

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

ROBERTO ALVARADO,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 1:16-cv-00746-SAB

ORDER DENYING PLAINTIFF’S SOCIAL
SECURITY APPEAL

(ECF Nos. 19, 29)

I.

INTRODUCTION

Plaintiff Roberto Alvarado (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for disability benefits pursuant to the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge Stanley A. Boone.¹

Plaintiff suffers from obesity, hepatitis C, polysubstance abuse, herpes, hypothyroidism, mild hearing loss, incipient cataracts, diverticulosis, history of premature beats, bilateral knee degenerative joint disease and history of meniscus tear, depressive disorder, and severe post-traumatic stress disorder (“PTSD”). For the reasons set forth below, Plaintiff’s Social Security appeal shall be denied.

¹ The parties have consented to the jurisdiction of the United States Magistrate Judge. (See ECF Nos. 7, 8.)

1 **II.**

2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 Plaintiff protectively filed a Title XVI application for supplemental security income on
4 December 10, 2012. (AR 71.) Plaintiff’s application was initially denied on March 6, 2013, and
5 denied upon reconsideration on June 19, 2013. (AR 124-128, 131-135.) Plaintiff requested and
6 received a hearing before Administrative Law Judge Cynthia Floyd (“the ALJ”). Plaintiff
7 appeared for a hearing on September 11, 2014. (AR 26-70.) On October 27, 2014, the ALJ
8 found that Plaintiff was not disabled. (AR 8-21.) The Appeals Council denied Plaintiff’s request
9 for review on March 25, 2016. (AR 1-4.)

10 **A. Relevant Hearing Testimony**

11 Plaintiff appeared with counsel and testified at the September 11, 2014 hearing. (AR 31-
12 64.) Plaintiff was born on May 1, 1957. (AR 31.) Plaintiff is 5 foot 4 inches tall and weighs
13 189 pounds. (AR 32.) His normal weight is 165 to 170 pounds. (AR 32.) He is single with no
14 living children. (AR 32-33.) Plaintiff currently resides with his parents and dog. (AR 32.)
15 Plaintiff does not have a valid driver’s license due to unpaid parking tickets. (34.)

16 Plaintiff has two years of college and has vocational training in welding and auto
17 mechanics. (AR 35-36.) Plaintiff was a tank gunner in the Army from 1975 to 1978, and
18 received an honorable discharge. (AR 36.) Plaintiff worked in construction prior to applying for
19 supplemental security income. (AR 40.) When he was working, Plaintiff went from being a
20 worker to running a crew. (AR 62.) He was trying to get his contractor’s license. (AR 62.)
21 Plaintiff got into carpentry by taking classes through the unemployment office. (AR 62.) In
22 1989, Plaintiff had a back injury and the doctor told him that he would not be able to work
23 construction anymore, but within a year he was back at work. (AR 33.) He has not worked since
24 December 10, 2012. (AR 36.) Plaintiff stated he has not applied for any jobs since he applied
25 for disability benefits, but he asked to see if anyone would let him work. (AR 37.) No
26 contractor will allow him to work with power tools because of the medication he takes. (AR 37.)
27 Plaintiff did attempt to become self-employed by selling t-shirts a couple of years ago, which
28 lasted about four hours. (AR 37.)

1 In 2004 or 2005, Plaintiff supported himself by recycling. (AR 34.) He made about \$100
2 per month. (AR 34.) Plaintiff has gotten food from service agencies in Merced. (AR 39.) He
3 also receives support from family members. (AR 39-40.) Plaintiff has not worked in carpentry
4 since 2003, but up until 2006 was doing some work for his landlord for room and board. (AR
5 60-62.) Plaintiff was charging \$15 per hour for his carpentry services. (AR 62.) Up to 2006, his
6 landlord had rentals and Plaintiff would paint, change a garbage disposal, or fix a broken
7 window as work was needed to be done. (AR 63.) He might have worked 10 hours per month.
8 (AR 63.) He would lift 15 to 20 pounds. (AR 63.)

9 Plaintiff is unable to work due to pain throughout his body, memory lapses, and injuries
10 he has suffered. (AR 38.) Plaintiff is afraid to work because he cannot do what he used to be
11 able to do. (AR 40.) Plaintiff has a lot of experience in the construction field, but he is not able
12 to move around and walk like he used to. (AR 40.) Plaintiff has a lot of injuries that are not
13 listed in the medical record; like a fractured elbow, dislocated clavicle, broken thumb, and he
14 hurt his arm so he can no longer straighten it out. (AR 40.) Plaintiff did not go to the doctor for
15 any of these injuries. (AR 40.)

16 Plaintiff fell into some trusses and hurt his ribs but did not go to the doctor because he
17 was working out of town. (AR 41.) He hurt his back again and did not go to the doctor because
18 he was working out of town. (AR 41.) Plaintiff needed to work more than he needed to have his
19 injuries addressed so he just kept working. (AR 41.) Plaintiff had a broken jaw that the doctors
20 took an x-ray of and did not treat. (AR 41.) Plaintiff's energy level is very low. (AR 53-54.)
21 Plaintiff has pain in all his bones from his feet to his neck. (AR 57.)

22 Plaintiff asked the doctors in 2003 or 2004 to fix his knees. (AR 42.) The doctors told
23 him they did not want to repair it and would not operate. (AR 42.) Plaintiff was escorted out of
24 the doctor's office when he was told that they would not fix his knees because Plaintiff "kind of
25 got cruel with him." (AR 43.) Plaintiff has not had any injections in his knees but does wear
26 braces on both knees. (AR 42-43.) The braces were prescribed by Dr. Lovell. (AR 43.)

27 Plaintiff is able to stand for a maximum of twenty minutes before needing to sit down.
28 (AR 43.) Since 2012, Plaintiff would be able to lift 20 pounds. (AR 44.) Plaintiff's

1 impairments only allow him to do chores for about twenty to thirty minutes at a time before
2 having to take a break for an hour or more. (AR 45.) Plaintiff has difficulty stooping; he can
3 only stoop so far before he has trouble getting back up. (AR 58.) He is also unable to kneel or
4 crouch, and requires assistance to get back up. (AR 58.)

5 Plaintiff last used alcohol a couple days prior to the hearing. (AR 50.) He enjoys
6 drinking beer, but does not drink like he used to. (AR 51.) He wants to get into a program for
7 his Hepatitis C but they will not accept alcoholics. (AR 51.) There were 60 people in the
8 program when he started and Plaintiff is the only one that has stayed with the program. (AR 51.)
9 For a year, Plaintiff has almost quit drinking completely. (AR 51.) The VA will not give him
10 interferon so he started drinking again. (AR 51.) Plaintiff had been in the program for three
11 years and they told him that he needs to have his white blood cell count tested. (AR 52.) He was
12 receiving antiviral medication for his Hepatitis C but he wanted interferon. (AR 51-52.)
13 Plaintiff was told that since he stopped drinking his blood cell count was down so he did not
14 need to take the medication. (AR 52.) Then, he was told that he needed to have testing on his
15 thyroid and he was given another pill to take. (AR 52.) Plaintiff was told that he needed to take
16 that medication for another year to raise some of his counts up. (AR 52.) Plaintiff felt like they
17 just did not want to spend the money on him and were trying to make him fall out or fail the
18 program. (AR 52.) But, Plaintiff thought he had done extremely well in quitting everything that
19 he was using to self-medicate before he went on the program. (AR 53.)

20 Plaintiff uses marijuana five times a week to help him relax or relieve his pain, and
21 smoked the day prior to the hearing. (AR 56.) The marijuana gets him euphoric and gives him
22 happy thoughts. (AR 57.) He smoked marijuana a lot while he was working and it did not
23 impair him. (AR 57.) In the past, Plaintiff has used methamphetamine (“meth”) but has not used
24 for almost two years. (AR 58.) Plaintiff used to consumed meth a couple of times a week and
25 this affected his ability to concentrate. (AR 58-59.) Plaintiff also has herpes that affects his
26 mental process and he has lost a lot of memory. (AR 56.)

27 Plaintiff suffers from PTSD due to some traumatic things he witnessed in the Army,
28 which causes his heart rate to increase and his blood rate to elevate every day. (AR 47, 48-49.)

1 Aside from the incident where Plaintiff got verbal with his doctor, he has no problems getting
2 along with others. (AR 49.) Plaintiff tried to overdose on his medication one time about ten
3 years ago. (AR 49.) Plaintiff goes for mental health treatment at the VA but his appointments
4 are few and far between. (AR 50.) He quit calling the hotline because they do not answer or call
5 back when he leaves a message. (AR 50.)

6 Plaintiff takes medication for his blood pressure, thyroid, herpes, and pain. (AR 49, 55-
7 57.) Plaintiff takes an anti-inflammatory drug to keep the swelling down when he does perform
8 tasks such as mowing the lawn so that his knees will not swell. (AR 57.)

9 Plaintiff spends most of his time alone in a storage room that they converted into a
10 bedroom for him. (AR 34-35, 49.) In a typical day, Plaintiff feels jolts of pain throughout his
11 body. (AR 46.) He alleviates the pain by sitting or lying down on the couch and he generally
12 lies down for about four to six hours daily. (AR 46.) When seated, Plaintiff props his legs up on
13 the couch, which also helps to alleviate the pain. (AR 46.) Plaintiff's medication causes him to
14 be drowsy and have dry mouth and he naps once or twice a day for about two to three hours.
15 (AR 47.) On some occasions Plaintiff naps for four to six hours. (AR 47.)

16 Plaintiff has an 18-speed bike that he rides 3 to 4 times a week to go to the store, which is
17 about 100 yards away from his residence. (AR 35.) He uses public transportation when he has
18 to go someplace. (AR 35.) Plaintiff helps with the housework by "cleaning the table off and
19 stuff", and mows the lawn which is approximately as big as the room in which the hearing was
20 held. (AR 44-45, 58.) His brother is trying to help out now so Plaintiff only is mowing the lawn
21 once or twice a month. (AR 58.)

22 A vocational expert ("VE"), Cheryl Chandler also testified at the hearing. (AR 59-70.)

23 **B. ALJ Findings**

24 The ALJ made the following findings of fact and conclusions of law.

- 25 • Plaintiff has not engaged in substantial gainful activity since December 10, 2012.
- 26 • Plaintiff has the following severe impairments: bilateral knee degenerative joint disease
27 and history of meniscus tear, depressive disorder, and severe PTSD.
- 28 • Plaintiff does not have an impairment or combination of impairments that meets or

1 medically equals the severity of one of the listed impairments.

- 2 • Plaintiff has the residual functional capacity to lift and carry 50 pounds occasionally and
- 3 25 pounds frequently; and to stand and walk 6 hours, and sit 6 hours in an 8-hour
- 4 workday. He can frequently climb ramps and stairs; occasionally ladders, ropes or
- 5 scaffolds; frequently stoop and kneel; occasionally crouch; and frequently crawl.
- 6 Plaintiff is capable of performing simple routine tasks.
- 7 • Plaintiff is unable to perform any past relevant work.
- 8 • Plaintiff was born on May 1, 1957, and was 55 years old, which is defined as an
- 9 individual of advanced age, on the date on the application was filed.
- 10 • Plaintiff has at least a high school education and is able to communicate in English.
- 11 • Transferability of job skills is not material to the disability because Plaintiff is not
- 12 disabled whether or not he has transferable job skills.
- 13 • Considering Plaintiff's age, education, work experience, and residual functional capacity,
- 14 there are jobs that exist in significant number in the national economy he can perform.
- 15 • Plaintiff has not been under a disability as defined by the Social Security Act from
- 16 December 10, 2012, through the date of decision.

17 (AR 13-21.)

18 III.

19 LEGAL STANDARD

20 To qualify for disability insurance benefits under the Social Security Act, the claimant
21 must show that he is unable “to engage in any substantial gainful activity by reason of any
22 medically determinable physical or mental impairment which can be expected to result in death
23 or which has lasted or can be expected to last for a continuous period of not less than 12
24 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five step
25 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §
26 404.1520; Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th
27 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is
28 disabled are:

1 Step one: Is the claimant presently engaged in substantial gainful activity? If so,
2 the claimant is not disabled. If not, proceed to step two.

3 Step two: Is the claimant's alleged impairment sufficiently severe to limit his or
4 her ability to work? If so, proceed to step three. If not, the claimant is not
disabled.

5 Step three: Does the claimant's impairment, or combination of impairments, meet
6 or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the
claimant is disabled. If not, proceed to step four.

7 Step four: Does the claimant possess the residual functional capacity ("RFC") to
8 perform his or her past relevant work? If so, the claimant is not disabled. If not,
proceed to step five.

9 Step five: Does the claimant's RFC, when considered with the claimant's age,
10 education, and work experience, allow him or her to adjust to other work that
exists in significant numbers in the national economy? If so, the claimant is not
11 disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

12 Congress has provided that an individual may obtain judicial review of any final decision
13 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g).
14 In reviewing findings of fact in respect to the denial of benefits, this court "reviews the
15 Commissioner's final decision for substantial evidence, and the Commissioner's decision will be
16 disturbed only if it is not supported by substantial evidence or is based on legal error." Hill v.
17 Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means more than a
18 scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)
19 (internal quotations and citations omitted). "Substantial evidence is relevant evidence which,
20 considering the record as a whole, a reasonable person might accept as adequate to support a
21 conclusion." Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec'y of
22 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

23 "[A] reviewing court must consider the entire record as a whole and may not affirm
24 simply by isolating a specific quantum of supporting evidence." Hill, 698 F.3d at 1159 (quoting
25 Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006)). However, it is not
26 this Court's function to second guess the ALJ's conclusions and substitute the court's judgment
27 for the ALJ's. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) ("Where evidence is
28

1 susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be
2 upheld.”).

3 IV.

4 DISCUSSION AND ANALYSIS

5 The sole issue that Plaintiff raises on appeal is the ALJ's finding regarding Plaintiff's
6 credibility. Plaintiff argues that the ALJ failed to articulate specific and legitimate, much less
7 clear and convincing, reasons to reject Plaintiff's testimony.² Defendant responds that the ALJ
8 pointed out specific testimony that was not credible and reasons to support the finding.

9 A. Legal Standard

10 Determining whether a claimant's testimony regarding subjective pain or symptoms is
11 credible, requires the ALJ to engage in a two-step analysis. Molina v. Astrue, 674 F.3d 1104,
12 1112 (9th Cir. 2012.) The ALJ must first determine if “the claimant has presented objective
13 medical evidence of an underlying impairment which could reasonably be expected to produce
14 the pain or other symptoms alleged.” Lingenfelter v. Astrue, 504 F3d. 1028, 1036 (9th Cir.
15 2007) (internal punctuation and citations omitted). This does not require the claimant to show
16 that his impairment could be expected to cause the severity of the symptoms that are alleged, but
17 only that it reasonably could have caused some degree of symptoms. Smolen, 80 F.3d at 1282.

18 Second, if the first test is met and there is no evidence of malingering, the ALJ can only
19 reject the claimant's testimony regarding the severity of his symptoms by offering “clear and
20 convincing reasons” for the adverse credibility finding. Carmickle v Commissioner of Social
21 Security, 533 F.3d 1155, 1160 (9th Cir. 2008). The ALJ must specifically make findings that
22 support this conclusion and the findings must be sufficiently specific to allow a reviewing court
23 to conclude the ALJ rejected the claimant's testimony on permissible grounds and did not
24 arbitrarily discredit the claimant's testimony. Moisa v Barnhart, 367 F.3d 882, 885 (9th Cir.
25 2004) (internal punctuation and citations omitted).

26
27 ² The Court notes that the opening brief also states that the ALJ erred by improperly considering the treating medical
28 opinion, but Plaintiff does not present any argument or otherwise address this issue in the opening brief. (Plaintiff's
Opening Brief 2:11-3:1, ECF No. 19.) Review of the brief persuades the Court that Plaintiff did not intend to raise
this issue but this was boilerplate language which was not deleted from the brief.

1 Factors that may be considered in assessing a claimant's subjective pain and symptoms
2 testimony include the claimant's daily activities the location, duration, intensity and frequency of
3 the pain or symptoms; factors that cause or aggravate the symptoms; the type, dosage
4 effectiveness or side effects of any medication; and other relevant factors. Lingerfelter, 504 F3d.
5 at 1040; Thomas, 278 F.3d at 958. In assessing the claimant's credibility, the ALJ may also
6 consider "(1) whether the claimant engages in daily activities inconsistent with the alleged
7 symptoms; (2) whether the claimant takes medication or undergoes other treatment for the
8 symptoms; (3) whether the claimant fails to follow, without adequate explanation, a prescribed
9 court of treatment; and (4) whether the alleged symptoms are consistent with the medical
10 evidence." Lingerfelter, 504 F3d. at 1040.

11 **B. The ALJ Provided Clear and Convincing Reasons for the Credibility Finding**

12 Plaintiff contends that the ALJ cited boilerplate language that is insufficient to justify an
13 adverse credibility finding. Plaintiff also argues that the ALJ simply rejects Plaintiff's testimony
14 based on the belief that it lacks support in the medical evidence and that while the ALJ cited to
15 Plaintiff's daily activities she offered no explanation as to how those sporadic activities render
16 Plaintiff not credible. Defendant counters that the regulations prohibit finding a claimant
17 disabled based solely on his subjective complaints, and the ALJ provided clear and convincing
18 reasons to find Plaintiff not credible including the lack of evidentiary support, conservative
19 treatment, daily activities, non-compliance with treatment, and doctor's opinions that Plaintiff
20 was capable of working.

21 The ALJ found that Plaintiff's allegations are not fully credible. (AR 18.) The ALJ then
22 continued the credibility discussion.

23 The claimant complained of bilateral knee pain. However diagnostic findings
24 showed mild to moderate osteoarthritis in the right knee and left knee. Physical
25 examinations of the bilateral knees revealed normal gait and station with minimal
26 crepitus, but normal ranges of motion. In addition, the claimant received
27 conservative treatment, such as medications, and there was no mention of surgery
28 or extraordinary therapies or hospitalizations or actual prescription of any
assistive device. Thus the undersigned gives little weight to the claimant's
allegations of constant and disabling pain. Furthermore, the records also showed
he could perform normal activities of daily living without assistance. He was also
able to do chores such as cooking, cleaning, raking the yard, walking the dog for
exercise, and bike riding three to four times a week. The claimant described daily

1 activities, which are not limited to the extent that one would expect, given the
2 complaints of disabling symptoms and limitations. Moreover, the claimant was
3 also non-compliant with his prescribed treatment and missed several
4 appointments without reasonable explanation. For these reasons, the undersigned
5 gives little weight to the claimant's allegations of disability because they are not
6 supported by the overall medical evidence of record or opinion evidence.

7 (AR 18-19 (citations omitted).)

8 The Court disagrees with Plaintiff that the ALJ simply set forth boilerplate language that
9 courts have rejected as insufficient to allow for meaningful review of the credibility finding.
10 While the ALJ did include some boilerplate language, the opinion went into detail about the
11 specific testimony the ALJ found to not be credible and stated the evidence that undermined the
12 testimony.

13 1. Inconsistencies with Objective Medical Evidence

14 Plaintiff argues that the ALJ's determination that Plaintiff's testimony was not credible
15 due to its inconsistency with the objective medical evidence is legally insufficient to discredit
16 Plaintiff's testimony. Although an ALJ cannot make an adverse credibility determination solely
17 based upon the lack of medical evidence, it is a factor that the ALJ can consider. Burch, 400
18 F.3d at 681. In his decision, the ALJ specifically noted, Plaintiff had little and only conservative
19 treatment of his bilateral knee pain. (AR 18.) While the sparse medical evidence shows plaintiff
20 has a medical history from a meniscus tear in 2009, administering doctors determined by
21 physical examination and by an x-ray performed in June 2012 Plaintiff's course of treatment
22 required pain medication and braces for both knees. (AR 16.)

23 **a. Medical Record**

24 Plaintiff was seen on August 17, 2005, to establish care and complained of palpitations
25 and back pain after straining his back two days prior doing carpentry work. (AR 483, 484.)
26 Plaintiff reported that he was working in home remodeling and repairs. (AR 483.) Plaintiff was
27 found to have some mild left sacroiliac tenderness and knee pain. (AR 483.) He was prescribed
28 Naproxen and Flexeril. (AR 483.)

On November 23, 2005, Plaintiff complained of joint pain within an hour of starting
work. (AR 482.) Plaintiff had a normal examination. (AR 481.)

1 On May 22, 2006, Plaintiff called complaining of pain and swelling in his right thigh and
2 pain in the upper chest wall after he was moving a refrigerator up a flight of stairs. (AR 473.)
3 On June 6, 2006, Plaintiff stated he was lifting a refrigerator and felt a pop. (AR 468.) He was
4 complaining of pain in his right thigh. (AR 468.) He had moderate effusion in the right knee
5 and tenderness in the right abductor muscle and was noted to be ambulating with minimal
6 apparent discomfort. (AR 468.) Plaintiff was seen on July 18, 2006, for an eye irritation after he
7 got paint in his eye. (AR 465.) He had been working outside. (AR 467.) Plaintiff was
8 diagnosed with severe conjunctivitis and possible chemical burns. (AR 465.) On December 26,
9 2006, Plaintiff complained of heel pain and feeling tired after 4 to 6 hours of work. (AR 462.)
10 His legs continue to hurt after working all day. (AR 462.) Plaintiff had a normal examination,
11 substance abuse was discussed, and AA attendance was advised. (AR 462.)

12 On December 17, 2007, Plaintiff reported apathy, sleep disturbance, and that he had been
13 recently incarcerated for anger problems and requested counseling. (AR 457.) Plaintiff was
14 referred for counseling and advised to cease using alcohol. (AR 457.) Plaintiff was seen on
15 August 14, 2008, and reported that he felt great and denied depression. (AR 452.) Plaintiff had
16 a normal examination. (AR 452.)

17 On January 21, 2009, Plaintiff reported that he was having pain in his knees and joint
18 pain. (AR 448.) Examination of the left knee revealed "EXT NO CCE. LT KNEE NO
19 EFFUSION, POS JOINT LINE TENDERNESS, MCL TENDERNESS AND VALGUS
20 INSTABILITY". (AR 448.) Plaintiff was prescribed Naproxen. (AR 448.) Plaintiff had a
21 follow up appointment on May 27, 2009, but had not gone to get his x-rays. (AR 439.)

22 On July 2, 2009, Plaintiff had an x-ray of his left knee which revealed slight medial
23 subluxation and slight narrowing of the medial compartment left knee. (AR 308.) On July 14,
24 2009, Plaintiff was seen complaining of left knee pain after a motorcycle accident. (AR 435.)
25 Examination showed moderate effusion of left knee. (AR 435.) On July 31, 2009, Plaintiff had
26 an MRI of his left knee which showed "[j]oint effusion. Intrasubstance degeneration of menisci
27 with tear in the posterior horn of medial meniscus. . . ." (AR 307-308.) The record notes
28 "ABNORMAL:**FURTHER EVALUATION REQUIRED!!" (AR 308.) Plaintiff was seen on

1 September 22, 2009, for his left knee injury. (AR 340, 432.) Plaintiff also complained of pain in
2 his ankle joints, right shoulder, and right hand. (AR 340, 432.) The record notes that the x-ray
3 showed moderately advanced tricompartment arthritis present and reflects the July 31, 2009 MRI
4 results. (AR 340, 432.) The record notes that Plaintiff is grossly intact and the most likely
5 source of his symptoms is arthritis in various joints, the left knee in particular. (AR 340, 432.)
6 The record also notes “it is unlikely that the MRI findings suggest a singular torn meniscal lesion
7 that will afford relief with surgical treatment.” (AR 340, 432.) Plaintiff was released to his
8 primary care provider for medical management of his arthritis to include combination drug
9 treatment, physical therapy, alterations of life style, and knee injections. (AR 340-341, 431.)
10 Plaintiff was released from ortho being found an unlikely surgical candidate. (AR 432.)

11 On March 15, 2010, Plaintiff reported knee pain that hurts worse with squatting and
12 bending but he could walk 50 yards or less without pain. (AR 416.)

13 On April 27, 2010, Plaintiff reported that he had been having pain of 6/10 for about a
14 month in both knees. (AR 410.) He asked that a list of all his injuries be set forth for disability
15 purposes. (AR 410.)

16 On March 9, 2012, Plaintiff was seen complaining of knee pain that hurts worse with
17 squatting. (AR 390.) Plaintiff reported that he had developed a lateral bulge in his knee the last
18 six months and the pain has been worsening. (AR 393.) He was able to walk 50 yards or less
19 without pain. (AR 390.) Plaintiff was not taking his Naproxen very often. (AR 390.) .) He had
20 medium effusion and joint line tenderness on his right knee. (AR 390.)

21 Plaintiff was seen for a routine follow-up on April 9, 2012. (AR 385-386.) Plaintiff
22 complained of pain 7/10 to bilateral patellar and reported that he was not taking his Naproxen
23 very often. (AR 385, 386.) He had medium effusion and joint line tenderness on his right knee
24 and knee braces were ordered. (AR 385.)

25 On June 7, 2012, Plaintiff had bilateral x-rays of his knees. (AR 305-306.) The x-rays
26 showed: right knee – mild to moderate tricompartment osteoarthritis, possible loose body; left
27 knee – mild tricompartment osteoarthritis. (AR 306.)

28 Plaintiff was seen on February 7, 2013, complaining of some dysphagia, chokes with no

1 emesis. (AR 526.) His physical status is noted as “patient with mild systemic disease[.]” (AR
2 528.) Plaintiff was alert and oriented and had a normal physical examination. (AR 528-529.)
3 He was scheduled for a screening colonoscopy. (AR 529.)

4 Plaintiff had a comprehensive physical examination by Dr. Wagner on February 12,
5 2013. (AR 497-501.) Plaintiff was found to have a history of hepatitis C with no history of
6 edema, ascites, jaundice, or encephalopathy. (AR 497.) Plaintiff also complains of bilateral
7 knee pain and the MRI of the left knee shows some meniscal degeneration, otherwise, the x-rays
8 show mild degenerative joint disease. (AR 497-498.) Plaintiff has not had any arthrocentesis or
9 injections and Plaintiff reports he can walk 4 to 6 blocks. (AR 498.) Plaintiff can climb stairs
10 but uses a railing to do so. (AR 498.) Plaintiff occasionally uses knee braces when he is doing
11 activities such as raking the yard, or walking the dog, but does not use them when he is inside his
12 house. (AR 498.) Plaintiff also has hypertension that was somewhat elevated. (AR 498.)
13 Plaintiff reported living with his parents. (AR 498.) He cooks, cleans, shops, performs activities
14 of daily living without assistance, and has a “cardio machine” at home that he uses to exercise
15 his arms and legs. (AR 498.) Plaintiff also walks the dog, rakes the yard, and does other similar
16 activities for exercise. (AR 498.) Plaintiff denied any current drug or alcohol use. (AR 498.)

17 Dr. Wagner noted that Plaintiff was easily able to get up and out of his chair in the
18 waiting room and walked with a brisk pace to the examination room without assistance. (AR
19 498.) Plaintiff sat comfortably and was was easily able to get on and off the examination table,
20 bend over at the waist, take off his shoes and socks, and put them back on without any difficulty.
21 (AR 498-499.) Plaintiff was easily able to walk on his toes and heels, had negative Romberg,
22 normal station, normal gait, and normal finger to nose. (AR 499.) Plaintiff wore knee braces
23 outside of his jeans and they appeared to be helpful in more high stress activities such as raking
24 the yard or going for long walks. (AR 499.) Examination of Plaintiff’s knees showed no
25 swelling, tenderness, effusions, or ligamentous laxity. (AR 500.) Dr. Wagner stated that at the
26 very most, there was minimal crepitus in the knees bilaterally. (AR 500.) Plaintiff had 5/5
27 bilateral upper and lower extremity strength, bulk, and tone. (AR 500.) Plaintiff was diagnosed
28 with hepatitis C without any signs or symptoms of advanced cirrhotic liver disease; bilateral knee

1 pain with some mild degenerative joint disease in both knees; and hypertension that is somewhat
2 poorly controlled with no history of any obvious end-organ damage. (AR 500-501.)

3 Dr. Wagner opined that Plaintiff can stand/walk up to six hours; has no limitation on
4 sitting with normal breaks; should use knee braces for strenuous activities; can lift 50 pounds
5 occasionally and 25 pounds frequently; can frequently perform postural activities, and has no
6 manipulative or workplace environmental limitations. (AR 501.)

7 Plaintiff had an esophagogastroduodenoscopy with colonoscopy on February 15, 2013.
8 (AR 518-524.) Plaintiff was diagnosed with mild sigmoid diverticulosis and had an otherwise
9 unremarkable upper endoscopy. (AR 518, 570.) On March 14, 2013, Plaintiff had a liver
10 ultrasound which found hepatocellular disease; cholelithiasis. (AR 547-548.) Plaintiff was seen
11 on April 9, 2013. (AR 564.) Plaintiff was alert and oriented. (AR 564.) He was ambulating
12 with braces and no edema was noted. (AR 546.) On April 16, 2013, Plaintiff had a normal CT
13 of his chest. (AR 546-547.)

14 Plaintiff reported on August 9, 2013, that he was feeling more energetic and active but
15 was having intermittent back pain and was not exercising. (AR 642.) He requested a CT scan
16 for memory loss stating that he was “not feeling himself lately”. (AR 643.) On August 23,
17 2013, Plaintiff reported severe pain in his left temple for two weeks, eye pressure, reddened left
18 eye, and pain down his neck. (AR 635.)

19 Plaintiff reported on March 17, 2014 that he had stopped taking his medication and he
20 was breaking out in herpes and was having anger, irritability and impatience. (AR 621.)
21 Plaintiff also said that his knees were worse. (AR 621.) The record notes DJD of knees and
22 Plaintiff was to continue his current medications. (AR 621.)

23 **b. The ALJ Properly Considered that Plaintiff’s Complaints Were Inconsistent**
24 **With the Medical Record**

25 The ALJ noted that Plaintiff has only had little and conservative treatment for his
26 bilateral knee pain. (AR 16.) Plaintiff was found not to be a candidate for surgery for his
27 bilateral knee pain, and has only been treated with medication and stated he does not take the
28 medication very often. (AR 385, 386, 390, 432.) Evidence of conservative treatment is

1 sufficient to discount a claimant's testimony regarding the severity of the impairment. Parra v.
2 Astrue, 481 F.3d 742, 751 (9th Cir. 2007).

3 The ALJ also considered diagnostic findings which show mild to moderate osteoarthritis
4 in the right and left knee. (AR 18, 305-306.) The ALJ also addressed that physical examination
5 of the bilateral knees revealed normal gait and station with minimal crepitus, but normal range of
6 motion. (AR 18, 500.) The determination that a claimant's complaints are inconsistent with
7 clinical evaluations can satisfy the requirement of stating a clear and convincing reason for
8 discrediting the claimant's testimony. Regennitter v. Commissioner of Social Sec. Admin., 166
9 F.3d 1294, 1297 9th Cir. 1999). The ALJ properly considered this evidence in weighing
10 Plaintiff's credibility. "While subjective pain testimony cannot be rejected on the sole ground
11 that it is not fully corroborated by objective medical evidence, the medical evidence is still a
12 relevant factor in determining the severity of the claimant's pain and its disabling effects."
13 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citing 20 C.F.R. § 404.1529(c)(2)).

14 2. Non-Compliance With Medical Treatment

15 The ALJ also specifically addressed that Plaintiff has a history of missing his mental
16 health appointments. (AR 17.) In addressing Plaintiff's credibility, the ALJ found that Plaintiff
17 was noncompliant with his prescribed treatment and missed several appointments without
18 reasonable explanation. (AR 19, 621, 623, 629.) Review of the medical record provides
19 substantial evidence to support the ALJ's determination that Plaintiff was non-compliant with his
20 treatment.

21 On March 31, 2009, Plaintiff cancelled an appointment with gastroenterology. (AR 344.)
22 On June 2, 2009, Plaintiff failed to show for an appointment at the GI clinic. (AR 438.) On
23 October 16, 2009, the record notes that Plaintiff did not take his blood pressure medication. (AR
24 421.)

25 On January 26, 2010, and April 3, 2011, Plaintiff failed to show for a sleep study. (AR
26 342, 401.) On January 26, 2010, Plaintiff did not show for a mental health appointment. (AR
27 419.) On March 15, 2010, the record notes Plaintiff did not take his blood pressure medication.
28 (AR 416.) On April 26, 2010, Plaintiff failed to show for an appointment for an orthopedic

1 examination. (AR 336.) An April 27, 2010 note reports that Plaintiff has failed to follow up
2 with the Hep C clinic. (AR 410.)

3 On September 13, 2010, Plaintiff failed to show for a CDTP SUB intake appointment.
4 (AR 406.) On October 15, 2010, Plaintiff failed to show for a psychotherapy session. (AR 404.)

5 On March 9, 2012, Plaintiff had not been taking his blood pressure medications. (AR
6 390.) On June 20, 2012, the record notes that Plaintiff has been noncompliant with his therapy
7 for his hypertension. (AR 376.)

8 On September 18, 2012, Plaintiff missed his appointment because he rides his bike to the
9 bus stop and he did not get there in time to catch the bus to Fresno. (AR 365.) Plaintiff failed to
10 show for an appointment on December 26, 2012, and December 27, 2012. (AR 530-532.)

11 Plaintiff failed to show for appointments on March 27, 2013; December 18, 2013;
12 February 6, 2014; March 12, 2014; and March 31, 2014. (AR 617, 627-629.)

13 It is well established in the Ninth Circuit that the ALJ may properly rely on “unexplained
14 or inadequately explained failure to seek treatment or to follow a prescribed course of treatment”
15 in determining a claimant’s credibility. Molina, 674 F.3d at 1113 (citations omitted). The ALJ
16 properly considered Plaintiff’s failure to comply with his treatment in making the credibility
17 determination.

18 3. Daily Activity

19 Plaintiff argues that the ALJ erred in considering his daily activities of daily living
20 without offering an explanation as to how those activities render Plaintiff not credible and that
21 nothing in Plaintiff’s testimony provides any indication that he is capable of performing anything
22 other than basic daily activities. There are two ways for an ALJ to “use daily activities to form
23 the basis of an adverse credibility determination: if the claimant’s activity contradicts his
24 testimony or if the claimant’s activity meets the threshold for transferable work skills.” Phillips
25 v. Colvin, 61 F. Supp. 3d 925, 944 (N.D. Cal. 2014).

26 In this instance, the ALJ found that that Plaintiff described daily activities which are not
27 limited to the extent that one would expect, given the complaints of disabling symptoms and
28 limitations. (AR 18.) The ALJ considered that Plaintiff could perform normal activities of daily

1 living without assistance and was also able to do chores such as cooking, cleaning, raking the
2 yard, walking the dog for exercise, and bike riding three to four times a week. (AR 18.)

3 On April 9, 2014, Plaintiff completed a daily activities questionnaire. (AR 282-285.)
4 Plaintiff stated that he lived with his parents and indicated that he cleaned, washed dishes, and
5 mowed the lawn, although he stated not enough. (AR 282.) Plaintiff indicated that he did not do
6 activities outside the home because he did not have money. (AR 282.) Plaintiff is able to cook
7 for himself although his mother does most of the cooking. (AR 283.) Plaintiff can take care of
8 his personal needs. (AR 283.) Plaintiff spends most of his day watching television. (AR 283.)
9 Plaintiff reads the newspaper for about half an hour on some days. (AR 283.) Plaintiff stated
10 that he has lost most of his friends and has very few left but he visits with them when he sees
11 them. (AR 284.) He participates in holidays and birthday with family and friends. (AR 284.)
12 Plaintiff could not remember the last time that he attended a social activity. (AR 285.) Plaintiff
13 does not always go to bed. (AR 285.) He sleeps 2 to 5 hours a night and is up from 3 a.m. to 4
14 p.m. (AR 285.) Plaintiff's medications make him drowsy. (AR 285.)

15 On July 7, 2014, Plaintiff completed a daily activities questionnaire. (AR 288-291.)
16 Plaintiff stated that he was living with his mother, father, and brother. (AR 288.) Plaintiff does
17 household chores only after he takes his medication. (AR 288.) Plaintiff sometimes rides his
18 bike to the local store. (AR 288.) Plaintiff is okay with these activities when he is on his meds
19 and if his body lets him. (AR 288.) Plaintiff states that he does not cook for himself and his
20 brother's girlfriend prepares his meals. (AR 289.) Plaintiff is able to take care of his personal
21 needs without assistance. (AR 289.) Plaintiff spends most of the day and night watching
22 television. (AR 289.) Plaintiff has a black belt and brown in Judo and Karate but cannot engage
23 in them now. (AR 289.) Plaintiff does not read. (AR 289.) Plaintiff is able to use public
24 transportation without assistance. (AR 290.) Plaintiff visits with family members when they
25 come over. (AR 290.) Plaintiff does not attend social activities. (AR 291.) Plaintiff sometimes
26 goes to bed at 4 a.m. and 10 p.m. (AR 291.) Plaintiff sleeps one to four hours a night and gets
27 up between 7:00 a.m. and 3:00 p.m. (AR 291.) Plaintiff takes naps during the day because he is
28 tired a lot of the time. (AR 291.)

