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

JAVIER MIGUEL MELENDEZ,

Plaintiff,

v.

CAROLYN W. COLVIN,¹ Acting
Commissioner of Social Security

Defendant.

1:13-cv-00691 GSA

**ORDER REGARDING PLAINTIFF'S
SOCIAL SECURITY COMPLAINT**

INTRODUCTION

Plaintiff Javier Miguel Melendez (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for Supplemental Security Income payments under Title XVI of the Social Security Act. The matter is pending before the Court on the parties’ briefs, which were submitted without oral argument to the Honorable Gary S. Austin, United States Magistrate Judge.²

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this action.

² The parties consented to the jurisdiction of a United States Magistrate Judge. *See* Docs. 8 & 10.

1 **THE ADMINISTRATIVE PROCEEDING**

2 **A. Background and Summary of the ALJ’s Decision**

3 On May 26, 2010, Plaintiff filed an application for supplemental security income under
4 Title XVI of the Social Security Act, alleging disability beginning February 27, 2010.
5 Administrative Record (“AR”) 9. On April 4, 2012 an administrative law judge (“ALJ”)
6 conducted a hearing on Plaintiff’s claim. AR 9. In a written decision issued on April 17, 2012,
7 the ALJ determined that Plaintiff was not disabled. AR 17. Specifically, the ALJ found: (1)
8 Plaintiff suffered from the following severe impairments: erythromelalgia, bipolar disorder, and a
9 history of polysubstance dependence; (2) Plaintiff’s impairments, considered singly or in
10 combination, did not meet or medically equal the severity of one of the listed impairments in 20
11 C.F.R. Part 404, Subpart P, Appendix 1; (3) Plaintiff retained the residual functional capacity
12 (“RFC”) to perform medium work as defined in 20 C.F.R. 416.967(c), with the limitations that he
13 needed to avoid concentrated exposure to extreme heat and extreme cold and could perform only
14 simple, repetitive tasks; (4) Plaintiff had no past relevant work; and (5) Plaintiff’s age, education,
15 work experience, and residual functional capacity allowed him to perform jobs that exist in
16 significant numbers in the national economy. AR 11-16.

17 On March 13, 2013, the Appeals Council denied Plaintiff’s request for review, making the
18 ALJ’s decision the Commissioner’s final decision. AR 1. Plaintiff then commenced this action
19 in District Court.
20

21 **STANDARD OF REVIEW**

22 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
23 whether (1) it is supported by substantial evidence and (2) it applies the correct legal standards.
24 See *Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Andrews v. Shalala*, 53
25 F.3d 1035, 1039 (9th Cir. 1995).
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1 “Substantial evidence means more than a scintilla but less than a preponderance.” *Thomas*
2 *v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is “relevant evidence which, considering the
3 record as a whole, a reasonable person might accept as adequate to support a conclusion.” *Id.* In
4 applying the substantial evidence test, courts review the record as a whole. *Lamb v. Mathews*,
5 546 F.2d 814, 818 n. 6 (9th Cir. 1976). Where the evidence is susceptible to more than one
6 rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be
7 upheld.” *Id.*

9 DISCUSSION

10 A. Issue Presented for Review

11 Plaintiff alleged disability due to erythromelalgia,³ swelling in hands and feet, bipolar
12 disorder, and chronic pain. Plaintiff testified about his impairments, and the pain he experienced
13 as a result of these impairments, at the administrative hearing conducted by the ALJ. In the instant
14 appeal Plaintiff argues that the ALJ did not provide legally sufficient reasons for rejecting his
15 testimony.

17 B. Applicable Law

18 In evaluating the credibility of a claimant's testimony regarding subjective complaints of
19 pain and other symptoms, an ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572
20 F.3d 586, 591 (9th Cir. 2009). First, the ALJ must determine whether the claimant has presented
21 objective medical evidence of an underlying impairment that could reasonably be expected to
22 produce the pain or other symptoms alleged. *Id.* The claimant is not required to show that the
23 impairment “could reasonably be expected to cause the severity of the symptom she has alleged;
24 she need only show that it could reasonably have caused some degree of the symptom.” *Id.* If the
25 claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the
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27 ³ Erythromelalgia is a genetic skin disease, which causes episodes of pain, redness and swelling in various parts of
28 the body, particularly the hands and feet.

1 claimant's testimony regarding the severity of the symptoms if she gives “specific, clear and
2 convincing reasons” for the rejection. *Id.*

3 Regarding credibility determinations by an ALJ, the Ninth Circuit has held as follows:

4 The ALJ may consider many factors in weighing a claimant's credibility, including
5 (1) ordinary techniques of credibility evaluation, such as the claimant's reputation
6 for lying, prior inconsistent statements concerning the symptoms, and other
7 testimony by the claimant that appears less than candid; (2) unexplained or
8 inadequately explained failure to seek treatment or to follow a prescribed course of
9 treatment; and (3) the claimant's daily activities. If the ALJ's finding is supported
10 by substantial evidence, the court may not engage in second-guessing.

11 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.2008) (citations and internal quotation marks
12 omitted); *see also Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1226–27 (9th Cir. 2009);
13 20 C.F.R. §§ 404.1529, 416.929; Social Security Ruling (“SSR”) 96-7p, available at 1996 WL
14 374186. Other factors the ALJ may consider include a claimant's work record and testimony
15 from physicians and third parties concerning the nature, severity, and effect of the symptoms of
16 which he complains. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

16 **C. Summary of Plaintiff’s Testimony**

17 At the time of his administrative hearing on April 4, 2012, Plaintiff was 43 years old. He
18 testified that he was 5 feet 8 inches tall and weighed 200 pounds. AR 26.

19 Regarding his work history, Plaintiff stated that in recent years he had run a home-based
20 business with his wife, taking care of elderly adults who lived in their home. Plaintiff testified
21 that he “just pretty much stayed at the house and kept an eye” on “four elderly males staying at
22 the house.” AR 27. When asked to explain what the care-taker work entailed, Plaintiff
23 responded: “Well, I didn’t really care for them, I was just a body there.” AR 51. He added: “[I
24 was] just a body there for when my wife needed to take off or whatever” because “they’re not
25 allowed to be alone.” AR 51. Plaintiff added, “I never did anything, I was just there with the
26 guys, you know.” AR 51.
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1 The ALJ noted that Plaintiff's records only showed earnings from that business in 2010,
2 despite the fact that Plaintiff worked in the business for several years. AR 26. When the ALJ
3 asked Plaintiff to explain why Plaintiff's records reflected earnings only for 2010, Plaintiff
4 replied that he did not know because his wife "did all the paperwork." AR 27. Plaintiff noted
5 that he and his wife were going through a divorce since 2010. The ALJ then asked whether,
6 given the pending divorce, his wife had wanted to show income for him in 2010 but not before.
7 Plaintiff responded that he "had no idea." AR 27.

9 Regarding his impairments, symptoms, and limitations, Plaintiff testified that he
10 experienced back pain; heat in his arms and legs from the erythromelalgia he has had from birth;
11 anger and mood swings. AR 30; 33; 34. Plaintiff testified that he sees a psychiatrist for a bipolar
12 condition and has been prescribed Zoloft, Gabitril and Depakote. Plaintiff testified that his
13 medications cause anger, insomnia, and also make him see shadows. AR 34; 45.

15 Plaintiff testified that he has pain all over his body, all the time. The pain is in the form of
16 burning heat as a result of his erythromelalgia. AR 39. Plaintiff testified that wearing clothing
17 makes him uncomfortable because it makes him feel hotter. AR 39-41. Plaintiff explained that
18 he deals with his pain by soaking in water. AR 41. Plaintiff stated that he soaks his hands and
19 feet in water every 15-20 minutes during the daylight hours. AR 42. He stated that on a good
20 day he "can probably go about half hour" before he has to soak his hands and feet. AR 42. He
21 specified that he soaks his legs from the knee down about six or seven times during the day. AR
22 43.

24 Plaintiff testified that in general he can focus for about 10 minutes at a time on account of
25 his pain. AR 46. Plaintiff testified that he can walk half a block outside his home; stand for four
26 to five minutes at a time; and sit for one hour at a time. AR 168.

27 Plaintiff stated that physicians from Stamford, Connecticut have contacted him in regard
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1 to experimental treatments. AR 48. Plaintiff added: “But I’ve refused to go down there now
2 because of the legal things that I’m going through right now, as far as divorce, I can’t take off
3 right now because of the court dates that I have, but I would like to go.” AR 49.

4 **D. Analysis**

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6 In this case, the ALJ found that Plaintiff’s medically determinable impairments could
7 reasonably be expected to produce the alleged symptoms. AR 15. However, the ALJ further
8 determined that Plaintiff’s statements about the intensity, persistence, and limiting effects of those
9 symptoms were not credible to the extent they were inconsistent with his assessment of Plaintiff’s
10 residual functional capacity. AR 15. Specifically, the ALJ found that while the Plaintiff “was not
11 at all times symptom-free, the evidence does not support the degree of limitation he alleges.” AR
12 16. Absent affirmative evidence of malingering, the ALJ was required to provide clear and
13 convincing reasons for discounting Plaintiff’s subjective symptom testimony. As discussed
14 below, the Court finds that the ALJ gave clear and convincing reasons supported by the record to
15 discount Plaintiff’s credibility.
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17 First the ALJ found that the objective medical evidence in the record did not support
18 Plaintiff’s subjective complaints. Specifically, the ALJ noted as follows: “[The Plaintiff’s] own
19 statements, and those of third parties concerning his impairments and their impact on his ability to
20 work, are not credible in light of discrepancies between [Plaintiff’s] assertions and information in
21 the documentary reports and the reports of the treating and examining practitioners.” AR 16.
22 Although an ALJ may not rely solely on the inconsistency between objective findings and a
23 claimant’s subjective claims in order to reject the latter, *Light*, 119 F.3d at 792, an ALJ may
24 properly consider such an inconsistency as one factor among others in making his credibility
25 determination. *Moisa v. Barnhart*, 367 F.3d 882, 885 (9th Cir. 2004); *Morgan v. Comm’r of Soc.*
26 *Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999).
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1 With regard to Plaintiff's physical impairments, the ALJ noted that the consultative
2 examiner, Dr. Rustom F. Damania, M.D., found that Plaintiff's skin appeared normal upon
3 examination and that Plaintiff had 5/5 strength in all extremities. AR 14. Dr. Damania concluded
4 that Plaintiff could lift and carry 50 pounds occasionally and 25 pounds frequently, stand and
5 walk without restriction, and sit without restriction. AR 14. He had to work in a temperature-
6 controlled environment, and could not tolerate too much heat or too much cold. AR 14. The ALJ
7 further observed that state-agency medical consultant J. Bonner, M.D., had noted that Plaintiff
8 had no exertional limitations, although he was advised to avoid concentrated exposure to extreme
9 cold and extreme heat.⁴ AR 14.

11 With regard to Plaintiffs mental impairment, the ALJ referenced the findings of Ekriam
12 Michiel, MD, a psychiatric consultative examiner, who noted that Plaintiff's attention,
13 concentration, judgment/insight and immediate recall were fairly intact. AR 14. Dr. Michiel
14 found that Plaintiff could maintain attention and concentration to carry out simple job
15 instructions, and relate to and interact with co-workers, supervisors, and the public. AR 14-15.
16 The ALJ further noted that state-agency psychological consultant, K. Loomis, MD, concluded
17 upon a review of Plaintiff's file, that Plaintiff could understand and remember simple work tasks;
18 sustain concentration, persistence and pace; and adapt to changes in the workplace. AR 15. Dr.
19 Loomis described Plaintiff's social interaction as appropriate. Finally, the ALJ noted that Kim
20 Morris, Psy.D., also adopted Dr. Loomis' findings.⁵ AR 15.

23 The ALJ properly summarized the opinions of the consultative examiners and state-
24 agency reviewing doctors, and correctly noted that their opinions do not support Plaintiff's
25 description of the severity of his impairments and their impact on his ability to work. The ALJ

27 ⁴ Dr. Bonner also noted that Plaintiff's "[d]egree of subjective complaints and limitations is not adequately supported
by MER [medical evidence of record]." AR 297.

28 ⁵ Dr. Loomis also noted that Plaintiff's "allegations are not fully supported by the objective findings in file." AR
324.

1 also discounted the third-party statements of Plaintiff's wife regarding the severity of Plaintiff's
2 impairments because he found that these also were not consistent with the opinions and
3 observations of medical doctors in the record and likely reflected Plaintiff's "symptomatological
4 exaggerations." AR 16. The ALJ's analysis of the inconsistency between Plaintiff's subjective
5 complaints and the objective medical evidence constitutes a specific, clear and convincing reason,
6 supported by the record as a whole, for his adverse credibility determination.⁶
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8 Next, the ALJ found that Plaintiff's "demeanor while testifying at the hearing was
9 generally unpersuasive." AR 16. The ALJ noted that that Plaintiff's demeanor was not a
10 determinative factor but rather was one factor of many that he relied on in assessing Plaintiff's
11 credibility. AR 16. The ALJ properly relied on Plaintiff's demeanor as a basis for discounting
12 his testimony regarding the severity of his symptoms and their limiting effects. *See, e.g., Fanale*
13 *v. Astrue*, 322 F. App'x 566, 567 (9th Cir. 2009) (claimant's demeanor at hearing amounted to
14 clear and convincing reason for discrediting her subjective complaints); *Matney on Behalf of*
15 *Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992) (holding that district court properly
16 affirmed the ALJ where ALJ's credibility finding was based on claimant's daily activities, "his
17 demeanor and appearance at the hearing" as well as his well-documented motivation to obtain
18 social security benefits"); *DeMaio v. Astrue*, 2011 WL 837180 at *12 (E.D. Cal. Mar. 7, 2011)
19 ("This Court will not dispute the subjective credibility assessment of the ALJ, who was present to
20 watch and listen to the testimony first hand.").

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23 The ALJ further noted that Plaintiff's credibility regarding the severity and impact of his
24 impairments was undermined by the fact that he was experiencing non-medical problems in his
25 life, such as financial stress and a separation/divorce, suggesting that "at least some of his
26 difficulties are situational, and not medical, in nature." AR 15 (citing Exhibit 1F15, AR 224-
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28 ⁶ The records of Plaintiff's treating doctors also do not support Plaintiff's description of his limitations. Indeed no treating doctor assessed any functional limitations on account of Plaintiff's impairments.

1 225). The ALJ's reasoning was specific, clear and convincing and supported by substantial
2 evidence in the record. *See, e.g., De Maio*, 2011 WL 837180 at *12 (the fact that Plaintiff was
3 going through a divorce and was experiencing related financial difficulties was relevant to the
4 ALJ's evaluation of the credibility of her subjective symptom testimony); *Chee v. Shalala*, 1994
5 WL 721447 (N.D. Cal. Dec. 28, 1994) (ALJ properly discounted claimant's subjective symptom
6 testimony where claimant testified to a "very bitter divorce" and "expensive custody fight" which
7 the ALJ found corresponded closely with her disability onset date, suggesting non-medical
8 reasons for her motivation to seek disability benefits). Here, the ALJ referenced evidence in
9 Plaintiff's records that revealed that Plaintiff, who was dependent on his wife's family financially,
10 was in the midst of a marital conflict, had lost his source of income, and was losing his home on
11 account of financial difficulties. AR 224-225; *also see* AR 211.

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14 The ALJ next noted that Plaintiff's work history was also inconsistent with his testimony
15 regarding his symptoms and limitations. AR 15. Specifically, the ALJ noted as follows:

16 The record reflects some evidence of work after the alleged [disability] onset date
17 [of February 27, 2010]. On May 7, 2010, Mr. Melendez reported that he worked
18 for his mother-in-law and was paid under the table. (Exhibit 1F2 [AR 211]).
19 Although that work did not constitute disqualifying "substantial gainful activity,"
neither is it consistent with his subjective complaints. He was working as a
caregiver, an occupation requiring considerable physical and mental activity.

20 AR 15. The Court finds the ALJ's reasoning to be sound. Plaintiff testified at the
21 administrative hearing that his wife and he operated a home business caring for elderly
22 males. Plaintiff testified that he had no idea why his earnings from that business were not
23 reflected in his earnings records. Plaintiff further testified that he basically just "kept an
24 eye on" the elderly males and did not do much else. However, Plaintiff's testimony is at
25 odds with earlier statements, included in the record, that the ALJ relied on in making his
26 credibility determination. The records cited by the ALJ reflect Plaintiff's statements to
27 Dr. Joseph Bonilla as follows:
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1 [Plaintiff] reports currently he is experiencing a lot of stress in his life. His wife
2 wants a divorce . . . they are selling their house which he really liked, they are
3 living with her mom, he is trying to get an apartment which is not going well and
4 appealing disability ... [His wife] will not help him financially and will not give
5 him what he deserves in the settlement. They both work for her mom who owns
6 several board and care homes although he is paid “under the table.”

5 AR 211. Plaintiff’s statements to Dr. Bonilla suggest that he was helping his mother-in-
6 law at several “board and care” homes after his alleged disability date, and was paid under
7 the table. The ALJ’s observation that this evidence of work in the record is not consistent
8 with Plaintiff’s subjective complaints counts as a specific, clear and convincing reason for
9 discounting Plaintiff’s testimony. *See Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th
10 Cir. 1997) (a claimant’s work record is a relevant factor in evaluating the credibility of his
11 subjective complaints).

13 The ALJ also relied on Plaintiff’s description of his daily activities in discounting
14 Plaintiff’s subjective complaints of disabling symptoms. AR 15. The fact that Plaintiff
15 stated that he goes outside two or three times per day and takes care of pet fish does not
16 necessarily undercut his subjective complaints. AR 175; 176. Indeed to the extent
17 Plaintiff stated he goes outside for the purpose of cooling off with a garden hose, this
18 testimony supports his subjective complaints. AR 175. However, Plaintiff also testified
19 that he goes shopping for food and clothing weekly and manages his finances. These
20 activities may be seen as inconsistent with his assertions of totally disabling symptoms.
21 For example, Plaintiff testified that on account of his symptoms from erythromelalgia, he
22 soaks his hands and feet in water every 15-20 minutes during the daylight hours. AR 42.
23 He stated that on a good day he “can probably go about half hour” before he has to soak
24 his hands and feet. AR 42. Plaintiff also stated that he could only stand for a few minutes
25 at a time, and, as to his ability to concentrate, he testified that in general he can focus for
26 about 10 minutes at a time. AR 46. This testimony may be viewed as inconsistent with
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1 Plaintiff going shopping and being able to manage his finances. The ALJ’s reliance on
2 this inconsistency is supported by substantial evidence and the Court may not second-
3 guess the ALJ’s determination. *See, e.g., Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir.
4 2002) (claimant’s “ability to perform various household chores such as cooking, laundry,
5 washing dishes and shopping,” among other factors, bolstered “the ALJ’s negative
6 conclusions about [her] veracity”); *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir. 2012)
7 (“[e]ven where [the daily] activities suggest some difficulty functioning, they may be
8 grounds for discrediting the claimant's testimony to the extent that they contradict claims
9 of a totally debilitating impairment”); *Orn v. Astrue*, 495 F.3d 625, 639 (2007) (claimant’s
10 daily activities that contradict claimant’s other testimony vitiate claimant’s credibility).

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12 In sum, the ALJ cited specific, clear and convincing reasons, based on permissible
13 grounds and supported by the record as a whole, for rejecting Plaintiff’s subjective complaints
14 regarding the intensity, duration, and limiting effects of his symptoms.⁷ *See Batson v. Comm’r of*
15 *Soc. Sec. Admin.*, 359 F.3d 1190, 1196–97 (9th Cir. 2004); *Thomas v. Barnhart*, 278 F.3d 947,
16 959 (9th Cir. 2002). As such the ALJ’s credibility determination is proper.

17 18 CONCLUSION

19 The Court finds that the ALJ’s decision is free of legal error and is supported by
20 substantial evidence in the record as whole. Accordingly, this Court DENIES Plaintiff’s appeal
21 from the administrative decision of the Acting Commissioner of Social Security. The Clerk of
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24 ⁷ The Court is not persuaded by two additional reasons that the ALJ provided for discounting Plaintiff’s testimony
25 regarding his subjective complaints, namely that Plaintiff’s responded well to medications for his mental impairment
26 and that he continued to smoke despite direct medical advice. AR 15. Neither of these reasons relate to Plaintiff’s
27 testimony regarding his symptoms from erythromelalgia, which he characterizes as his chief complaint. *See* Doc. 14
28 at 8. While these two reasons for discounting Plaintiff’s credibility may have some merit, they do not amount to a
clear and convincing basis for rejecting Plaintiff’s subjective complaints. Nonetheless, the ALJ cited a number of
specific, clear and convincing reasons for discounting Plaintiff’s subjective complaints, and his credibility
determination is therefore proper. *See Carmickle v. Comm’r of Social Sec. Admin.*, 533 F.3d 1155, 1162–63 (9th Cir.
2008) (the inclusion of improper reasons does not negate an overall adverse credibility determination); *Kibble v.*
Comm’r Soc. Sec. Admin., 2014 WL 4290790 at *1 (9th Cir. Sept. 2, 2014).

1 this Court is DIRECTED to enter judgment in favor of Defendant Carolyn W. Colvin, the Acting
2 Commissioner of Social Security, and against Plaintiff Javier Melendez.

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IT IS SO ORDERED.

Dated: September 19, 2014 /s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE