produce the pain or other symptoms alleged. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). Here, the ALJ identified degenerative disc disease and degenerative joint disease of the right knee as severe impairments. AR 14. He further found that:

> After considering the evidence of record, the undersigned finds that the claimaint's medically-determinable impairments can reasonably be expected to produce the alleged symptoms, but the claimant's statements about the intensity, persistence, and limiting effects of those symptoms are not credible to the extent they are inconsistent with my assessment of his residual functional capacity assessment.

AR 16. This finding satisfied step one of the credibility analysis. *Smolen v. Chater*, 80 F.3d at 1281-1282.

Because the ALJ did not find that Plaintiff was malingering, he was required to provide clear and convincing reasons for rejecting Plaintiff's testimony. *Smolen v. Chater*, 80 F.3d at 1283-1284; *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (as amended). When there is evidence of an underlying medical impairment, the ALJ may not discredit the claimant's testimony regarding the severity of his symptoms solely because it is unsupported by medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991); SSR 96-7. Moreover, it is not sufficient for the ALJ to make general findings; he must state which testimony is not credible and what evidence in the record leads to that conclusion. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *Bunnell*, 947 F.2d at 345-346.

Here, the ALJ made several specific credibility findings:

> Claimant's statements regarding being too young for surgery appear inconsistent with the medical records of treating physician Edward Holm, M.D. Dr. Holm has treated claimant principally with pain medications and has expressed concerns about compliance on several occasions as well as repeatedly urging him to stop smoking, most recently in December 2008. Curiously, in December 2007, Dr. Holms also noted that claimant "hates medicines and pills." Despite the apparent hatred of pills, claimant is noted to be taking an extremely high volume of pain medications, specifically 240 Norco with five refills as necessary as recently as December 2008. In addition, in December 2007, claimant self-prescribed some of his wife's Xanax for himself and subsequently requested and received his own prescription of Xanax. Finally, I give little weight to the November and December 2007 third-party statements of Kandi Dunham, Darla Parmley and Pamela Collins, all of which attest to claimaint's ability to read and write, [sic] claimant has been able to successfully perform a wide variety of unskilled, semiskilled and unskilled jobs in the past.

AR 16. (Citations omitted).

In short, the ALJ provided a number of clear and convincing reasons that are supported by the record when concluding Plaintiff's subjective symptom testimony was less than credible. These reasons include: (1) the medical evidence did not support Plaintiff's alleged symptoms, (2) Plaintiff's explanation that he was too young for knee surgery was not consistent with Dr. Holm's assessment, (3) Plaintiff is taking large amounts of prescription medication and obtained Xanax from his wife and doctor, and 4) Plaintiff has been non-compliant with treatment.

Here, ALJ Webster clearly identified what testimony he found not credible and what evidence undermined Plaintiff's complaints. *Lester v. Chater,* 81 F.3d at 834. Furthermore, the reasons provided are acceptable. *See, e.g., Morgan v. Commissioner v. Social Security Adminstration,* 169 F. 3d 595, 600 (9th Cir. 1999) (conflict between claimant's subjective complaints and the objective medical evidence in the record is a specific and substantial reason that undermines a claimant's credibility); *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (inconsistencies between the record and medical evidence supports a rejection of a claimant's credibility).[8]

Second, the record establishes that Plaintiff was consuming large quantities of narcotic drugs including Norco, Xanax, and Vicodin. AR 146, 149, 172-174, 176, 177, Dr. Holm continually increased Plaintiff's dosage often refilling medications for several months at time. *Id*. The ALJ also expressed concerns that Plaintiff was not compliant with this treatment which is supported by the record. For example, Plaintiff's doctor needed to advise him that he should not be taking more than eight Vicodin pills in one day. AR 175. Moreover, Plaintiff called the doctor's office on several occasions requesting additional medication because he had prematurely used all of the drugs. AR 174, 177. In fact, Dr. Holm advised Plaintiff that additional prescriptions would not be given if he continued to request additional medications prior to the time that his prescription was scheduled to run out. AR 175. Accordingly, there is support for

[8] *See also* 20 C.F.R. § 416.929 (objective medical evidence can be used in determining credibility; SSR 96-7p (objective medical evidence is a useful indicator to assist in making a reasonable conclusion about credibility and the ability to function).

the ALJ's conclusion that Plaintiff was not following the doctor's treatment plan with undermines his credibiltiy. *Fair v. Bowen*, 885 F.2d 597, 603-04 (9th Cir. 1989) (failure to follow prescribed treatment can be considered in determining credibility). This Court will not disturb the ALJ' interpretation of the evidence on this issue. Although evidence supporting an ALJ's conclusions might also permit an interpretation more favorable to the claimant, if the ALJ's interpretation of evidence was rational, as here, the Court must uphold the ALJ's decision.. *Burch v. Barnhart*, 400 F.3d 676, 680-81 (9th Cir. 2005).

Finally, the Court agrees with Plaintiff that the ALJ may have improperly relied on Plaintiff's failure to stop smoking as a basis to reject his credibility. However, because there is evidence to support the ALJ's other conclusions, the credibility determination will not be disturbed. *See eg., Batson v. Barnhart*, 359 F.3d 1190, 1197 (9th Cir. 2004) (upholding ALJ's credibility determination even though one reason may have been in error).

C. Lay Witness Testimony

Plaintiff also argues the ALJ improperly rejected the testimony of Plaintiff's family members. AR 137-139. The Court disagrees.

Lay witness testimony as to a claimant's symptoms is competent evidence which the Commissioner must take into account. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). The ALJ may reject such testimony if he does so expressly, in which case "he must give reasons that are germane to each witness." *Id.* The ALJ need not discuss lay witness testimony that pertains to whether or not an impairment exists. *Nguyen v. Chater,* 100 F.3d 1462, 1467 (9th Cir. 1996). These medical diagnoses are beyond the competence of lay witnesses and therefore do not constitute competent evidence. 20 C.F.R. § 404.1513(a). However, once an impairment has been established by medical evidence, the extent of the diagnosed impairment may be testified to by the lay witnesses. 20 C.F.R. § 404.1513(e); *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987).

In this instance, the ALJ gave little weight to the Plaintiff's family member's assessment regarding the Plaintiff's literacy levels. AR 16. As a basis for doing so, the ALJ noted that Plaintiff was able to perform a wide range of jobs in the past despite these limitations.

Therefore, the ALJ did not flatly reject the reports but adequately explained his reasoning for giving them minimal weight. Moreover, as Plaintiff concedes, this finding would only be relevant if Plaintiff were restricted to sedentary work because the grids would mandate a finding of disability. As discussed in this opinion, the ALJ's residual functional capacity limiting Plaintiff to light work is supported by substantial evidence so a remand or reversal is not warranted.

D. Step Five

Plaintiff argues that ALJ did not meet his burden at step five because the residual functional capacity and the limitations the ALJ included in the hypotheticals posed to the VE did not did not accurately reflect actual Plaintiff's limitations. The Court disagrees.

The ALJ the found Plaintiff could perform light work except that he is limited to occasional climbing, balancing, stopping, kneeling, crouching or crawling, with occasional use of foot controls. AR 15. The ALJ applied the medical-vocational guidelines as a framework and determined that jobs exist in significant numbers in the national economy that the Plaintiff can perform. AR 17. The ALJ also questioned a VE who indicated that there were jobs available in the national economy that Plaintiff could perform.

Light work represents " substantial work capability compatible with making a work adjustment to substantial numbers of unskilled jobs, and thus generally provides sufficient occupational mobility even for severely impaired individuals who are not of advanced age and have sufficient educational competencies for unskilled work." *See* 20 C.F.R.§ 404, Subpart P, Appendix 2, § 202.00. Here, the ALJ included limitations to the VE that he considered were credible were based on substantial evidence. Thus, the ALJ met his burden at step five. *Osenbrock v. Apfel*, 240 F. 3d 1157, 1164-1165 (9th Cir. 2001) (An ALJ is not bound to accept as true restrictions set forth in the second hypothetical if they are not supported by substantial evidence).

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RECOMMENDATION

Based on the foregoing, the ALJ's decision is supported by substantial evidence and is free of legal error. It is recommended that judgment be entered against Plaintiff, Dwayne Collins and in favor of Defendant Commissioner of Social Security.

These findings and recommendations will be submitted to the Honorable Lawrence J. O'Neill pursuant to the provisions of Title 28 of the United States Code section 636(b)(l). Within **ten (10)** days after being served with these findings and recommendations, the parties may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: September 14, 2011

/s/ Gary S. Austin
The Honorable Gary S. Austin
United States Magistrate Judge