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

KEVIN ROBERT GUTH,
Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

1:16-cv-00625 GSA

**ORDER DIRECTING ENTRY OF
JUDGMENT IN FAVOR OF DEFENDANT
NANCY BERRYHILL, ACTING
COMMISSIONER OF SOCIAL
SECURITY, AND AGAINST PLAINTIFF
KEVIN ROBERT GUTH**

I. INTRODUCTION

Plaintiff, Kevin Robert Guith (“Plaintiff”), seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for Disability Insurance Benefits (“DIB”) pursuant to Title II of the Social Security Act. The matter

¹ Pursuant to Fed. R. Civ. Pro. 25(d), Nancy A. Berryhill shall be substituted in for Carolyn W. Colvin, as Nancy A. Berryhill is now the acting Commissioner of Social Security.

1 is currently before the Court on the parties' briefs which were submitted without oral argument to
2 the Honorable Gary S. Austin, United States Magistrate Judge.² (*See*, Docs. 18, 23 and 24). Upon
3 a review of the entire record, the Court finds that the ALJ's decision is supported by substantial
4 evidence. Accordingly, the Court AFFIRMS the agency's disability determination and DENIES
5 Plaintiff's appeal.

6 **II. FACTS AND PRIOR PROCEEDINGS**³

7 **A. Background**

8 Plaintiff filed an application for DIB alleging he was disabled as of July 22, 2006, due to
9 herniated discs in his cervical spine, neck and back pain, and migraines.⁴ AR 375; 462; 483. The
10 parties agree that the Plaintiff properly exhausted his administrative remedies and that the
11 Appeals Council denied Plaintiff's appeal. (Doc. 21, pg. 2 and Doc. 23, pg. 2). Therefore, this
12 appeal is a review of Administrative Law Judge Serena Hong's ("ALJ") decision issued on
13 September 18, 2014, which is considered the Commissioner's final order. *See*, 42 U.S.C. §§
14 405(g), 1383(c)(3). AR 22-36.

15 **B. Summary of the Medical Record**

16 The Court has reviewed the entire medical record. Relevant portions of the record will be
17 referenced in the discussion where appropriate. AR 584-853.

18 **III. THE DISABILITY STANDARD**

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

24 . . . his physical or mental impairment or impairments are of such severity that he is
25 not only unable to do his previous work, but cannot, considering his age, education,
26 and work experience, engage in any other kind of substantial gainful work which

27 ² The parties consented to the jurisdiction of the United States Magistrate Judge. (*See* Docs. 8 and 12).

28 ³ References to the Administrative Record will be designated as "AR," followed by the appropriate page number.

⁴ Plaintiff also filed an application for Supplemental Security Income (SSI) under Title XVI, which the agency denied on October 8, 2009, because his resources were over the allowable amount (AR 163-70, 382-87). Plaintiff did not appeal his SSI application and it is not before the Court. (Doc. 18, pg. 3).

1 exists in the national economy, regardless of whether such work exists in the
2 immediate area in which he lives, or whether a specific job vacancy exists for him, or
3 whether he would be hired if he applied for work.
42 U.S.C. § 1382c(a)(3)(B).

4 To achieve uniformity in the decision-making process, the Commissioner has established
5 a sequential five-step process for evaluating a claimant's alleged disability. 20 C.F.R. §
6 404.1520(a). The ALJ proceeds through the steps and stops upon reaching a dispositive finding
7 that the claimant is or is not disabled. 20 C.F.R. § 404.1520(a)(4). The ALJ must consider
8 objective medical evidence and opinion testimony. 20 C.F.R. § 404.1513.

9 Specifically, the ALJ is required to determine: (1) whether a claimant engaged in
10 substantial gainful activity during the period of alleged disability; (2) whether the claimant had
11 medically-determinable "severe" impairments; (3) whether these impairments meet or are
12 medically equivalent to one of the listed impairments set forth in 20 C.F.R. § 404, Subpart P,
13 Appendix 1; (4) whether the claimant retained the residual functional capacity ("RFC") to
14 perform his past relevant work⁵; and (5) whether the claimant had the ability to perform other
15 jobs existing in significant numbers at the regional and national level. 20 C.F.R. § 404.1520(a)(4).

15 **IV. SUMMARY OF THE ALJ'S DECISION**

16 Using the Social Security Administration's five-step sequential evaluation process, the
17 ALJ determined that Plaintiff met the insured status requirements through December 31, 2011.
18 AR 24. She noted that Plaintiff had not engaged in substantial gainful activity from his alleged
19 date of onset of July 22, 2006, through his last insured date of December 31, 2011. AR 24.
20 At step two, the ALJ identified depression, obsessive compulsive disorder, degenerative disc
21 disease, and migraine headaches, as severe impairments. AR 24. At step three, the ALJ found
22 that Plaintiff did not have an impairment or combination of impairments that met or medically
23 equaled one of the listing impairments in 20 C.F.R. Part 404 P, Appendix 1. AR 25-26. However,
24 the ALJ also determined that Plaintiff had the residual functional capacity ("RFC") to: lift and
25 carry twenty pounds occasionally and ten pounds frequently; sit, stand, and walk in one hour
26 increments for a total of six hours in an eight-hour workday; occasionally climb, balance, stoop,

27 ⁵ Residual functional capacity captures what a claimant "can still do despite [his] limitations." 20 CFR § 404.1545.
28 "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 kneel, crouch, and crawl; occasionally perform overhead activity; frequently use foot controls;
2 avoid concentrated exposure to hazards, humidity, dampness, temperature extremes, and
3 vibration; and that he could perform simple, repetitive tasks. AR 27-34. In reaching this
4 conclusion, the ALJ found that Plaintiff's statements concerning the intensity, persistence, and
5 limiting effects of his symptoms were not entirely credible. AR 25-34.

6 Given the above, at step four, the ALJ found Plaintiff could not perform his past relevant
7 work as a pharmaceutical sales representative or a nurse. AR 34. Alternatively, at step five, the
8 ALJ considered the testimony of a vocational expert and concluded that other jobs existed in
9 significant numbers in the national economy that Plaintiff could perform including an assembler,
10 a packager, and a garment folder. AR 35. The ALJ therefore concluded Plaintiff was not
11 disabled. AR 35-36.

12 **V. THE ISSUES PRESENTED**

13 Plaintiff argues that the ALJ improperly considered the opinion of Dr. Portnoff, Ph.D., who
14 performed a consultative psychological examination on March 17, 2012. Specifically, he
15 contends that the ALJ did not incorporate Dr. Portnoff's opinion that Plaintiff was moderately
16 limited in his ability to interact with supervisors into the RFC. Plaintiff also argues that the ALJ
17 erred at step five. In particular, he asserts that the ALJ did not address a conflict between the
18 limitation in the RFC that Plaintiff was only able to occasionally perform overhead activities and
19 the VE's testimony that Plaintiff could perform all of the jobs the VE identified. He contends that
20 the Dictionary of Occupational Titles ("DOT") and related publications mandate that these jobs
21 require either frequent or constant reaching. Finally, Plaintiff argues that the ALJ improperly
22 ignored the lay testimony of David Guith, Plaintiff's father. He requests that the case be
23 remanded for a payment of benefits, or alternatively, that the case be remanded for further
24 consideration of these issues. (Doc. 18, pgs. 10-23; Doc. 24, pgs. 3-6).

25 In reply, the Commissioner argues that the ALJ's RFC which limited Plaintiff to simple
26 repetitive tasks properly accounted for Dr. Portnoff's limitations. Additionally, she contends that
27 substantial evidence supports the ALJ's findings at step five because nothing in a plain reading of
28 the DOT suggests that the required reaching would be overhead, and the VE testified that none of
the proposed jobs required overhead reaching. Finally, she asserts that the ALJ's failure to
address the testimony of Plaintiff's father was harmless error because the ALJ's reasons for

1 rejecting Plaintiff's testimony apply equally to his father's similar allegations. (Doc. 23, pgs. 13-
2 25). As such, the ALJ's decision should be affirmed.

3 **VI. THE STANDARD OF REVIEW**

4 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to determine
5 whether (1) it is supported by substantial evidence, and (2) it applies the correct legal standards.
6 See *Carmickle v. Commissioner*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Hoopai v. Astrue*, 499 F.3d
7 1071, 1074 (9th Cir. 2007).

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

13 **VII. DISCUSSION**

14 **A. The ALJ Properly Considered Dr. Portnoff's Opinion and the RFC
15 Incorporated the Limitations that the ALJ Found Were Supported by
16 Substantial Evidence.**

17 On March 17, 2012, Lance A. Portnoff, Ph.D., a state agency doctor completed a
18 comprehensive psychological evaluation. AR 687-698. Plaintiff reported that his pain was
19 constant and he only got four hours of sleep per night. AR 687. He also stated that he had become
20 depressed, felt hopeless and worthless, had passive suicidal ideas, and heard his name called. AR
21 687. Plaintiff denied having any psychiatric hospitalizations or counseling. AR 688. He reported
22 that he had problems with dressing and bathing due to apathy; he was unable to cook, but could
23 grab items from the refrigerator; he could not bend or reach, which limited his ability to clean;
24 and he could manage his own money. AR 688. Plaintiff said his typical day was staying at home,
25 sitting and resting, and watching television. AR 688.

26 Plaintiff was casually-dressed and groomed, he had moderate-to-marked psychomotor
27 discomfort, mildly reduced facial kinetics, and good eye contact. AR 689. He demonstrated
28 adequate concentration, persistence, and pace. AR 688. Plaintiff's speech was quiet and flattened,
but prompt and spontaneous; his thought process was mildly rambling, but coherent; and his
thought content was appropriate. AR 689. Plaintiff denied hallucinations or suicidal ideation. AR
689. His affect was characterized by mild-to-moderate tense depression. AR 689. Plaintiff's

1 immediate recall was intact - he recalled 2/3 words after several minutes, he was able to
2 remember autobiographical information, and could perform simple calculations. AR 689.

3 Intelligence and memory testing indicated generalized impairment in visual reasoning,
4 working memory, processing speed, visuo-motor control/retention, and immediate/delayed
5 verbal/visual memory. AR 690-694. Dr. Portnoff diagnosed major depressive disorder and
6 moderate obsessive-compulsive disorder and assigned a global assessment of functioning score of
7 57, indicating moderate symptoms.⁶ AR 694.

8 Dr. Portnoff concluded that Plaintiff was able to perform simple and repetitive tasks, and
9 that he had mild limitations in his ability to interact with co-workers and the public; work without
10 special or additional instruction; and maintain regular attendance. He had moderate limitations in
11 his ability to perform detailed and complex tasks; accept instructions from supervisors; complete
12 a normal workday or workweek without interruptions from a psychiatric condition; and deal with
13 stress. AR 694-695. The form accompanying Dr. Portnoff's opinion defined the term "moderate"
14 as more than slight, but that "the individual is still able to function satisfactorily" in that area. AR
15 696.

16 The ALJ gave partial weight to Dr. Portnoff's opinion. AR 25-26. In doing so, the ALJ
17 specifically referenced Plaintiff's moderate limitations in his ability to accept instructions from
18 supervisors. AR 25-26; 31. She noted that the examination was performed after the Plaintiff's last
19 insured date so the doctor's finding had limited relevance to Plaintiff's disability period.
20 Relatedly, she noted that Plaintiff did not allege any problems with social functioning or mental
21 limitations when he applied for benefits, or when he filed for reconsideration, nor did the person
22 interviewing him observe any problems. AR 25-26; 31. Similarly, there was no mention of social
23 functioning problems in the treatment file. AR 26. She further found that Dr. Portnoff's opinion
24 was based on Plaintiff's subjective complaints. As a result, the ALJ concluded that Plaintiff only
25 had mild limitations in social functioning, if any, prior to last insured date. AR 26.

26 Plaintiff contends that rejection of Plaintiff's moderate limitation in his ability to accept

27 ⁶ A GAF score represents a rating of overall psychological functioning on a scale of 0 to 100. *See, Am. Psychiatric*
28 *Ass'n, Diagnostic and Statistical Manual of Disorders*, Text Revision 34 (4th ed. 2000). A GAF score in the range of
51 to 60 indicates "[m]oderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) OR
moderate difficulty in social, occupational or school functioning (e.g., few friends, conflicts with peers or co-
workers)." *Id.* The American Psychiatric Association has since omitted GAF scores from its multiaxial diagnostic
system.

1 instructions from supervisors was improper because the evaluation was completed approximately
2 three months after Plaintiff's last date of insured, and the ALJ relied on the opinion of Dr. Van
3 Kirk, an orthopedic examiner whose opinion was dated ten days after Dr. Portnoff's opinion was
4 rendered. Therefore, Plaintiff argues that rejection of Dr. Portnoff's reports due to timing is
5 internally inconsistent with the ALJ's reliance on other medical evidence in the file when
6 evaluating Plaintiff's physical impairments. Further, he argues that since Dr. Portnoff completed
7 objective psychological testing, the ALJ's assertion that his opinion was based on Plaintiff's
8 subjective complaints is not accurate.

9 As a preliminary matter, the Court is not convinced that the ALJ rejected Dr. Portnoff's
10 limitation with regard to social functioning. As Defendant has pointed out, the supplemental sheet
11 to Dr. Portnoff's assessment indicates that he was defining the term "moderate" as more than
12 slight, but that "the individual is still able to function satisfactorily" in that area. AR 696.
13 Notably, although Dr. Portnoff indicated that Plaintiff had moderate limitations in several areas,
14 he still opined that Plaintiff had the ability to perform simple repetitive tasks, which the ALJ
15 incorporated into the RFC. A RFC captures what a claimant "can still do despite [his]
16 limitations." 20 CFR § 404.1545. Given the doctor's definition of moderate in this case, and since
17 the only limitation he identified was limiting Plaintiff to simple repetitive tasks, the ALJ's
18 formulation of the RFC was not inconsistent with Dr. Portnoff's opinion.

19 Additionally, even assuming that the ALJ's interpretation of this moderate limitation was
20 incorrect, the Court finds that the reasons for rejecting this limitation were sufficient. An ALJ
21 may reject the uncontradicted opinion of a treating or examining medical professional only for
22 "clear and convincing" reasons. *Ghanim v. Colvin*, 763 F. 3d 1154, 1161 (9th Cir. 2014); *Lester*,
23 81 F.3d 821, 831 (9th Cir. 1995). In contrast, a contradicted opinion of a treating or examining
24 professional may be rejected for "specific and legitimate" reasons. *Ghanim*, 763 F. 3d at 1161;
25 *Lester v. Chater*, 81 F.3d at 830. Here, the ALJ correctly noted that there was no mention of
26 social functioning limitations in Plaintiff's disability application, his requests for reconsideration,
27 or the medical record prior to his date of last insured. AR 375; 462; 469-471; 482-487; 502-506;
28 598-611; 613-616; 728-754; 762-796. Therefore, it was reasonable for the ALJ to find that Dr.
Portnoff's opinion had limited relevance to the applicable time period. The Court is not
persuaded by Plaintiff's argument that the ALJ's reliance on this factor was improper because she

1 gave weight to Dr. Van Kirk's orthopedic evaluation, which was completed after Dr. Portnoff's
2 assessment. The crux of Plaintiff's disability application was based on his physical ailments -
3 specifically his degenerative disc disease, pain in his neck and back, and migraines. AR 375; 462;
4 483. The record is replete with treatment he received for these ailments which is not the case with
5 regard to his social impairments prior to his last insured date. AR 598-616; 728-754; 762-796.
6 Therefore, the ALJ's rejection of Dr. Portnoff's opinion concerning Plaintiff's social limitation is
7 both a specific and legitimate, as well as a clear and convincing reason to reject the doctor's
8 findings. Since the ALJ's reasoning is rational and is supported by the record, the Court must
9 defer to this interpretation as the ALJ is responsible for resolving conflicts and weighing the
10 medical evidence. *See Gutierrez v. Comm'r of Soc. Sec.*, 740 F.3d 519, 523 (9th Cir. 2014) ("The
11 court must consider the record as a whole and weigh 'both the evidence that supports and the
12 evidence that detracts from the ALJ's' factual conclusions" and "[i]f the evidence can reasonably
13 support either affirming or reversing,' the reviewing court 'may not substitute its judgment' for
14 that of the Commissioner"); *Burch v. Barnhart*, 400 F.3d 676, 680-681 (9th Cir. 2005); (Where
15 the evidence is susceptible to more than one rational interpretation, one of which supports the
16 ALJ's decision, the ALJ's conclusion must be upheld.); *Thomas*, 278 F.3d at 954 (same).

17 Notwithstanding the above, the Court is not persuaded by the ALJ's other reason for
18 rejecting the opinion, which was that Dr. Portnoff's findings were unreliable because they were
19 based on Plaintiff's subjective complaints. It is clear that Dr. Portnoff's assessment was based on
20 objective data since he administered psychological testing. However, this error is harmless in
21 light of the other reasons the ALJ provided. *Carmickle v. Comm'r of Social Security*, 533 F.3d at
22 1162 (An ALJ's error is harmless where it is "inconsequential to the ultimate nondisability
23 determination); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (same); *Robbins v.*
24 *Soc. Sec. Admin.*, 466 F.3d 880, 885 (9th Cir.2006) (same); *Stout v. Comm'r of Social Security*,
25 454 F.3d 1050, 1055 (9th Cir. 2006) (same). Given the above, the ALJ's evaluation of the
26 medical evidence and formulation of the RFC, including the omission of Plaintiff's moderate
27 limitation of taking directions from supervisors, is based on the correct legal standards and is
28 supported by substantial evidence.

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1 However, not all potential conflicts between a vocational expert’s job suitability
2 recommendation and the DOT will be apparent or obvious. *Lamear v. Berryhill*, 2017 WL
3 3254930 *3 (9th Cir. Aug. 1, 2017); *Gutierrez v. Colvin*, 844 F. 3d 804, 808 (9th Cir. 2016). In
4 order for a difference between a VE’s testimony and the DOT’s listings to be fairly characterized
5 as a conflict, it must be obvious or apparent. *Lamear*, 2017 WL 3254930 at *3; *Gutierrez*, 844 F.
6 3d at 808. This means that the testimony must be at odds with the DOT's listing of job
7 requirements that are essential, integral, or expected. *Lamear*, 2017 WL 3254930 at *3;
8 *Gutierrez*, 844 F. 3d at 808. Where the job itself is a familiar one, less scrutiny by the ALJ is
9 required. *Lamear*, 2017 WL 3254930 at *3; *Gutierrez*, 844 F. 3d at 808. Thus, an ALJ must ask
10 follow up questions of a vocational expert only when the expert's testimony is either obviously or
11 apparently contrary to the DOT. However, the obligation doesn't extend to unlikely situations or
12 circumstances. *Lamear*, 2017 WL 3254930 at *3; *Gutierrez*, 844 F. 3d at 808. Thus, the
13 requirement for an ALJ to ask follow-up questions to determine if an actual conflict exists is fact-
14 dependent.

15 Here, the ALJ found that Plaintiff could perform a reduced range of light work, including
16 only occasional overhead activity, and that he could sit, stand, or walk in one-hour increments for
17 a total of six hours in an eight-hour workday. AR 25-34. The ALJ presented these limitations to
18 the VE, who then identified three occupations that Plaintiff could perform including an assembler,
19 DOT 706.684-022, 1991 WL 679050; a garment folder, DOT 789.687-066, 1991 WL 681266;
20 and a packager, DOT 929.587-010, 1991 WL 688159 (emphasis added). AR 80-82. The VE
21 confirmed that his testimony was consistent with the DOT, except for alternating positions, which
22 was not covered in the DOT, and was based on the VE’s experience observing jobs and how they
23 were performed. AR 83.

24 At the hearing, Plaintiff’s representative specifically cross-examined the VE and inquired
25 whether an individual who was limited to reaching, handling, or fingering one foot in front of him
26 or herself would be able to perform the jobs identified. AR 84. The VE testified that “reaching
27 one foot would be appropriate for . . . the jobs I identified because . . . you’re only doing them like
28 on a table or a bench and so that would be appropriate . . . also the handling would be directly in
front of you in those jobs.” AR 84-85. Similarly, according to the DOT, an assembler’s duties
include, “[f]requently work[ing] at bench as member of assembly group assembling one or two

1 specific parts and passing unit to another worker” DOT 706.684-022, 1991 WL 679050; a
2 garment folder’s duties include “[f]old[ing] garments for bagging or boxing, following guide
3 marks on table or using folding board” DOT 789.687-066, 1991 WL 681266; and packager duties
4 include “[p]ush[ing] box or carton along bench or onto conveyor.”⁸ DOT 929.587-010, 1991 WL
5 688159. Thus, the duty descriptions contained in the DOT for these jobs are consistent with the
6 VE’s testimony.

7 Plaintiff contends that because these three occupations involve frequent reaching (or
8 constant reaching in the case of the alternative packager occupation Plaintiff cites), the reaching
9 must be in one direction and that direction is overhead. (Doc. 23, pgs.16-17). He relies on SSR
10 85-15 and the Revised Handbook for Analyzing Jobs (“RHAJ”) for the premise that reaching
11 includes extending hands and arms in any direction. However, the DOT and its accompanying
12 materials, defines reaching in its broadest way possible. The role of a VE is to provide more
13 specific information than the DOT publications about the requirements of a particular job as it is
14 performed in a particular setting. *Breitmeyer v. Colvin*, 2015 WL 2260603, at *5-6 (D. Or. May 12,
15 2015) (unpub.) (citing SSR 00-4p). That is what happened here. The VE gave affirmative testimony
16 on cross-examination that an individual limited to occasional overhead activity would be able to
17 perform these jobs. AR 84-85. Given these facts, it was not obvious or apparent that a conflict
18 existed between the VE’s testimony and the DOT such that the ALJ would be required to elicit
19 additional testimony from the VE. Therefore, the ALJ did not err at step five. AR 34-35.

20 **C. The ALJ’s Failure to Address David Guith’s Testimony was Harmless
21 Error.**

22 Plaintiff contends the ALJ failed because she did not properly evaluate the testimony of David
23 Guith, Plaintiff’s father. Specifically, Plaintiff argues that the ALJ did not provide specific,
24 germane reasons for rejecting the testimony, and in fact, did not consider it at all in the decision.

25 ⁸ Plaintiff asserts that the ALJ incorrectly listed the DOT code for the packager occupation as 929.587-01, and that it
26 should have been 920.587-018, 1991 WL 687916. (Doc. 18, pg. 15). The code the VE identified and the ALJ cited
27 pertains to a subset of occupations within the packaging and materials handling occupations, which the DOT
28 describes as a nut and bolt assembler. AR 35, 80-82. *See*, DOT code 929.587-010, 1991 WL 688159. This occupation
is light exertion and, according to the duty description in the DOT, also entails working along a bench, as the VE
testified. AR 80-82, 84-85. Thus, it appears that the DOT code the VE and the ALJ indicated was correct. Whether
the correct code is 929.587-010 or 920.587-018, as Plaintiff contends, does not affect the outcome here since both
jobs were light exertion packaging occupations. Moreover, even excluding the packager job, two other jobs exist at
step five to meet the Commissioner’s burden.

1 He argues this constitutes reversible error. (Doc. 18, pgs. 18-23; Doc. 24, pgs. 4-6). Defendant
2 asserts that while the ALJ did not specifically address the third party statements, her error was
3 harmless. (Doc. 21-25.)

4 Lay witness testimony as to a claimant's symptoms or how an impairment affects a claimant's
5 ability to work is competent evidence which the Commissioner must take into account. *Nguyen v.*
6 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.
7 1993). The ALJ may reject such testimony if he does so expressly, in which case "he must give
8 reasons that are germane to each witness." *Dodrill*, 12 F. 3 at 919. "If the ALJ gives germane
9 reasons for rejecting testimony by one witness, the ALJ need only point to those reasons when
10 rejecting similar testimony by a different witness." *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th
11 Cir. 2012) (citing *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009)).

12 The lay witness statement at issue is a statement written by Plaintiff's father on August 11,
13 2012. AR 523-525. In the statement, Plaintiff's father reported that Plaintiff suffers from migraine
14 headaches which last more than a day.⁹ When Plaintiff has a migraine he stays in his room except
15 to use the restroom, or to get an ice pack for his head and eyes. AR 523. Mr. Guith also reported
16 that Plaintiff typically sits in a recliner when he is up, he remains in a seated position for thirty-
17 five minutes before moving, then he walks around for ten minutes. He repeats the cycle for about
18 four hours, then lies down for two to four hours. Plaintiff only leaves the house four times a
19 month to go to appointments. He can drive to appointments, but needs to lay down before and
20 after. AR 523.

21 With regard to daily activities, Mr. Guith reported that Plaintiff would try do to dishes in the
22 past, but would never finish because he would have to rest for hours after. Additionally, he has
23 had to help Plaintiff get in the tub to bathe and helps him into bed. AR 524. Mr. Guith reported
24 that Plaintiff seemed depressed and that he used to be outgoing, but now he primarily keeps to
25 himself and no longer participates in social activities. AR 525.

26 Here, the Commissioner concedes that ALJ did not specifically address this statement in the
27 opinion, but that the error was harmless. The Court agrees. Although the statement is not
28 specifically referenced in the decision, the ALJ advised Plaintiff and his father that she would

⁹ He also reported he has to put blinds on the inside and outside of Plaintiff's window, along with a blackout curtain to provide silence and darkness to allow Plaintiff to rest.

1 consider the evidence. AR 53. (ALJ noting that the statement was in the record at Exhibit 16E
2 and that she would consider the statement when making the decision). Moreover, she indicated
3 several times in the opinion that she had considered the entire record when making her disability
4 determination. AR 23; 24; 26. Finally, a review of this statement reveals it does not describe any
5 limitations beyond that which Plaintiff described. More particularly, the statement references
6 Plaintiff's daily struggle with back and neck pain; his problems sitting, standing, and walking; his
7 migraines; his depression; and his ability to do daily activities. Plaintiff testified to all these
8 symptoms and conditions himself and the ALJ rejected Plaintiff's testimony because she found he
9 was not credible. AR 32-34; 60-78. As explained in *Molina v. Astrue*, 674 F.3d 1104 (9th Cir.
10 2012):

11 Where lay witness testimony does not describe any limitations not already described by the
12 claimant, and the ALJ's well-supported reasons for rejecting the claimant's testimony apply
13 equally well to the lay witness testimony, it would be inconsistent with our prior harmless
14 error precedent to deem the ALJ's failure to discuss the lay witness testimony to be
15 prejudicial per se.

16 *Id.* at 1117.

17 When rejecting Plaintiff's testimony, the ALJ noted his physical symptoms were not
18 consistent with the objective medical evidence in the file; Plaintiff gave inconsistent testimony to
19 doctors regarding the extent of his ability to perform daily activities; he stopped working initially
20 to care for his ailing mother; and he did not receive treatment for his mental health condition. AR
21 33-34. Plaintiff has not contested the ALJ's credibility determination and therefore, he has
22 waived that argument. See *Carmickle v. Commissioner*, 533 F.3d 1155, 1161 n. 2 (9th Cir. 2008)
23 (issue not argued with specificity will not be addressed); *see also Paladin Associates., Inc. v.*
24 *Montana Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003) (ordinarily the Court will not consider
25 matters on appeal that are not specifically and distinctly argued); *Kim v. Kang*, 154 F.3d 996,
26 1000 (9th Cir. 1998) (matters not specifically and distinctly argued in opening brief ordinarily
27 will not be considered).

28 Because the ALJ discussed Plaintiff's testimony at length and rejected his testimony
regarding the extent of his limitations, the same reasons apply equally to Mr. Guith's statement.
Thus, any error in not expressly rejecting Mr. Guith's witness statement is harmless. *Molina v.*
Astrue, 674 F.3d at 1121.

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VIII. CONCLUSION

Based on the foregoing, the Court finds that the ALJ’s decision is supported by substantial evidence and is based on the correct legal standards. Accordingly, this Court DENIES Plaintiff’s appeal. The Clerk of this Court is DIRECTED to enter judgment in favor of Nancy A. Berryhill, Commissioner of Social Security and against Kevin Robert Guith, and to close this action.

IT IS SO ORDERED.

Dated: September 12, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE