

1 allergies. AR 160. After being denied initially and on reconsideration, Plaintiff requested a
2 hearing before an Administrative Law Judge (“ALJ”). AR 77-81, 83-88, 91-92. On October 18,
3 2010, ALJ Michael J. Haubner held a hearing. AR 19-57. ALJ Haubner denied benefits on
4 November 10, 2010. AR 5-14. On August 25, 2011, the Appeals Council denied review. AR 1-
5 3.

6
7 Hearing Testimony

8 ALJ Haubner held a hearing on October 18, 2010. Plaintiff appeared with his attorney,
9 Gina Fazio. Vocational expert (“VE”) Thomas Dachelet also appeared and testified. AR 19, 21.

10 *Plaintiff’s Testimony*

11 Plaintiff was born in 1967. He completed the 12th grade and attended college for two
12 months. AR 28. Plaintiff confirmed that he has a history of finger tendinitis, high blood
13 pressure, diabetes, chest pain, “roulette,” coronary artery disease, arthralgia in his hands, plantar
14 fasciitis in his feet, along with a history of adjustment disorder with mixed emotional features,
15 and some emotional or mental problems. AR 28-29.

16 Plaintiff testified that he can lift and carry two pounds. He can stand for twenty-five
17 minutes at one time and sit for thirty minutes at one time. He can walk a block and a half before
18 he needs to rest. He is right-handed, but has trouble gripping and grasping with both hands. The
19 longest he can grip or grasp is two or three seconds with either hand. He needs to rest for five
20 minutes before he can hold something for two or three more seconds. AR 29-30.

21 Plaintiff testified that he has criminal convictions for drunk driving, driving under the
22 influence of cocaine, possession for sale of a controlled substance and fraud. AR 31. He last
23 used street drugs in October 2009 and alcohol in August of 2010. He has not had a valid driver’s
24 license for eight years, but last drove in October 2009. AR 34. He is fully compliant with his
25 treatment recommendations and takes all of his medications. Although doctors told him to quit
26 smoking a year earlier, he still smokes 10 cigarettes a day. AR 32-33.
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1 Plaintiff indicated that he lives with his mom and his brother. His brother is on SSI for
2 physical and mental disabilities. Plaintiff sleeps on the couch in the living room. He can brush
3 his own teeth, put on his clothes, and shower or bathe. He is not able to shave himself, but can
4 do buttons and zippers. He does not cook or prepare simple meals. He goes out to eat two times
5 a month and attends church every Sunday. AR 33-35, 38. He does not do any chores around the
6 house. AR 36. He goes for walks every other day for about ten minutes. AR 37.

8 On an average day, Plaintiff watches TV for about four hours. He talks on the telephone
9 and visits people outside of his house every other day. AR 38.

10 Plaintiff explained that his hands flare-up all the time. He cannot close his hand, it's
11 swollen and he's in a lot of pain. However, he is able to hold a toothbrush with his thumb and
12 index finger. He cannot make a fist. AR 39-40. Plaintiff testified that he can only sit for about
13 30 minutes at a time because he has sharp pain down his leg, but his main problem is his hands.
14 Over the last two years, his hands have gotten worse and he has problems every day. AR 41.

15 Plaintiff confirmed that he worked with his cousin recycling in 2004 for about four
16 months. In that job, he lifted thirty pounds. In 2005, he was doing general labor in production
17 and lifted about twenty pounds loading boxes on a pallet. Plaintiff also worked for a month
18 making cheese, putting chemicals in a mixer. In 2008, he worked part-time as a dishwasher at
19 Denny's for six months. AR 41-44, 47.

21 *Vocational Expert's Testimony*

22 In response to questioning, the VE identified Plaintiff's past work as laborer, stores, as
23 medium, SVP 2, unskilled and light as performed. Plaintiff's job as an apprentice cheese maker
24 was medium per the DOT, light as performed, and unskilled. AR 47-48.

25 For the hypotheticals, the ALJ asked the VE to assume a person of the same age,
26 education, language and experience background as Plaintiff. AR 48. For the first hypothetical,
27 the ALJ asked the VE to assume a person capable of managing funds and mildly limited in the
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1 ability to remember location and work-like procedures, remember and understand very short and
2 simple instructions, understand and remember detailed instructions, carry out very short and
3 simple instructions, maintain attention and concentration for extended periods, accept
4 instructions from supervisors and respond appropriately to criticisms. This person was mildly
5 limited in social judgment and awareness and socially appropriate behavior. This person also
6 was mildly limited in the ability to perform activities within a schedule, maintain regular
7 attendance, function independently and sustain an ordinary routine without special supervision,
8 complete a normal workday or week without interruptions and perform at a consistent pace,
9 interact with coworkers and withstand stress of a routine workday. The likelihood of emotional
10 deterioration in the work environment was minimal. The VE testified that this person could
11 perform Plaintiff's past relevant work. AR 49-50. The VE explained that the mild limitations
12 "essentially have no effect on eroding the world of work, particularly at the unskilled [level]."
13 AR 50. This person could perform other unskilled work at all exertional levels. AR 50.

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15 For the second hypothetical, the ALJ asked the VE to assume a person who is not
16 significantly limited in all functional areas. The VE testified that this person could perform
17 Plaintiff's past relevant work and other unskilled sedentary through very heavy work. AR 50.

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19 For the third hypothetical, the ALJ asked the VE to assume a person with mild
20 restrictions of activities of daily living, mild difficulties in maintaining social functioning,
21 moderate difficulties in maintaining concentration, persistence and pace, and insufficient
22 evidence of any repeated episodes of decompensation. The VE testified that this person could
23 perform Plaintiff's past relevant work and the entire world of unskilled work. AR 51.

24 For the fourth hypothetical, the ALJ asked the VE to assume a person able to lift and
25 carry without limitations and no restrictions on standing, walking and sitting. This person could
26 climb, balance, kneel, crawl, bend, crouch, stoop, walk on uneven terrain, climb ladders and
27 work at heights. This person has a bilateral impairment in fine and gross manipulation with both
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1 hands, but has motor strength of 5/5 in all extremities, normal motor bulk and tone and normal
2 peripheral pulses. The VE testified that he could not reduce the world of work at all based on the
3 description, so it would be the same response as for the first three hypotheticals. AR 52. The
4 VE further testified that the answer would be the same if combining hypotheticals one and four,
5 two and four and three and four. AR 52-53.
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7 For the fifth hypothetical, the ALJ asked the VE to assume a person who could lift and
8 carry 20 pounds occasionally, 10 pounds frequently, could stand and walk about six hours out of
9 eight and could sit about six hours of eight. This person has limited ability in the upper
10 extremities to push and pull and this person should avoid frequent forceful pushing and pulling
11 with either hand. This person should never climb ladders, ropes and scaffolds, but occasionally
12 could crawl and frequently could climb ramps and stairs, balance, stoop, kneel and crouch. This
13 person has limited handling and fingering and should avoid frequent forceful grasping, such as
14 clenching. This person was limited to occasional fingering with either hand and no frequent
15 forceful grasping such as clenching a wrench with either hand. This person was able to do
16 frequent basic handling and simple grasping required for light work using either hand. The VE
17 testified that this person could perform Plaintiff's past relevant work as performed at the light
18 level, but not per the DOT. AR 53-54. The answer would be the same if combining hypothetical
19 one and five, two and five or three and five. AR 54.
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21 For the sixth hypothetical, the ALJ asked the VE to assume a person who could sit six
22 hours out of eight, could stand and walk two hours and could lift five pounds frequently, less
23 than five pounds occasionally. This person could reach 30 percent of the time, handle 30 percent
24 of the time, feel 30 percent of the time, push and pull 30 percent of the time, and grasp 10
25 percent of the time each for 30 minutes at a time out of eight hours. The VE testified that this
26 person could not perform Plaintiff's past relevant work or any other jobs at any skill level. AR
27 54-55.
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1 For the seventh hypothetical, the ALJ asked the VE to assume a person who could lift
2 and carry two pounds, could stand 25 minutes at a time, could sit 30 minutes at a time, could
3 walk one and a half blocks at a time and could grip and grasp things for two to three seconds at a
4 time and then must rest his hands for five minutes. The VE testified that there was no past
5 relevant work and no other work that this person could perform. AR 55-56.
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7 Medical Record

8 On October 3, 2008, Plaintiff sought emergency room treatment for complaints of
9 lightheadedness, dizziness, near syncope, weakness and blurred vision. He was given glucose
10 and Ativan. AR 224-28. Dr. Ronald Smith prepared an emergency room report, noting that
11 Plaintiff tested positive for cocaine, which probably explained his symptoms. AR 234-36, 237.
12

13 On October 24, 2008, Plaintiff sought follow-up treatment for hypertension with Dr. Chi
14 Nguyen. Plaintiff reported that he had not worked for the last three weeks, he could not make a
15 fist with both hands and he could not grip anything. Plaintiff had called an ambulance a week
16 earlier because his blood glucose went down to 70. On examination, Plaintiff was unable to flex
17 the fingers of either hand "all the way." Dr. Nguyen assessed finger tendinitis, hypertension and
18 diabetes mellitus type 2. AR 332.

19 On November 1, 2008, Plaintiff again sought emergency room treatment for complaints
20 of chest tightness radiating to his right arm, along with shortness of breath. First cardiac enzyme
21 was negative and an EKG showed no ischemic pattern. Plaintiff's urine drug screen was positive
22 for cocaine. Dr. Chi Nguyen noted that Plaintiff had a history of arthritis and was unable to
23 make a fist with both hands. Plaintiff had been referred to Dr. Lee for evaluation, but failed to
24 show. Following examination, Dr. Nguyen diagnosed angina, ruling out myocardial infarction,
25 substance abuse, elevated creatinine of 1.5, ruling out renal insufficiency due to chronic
26 hypertension, history of hypertension, history of diabetes mellitus type II. AR 240-42, 250, 252.
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1 On November 4, 2008, Plaintiff returned to Dr. Nguyen for follow-up after discharge
2 from the hospital for chest pain. Plaintiff's cardiac enzymes were negative for myocardial
3 infarction. Following examination, Dr. Nguyen assessed diabetes mellitus type 2, hypertension
4 and chest pain, rule out coronary artery disease. AR 331.

5 On November 7, 2008, Dr. J. R. Lee indicated that Plaintiff had multiple tendonitis, a
6 stiff hand and was unable to make a full fist. He also had a trigger finger that was not currently
7 locking. Dr. Lee authorized occupational therapy for bilateral hand stiffness. AR 287-89.

8 On December 16, 2008, Dr. Emmanuel Fabella completed a consultative internal
9 medicine evaluation. Plaintiff complained of chest pain, diabetes, hand pains and pains in the
10 ankles and feet. On physical examination, Plaintiff was able to generate 25 pounds of force
11 using his right hand and 20 pounds of force using his left hand. He had normal gait and balance.
12 His peripheral pulses were 4/4 and symmetrical. He had no joint deformities, effusions, warmth
13 swelling, crepitus or pain on motion in his extremities. Examination of his hands showed pain in
14 the second and third metacarpophalangeal joint bilaterally with flexion of greater than 90
15 degrees. He had normal muscle bulk and tone and strength of 5/5 throughout without focal
16 motor deficits.

17 Dr. Fabella diagnosed chest pain with recent hospitalization that could be related to
18 cocaine use, anterior chest wall tenderness worsened by deep inhalation, suggestive of
19 costochondritis, type 2 diabetes mellitus under reasonable control, arthralgias of the second and
20 third metacarpophalangeal joints bilaterally, bilateral foot pain consistent with plantar fasciitis
21 and uncontrolled hypertension. Dr. Fabella opined that Plaintiff could lift and carry without
22 limitations. He could walk, stand or sit without restrictions and could climb, balance, kneel,
23 crawl, bend, crouch and stoop. He also could walk on uneven terrain, climb ladders and work at
24 heights. He had bilateral impairment in fine and gross manipulation with respect to both hands
25 because of metacarpophalangeal arthralgias of unclear etiology. AR 254-59.
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1 On December 16, 2008, Dr. Nguyen reported that Plaintiff's blood tests were negative for
2 rheumatoid arthritis, but Plaintiff still had a problem with his fingers and may need trigger finger
3 release as planned by Dr. Lee. AR 323. Plaintiff was unable to flex his fingers. AR 324.
4

5 On December 19, 2008, Dr. Lee saw Plaintiff in the ortho clinic and advised that Plaintiff
6 did not need surgery. AR 322.

7 On January 15, 2009, Plaintiff was taken to the emergency department by the Tulare
8 Police Department for medical clearance following complaints of chest pain after using cocaine.
9 The attending physician noted that Plaintiff smokes tobacco, drinks alcohol occasionally and
10 uses cocaine. The physician encouraged Plaintiff to not use drugs and "spent 30 minutes"
11 discussing the importance of quitting the use of nicotine products. A cardiovascular examination
12 was negative and an EKG was normal. A chest x-ray showed a questionable left lower lobe
13 nodule versus artifact. The physician diagnosed chest pain of an unclear etiology,
14 hyperglycemia, acute renal insufficiency and possible left lower lobe solitary pulmonary nodule
15 versus artifact versus other etiology. Plaintiff complained of acute pain and was given
16 nitroglycerin, Ativan, aspirin and was admitted to telemetry. Dr. Truc Nguyen also examined
17 Plaintiff and diagnosed chest pain, rule out myocardial infarction, stable diabetes mellitus and
18 controlled hypertension. AR 262-63, 271, 291-92.
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20 On January 20, 2009, Dr. S. Reddy, a state agency medical consultant, completed a
21 Physical Residual Functional Capacity Assessment form. Dr. Reddy opined that Plaintiff could
22 lift 20 pounds occasionally, 10 pounds frequently, could stand and/or walk about 6 hours in 8-
23 hour workday, could sit about 6 hours in an 8-hour workday. He had a light RFC with no
24 frequent forceful push or pull with either hand. Dr. Reddy further opined that Plaintiff had a
25 light RFC with no frequent forceful grasping, occasional fingering and frequent simple grasping
26 and basic handling. Plaintiff frequently could climb ramps and stairs, but could never climb
27 ladders, ropes or scaffolds because of a history of flexor tendinitis of hands. Plaintiff frequently
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1 could stoop, kneel, and crouch and occasionally could crawl. He was limited to occasional
2 fingering with either hand with no frequent forceful grasping, such a clenching a wrench with
3 either hand, but was able to do frequent basic handling and simple grasping required for light
4 work using either hand. He had no visual, communicative or environmental limitations. AR
5 303-09.
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7 On January 22, 2009, Plaintiff reportedly saw Dr. Lee for his hands. Treatment notes
8 indicated no surgery and that Plaintiff was to be referred for therapy. AR 320. On January 23,
9 2009, Plaintiff was referred for evaluation of tendonitis of both hands. AR 290.

10 On March 10, 2009, Plaintiff complained of pain on both hands and reported that
11 Ibuprofen was not working. He was assessed with diabetes mellitus and hypertension. AR 315-
12 16.

13 On March 25, 2009, Plaintiff was unable to make a fist with both hands. On
14 examination, Plaintiff had tenderness of his fingers and was unable to flex. AR 317.

15 On April 22, 2009, Plaintiff reported that he saw Dr. Lee three times and was told that he
16 had tendonitis of the fingers. On examination, Plaintiff had mild swelling of the hands and was
17 unable to flex his fingers all the way. Dr. Nguyen diagnosed hand arthritis and tendonitis. AR
18 467.
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20 On May 1, 2009, Greg Hirokawa, PhD, completed a consultative psychiatric evaluation.
21 Plaintiff reported feeling depressed, anxious, having mood swings, easily frustrated, irritable and
22 with short-term memory problems. Plaintiff claimed that his symptoms of depression and
23 anxiety were primarily due to his physical problems. In providing his social history, Plaintiff
24 indicated that he was in special education classes from the 9th through the 12th grade. As to
25 activities of daily living, Plaintiff reported that he was unable to do any chores around the house.
26 During a typical day, he sits around the house and watches television. He also enjoys going to
27 church and spending time with family members. On mental status exam, Plaintiff's mood
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1 appeared mildly depressed with a restricted affect. Dr. Hirokawa diagnosed adjustment disorder
2 with mixed emotional features and assigned Plaintiff a Global Assessment of Functioning
3 (“GAF”) of 61. Dr. Hirokawa believed that Plaintiff’s symptoms of depression and anxiety
4 appeared to be within the mild range and he had mild limitations for most work activities. AR
5 333-37.
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7 On May 21, 2009, A. Middleton, PhD, a state agency consultant, completed a Psychiatric
8 Review Technique form. Dr. Middleton opined that Plaintiff had mild restriction of activities of
9 daily living, mild difficulties in maintaining social functioning and moderate difficulties in
10 maintaining concentration, persistence or pace. AR 338-48.

11 Dr. Middleton also completed a Mental Residual Functional Capacity Assessment form.
12 Dr. Middleton opined that Plaintiff was not significantly limited in his abilities for understanding
13 and memory, sustained concentration and persistence, social interaction and adaptation. AR 349-
14 51.

15 On July 14, 2009, Plaintiff sought emergency room treatment for complaints of right-
16 sided chest pain, along with some mild epigastric discomfort. Plaintiff had a normal chest x-ray,
17 a normal EKG and negative cardiac enzymes. Plaintiff was admitted to telemetry for further
18 diagnostic workup, but decided to sign out of the emergency department against medical advice.
19 AR 417-23. A drug screen was positive for cocaine. AR 425.
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21 On August 10, 2009, Plaintiff complained of pain in the fingers of his hands, finger
22 swelling and the inability to make a fist. On examination, Plaintiff had swelling of his fingers
23 and could not flex his fingers all the way. Dr. Nguyen diagnosed arthritis of the fingers and
24 diabetes mellitus not under control. AR 465.

25 On August 13, 2009, Plaintiff sought emergency treatment for chest pain radiating to his
26 right arm. An EKG showed normal sinus rhythm and the first cardiac enzymes were negative.
27 In the emergency room, Plaintiff denied illicit drug use. However, a urine drug screen was
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1 positive for cocaine. The next day, following examination, Dr. Nguyen indicated that Plaintiff's
2 chest pain was most likely related to his illicit drug use and anxiety, but Plaintiff was admitted
3 for 24-hour observation to rule out myocardial infarction. AR 335, 357-58, 369-70, 399.
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5 On September 23, 2009, Plaintiff was unable to flex the fingers of both hands. Dr.
6 Nguyen diagnosed arthritis of the fingers and questioned whether Plaintiff had tendonitis. AR
7 461.

8 On December 10, 2009, Plaintiff complained of pain on both hands. On examination, he
9 was unable to flex his fingers all the way. He was diagnosed with arthritis/tendonitis of the
10 fingers. AR 457.

11 On April 13, 2010, Plaintiff sought treatment to extend his disability and complained of
12 severe pain on his hands and swelling. On examination, Plaintiff had swelling and tenderness of
13 his fingers. Dr. Nguyen diagnosed acute inflammation of parts of Plaintiff's fingers and
14 prescribed Tylenol and prednisone. AR 452.

15 On July 8, 2010, Dr. Nguyen diagnosed diabetes mellitus and tendonitis of fingers. AR
16 450.

17 On September 1, 2010, Plaintiff sought treatment from Dr. Nguyen for pain on the
18 fingers of both hands. On examination, Plaintiff had swelling and tenderness of his fingers and
19 could not shake hands. AR 447.
20

21 On September 24, 2010, Dr. Nguyen noted that Dr. Lee wanted to do surgery on
22 Plaintiff's hands, but insurance would not cover it. On examination, Plaintiff was unable to flex
23 all of his fingers and had swelling and tenderness of his hands. Dr. Nguyen questioned if
24 Plaintiff had tendonitis of the fingers and prescribed Tylenol. AR 446.

25 On the same day, Dr. Nguyen completed a Medical Report for the TulareWORKs
26 program. Dr. Nguyen indicated that Plaintiff had a physical incapacity that prevented or
27 substantially reduced his ability to work full time at his customary work for an expected duration
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1 of over one year. Plaintiff did not have a physical or mental incapacity that prevented or
2 substantially reduced his ability to care for his children. Dr. Nguyen listed Plaintiff's diagnosis
3 as inflammation of fingers of both hands and possible tendonitis with a poor prognosis. AR 443.
4

5 Dr. Nguyen also completed a Questionnaire and indicated that Plaintiff did not have
6 complications from diabetes that precluded him from performing any full-time work at any
7 exertional level. Dr. Nguyen identified Plaintiff's primary impairments as inflammation of
8 fingers of both hands, along with pain and swelling of his fingers. Plaintiff was "unable to flex
9 all the way the fingers of both hands." He also has a history of depression and anxiety. Dr.
10 Nguyen opined that Plaintiff could sit 6 hours in an 8-hour workday and could stand/walk 2
11 hours in an 8-hour workday. He could lift less than 5 pounds frequently and could lift less than 5
12 pounds occasionally. In an 8-hour workday, Plaintiff could perform reaching for 30% of the day,
13 handling for 30%, feeling for 30%, pushing/pulling for 30% and grasping for 10%. Plaintiff
14 could reach for 30 minutes at one time, could handle for 30 minutes at one time, could feel for 30
15 minutes at one time, could push/pull for 30 minutes at one time and could grasp for 5 minutes at
16 one time. AR 444-45.

17 ALJ's Findings

18 The ALJ found that Plaintiff had not engaged in substantial gainful activity since his
19 application date. The ALJ further found that Plaintiff had the severe impairments of
20 hypertension, diabetes mellitus type II, history of chest pain-rule out coronary artery disease,
21 arthralgias hands, finger tendonitis and bilateral plantar fasciitis feet. Despite these impairments,
22 the ALJ determined that Plaintiff retained the residual functional capacity ("RFC") to lift and
23 carry 20 pounds occasionally, 10 pounds frequently, and to sit, stand and/or walk 6 hours each in
24 an 8-hour day. He could never climb ladders, ropes or scaffolds. He occasionally could crawl
25 and occasionally could finger using either hand. He frequently could balance, stoop, kneel,
26 crouch or climb ramps or stairs. He could not frequently forcefully push or pull with either hand.
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1 He could not frequently forcefully grasp, such as clenching a wrench, with either hand. He could
2 do frequent basic handling and simple grasping required for light work using either hand. With
3 this RFC, the ALJ concluded that Plaintiff could perform his past relevant work. AR 10-14.
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5 **SCOPE OF REVIEW**

6 Congress has provided a limited scope of judicial review of the Commissioner's decision
7 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
8 the Court must determine whether the decision of the Commissioner is supported by substantial
9 evidence. [42 U.S.C. 405\(g\)](#). Substantial evidence means "more than a mere scintilla,"
10 [Richardson v. Perales, 402 U.S. 389, 402 \(1971\)](#), but less than a preponderance. [Sorenson v.](#)
11 [Weinberger, 514 F.2d 1112, 1119, n. 10 \(9th Cir. 1975\)](#). It is "such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion." [Richardson, 402 U.S.](#) at
13 401. The record as a whole must be considered, weighing both the evidence that supports and
14 the evidence that detracts from the Commissioner's conclusion. [Jones v. Heckler, 760 F.2d 993,](#)
15 [995 \(9th Cir. 1985\)](#). In weighing the evidence and making findings, the Commissioner must
16 apply the proper legal standards. *E.g.*, [Burkhart v. Bowen, 856 F.2d 1335, 1338 \(9th Cir. 1988\)](#).
17 This Court must uphold the Commissioner's determination that the claimant is not disabled if the
18 Commissioner applied the proper legal standards, and if the Commissioner's findings are
19 supported by substantial evidence. *See* [Sanchez v. Sec'y of Health and Human Serv., 812 F.2d](#)
20 [509, 510 \(9th Cir. 1987\)](#).
21

22 **REVIEW**

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

5
6 In an effort to achieve uniformity of decisions, the Commissioner has promulgated
7 regulations which contain, inter alia, a five-step sequential disability evaluation process. [20](#)
8 [C.F.R. § 416.920\(a\)-\(g\)](#). Applying the process in this case, the ALJ found that Plaintiff: (1) had
9 not engaged in substantial gainful activity since October 23, 2008; (2) has an impairment or a
10 combination of impairments that is considered “severe” (hypertension, diabetes mellitus type II,
11 history of chest pain-rule out coronary artery disease, arthralgias hands, finger tendonitis and
12 bilateral plantar fasciitis feet) based on the requirements in the Regulations ([20 C.F.R. §](#)
13 [416.920\(c\)](#)); (3) does not have an impairment or combination of impairments which meets or
14 equals one of the impairments set forth in Appendix 1, Subpart P, Regulations No. 4; and (4) can
15 perform his past relevant work. AR 10-14.

16
17 Here, Plaintiff claims the ALJ erred by: (1) rejecting the opinion of Dr. Nguyen; (2)
18 improperly evaluating Plaintiff’s testimony and third party statements; and (3) improperly
19 determining Plaintiff’s RFC.

20 **DISCUSSION**

21 **A. Treating Physician Opinion**

22 Plaintiff contends that the ALJ gave insufficient reasons to reject the opinion of his
23 treating physician, Dr. Chi Nguyen.

24 Generally, the opinion of a claimant’s treating physician is entitled to more weight than
25 the opinions of doctors who do not treat the claimant. [20 C.F.R. § 416.927\(c\)\(2\)](#); [Orn v. Astrue](#),
26 [495 F.3d 625, 631-32 \(9th Cir. 2007\)](#). If there is substantial evidence in the record contradicting
27 the opinion of the treating physician, then such an opinion is not entitled to controlling weight.
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1 Id. at 632. Even in that instance, however, the opinion of a treating physician is still entitled to
2 deference. Id. If the ALJ disregards the opinion of a treating physician, he must make findings
3 setting forth specific and legitimate reasons for doing so. Id.
4

5 Here, the ALJ did not assign Dr. Nguyen’s opinion controlling weight, finding it to be
6 “overly restrictive” and “not consistent with other evidence.” AR 13. As noted, if a treating
7 physician’s opinion “is not well-supported” or “is inconsistent with other substantial evidence in
8 the record,” then it should not be given controlling weight. Id. at 631.

9 Plaintiff argues that the ALJ “does not explain why [the opinion] is overly restrictive nor
10 does he cite the evidence which specifically supports his assertion.” Opening Brief, p. 5. This
11 argument is without merit. In rejecting Dr. Nguyen’s opinion as overly restrictive, the ALJ first
12 noted that Dr. Nguyen listed Plaintiff’s primary impairments as inflammation, pain and swelling
13 of the fingers of both hands, but limited Plaintiff to standing and walking 2 hours a day “without
14 explanation or comment as to how finger symptoms impeded standing and walking.” AR 13.
15 Although Plaintiff contends that Dr. Nguyen limited him to a sedentary RFC due to diabetes, this
16 is mere conjecture. Dr. Nguyen’s opinion did not attribute any limitations (or any complications)
17 to diabetes. AR 444.
18

19 Plaintiff contends that if the ALJ “felt that this treating opinion was missing necessary
20 information to evaluate it,” then he had the obligation to recontact the physician. However, the
21 ALJ’s duty to recontact a treating physician is triggered only “when there is ambiguous evidence
22 or when the record is inadequate to allow for proper evaluation of the evidence.” Mayes v.
23 Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001). The record before the ALJ was neither
24 ambiguous nor inadequate to allow for proper evaluation of the evidence regarding Plaintiff’s
25 diabetes or any resulting limitations from such impairment.

26 Next, the ALJ noted that Dr. Nguyen “mentions unidentified additional work limitations
27 secondary to depression and anxiety, but does not quantify those, and . . . the bulk of the
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1 evidence supports a finding that the claimant’s mental impairments are nonsevere.” AR 13.
2 Plaintiff does not argue that his mental impairments were severe and he does not point to
3 evidence of any limitations secondary to depression and anxiety. Accordingly, the ALJ properly
4 discounted this portion of Dr. Nguyen’s opinion as unsupported by the record. [Orn, 495 F.3d](#) at
5 631.
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7 Additionally, the ALJ also considered Dr. Nguyen’s “check-blocks State Welfare form,”
8 which stated that Plaintiff was temporarily disabled for over one year and referenced finger
9 inflammation and tendonitis with poor prognosis. AR 13. The ALJ accorded this opinion “little
10 weight” for multiple reasons.

11 First, the ALJ properly discounted the opinion because it lacked a specific assessment of
12 Plaintiff’s functional limitations. See [Thomas v. Barnhart, 278 F.3d 947, 957 \(9th Cir. 2002\)](#)
13 (ALJ need not accept brief and conclusory findings); [Batson v. Comm’r of Social Sec. Admin.,](#)
14 [359 F.3d 1190, 1195 \(9th Cir. 2004\)](#) (ALJ may discredit a treating physician’s opinion that is
15 conclusory, brief, and unsupported by objective medical findings).
16

17 Second, the ALJ correctly confirmed that Dr. Nguyen’s conclusion of disability invaded
18 an opinion reserved to the Social Security Administration. [20 C.F.R. § 416.927\(d\)](#); Social
19 Security Ruling 96-5p (determination of whether an individual is disabled is an issue reserved to
20 the Commissioner).

21 Third, the ALJ appropriately discounted Dr. Nguyen’s opinion because it was not
22 consistent with other evidence, including independent findings by the consultative examiner that
23 Plaintiff had normal motor strength in all extremities, normal muscle tone and normal bulk. [Orn,](#)
24 [495 F.3d](#) at 631 (treating physician’s opinion need not be given controlling weight if it is
25 inconsistent with other substantial evidence in the record); see also [Tonapetyan v. Halter, 242](#)
26 [F.3d 1144, 1149 \(9th Cir. 2001\)](#) (consultative examiner’s opinion may serve as specific and
27 legitimate reason to reject opinion of treating physician and serve as substantial evidence).
28

1 For these reasons, the Court finds that the ALJ's evaluation of Dr. Nguyen's opinion is
2 supported by substantial evidence and free of legal error.

3 **B. Evaluation of Testimony**

4 1. Plaintiff's Testimony

5 As an initial matter, Plaintiff argues that the ALJ failed to fairly evaluate his testimony.
6 Specifically, Plaintiff complains that the ALJ ignored his testimony "for the most part" and his
7 testimony was "misstated or taken out of context." Opening Brief, p. 6. However, Plaintiff does
8 not cite specific testimony that the ALJ ignored or misstated.
9

10 Plaintiff also asserts that the ALJ failed to report his testimony "fully or sufficiently" and
11 even failed to "enlist much testimony" at the hearing. Plaintiff further asserts that the ALJ
12 "spent five pages of rules for Plaintiff in testifying[,] followed by a series of mostly canned and
13 leading questions." Opening Brief, p. 7. Plaintiff's assertions are unavailing. The mere quantity
14 of testimony elicited by the ALJ does not suggest error. This is particularly true given that
15 Plaintiff's counsel also had an opportunity to elicit testimony from Plaintiff.
16

17 Plaintiff next argues that the ALJ erred in his reasons for finding Plaintiff's credibility to
18 be "extremely poor." An ALJ must make specific findings and state clear and convincing
19 reasons to reject a claimant's symptom testimony unless affirmative evidence of malingering is
20 suggested in the record. [Smolen v. Chater, 80 F.3d 1273, 1283-84 \(9th Cir. 1993\)](#); *see also*
21 [Valentine v. Comm'r Soc. Sec. Admin., 574 F.3d 685, 693 \(9th Cir. 2009\)](#). Here, there was no
22 affirmative evidence of malingering and therefore the ALJ was required to provide clear and
23 convincing reasons to discredit Plaintiff's testimony.

24 In finding Plaintiff's credibility "extremely poor," the ALJ first noted that Plaintiff had a
25 "dismal work history" with no full years of substantial gainful activity in his entire life. AR 13.
26 A poor work history is a relevant factor in assessing a claimant's credibility. *See Thomas, 278*
27
28

1 F.3d at 95 (claimant’s “extremely poor work history” was a specific, clear and convincing reason
2 for a negative credibility determination). Plaintiff does not challenge this finding by the ALJ.

3
4 Second, the ALJ considered Plaintiff’s inconsistent reports about his participation in
5 special education, noting that Plaintiff told the psychological consultative examiner that he had
6 been in special education in high school, but had earlier denied being in special education. AR
7 13, 165, 334. In weighing a claimant’s credibility, an ALJ properly may consider inconsistencies
8 in testimony. *See Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1987). Plaintiff takes
9 issue with the ALJ’s reasoning, positing that there could have been a typing error in the CE
10 report. This is simply speculation. The examiner clearly stated that “claimant reported being in
11 special education classes from the 9th through the 12th grade.” AR 334. Plaintiff also suggests
12 that the ALJ could have obtained school records to verify the statement or could have asked
13 Plaintiff about the inconsistency. Opening Brief, p. 7. However, the ALJ asked about education
14 at the hearing and both Plaintiff and his counsel had an opportunity to clarify any discrepancies
15 in the record. AR 28.

16
17 Third, the ALJ considered Plaintiff’s inconsistent reports regarding drug use, citing
18 Plaintiff’s denial of drug use to at least two physicians while the medical record contained
19 multiple positive toxicology reports for cocaine and a positive result for “TCA.” AR 13. A lack
20 of candor about drug use supports an ALJ’s negative conclusions regarding a claimant’s veracity.
21 *See Thomas*, 278 F.3d at 959 (upholding adverse credibility determination where claimant made
22 inconsistent statements about her drug use). Plaintiff does not challenge this reason for the
23 ALJ’s adverse credibility determination.

24
25 Fourth, the ALJ found that Plaintiff’s conviction for fraud, a crime of moral turpitude,
26 lessened his credibility. AR 13. An ALJ may rely on a claimant’s convictions for crimes of
27 moral turpitude as part of a credibility determination. *See Albidrez v. Astrue*, 504 F.Supp.2d 814,
28 [822 \(C.D. Cal. 2007\)](#) (convictions involving moral turpitude are a proper basis for an adverse

1 credibility determination); [Kral v. Astrue, 2011 WL 4383111, *7 \(E.D. Cal. 2011\)](#) (same).
2 Further, an ALJ may consider “ordinary techniques of credibility evaluation, such as the
3 claimant’s reputation for lying.” [Tommasetti v. Astrue, 533 F.3d 1035, 1039 \(9th Cir. 2008\)](#);
4 [Orn, 495 F.3d at 636](#) (ALJ may consider claimant’s reputation for truthfulness in assessing
5 credibility). Plaintiff does not contest the ALJ’s findings regarding his former fraud conviction.
6 Rather, Plaintiff incorrectly suggests that the conviction is the sole reason for the ALJ denying
7 benefits in this case.
8

9 Fifth, and finally, the ALJ considered Plaintiff’s inconsistent reports about his
10 compliance with treatment, indicating that Plaintiff asserted compliance, but continued to smoke
11 against medical advice. AR 13. Plaintiff believes that his cigarette use is not a material factor
12 demonstrating noncompliance with treatment recommendations. Even if the ALJ’s reference to
13 smoking was error, the ALJ has presented other independent bases for discounting Plaintiff’s
14 testimony. See [Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1227 \(9th Cir. 2009\)](#).
15

16 For the reasons stated, the Court finds that the ALJ provided clear and convincing
17 reasons to discredit Plaintiff’s testimony.

18 2. Third Party Testimony

19 Plaintiff contends that the ALJ provided insufficient rationale for rejecting the third party
20 statement of his girlfriend, Tara Choate. If an ALJ disregards the testimony of a lay witness, the
21 ALJ must provide specific reasons germane to the witness. [Bruce v. Astrue, 557 F.3d 1113,](#)
22 [1115 \(9th Cir. 2009\)](#); [Stout v. Comm’r, 454 F.3d 1050, 1053 \(9th Cir. 2006\)](#); [Nguyen v. Chater,](#)
23 [100 F.3d 1462, 1467 \(9th Cir. 1996\)](#).

24 Here, the ALJ correctly noted that portions of Ms. Choate’s statements regarding
25 Plaintiff’s affected areas were “generally vague and unquantified.” AR 13, 196-201. The ALJ
26 acknowledged Ms. Choate’s statement that Plaintiff was limited to walking 1 block, but properly
27 rejected this limitation because it was not supported by the medical opinions of the consultative
28

1 examiner and state agency physicians. [Lewis v. Apfel, 236 F.3d 503, 511 \(9th Cir. 2001\)](#) (ALJ
2 may discount lay testimony that conflicts with medical evidence). Further, Ms. Choate’s
3 testimony described the same limitations as Plaintiff’s testimony (AR 203-09), which the ALJ
4 properly rejected. Thus, even if the ALJ failed to give germane reasons for rejecting Ms.
5 Choate’s testimony, any such error is harmless. [Molina v. Astrue, 674 F.3d 1104, 1122 \(9th Cir.](#)
6 [2012\)](#) (“Although the ALJ erred in failing to give germane reasons for rejecting the lay witness
7 testimony, such error was harmless given that the lay testimony described the same limitations as
8 [claimant’s] own testimony, and the ALJ’s reasons for rejecting [claimant’s] testimony apply
9 with equal force to the lay testimony.”).

11 **C. Residual Functional Capacity**

12 Plaintiff argues that the ALJ did not properly review all of the evidence in determining
13 the RFC. To support this argument, Plaintiff first contends that the RFC is inconsistent with the
14 Step 2 findings of severe impairments of diabetes and plantar fasciitis because the ALJ attributed
15 no functional limitations to these impairments. However, it is well-established that an ALJ is not
16 required to include all the limitations from the impairments deemed severe at step two in the
17 final RFC analysis. *Bray*, 554 F.3d at 1228-29.

18
19 Second, Plaintiff faults the ALJ for failing to report all of the findings in his evidence
20 review, claiming the ALJ cited only Exhibit 7F. However, Plaintiff overlooks the entirety of the
21 ALJ’s decision, which cites not only Exhibit 7F, but also Exhibits 3E, 10E, 1F, 2F, 3F, 5F, 6F,
22 8F, 9F, 10F, 11F, 12F, 13F and 14F. AR 10, 12, 13. Plaintiff also fails to identify the findings
23 or the exhibits that he believes the ALJ failed to consider.

24 Third, Plaintiff contends that the ALJ erred by relying on the opinions of Drs. Fabella and
25 Reddy and by not considering recent evidence. As an example, Plaintiff cites evidence of
26 uncontrolled hypertension with acute renal insufficiency, but fails to identify any functional
27 limitations attributable to this impairment. Opening Brief, p. 11. As another example, Plaintiff
28

1 cites evidence of hand problems bilaterally, but apparently overlooks the ALJ’s consideration of
2 Plaintiff’s “limited treatment for finger tendonitis,” arthralgias of the hands” and RFC findings
3 related to Plaintiff’s ability to grasp. AR 12.
4

5 Fourth, Plaintiff argues that the ALJ “failed to explain adequately why he rejected the
6 treating source and CE opinion evidence about hand problems and limitations.” Opening Brief,
7 p. 11. As discussed above, the ALJ properly evaluated the opinion of Plaintiff’s treating
8 physician, Dr. Nguyen. As to the opinion of Dr. Fabella, the ALJ considered his objective
9 opinion regarding Plaintiff’s adequate grip strength, along with his assessment of bilateral and
10 fine and gross motor hand impairments. AR 12. The ALJ also noted, however, that Dr. Fabella
11 did not quantify Plaintiff’s fine and gross motor hand impairments or identify any exertional
12 limitations from such impairments. As to this issue, the ALJ assigned greater weight to the
13 opinion of the state agency consultant, finding that Plaintiff was able to perform a restricted
14 range of light work and could not frequently forcefully push, pull or grasp with either hand, but
15 could do frequent basic handling and simple grasping required for light work. AR 12. The ALJ
16 determined that these exertional limitations were entirely consistent with Dr. Fabella’s objective
17 hand motor strength testing. AR 12-13, 254-59. Reports of a non-examining advisor may serve
18 as substantial weight when they are supported by other evidence in the record and are consistent
19 with it. [Andrews v. Shalala, 53 F.3d 1035, 1041 \(9th Cir. 1995\)](#). The ALJ also accepted the
20 opinion of the state agency consultant because it afforded some deference to Plaintiff’s pain
21 complaints.
22

23 For the reasons stated, the Court finds that the ALJ properly evaluated the medical
24 evidence in assessing Plaintiff’s RFC.

25 **RECOMMENDATION**

26 Based on the foregoing, the Court finds that the ALJ’s decision is supported by
27 substantial evidence and is based on proper legal standards. Accordingly, the Court
28

1 RECOMMENDS that Plaintiff's appeal from the administrative decision of the Commissioner of
2 Social Security be DENIED and that JUDGMENT be entered for Defendant Michael J. Astrue
3 and against Plaintiff Larry Kennedy Jenkins.
4

5 These Findings and Recommendations are submit-ed to the Honorable Anthony W. Ishii,
6 United States District Court Judge, pursuant to the provisions of [28 U.S.C. § 631\(b\)\(1\)\(B\)](#) and
7 Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of
8 California. Within **fourteen (14) days** after being served with a copy, any party may serve on
9 opposing counsel and file with the court written objections to such proposed findings and
10 recommendations. Such a document should be captioned "Objections to Magistrate Judge's
11 Findings and Recommendations." Replies to the objections shall be served and filed within
12 **fourteen (14) days** after service of the objections. The Court will then review the Magistrate
13 Judge's ruling pursuant to [28 U.S.C. § 636\(b\)\(1\)](#).
14

15 IT IS SO ORDERED.

16 Dated: December 13, 2012

17 /s/ Dennis L. Beck
18 UNITED STATES MAGISTRATE JUDGE
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