

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

RANDY DAVISSON,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security  
  
Defendant.

**Case No. 1:15-cv-00758-EPG  
ORDER REGARDING PLAINTIFF'S  
SOCIAL SECURITY COMPLAINT**

**I. INTRODUCTION**

Plaintiff Randy Davisson ("Plaintiff") seeks judicial review of a final decision by the Commissioner of Social Security ("Commissioner" or "Defendant") denying his application for disability insurance and supplemental security income ("SSI") benefits pursuant to Titles II and XVI of the Social Security Act. The matter is currently before the Court on the parties' briefs, which were submitted without oral argument to the Honorable Erica P. Grosjean, United States Magistrate Judge.<sup>1</sup>

**II. BACKGROUND AND PRIOR PROCEEDINGS<sup>2</sup>**

Plaintiff was 43 years old at the time of his hearing before the Social Security Administration. AR 50. He graduated from high school, but has no post-secondary education.<sup>3</sup>

---

<sup>1</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. (ECF Nos. 7, 9.)  
<sup>2</sup> References to the Administrative Record will be designated as "AR," followed by the appropriate page number.  
<sup>3</sup> Plaintiff testifies that he received special education in high school.

1 AR 50-51. Plaintiff most recently worked as a custodian in 2010, but was laid off. AR 52, 248.  
2 Plaintiff lives alone and does not drive because he lacks a vehicle, although he sometimes rides  
3 the bus. AR 64-65.

4 Plaintiff's alleged physical conditions are: scoliosis, a shortened right leg, and a right hip  
5 injury. AR 247. He also alleges depression. AR 53. On April 19, 2012, Plaintiff filed  
6 applications for SSI under Title XVI and disability insurance benefits under Title II, alleging a  
7 disability beginning on April 18, 2012. AR 214-223, 224-230. The applications were denied  
8 initially on September 15, 2012 and on reconsideration on February 21, 2013. AR 92-117, 148-  
9 149. Plaintiff filed a request for a hearing on July 3, 2013. AR 127-129. The hearing was then  
10 conducted before Administrative Law Judge G. Ross Wheatley (the "ALJ") on October 16, 2013.  
11 AR 46. On November 1, 2013, the ALJ issued an unfavorable decision determining that Plaintiff  
12 was not disabled. AR 26-38. Plaintiff filed an appeal of this decision with the Appeals Council.  
13 The Appeals Council denied the appeal, rendering the ALJ's order the final decision of the  
14 Commissioner. AR 1-6.

15 Plaintiff now challenges that decision, arguing that: (1) The ALJ erroneously rejected  
16 opinions by Drs. Fine and Hernandez, two consulting examiners; (2) the ALJ incorrectly rejected  
17 Plaintiff's testimony; and, (3) the ALJ failed to consider Plaintiff's psychological impairments at  
18 step two of the five step process.

19 Defendant contests Plaintiff's assessment, pointing out that: (1) The ALJ had specific and  
20 legitimate reasons to discount the opinions of Drs. Fine and Hernandez; (2) Plaintiff's testimony  
21 was inconsistent with the medical record and with his daily activities; and, (3) the ALJ found that  
22 the combined effects of Plaintiff's impairments were "severe," thus any failure to consider  
23 psychological impairments was not error.

### 24 **III. THE DISABILITY DETERMINATION PROCESS**

25 To qualify for benefits under the Social Security Act, a plaintiff must establish that he or  
26 she is unable to engage in substantial gainful activity due to a medically determinable physical or  
27 mental impairment that has lasted or can be expected to last for a continuous period of not less  
28 than twelve months. 42 U.S.C. § 1382c(a)(3)(A). An individual shall be considered to have a

1 disability only if:

2 . . . his physical or mental impairment or impairments are of such severity that he  
3 is not only unable to do his previous work, but cannot, considering his age,  
4 education, and work experience, engage in any other kind of substantial gainful  
5 work which exists in the national economy, regardless of whether such work  
6 exists in the immediate area in which he lives, or whether a specific job vacancy  
7 exists for him, or whether he would be hired if he applied for work.

8 42 U.S.C. § 1382c(a)(3)(B).

9 To achieve uniformity in the decision-making process, the Commissioner has established  
10 a sequential five-step process for evaluating a claimant’s alleged disability. 20 C.F.R. §§  
11 404.1520(a)-(f), 416.920(a)-(f). The ALJ proceeds through the steps and stops upon reaching a  
12 dispositive finding that the claimant is or is not disabled. 20 C.F.R. §§ 404.1520(a)(4),  
13 416.920(a)(4). The ALJ must consider objective medical evidence and opinion testimony. 20  
14 C.F.R. §§ 404.1527, 404.1529, 416.927, 416.929.

15 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in  
16 substantial gainful activity during the period of alleged disability, (2) whether the claimant had  
17 medically-determinable “severe” impairments,<sup>4</sup> (3) whether these impairments meet or are  
18 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,  
19 Appendix 1, (4) whether the claimant retained the residual functional capacity (“RFC”) to  
20 perform his past relevant work,<sup>5</sup> and (5) whether the claimant had the ability to perform other jobs  
21 existing in significant numbers at the regional and national level. 20 C.F.R. §§ 404.1520(a)-(f),  
22 416.920(a)-(f).

23 Using the Social Security Administration’s five-step sequential evaluation process, the  
24 ALJ determined that Plaintiff did not meet the disability standard. AR 26-38. In particular, the  
25 ALJ found that Plaintiff had not engaged in substantial gainful activity since April 18, 2012, the  
26 date specified in his application. AR 28. Further, the ALJ identified scoliosis with low back  
27 pain, a history of right hip fracture status post surgeries, and right knee disorder as severe

28 <sup>4</sup> “Severe” simply means that the impairment significantly limits the claimant’s physical or mental ability to do basic work activities. *See* 20 C.F.R. §§ 404.1520(c), 416.920(c).

<sup>5</sup> Residual functional capacity captures what a claimant “can still do despite [his or her] limitations.” 20 C.F.R. §§ 404.1545 and 416.945. “Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant’s residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th Cir. 2007).

1 impairments. AR 28. Nonetheless, the ALJ determined that the severity of Plaintiff's  
2 impairments did not meet or exceed any of the listed impairments in 20 C.F.R. Part 404, Subpart  
3 P, Appendix 1. AR 31-32.

4 Based on a review of the entire record, the ALJ determined that Plaintiff had the RFC to:  
5 “perform light work as defined in 20 CFR 404.1567(b) and 416.967(b), but he needs to be  
6 allowed to sit or stand alternatively at will, provided that he is not off-task more than 10% of the  
7 work period. He can only occasionally crouch, kneel, crawl, and climb ladders, ropes, and  
8 scaffolds. In addition, he can only frequently stoop and climb ramps and stairs.” AR 32. Plaintiff  
9 was unable to perform his past relevant work. AR 36. However, the ALJ determined that there  
10 were jobs that exist in significant numbers in the national economy that Plaintiff could perform,  
11 including shipping and receiving weigher, router clerk, and checker. AR 37.

#### 12 **IV. STANDARD OF REVIEW**

13 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine  
14 whether: (1) it is supported by substantial evidence; and (2) it applies the correct legal standards.  
15 *See Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d  
16 1071, 1074 (9th Cir. 2007).

17 “Substantial evidence means more than a scintilla but less than a preponderance.”  
18 *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is “relevant evidence which,  
19 considering the record as a whole, a reasonable person might accept as adequate to support a  
20 conclusion.” *Id.* “Where the evidence is susceptible to more than one rational interpretation, one  
21 of which supports the ALJ's decision, the ALJ's conclusion must be upheld.” *Id.*

#### 22 **V. DISCUSSION**

##### 23 **A. The Relevant Medical Evidence**

24 Plaintiff argues that the ALJ improperly considered the medical evidence, as well as the  
25 statements of Plaintiff, and thus erroneously determined that Plaintiff was not disabled.  
26 Specifically at issue is the ALJ's consideration of: (1) the opinion of consulting examiner Dr.  
27 Frank Fine; (2) the opinion of psychological consulting examiner Dr. Joseph Hernandez; and (3)  
28 the testimony of Plaintiff. The Court has reviewed the entire medical record and will summarize

1 it in relevant part.

2 *i. Treatment at Doctors Medical Center of Modesto*

3 Plaintiff saw a succession of physicians and other medical caretakers between November  
4 2011 and May 2012 at or in connection with his treatment at Doctors Medical Center of Modesto.

5 On November 3, 2011, Plaintiff sought treatment for shortness of breath and chest pain  
6 and saw Jeremiah Fillo, M.D. AR 472. Plaintiff was given aspirin, morphine, a nitro patch, and  
7 Zofran, which relieved his chest pain. AR 472. Plaintiff told Dr. Fillo he took Aleve as  
8 necessary for headaches. AR 472. Plaintiff reported receiving a DUI within the past year. AR  
9 473. He complained of insomnia, but denied any feelings of anxiousness. AR 473. A mental  
10 status examination described his affect as “slightly disheveled” and “somewhat blunted.” AR  
11 473. He had a euthymic mood, but appropriate speech and thought processes. AR 473. He had  
12 no suicidal or homicidal ideations and was fully oriented. AR 473. Dr. Fillo entered a diagnosis  
13 of “[q]uestionable anxiety disorder.” AR 474.

14 On December 21, 2011, Plaintiff saw Satnam Ludder, M.D., a cardiologist, for a  
15 consultation regarding his chest pains. Dr. Ludder reviewed Plaintiff’s chest x-rays and EKG  
16 results and noted that Plaintiff had a history of “some anxiety disorder.” AR 460. He also noted  
17 that Plaintiff “walks about a mile a day without any problems.” AR 460. He observed that  
18 Plaintiff was oriented to time, place, and person. AR 461. Plaintiff’s mood was good. AR 461.  
19 Dr. Ludder recommended a metabolic panel, lipid panel, and blood work up, although follow up  
20 treatment was to be conducted by his primary care physician. AR 462. He also recommended  
21 that Plaintiff “continue his exercise protocol walking about a mile a day everyday [sic].” AR 462.

22 On April 16, 2012, Shawn Escobar, M.D., reviewed x-rays of Plaintiff’s hip and noted  
23 that he had “[s]evere degenerative changes of the right hip which . . . may be related to a prior  
24 injury in this region.” AR 488.

25 On October 16, 2012, Plaintiff was seen by Omar Liran, M.D., complaining of suicidal  
26 ideation. AR 556. Plaintiff was admitted to the hospital under California Welfare and  
27 Institutions Code § 5150. AR 556. Plaintiff stated that he was “feeling depressed and anxious”  
28 because he was required to pay child support but did not have the money to do so. AR 556. He

1 “complained of hip pain and said that he is applying for social security disability and that is why  
2 he cannot work.” AR 556. Plaintiff was given Cymbalta and ate and slept normally while  
3 admitted. AR 557. Plaintiff then said that he felt good and “no longer wants to hurt himself.”  
4 AR 557. Dr. Liran observed that he appeared “less anxious” and “currently does not meet criteria  
5 for involuntary inpatient hospitalization.” AR 557. Plaintiff requested that he be discharged and  
6 was provided with a bus ticket and resource packet for psychiatric and peer support groups in his  
7 area. AR 557.

8 ***ii. Roger Wagner, M.D.***

9 Dr. Wagner conducted an internal medicine consultative examination of Plaintiff on  
10 August 24, 2012. AR 503. Plaintiff explained that he had suffered a hip fracture in 2001 while at  
11 work and that the injury required two surgeries to repair. AR 503. He stated that his right leg is  
12 shorter than his left leg and that he could walk “about one to one and a half blocks.” AR 503. He  
13 also complained of scoliosis, which caused him pain when bending or lifting. AR 504. He  
14 claimed that he could only tolerate sitting for approximately 45 minutes. He stated that he lived  
15 with his girlfriend and that he could cook, clean, and perform other daily living activities without  
16 assistance. AR 504. He rode a bicycle for exercise and took ibuprofen for pain. AR 504. Dr.  
17 Wagner observed that Plaintiff was able to walk at a normal pace while at the office, was “easily  
18 able to get on and off the examination table,” and was “very, very easily able to bend over at the  
19 waist and take off his shoes and socks, demonstrating very good limberness in the back when  
20 doing so.” AR 504. Plaintiff had a normal station and gait, but reported discomfort “on internal  
21 and external rotation of the right hip.” AR 505.

22 Dr. Wagner diagnosed Plaintiff with a right hip fracture status post surgery and scoliosis.  
23 AR 506-507. Based on these diagnoses, Dr. Wagner found that Plaintiff could: stand and/or  
24 walk for up to six hours; sit for up to six hours; lift/carry 20 pounds occasionally and 10 pounds  
25 frequently; stoop frequently; and crouch and crawl occasionally. AR 507.

26 The ALJ gave Dr. Wagner’s opinion substantial weight. AR 35.

27 ***iii. Deborah von Bolschwing, Ph.D.***

28 Dr. von Bolschwing conducted a psychological consultative examination of Plaintiff on

1 August 27, 2012. Plaintiff complained to Dr. von Bolschwing of his physical problems, but did  
2 not complain about any psychological symptoms. AR 510. Plaintiff told Dr. von Bolschwing  
3 that he had been laid off in 2011 because of a lack of available work. AR 510. He reported  
4 chronic hip pain for which he was taking aspirin. AR 511. He also denied any suicidal or  
5 homicidal ideation or psychiatric hospitalizations. AR 511. He said that he was able to drive and  
6 perform simple chores “such as washing dishes, doing laundry, and preparing simple meals.” AR  
7 511.

8 Dr. von Bolschwing observed that Plaintiff had a “full affect and a pleasant mood.” AR  
9 511. His mental status examination was largely normal, although his general fund of knowledge  
10 was below average. AR 511. Dr. von Bolschwing did not diagnose any psychological  
11 impairments. AR 511. She did state, however, that Plaintiff had mild impairments in:  
12 understanding, remembering, and carrying out simple instructions; maintaining attention and  
13 concentration for the duration of the evaluation; maintaining pace while completing tasks;  
14 enduring the stress of the interview; and interacting with the public, supervisors, and co-workers.  
15 AR 512. She also found that Plaintiff had moderate impairments in: understanding,  
16 remembering, and carrying out complex instructions; and adapting to changes in routine work-  
17 related settings. AR 512. Despite these impairments, Dr. von Bolschwing found that the “main  
18 obstacle to adequate work performance appears to be his medical condition,” which was “beyond  
19 the scope of today’s evaluation, and is deferred to medical opinion.” AR 512.

20 The ALJ gave Dr. von Bolschwing’s opinion little weight. AR 31.

21 *iv. Frank Fine, M.D.*

22 Dr. Fine conducted a physical consultative examination of Plaintiff on September 9, 2013.  
23 AR 580. Plaintiff complained of pain in his lower back that radiated down his right leg. AR 584.  
24 He stated that he was only able to walk a quarter of a block and that he experienced “agonizing  
25 back pain” when trying to bend, stoop, or lift. AR 584. He explained that his hip injury was  
26 sustained in 2000 while he was working for a railroad company and that he had needed surgery  
27 and physical therapy as a result of the injury. AR 584. He told Dr. Fine that he returned to work  
28 after his injury, but developed carpal tunnel syndrome after a month on the job. AR 585.

1 Eventually, he decided that he could not perform his job duties any longer. AR 585. He rated his  
2 current back and knee pain as 8/10 and his hip pain as 9/10. AR 585.

3 Dr. Fine conducted a physical examination and found that Plaintiff had limited range of  
4 motion in his right hip and lumbar trunk. AR 586. Plaintiff also had difficulty walking. AR 587.  
5 Plaintiff's right knee had a full range of motion, but had swelling around the joint and some pain.  
6 AR 587.

7 Dr. Fine concluded that Plaintiff was "quite disabled" and that he would not be able to  
8 "return to the open job market and compete in the workforce due to his multiple disabilities." AR  
9 587. In particular, he found that:

10 It is my opinion this patient has permanent restrictions. He cannot repetitively  
11 bend or stoop, he cannot lift more than 10 lbs. He cannot walk more than a  
12 quarter of a block and needs to sit down for a 5-10 interval rest. He should not be  
13 on his feet for more than 20 minutes at a time. He cannot walk over uneven  
14 ground, he cannot perform pivoting maneuvers with his right hip. He cannot  
15 repetitively kneel or squat about his right lower extremity. He also has some  
16 impairment with his ability to repetitively grip and grasp with both hands related  
17 to his carpal tunnel syndrome and history of carpal tunnel release surgery in his  
18 hands. The patient needs to be under the care of a psychiatrist and continues to  
19 require psychotropic medications. He should also be allowed the benefit of being  
20 seen by a psychologist for his issues of depression and anxiety. His previous  
21 Social Security psychological evaluator, Dr. Von Volschwing [sic] noted the  
22 patient has moderate impairment with ability to understand, remember, and carry  
23 out complex instructions and moderate impairment of ability to adapt to changes  
24 in routine work-related settings. It is my opinion with regard to his psychiatric  
25 disability and physical impairments I doubt [sic] that he could return to the open  
26 job market. I told the patient I would be happy to take over as his primary treating  
27 physician and provide pain management for him and see if this might improve his  
28 level of function.

AR 587-588.

The ALJ gave Dr. Fine's opinion little weight. AR 31.

***v. Joseph Hernandez, Ph.D.***

23 Dr. Hernandez conducted a psychological consultative examination of Plaintiff September  
24 30, 2013. AR 589. Plaintiff told Dr. Hernandez that after 2003 or 2004, he has only been able to  
25 work in various odd jobs because of his impairments. AR 597. He rated his pain level for his  
26 back and leg 6/10 and his wrist as 0 or 1/10. AR 597. He reported that he takes aspirin and  
27 ibuprofen to manage his pain. AR 597.

28 Dr. Hernandez conducted a mental status examination and observed that Plaintiff's fund



1 of knowledge appeared low, although he had “no loss of contact with reality.” AR 598. He  
2 reported that Plaintiff was “an affable individual, who was cooperative during interview and  
3 testing.” AR 598. He noted that although Plaintiff had a “brief period of suicidal ideation in  
4 October 2012,” his thoughts during that period “have resolved.” AR 598. Nonetheless, he  
5 believed that Plaintiff “presented in a manner consistent with moderate to severe depression.”  
6 AR 598.

7 Dr. Hernandez concluded that Plaintiff’s “physical condition has precluded Mr. Randy  
8 Davisson from working in his former occupation since 2010, when he last worked.” AR 599. He  
9 explained that Plaintiff’s “affective symptoms appear to be predominantly the result of his  
10 chronic pain condition and resultant financial stress.” AR 599. He also noted, however, that  
11 Plaintiff “has, undoubtedly, felt significant emotional distress since October 16, 2012, which is  
12 when he experienced severe suicidal ideation and was hospitalized as being a danger to self or  
13 others.” AR 599. He observed that Plaintiff’s psychological “symptoms are being controlled  
14 through the use of Wellbutrin.” AR 599. Nonetheless, he determined that Plaintiff “appears  
15 unable to work in his Past Relevant Work from a physiological perspective due to the level of  
16 pain that he experiences.” AR 600.

17 The ALJ gave Dr. Hernandez’s opinion little weight. AR 31

18 *vi. Alan Coleman, M.D. and Maria Legarda, M.D.*

19 Dr. Coleman reviewed Plaintiff’s medical records on September 15, 2012. AR 117. He  
20 concluded that Plaintiff was capable of work at a medium exertion level and with minimal  
21 exertional limitations. AR 114, 116. Dr. Legarda reviewed Plaintiff’s medical records on  
22 February 11, 2013 and concurred with respect to the exertional limitations. AR 130, 141. The  
23 ALJ gave Drs. Coleman and Legarda reduced weight, saying that they “overstate the claimant’s  
24 physical capacity.” AR 35.

25 *vii. Helen Patterson, Ph.D.*

26 Dr. Patterson reviewed Plaintiff’s medical records on February 11, 2013. AR 141. Dr.  
27 Patterson noted that there was no evidence of psychological problems until Plaintiff’s October 16,  
28 2012 hospital admission. AR 141. She concluded that “any work-related functional limitations

1 caused by symptoms of depression would resolve to a non-severe level within 12 months.” AR  
2 141. Accordingly, she found that Plaintiff had only mild limitations in activities of daily living;  
3 maintaining social functioning; and maintaining concentration, persistence, or pace. AR 142.

4 The ALJ gave Dr. Patterson’s opinion substantial weight. AR 30.

5 **B. The ALJ Appropriately Considered Plaintiff’s Impairments at Step Two of the**  
6 **Five Step Analysis<sup>6</sup>**

7 *i. Legal standard*

8 In step two of the five step analysis, the ALJ is required to determine whether a plaintiff  
9 has a “severe” medical impairment or combination of impairments. 20 C.F.R. §§ 404.1520(c),  
10 416.920(c). “An impairment or combination of impairments is not severe if it does not  
11 significantly limit [an individual’s] physical or mental ability to do basic work activities.”<sup>7</sup> 20  
12 C.F.R. §§ 404.1521(a), 416.921(a). Social Security Ruling (“SSR”) 85-28 further clarifies that an  
13 impairment or combination of impairments is “not severe” when “medical evidence establishes  
14 only a slight abnormality or a combination of slight abnormalities *which would have no more*  
15 *than a minimal effect on an individual’s ability to work* even if the individual’s age, education, or  
16 work experience were specifically considered.” SSR 85-28, 1985 WL 568556 (1985) (emphasis  
17 added); *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (adopting SSR 85-28).

18 When the severity of a mental impairment is at issue, the regulations require a state  
19 agency reviewing physician to rate the claimant’s functional limitations in four broad areas  
20 (activities of daily living; social functioning; concentration, persistence or pace; and episodes of  
21 decompensation). The ALJ’s written decision must then address the reviewing physician’s

---

22 <sup>6</sup> Although Plaintiff is purportedly challenging the ALJ’s determination at Step Two that Plaintiff’s psychological  
23 impairments were not “severe,” the substance of his argument appears directed at the ALJ’s rejection of Dr.  
24 Hernandez’s opinion. (Plaintiff’s Opening Brief 10:6-7 (“Plaintiff takes issue with the ALJ’s reliance on a non-  
25 examining physician opinion, over that of the examining physician, Dr. Hernandez, or even Dr. van [sic]  
26 Bolschwing.”), ECF No. 16.) Because Plaintiff raises a separate challenge to the ALJ’s rejection of Dr. Hernandez,  
27 however, the Court will treat the current argument as an objection to the ALJ’s step two analysis and will address  
28 Plaintiff’s arguments with respect to Dr. Hernandez below.

<sup>7</sup> Basic work activities are defined as “the abilities and aptitudes necessary to do most jobs,” including physical  
functions (such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling); capacities for  
seeing, hearing, and speaking; understanding, carrying out, and remembering simple instructions; use of judgment;  
responding appropriately to supervision, co-workers and usual work situations; and dealing with changes in a routine  
work setting. 20 C.F.R. §§ 140.1521(b), 416.921(b).

1 findings in relation to his or her determination at step two of the analysis. SSR 96-8p, 1996 WL  
2 374184 (1996); 20 C.F.R. §§ 404.1520a(c)(3) and (e), 416.920a(c)(3) and (e); *Keyser v.*  
3 *Commissioner of Social Security*, 648 F. 3d 721, 725 (9th Cir. 2011). If the degree of functional  
4 limitations in the first three functional areas is rated as “none” or “mild” and is rated as “none” in  
5 the fourth area, the impairment is generally considered not severe, unless the evidence otherwise  
6 indicates that there is more than a minimal limitation in the ability to do basic work activities. 20  
7 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1). A failure to designate an impairment “severe” at step  
8 two does not constitute error if the “medical record does not establish any work-related  
9 limitations as a result of [that] impairment.” *Carmickle v. Comm’r*, 533 F.3d 1155, 1165 (9th Cir.  
10 2008) (failure to designate carpal tunnel syndrome “severe” not error where few medical records  
11 mentioned condition).

12 ***ii. Analysis***

13 Plaintiff contends that the ALJ erred by failing to find that his psychological impairments  
14 were “severe” at step two. (Plaintiff’s Opening Brief 10:12-13, ECF No. 16.) In support of this  
15 conclusion, Plaintiff lists several instances that he believe support the argument that he was  
16 suffering from severe psychological impairments. In particular, Plaintiff argues that the ALJ did  
17 not discuss a visit to the hospital on October 16, 2012, during which Plaintiff expressed suicidal  
18 ideation.

19 Defendant responds that the ALJ’s step two analysis need not catalogue all impairments,  
20 nor need he make an independent ruling as to the severity of each individual impairment. Rather,  
21 the ALJ need only determine whether the cumulative effects of Plaintiff’s impairments are  
22 “severe” enough to allow the analysis to continue.

23 The mere existence of an impairment is not, by itself, disabling. *Sample v. Schweiker*, 694  
24 F.2d 639, 642 (9th Cir. 1982). The fact that Plaintiff was diagnosed with a psychological  
25 impairment does not necessarily establish the need for functional limitations arising out of that  
26 impairment. Thus, even if Plaintiff was diagnosed with a “[h]istory of some anxiety disorder,” it  
27 is within the ALJ’s discretion to determine whether the medical record supports functional  
28 limitations as a result of that diagnosis. AR 460. Nor does a simple diagnosis demand a finding

1 of a “severe” impairment—the ALJ reviews the Plaintiff’s functional limitations in the four  
2 above-mentioned areas precisely because mental impairments require a “complex and highly  
3 individualized process” to assess severity. 20 C.F.R. §§ 404.1520a(c)(1), 416.920a(c)(1).

4 Here, the ALJ thoroughly examined the possibility that any limitations could arise from  
5 Plaintiff’s alleged psychological impairments. He reviewed the medical evidence and noted, for  
6 example, that Plaintiff had no more than mild limitations with respect to his activities of daily  
7 living; social functioning; and concentration, persistence, and pace. AR 29-30. Each of his  
8 findings in these areas is consistent with substantial evidence in the record. Contrary to  
9 Plaintiff’s assertion, the ALJ reviewed and considered Plaintiff’s October 16, 2012 episode of  
10 suicidal ideation. AR 29 (“Although he was placed on an involuntary psychiatric hold for 2 days  
11 in October 2012 due to suicidal ideation, his mental status stabilized at discharge and his  
12 prognosis was reported to be fair. Moreover, the claimant has received relatively little specialized  
13 mental health treatment throughout the adjudicated period, which indicates that his mental  
14 functioning is generally intact.”). He did not find (nor does Plaintiff point to) evidence  
15 suggesting that any of Plaintiff’s psychological impairments require specific functional  
16 limitations beyond those explained in the decision. A statement that Plaintiff is experiencing  
17 stress or that Plaintiff has some history of “anxiety disorder,” without more, does not demonstrate  
18 a significant limitation on the ability to perform basic work activities. *Carmickle*, 533 F.3d at  
19 1165. Given these findings, the ALJ did not err in finding Plaintiff’s psychological limitations  
20 “non-severe.”

### 21 **C. The ALJ’s Treatment of Physician Opinions**

#### 22 *i. Legal standards*

23 The weight given to medical opinions depends in part on whether they are offered by  
24 treating, examining, or non-examining (reviewing) professionals. *Holohan v. Massanari*, 246  
25 F.3d 1195, 1201 (9th Cir. 2001); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Ordinarily,  
26 more weight is given to the opinion of a treating professional, who has a greater opportunity to  
27 know and observe the patient as an individual. *Id.*; *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th  
28 Cir. 1996).

1 An ALJ may reject the *uncontradicted* opinion of a treating or examining medical  
2 professional only for “clear and convincing” reasons. *Lester*, 81 F.3d at 831. In contrast, a  
3 *contradicted* opinion of a treating or examining professional may be rejected for “specific and  
4 legitimate” reasons. *Lester*, 81 F.3d at 830. While a treating professional’s opinion is generally  
5 accorded superior weight, if it is contradicted by an examining professional’s opinion (when  
6 supported by different independent clinical findings), the ALJ may resolve the conflict. *Andrews*  
7 *v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995), *citing Magallanes v. Bowen*, 881 F.2d 747, 751  
8 (9th Cir.1989). The regulations require the ALJ to weigh the contradicted treating physician  
9 opinion, *Edlund v. Massanari*, 253 F.3d 1152 (9th Cir. 2001), but the ALJ need not give it any  
10 weight if it is conclusory and supported by minimal clinical findings. *Meanel v. Apfel*, 172 F.3d  
11 1111, 1113 (9th Cir. 1999) (treating physician's conclusory, minimally supported opinion  
12 rejected); *see also Magallanes*, 881 F.2d at 751.

13 The opinion of an examining physician is, in turn, entitled to greater weight than the  
14 opinion of a non-examining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990);  
15 *Gallant v. Heckler*, 753 F.2d 1450 (9th Cir. 1984). As is the case with the opinion of a treating  
16 physician, the Commissioner must provide “clear and convincing” reasons for rejecting the  
17 uncontradicted opinion of an examining physician. And like the opinion of a treating doctor, the  
18 opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for  
19 specific and legitimate reasons that are supported by substantial evidence in the record. *Lester v.*  
20 *Chater*, 81 F.3d 821, 830 (9th Cir. 1996).

21 The opinion of a non-examining physician may constitute substantial evidence when it is  
22 “consistent with independent clinical findings or other evidence in the record.” *Thomas v.*  
23 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). Such independent reasons may include laboratory  
24 test results or contrary reports from examining physicians, and plaintiff’s testimony when it  
25 conflicts with the treating physician's opinion. *Lester*, 81 F.3d at 831, *citing Magallanes*, 881  
26 F.2d at 751–55.

27 ***ii. Joseph Hernandez, Ph.D.***

28 Plaintiff contends that the ALJ rejected Dr. Hernandez’s opinion and declined to

1 incorporate his recommendations in Plaintiff's RFC. Plaintiff does not, however, identify  
2 particular issues he is challenging in the ALJ's treatment of Dr. Hernandez. Rather, he recites Dr.  
3 Hernandez's findings, states that they contradict the ALJ's findings with respect to Plaintiff's  
4 medical impairments, and asserts that Dr. Hernandez's opinion should have been used in creating  
5 an RFC. (Plaintiff's Opening Brief 10:2-5, 16:17-17:4, ECF No. 16.) Despite the lack of a  
6 specific challenge to the ALJ's reasoning, the Court will review the ALJ's treatment of Dr.  
7 Hernandez's opinion for legal error.

8 Dr. Hernandez's opinion that Plaintiff is unable to work because of his psychological  
9 impairments is contradicted by Dr. von Bolschwing's findings. *Compare* AR 599 ("From a  
10 psychological perspective, I believe that it would be very difficult for Mr. Randy Davisson to  
11 work without some interruption to his usual schedule.") *with* AR 511 ("Only medical problems  
12 were reported. No current affective symptoms were reported, and none were observed."). The  
13 ALJ would thus need specific and legitimate reasons supported by substantial evidence to reject  
14 Dr. Hernandez's findings. *Lester*, 81 F.3d at 830.

15 In the decision, the ALJ explained his rationale for assigning Dr. Hernandez (and Dr.  
16 Fine) little weight:

17 Frank Fine, M.D., who examined the claimant on September 9, 2013, stated that  
18 the claimant was incapable of even "low stress" jobs. Joseph Hernandez, Ph.D.,  
19 who examined the claimant on September 30, 2013, assessed that the claimant  
20 could not maintain a regular work schedule or perform work activities  
21 consistently in a competitive work environment. These opinions are given little  
22 weight because they understate the claimant's mental capacity and are  
23 inconsistent with the general absence of evidence of specialized mental health  
24 treatment in the record. In addition, the assessments are inconsistent with the  
25 claimant's relatively normal mental status examination conducted on August 27,  
26 2012. Moreover, the assessments are inconsistent with the claimant's relatively  
27 normal daily living activities and generally adequate social activities as discussed  
28 above.

AR 31 (internal citations omitted).

This explanation suggests that the ALJ rejected Dr. Hernandez's opinion because: (1) it  
was inconsistent with the absence of mental health treatment in the record; (2) it was inconsistent  
with Dr. von Bolschwing's mental status examination; and (3) it was inconsistent with Plaintiff's  
daily activities.

1 “The ALJ is responsible for determining credibility and resolving conflicts in medical  
2 testimony.” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). As a result, an ALJ may  
3 choose to give more weight to an opinion that is more consistent with the evidence in the record.  
4 20 C.F.R. §§ 404.1527(c)(4), 416.927(c)(4) (“the more consistent an opinion is with the record as  
5 a whole, the more weight we will give to that opinion”); *Tonapetyan v. Halter*, 242 F.3d 1144,  
6 1149 (9th Cir. 2001) (examining physician’s opinion “alone constitutes substantial evidence” to  
7 reject treating physician’s opinion where it “rests on his own independent examination”). It was  
8 thus within the ALJ’s discretion to give more credence to Dr. von Bolschwing’s results from her  
9 mental status examination than Dr. Hernandez’s results from his mental status examination if the  
10 ALJ determined that Dr. von Bolschwing’s results were more consistent with the evidence in the  
11 record.

12 Such a finding is supported by substantial evidence. Very few of the treating physician  
13 records suggest significant limitations as a result of any psychological impairments. Even  
14 Plaintiff’s hospitalization on October 16, 2012 as a result of his suicidal ideation appears to have  
15 resolved within a short period of time. AR 519 (“On the unit, the patient was eating and sleeping  
16 normally and today, the patient says he feels good and he no longer wants to hurt himself. He  
17 appears less anxious and says that he slept well at night. The patient is requesting to be  
18 discharged and currently does not meet criteria for involuntary inpatient hospitalization.”). Even  
19 Dr. Hernandez’s own report appears to indicate that Plaintiff’s psychological symptoms are  
20 largely under control. AR 599 (“At the present time, Mr. Davisson experiences moderate levels  
21 of both depression and anxiety. However, I believe that these symptoms are being controlled  
22 through the use of Wellbutrin.”). Confronted with this record, a factfinder could easily conclude  
23 that Dr. Hernandez’s ultimate conclusions have overstated Plaintiff’s impairments.

24 The ALJ also notes that Plaintiff’s daily activities are inconsistent with Dr. Hernandez’s  
25 stated limitations. AR 31. A claimant’s daily activities can constitute a reason to discredit a  
26 physician’s opinion of the claimant’s limitations. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th  
27 Cir. 2014) (conflict between medical opinion and daily activities “may justify rejecting a treating  
28 provider’s opinion”). As the ALJ noted, Plaintiff is independent with respect to his self-care

1 activities and performs household chores such as “cooking, sweeping, mopping, cleaning, doing  
2 laundry, and washing dishes.” AR 32, 64-65. Such activities could plausibly be read as  
3 inconsistent with Dr. Hernandez’s assessment of Plaintiff’s psychological impairments. The ALJ  
4 did not commit error in giving little weight to Dr. Hernandez’s opinion.

5 **iii. Frank Fine, M.D.**

6 Plaintiff contends that the ALJ erred in giving little weight to Dr. Fine’s opinion. In  
7 particular, Plaintiff targets the ALJ’s statement that: “Dr. Fine’s opinion is ‘inconsistent with the  
8 routine and conservative nature of the treatment for the Plaintiff’s impairment, which shows that  
9 the symptoms are not debilitating. In addition, the opinion is inconsistent with the general  
10 absence of positive clinical signs concerning the Plaintiff’s back and right knee in the objective  
11 medical evidence.’”<sup>8</sup> (Plaintiff’s Opening Brief 18:1-4, ECF No. 16, *quoting* AR 35.) Plaintiff  
12 also compares, at length, Dr. Fine’s opinion with the opinion of Dr. Wagner, to whom the ALJ  
13 assigned substantial weight.

14 As an initial matter, it is not the Court’s role to compare and contrast each piece of  
15 medical evidence and reach conclusions as to how much weight should be assigned to each  
16 medical opinion *de novo*; such decisions are the ALJ’s responsibility. *Magallanes*, 881 F.2d at  
17 750; *see also Morgan v. Commr. of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999)  
18 (“Determining whether inconsistencies are material (or are in fact inconsistencies at all) and  
19 whether certain factors are relevant to discount” medical opinions falls with the ALJ’s  
20 responsibilities). Rather, the Court must examine the ALJ’s reasoning and assess its sufficiency.  
21 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (“If the ALJ’s finding is supported by

---

22 <sup>8</sup> Plaintiff also argues that Dr. Fine’s opinion falls within the purview of 20 C.F.R. §§ 404.1527(d) and 416.927(d),  
23 which Plaintiff believes establish that Dr. Fine’s opinion constitutes substantial evidence. (Plaintiff’s Opening Brief  
24 18:5-8, ECF No. 16 (“Plaintiff asserts that Dr. Fine’s reports [sic] meets the substantial weight evidence standard  
25 required by 20 CFR 404.1527(d), as the doctor, in his reports, indicated appropriate supporting rationale for his  
26 limitations.”). Sections 404.1527(d) and 416.927(d) establish no such standard, however. Rather, they lay out  
27 specific opinions that an ALJ need not treat as medical evidence—opinions, for example, such as Dr. Fine’s  
28 statements that the Plaintiff “is quite disabled” and could not “return to the open job market and compete in the  
workforce due to his multiple disabilities.” AR 587; *see* 20 C.F.R. §§ 404.1527(d), 416.927(d) (“Opinions on some  
issues, such as the examples that follow, are not medical opinions . . . but are, instead, opinions on issues reserved to  
the Commissioner because they are administrative findings that are dispositive of a case; *i.e.*, that would direct the  
determination or decision of disability.”). Despite the fact that at least some of Dr. Fine’s opinions may not qualify as  
medical evidence under these regulations, the Court will conduct an analysis of the ALJ’s reasons for giving Dr.  
Fine’s conclusions little weight.



1 substantial evidence, the court ‘may not engage in second-guessing.’”). Thus, the Court declines  
2 Plaintiff’s invitation to consider whether Dr. Wagner’s examination was more or less thorough  
3 than Dr. Fine’s. The Court will consider, however, whether the ALJ committed any error in  
4 assigning little weight to Dr. Fine’s opinion. As Plaintiff notes, Dr. Fine’s opinion is inconsistent  
5 with Dr. Wagner’s findings. Thus, the ALJ was required to provide specific and legitimate  
6 reasons to give Dr. Fine little weight.

7 The ALJ considered Dr. Fine’s opinion at length:<sup>9</sup>

8 Dr. Fine, who examined the claimant on September 9, 2013, found that the  
9 claimant was limited to less than sedentary exertion and was expected to be  
10 absent from work more than 4 days per month. This opinion is given little weight  
11 because it understates the claimant’s physical capacity and is inconsistent with the  
12 routine and conservative nature of the treatment for the claimant’s physical  
13 impairments, which shows that the symptoms are not debilitating. In addition, the  
14 opinion is inconsistent with the general absence of positive clinical signs  
15 concerning the claimant’s back and right knee in the objective medical evidence.  
16 Moreover, the opinion is inconsistent with the essentially normal physical  
17 functioning that the claimant exhibited during the Internal Medicine Consultative  
18 Examination conducted on August 24, 2012. Furthermore, the opinion is  
19 inconsistent with the claimant’s admitted ability to be independent in self-care,  
20 carry out many household chores, ride a stationary exercise bicycle for 30 minutes  
21 every other day, and drive a car. Finally, Dr. Fine’s offer to assume the duties as  
22 the claimant’s Primary Care Physician (PCP), suggest the potential for something  
23 less than total lack of bias in the assessment since it involves a single visit by  
24 claimant.

25 AR 35 (internal citations omitted).

26 The ALJ offers at least five reasons here for rejecting Dr. Fine’s opinion: (1) it is  
27 inconsistent with the routine and conservative treatments Plaintiff has received; (2) it is  
28 inconsistent with the general absence of supportive medical evidence; (3) it is inconsistent with  
the examination results from Dr. Wagner’s examination; (4) it is inconsistent with the Plaintiff’s  
daily activities; and (5) Dr. Fine offers to continue as Plaintiff’s primary care physician,  
indicating his bias. Plaintiff discusses Dr. Wagner’s examination (3) and, charitably read,  
contends that there is evidence in the record supporting Dr. Fine’s conclusions (2). Plaintiff does  
not challenge, however, the ALJ’s determination that Dr. Fine’s opinion is inconsistent with the  
conservative nature of Plaintiff’s care (1); that Dr. Fine’s opinion is inconsistent with Plaintiff’s  
daily activities (4); or that Dr. Fine agreed to continue as Plaintiff’s primary care physician (5).

---

<sup>9</sup> The ALJ also considered Dr. Fine’s conclusions when discussing Dr. Hernandez, as indicated above.

1 Even assuming, therefore, that Plaintiff is correct that the ALJ erred with respect to (2) and (3),  
2 the Court must find in favor of the Commissioner if (1), (4), or (5) are legitimate and supported  
3 by substantial evidence.

4 As noted above, a Plaintiff's daily activities can constitute a specific and legitimate reason  
5 to reject a medical opinion where the daily activities are inconsistent with that opinion. *Ghanim*  
6 *v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Substantial evidence in the record supports the  
7 conclusion that Plaintiff engaged in daily activities that were inconsistent with many of Dr. Fine's  
8 statements and conclusions. For example, Dr. Fine concluded that Plaintiff could walk no more  
9 "than a quarter of a block and needs to sit down for a 5-10 minute interval rest." AR 587.  
10 Multiple other records indicated, however, that Plaintiff was capable of engaging in relatively  
11 vigorous physical activity for an extended period of time. *See, e.g.*, AR 59 ("Q. What do you do  
12 for exercise? A. Ride a bike. Q. How often do you do that? A. Every other day . . . Q. Okay. How  
13 long do you ride? A. For about 30 minutes."); 462 (Plaintiff "will continue his exercise protocol  
14 walking about a mile a day everyday."); 504 (Plaintiff "does some biking for exercise"). Plaintiff  
15 also engages in a wide range of other activities that are inconsistent with a disability finding. He  
16 testified that he sweeps, mops, does the dishes, does the laundry, shops for himself, and is able to  
17 drive (although he does not drive because he does not have a vehicle). AR 64. He also enjoys  
18 fishing. AR 560.

19 The ALJ's finding that Plaintiff's daily activities are inconsistent with Dr. Fine's  
20 conclusions is specific, legitimate, and supported by substantial evidence. There is thus no error  
21 in the ALJ's decision to give Dr. Fine's opinion little weight.

#### 22 **D. The ALJ's Evaluation of Plaintiff's Credibility**

##### 23 *i. Legal standards*

24 To evaluate the credibility of a claimant's testimony regarding subjective complaints of  
25 pain and other symptoms, an ALJ must engage in a two-step analysis. *Vasquez v. Astrue*, 572  
26 F.3d 586, 591 (9th Cir. 2009). First, the ALJ must determine whether the claimant has presented  
27 objective medical evidence of an underlying impairment that could reasonably be expected to  
28 produce the pain or other symptoms alleged. *Id.* The claimant is not required to show that the

1 impairment “could reasonably be expected to cause the *severity* of the symptom she has alleged;  
2 she need only show that it could reasonably have caused some degree of the symptom.” *Id.*  
3 (emphasis added). If the claimant meets the first test and there is no evidence of malingering, the  
4 ALJ can only reject the claimant's testimony regarding the severity of the symptoms for “specific,  
5 clear and convincing reasons” that are supported by substantial evidence. *Id.*

6 An ALJ can consider a variety of factors in assessing a claimant’s credibility, including:

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

13 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations and internal quotation marks  
14 omitted).

15 Other factors can include a claimant’s work record and testimony from physicians and  
16 third parties concerning the nature, severity, and effect of the symptoms of which the claimant  
17 complains. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). An ALJ can only rely  
18 on an inconsistency between a claimant’s testimony and the objective medical evidence to reject  
19 that testimony where the ALJ specifies which “complaints are contradicted by what clinical  
20 observations.” *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999).  
21 An ALJ properly discounts credibility if she makes specific credibility findings that are properly  
22 supported by the record and sufficiently specific to ensure a reviewing court that she did not  
23 “arbitrarily discredit” the testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9th Cir. 1991).

#### 24 *ii. Analysis*

25 The ALJ’s decision questions Plaintiff’s credibility with respect to the severity of his  
26 symptoms. AR 34 (“the claimant’s statements concerning the intensity, persistence and limiting  
27 effects of these symptoms are not entirely credible for the reasons explained in this decision.”).  
28 The ALJ is thus required to provide “specific, clear and convincing reasons” for finding Plaintiff  
not credible. *Vasquez*, 572 F.3d at 591.

The ALJ offers a lengthy discussion of his consideration of Plaintiff’s testimony. He

1 offers, among others, four reasons for finding Plaintiff not credible: (1) Plaintiff’s allegations of  
2 his physical limitations are not supported by the evidence in the record (AR 34 (“As discussed  
3 above, the claimant’s allegations of debilitating physical symptoms are not well supported by the  
4 Medical Evidence of Record”)); (2) Plaintiff’s testimony at the hearing is inconsistent with his  
5 daily activities (AR 34 (“The claimant has described daily activities that are not limited to the  
6 extent one would expect, given the complaints of disabling symptoms and limitations.”)); (3)  
7 Plaintiff’s testimony is inconsistent with the statements in his function report (AR 34 (“The  
8 record reflects that the claimant has made inconsistent statements regarding matters relevant to  
9 the issue of disability.”)); and, (4) the ALJ did not observe any evidence of debilitating symptoms  
10 at the hearing (AR 34 (“The claimant showed no persuasive evidence of debilitating pain or  
11 discomfort while testifying at the hearing.”). The ALJ also makes a brief note about Plaintiff’s  
12 prior employment and the reason that employment was terminated. The Court will consider each  
13 of these reasons in turn.<sup>10</sup>

14 The fact that a Plaintiff’s statements are not supported by the objective evidence in the  
15 record may constitute a reason to find those statements unpersuasive, although it cannot represent  
16 the *only* reason. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (“an adjudicator may not  
17 reject a claimant’s subjective complaints based solely on the lack of objective medical evidence  
18 to fully corroborate the alleged severity of pain”). When this rationale is relied on, the ALJ “must  
19 be sufficiently specific to allow a reviewing court to conclude the adjudicator rejected the  
20 claimant’s testimony on permissible grounds.” *Id.* This means that the ALJ must “identify  
21 specifically which of [Plaintiff’s] statements she found not credible and why.” *Brown-Hunter v.*  
22 *Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (ALJ’s statement that “the functional limitations from

---

23 <sup>10</sup> As with many of the issues raised in this appeal, Plaintiff challenges some, but not all, of the ALJ’s reasons for  
24 discrediting Plaintiff’s testimony. With respect to credibility, for instance, Plaintiff challenges that ALJ’s use of  
25 Plaintiff’s daily activities and inconsistent statements, but does not challenge the ALJ’s personal observations of  
26 Plaintiff or the lack of medical evidence to support the *severity* of Plaintiff’s symptoms. Plaintiff does provide  
27 evidence that Plaintiff has impairments and that those impairments may cause *some* level of the alleged symptoms,  
28 but that is not at issue—the ALJ made findings that agree with these contentions. AR 33 (“After careful  
consideration of the evidence, the undersigned finds that the claimant’s medically determinable impairments could  
reasonably be expected to cause the alleged symptoms”). While the Court would be within its discretion to find that  
any error committed by the ALJ was thus harmless error (because at least some of the ALJ’s findings are valid,  
absent any challenge from Plaintiff), the Court will review the most prominent reasons for rejecting Plaintiff’s  
credibility.

1 the claimant’s impairments were less serious than she has alleged” insufficiently specific to  
2 justify rejection of testimony).

3 In his decision, the ALJ recounts each of the alleged conditions/impairments and describes  
4 whether they are supported by the objective medical evidence. AR 34. He identifies the specific  
5 conditions that Plaintiff complains of and explains what evidence is lacking in the record to  
6 support those conditions. *See, e.g.*, AR 34 (“Few positive clinical signs concerning his back and  
7 right knee were found at physical examinations held throughout the adjudicated period. In  
8 addition, the record contains no relevant positive findings from a diagnostic image of his right  
9 knee.”). The ALJ’s reasoning here is sufficiently specific to cast doubt on the credibility of  
10 Plaintiff’s statements about the pain in his back and right knee. Because the absence of supportive  
11 objective evidence cannot form the sole rationale to reject a plaintiff’s testimony, however, this  
12 reason alone is not dispositive.

13 The ALJ determined that Plaintiff’s daily activities were inconsistent with the extent of his  
14 alleged impairments. A plaintiff’s daily activities or inconsistencies in testimony can constitute a  
15 reason to find that he lacks credibility. *Tommasetti*, 533 F.3d at 1039. In particular, the ALJ  
16 noted that that Plaintiff was able to cook, sweep, mop, do laundry, wash dishes, ride a stationary  
17 exercise bicycle every other day, and drive (although he does not drive because he does not have  
18 a vehicle). AR 34. Substantial evidence supports the fact that Plaintiff is able to engage in these  
19 activities, despite his allegations of debilitating symptoms. Plaintiff testified that he was able to  
20 perform all these tasks at the hearing and in interviews with medical examiners. AR 64, 69, 504,  
21 511.

22 Plaintiff contends that these activities do not show that he is able to perform functions in a  
23 workplace setting because they do not demonstrate skills that are transferable into the workplace.  
24 (Plaintiff’s Opening Brief 14:11-18, *citing Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007), ECF  
25 No. 16.) But, unlike in *Orn*, the ALJ’s analysis does not rest on transferability into a specific  
26 occupation.<sup>11</sup> Rather, the ALJ found that the specific limitations Plaintiff claimed were

---

27  
28 <sup>11</sup> In *Orn*, the ALJ found that the plaintiff could be a “surveillance systems monitor” by virtue of the fact that he  
could read, watch television, and color in coloring books as daily activities. *Orn*, 495 F.3d at 639.

1 incongruent with his specific daily activities. For instance, the allegation that Plaintiff is unable  
2 to sit for more than 10 minutes at a time (AR 76) is inconsistent with the statement that he uses an  
3 exercise bicycle for 30 minutes every other day (AR 59). The allegation that he is unable to  
4 prepare his own meals (AR 296) is inconsistent with the statement that he can cook and likes to  
5 barbecue stuffed tri-tip (AR 68-69). And the allegation that he can only walk for 10-15 feet  
6 before resting for an hour or two (AR 299) is inconsistent with the statement that he is walking  
7 “about a mile everyday.” AR 462. None of these contradictions are offered to prove that Plaintiff  
8 is able to perform specific work activities; instead, they are offered to establish that Plaintiff has  
9 been inconsistent in explaining his limitations and that his statements about the severity of his  
10 symptoms should be weighted accordingly. Such a finding is within the ALJ’s discretion.

11 Plaintiff also contends that Plaintiff’s activities and symptoms have varied over time.  
12 (Plaintiff’s Opening Brief 15:1-5, ECF No. 16.) The implied argument is thus that a factfinder  
13 would expect some contradictions in Plaintiff’s statements and symptoms. But no evidence in the  
14 record supports this contention—the mere fact that Plaintiff’s stated activities are inconsistent  
15 with his stated limitations does not, without more, establish clear fluctuations over time in his  
16 condition. The Court sees little reason, based on the record, to assume that Plaintiff’s  
17 condition(s) are susceptible to erratic and unexplained changes in their severity over time.

18 The ALJ also observed at the hearing that the Plaintiff did not demonstrate any signs of  
19 pain or discomfort while testifying at the hearing. An ALJ’s personal observations of a Plaintiff’s  
20 demeanor may form a part of the credibility analysis. *Nyman v. Heckler*, 779 F.2d 528, 531 (9th  
21 Cir. 1985). Such observations, however, cannot “form the sole basis for discrediting a person’s  
22 testimony.” *Orn v. Astrue*, 495 F.3d 625, 640 (9th Cir. 2007). The ALJ acknowledged this  
23 limitation in his findings here—noting that his observations “cannot be considered a conclusive  
24 indicator of the claimant’s overall level of pain on a day-to-day basis.” AR 34. The ALJ thus  
25 gave this consideration only “slight weight” in negating Plaintiff’s credibility. AR 34. Plaintiff  
26 does not challenge this finding. To the limited extent the ALJ considered this factor, he was not  
27 in error.

28 Finally, the ALJ noted that Plaintiff’s condition appears to have originated from an injury

1 that occurred in 2000 and that Plaintiff worked for nearly eight years following that injury. AR  
2 34. When Plaintiff stopped working, it was only because of a business-related layoff, rather than  
3 any disability. AR 34. The ALJ suggests that these two facts demonstrate that Plaintiff's  
4 impairment was not entirely debilitating. A plaintiff's prior work history or reasons for job loss  
5 are legitimate considerations in evaluating credibility. 20 C.F.R. §§ 404.1529(c)(3),  
6 416.929(c)(3) ("Since symptoms sometimes suggest a greater severity of impairment than can be  
7 shown by objective medical evidence alone, we will carefully consider any other information you  
8 may submit about your symptoms . . . We will consider all of the evidence presented, including  
9 information about your prior work record"); *Drouin v. Sullivan*, 966 F.2d 1255, 1258 (9th Cir.  
10 1992) (fact that plaintiff lost two jobs for reasons other than pain appropriate consideration in  
11 credibility analysis). Plaintiff does not challenge these contentions. Both appear to be  
12 substantiated by the record. AR 52, 248, 510 ("He was laid off due to lack of available work"),  
13 584. The Court thus finds that the ALJ did not commit error in considering these facts.

#### 14 **VI. CONCLUSION**

15 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial  
16 evidence in the record and based on proper legal standards. Accordingly, this Court DENIES  
17 Plaintiff's appeal from the administrative decision of the Commissioner of Social Security. The  
18 Clerk of the Court is DIRECTED to enter judgment in favor of Defendant Carolyn W. Colvin,  
19 Commissioner of Social Security and against Plaintiff Randy Davisson.

20 IT IS SO ORDERED.

21  
22 Dated: July 22, 2016

23 /s/ Eric P. Gray  
24 UNITED STATES MAGISTRATE JUDGE  
25  
26  
27  
28