

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

DONALD JACKSON,  
Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,  
Defendant.

Case No. 1:16-cv-01917-SAB

ORDER DENYING PLAINTIFF’S SOCIAL  
SECURITY APPEAL

(ECF No. 16, 17, 18)

**I.**

**INTRODUCTION**

Plaintiff Donald Jackson (“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.<sup>1</sup>

Plaintiff suffers from obesity, diabetes mellitus, asthma, disorders of the muscle, ligament and fascia with peripheral neuropathy. For the reasons set forth below, Plaintiff’s Social Security appeal shall be denied.

---

<sup>1</sup> The parties have consented to the jurisdiction of the United States Magistrate Judge. (See ECF Nos. 8, 10.)

1 **II.**

2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 Plaintiff protectively filed an application for a period of disability and disability insurance  
4 benefits on October 1, 2013. (AR 73.) Plaintiff's applications were initially denied on  
5 December 17, 2013, and denied upon reconsideration on February 20, 2014. (AR 86-90, 94-97.)  
6 Plaintiff requested and received a hearing before Administrative Law Judge Daniel G. Heely  
7 ("the ALJ"). Plaintiff appeared for a hearing on February 23, 2015. (AR 37-63.) On April 17,  
8 2015, the ALJ found that Plaintiff was not disabled. (AR 21-32.) The Appeals Council denied  
9 Plaintiff's request for review on October 19, 2016. (AR 1-4.)

10 **A. Hearing Testimony**

11 Plaintiff appeared with counsel and testified at the February 23, 2015 hearing. (AR 41-  
12 58.) Plaintiff is 5 foot 11 inches tall and weighs 216 pounds. (AR 42.) Plaintiff lives with his  
13 brother. (AR 46.) His brother does not work because he has health problems but is not on  
14 disability yet. (AR 46.) Plaintiff and his brother share equally the work at home. (AR 47.)  
15 Every once in a while when Plaintiff is really hurting his brother will let the dog out to use the  
16 restroom. (AR 47.) Plaintiff's brother has two dogs and Plaintiff has a Jack Russell Terrier.  
17 (AR 47.) Plaintiff's brother will also go and get water in five gallon jugs and pick it up for  
18 Plaintiff because he cannot pick it up. (AR 47.)

19 Plaintiff has never had a driver's license and has never driven. (AR 47-48.) His brother  
20 takes him when he needs to go somewhere or he will take a cab. (AR 48.) Plaintiff has taken the  
21 bus a couple of times. (AR 48.) Plaintiff does his own microwave cooking, laundry, and some  
22 housework, like vacuuming the carpet. (AR 49.) Plaintiff has difficulty with the back and forth  
23 motion of vacuuming. (AR 49.) Plaintiff has San Joaquin health insurance and does not pay  
24 anything. (AR 49-50.)

25 Plaintiff and his brother will go out to eat on occasion. (AR 50.) He watches television  
26 in the evening. (AR 50.) Plaintiff watches about 8 hours of television a day. (AR 50.) He likes  
27 documentaries like NOVA and those on the PBS channel. (AR 51.) Plaintiff uses the Internet to  
28 talk to friends. (AR 51.) He uses instant messaging and Facebook. (AR 51.) He also plays

1 checkers online by himself or against the computer. (AR 51.) Plaintiff collects stamps, coins,  
2 keychains, and buttons. (AR 51.) He purchases the items when he sees them in the store. (AR  
3 52.) The furthest Plaintiff has travelled since he moved was to visit his sister in Pleasanton. (AR  
4 53.) She took Plaintiff for Christmas and Thanksgiving in 2013. (AR 52.) Plaintiff just went for  
5 the day and did not stay overnight. (AR 53.)

6 Plaintiff smokes about a half a pack of cigarettes on a normal day. (AR 43.) He used to  
7 smoke a pack a day but has cut back. (AR 43.) Plaintiff has not been diagnosed with COPD,  
8 emphysema or asthma. (AR 43.) Plaintiff does not drink alcohol or use illegal drugs or medical  
9 marijuana. (AR 43.) Plaintiff has never had any surgeries on parts of his body related to his  
10 ability to work. (AR 43.)

11 Plaintiff has not worked since February 1, 2013. (AR 41.) Plaintiff does not think that he  
12 could do much work because he has a lot of pain. (AR 42.) Plaintiff has arthritis in his neck,  
13 and numbness in his toes. (AR 42.) Plaintiff's hands sometimes swell and he has a hard time  
14 gripping. (AR 44.) His knuckles have arthritis and will feel tight and hurt. (AR 44-45.)  
15 Plaintiff has difficulty sleeping because his legs, feet, and toes give him a lot of pain. (AR 53.)  
16 The toes on his left foot will curl up and cause pain at night. (AR 53.) He has diabetes in his big  
17 toe on his left foot and severe arthritis. (AR 52.) Plaintiff's toe will hurt so bad that he will have  
18 to take a two-hour nap during the day to feel better. (AR 53.)

19 Plaintiff will take a two hour nap because he is fatigued from not sleeping at night. (AR  
20 55.) He has more energy when he wakes up from his naps. (AR 55-56.) The pain is worse on  
21 cold days. (AR 56.) The pain is constant and never lets up. (AR 56.) Plaintiff has pain in his  
22 left shoulder when he picks up something heavy. (AR 56.) He cannot put his hands above his  
23 shoulder because it hurts really bad. (AR 56.) Plaintiff is able to pick something up from a table  
24 in front of him but he still gets pain in his shoulders. (AR 56-57.) He is able to reach in front of  
25 him. (AR 57.) Plaintiff has pain in his neck, back, feet, and legs. (AR 57.) When he puts on a  
26 jacket his left shoulder causes problems. (AR 57.) He has pain around the neck bone and it will  
27 feel so tight that he gets disoriented. (AR 58.) He almost fell twice when he was working. (AR  
28 58.)

1 Plaintiff has diabetes and takes pills for it. (AR 42.) He checks his blood sugar every  
2 day. (AR 42.) His blood sugar on the morning of the hearing was 252. (AR 42.) Plaintiff also  
3 takes blood pressure medication that makes him feel a little light headed when he first takes it,  
4 but he feels much better once it is in his system. (AR 45.) His blood pressure is controlled on  
5 the medication. (AR 45.) Plaintiff does have slight asthma, not really full blown, but every once  
6 in a while when he gets sinus problems his chest will wheeze a little bit. (AR 45.) He uses an  
7 inhaler. (AR 45.)

8 Plaintiff can stand for ten minutes at the most and then has to sit down to take the  
9 pressure off of his legs, feet, and hips. (AR 54.) Some of the pain is from his diabetes and he  
10 also is getting arthritis in his toes. (AR 54.) Plaintiff has numbness in his toes and it is going to  
11 the top of his foot. (AR 54.) Plaintiff's doctor had him get compression stockings and they do  
12 help a little bit. (AR 55.) He wears them when he sleeps. (AR 55.)

13 A vocational expert ("VE"), Malcolm J. Brodzinsky, also testified at the hearing. (AR  
14 58-62.)

15 **B. ALJ Findings**

- 16 • Plaintiff met the insured status requirements of the Social Security Act through December  
17 31, 2017.
- 18 • Plaintiff has not engaged in any substantial gainful activity since the alleged onset date of  
19 February 1, 2013.
- 20 • Plaintiff has the following severe impairments: obesity, diabetes mellitus, asthma,  
21 disorders of the muscle, ligament and fascia with peripheral neuropathy.
- 22 • Plaintiff does not have an impairment or combination of impairments that met or  
23 medically equal the severity of one of the listed impairments.
- 24 • Plaintiff has the residual functional capacity to perform a full range of medium work.  
25 Specifically, Plaintiff can lift and/or carry 50 pounds occasionally and 25 pounds  
26 frequently; stand and/or walk 6 hours out of an 8 hour workday with regular breaks;  
27 never climb ladders, ropes, or scaffolds; occasionally climb ramps or stairs; never work  
28 around hazards, like moving dangerous machinery or unprotected heights; cannot work

1 around concentrated fumes, odors, dust, gases, poor ventilation or other environmental  
2 irritants; and cannot operate motor vehicles.

- 3 • Plaintiff is unable to perform any past relevant work.
- 4 • Plaintiff was born on July 25, 1961, and was 51 years old, which is defined as an  
5 individual closely approaching advanced age, on the alleged disability onset date.
- 6 • Plaintiff has at least a high school education and is able to communicate in English.
- 7 • Transferability of job skills is not an issue in this case because Plaintiff's past relevant  
8 work is unskilled.
- 9 • Considering Plaintiff's age, education, work experience, and residual functional capacity,  
10 there are jobs that exist in significant numbers in the national economy that Plaintiff can  
11 perform.
- 12 • Plaintiff has not been under a disability as defined in the Social Security Act from  
13 February 1, 2013, through the date of this decision.

14 (AR 26-32.)

### 15 III.

#### 16 LEGAL STANDARD

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

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

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

1 disabled.

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

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

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

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

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

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

///

1 **IV.**

2 **DISCUSSION AND ANALYSIS**

3 Plaintiff contends that the ALJ's RFC finding is based on insubstantial evidence and legal  
4 error and was not properly based on the objective evidence and Plaintiff's complaints. Plaintiff  
5 also argues that the appeal's counsel failed to give specific and legitimate reasons to reject Dr.  
6 Lee's opinion. Defendant counters that the ALJ properly evaluated and interpreted the  
7 conflicting medical evidence, provided proper reasons to reject Plaintiff's credibility, the step 5  
8 finding is supported by substantial evidence in the record, and the evidence supported to the  
9 appeals counsel does not show a reasonable probability that it would erode the substantial  
10 evidence supporting the ALJ's decision. Plaintiff replies that the ALJ's findings are not  
11 supported by substantial evidence in the record and were based on unreasonable interpretations  
12 of the evidence. Plaintiff argues that Dr. Lee's opinion should be credited as true and this action  
13 should be remanded for payment of benefits.

14 **A. The Residual Functional Capacity Assessment is Supported by Substantial**  
15 **Evidence in the Record**

16 Plaintiff concedes that there was very little medical evidence in the record reviewed by  
17 the state physicians. (Pl.'s Opening Brief 9,<sup>2</sup> ECF No. 16.) Plaintiff's treating provider prior to  
18 2013 did not provide medical records. Therefore, the record was limited to records beginning  
19 October 2013. Plaintiff argues that the ALJ erred by reviewing the x-rays and MRI scans of  
20 Plaintiff's spine and finding the medical evidence to be benign.<sup>3</sup>

21 If the claimant has established that he has a severe impairment but has not demonstrated  
22 that his impairment or combination of impairments meets or equals a listed impairment, the ALJ  
23 goes to step four to determine if the claimant possesses the RFC to perform his or her past  
24 relevant work. Stout, 454 F.3d at 1052. A claimant's RFC is "the most [the claimant] can still  
25 do despite [his] limitations." 20 C.F.R. § 416.945(a)(1). The RFC is "based on all the relevant

26 <sup>2</sup> All references to pagination of specific documents pertain to those as indicated on the upper right corners via the  
27 CM/ECF electronic court docketing system.

28 <sup>3</sup> As Plaintiff is only challenging the ALJ's RFC findings as they relate to his spine, the Court shall limit the  
discussion to those portions of the record relevant to this issue.

1 evidence in [the] case record.” 20 C.F.R. § 416.945(a)(1). “The ALJ must consider a claimant’s  
2 physical and mental abilities, § 416.920(b) and (c), as well as the total limiting effects caused by  
3 medically determinable impairments and the claimant’s subjective experiences of pain, §  
4 416.920(e).” Garrison v. Colvin, 759 F.3d 995, 1011 (9th Cir. 2014).

5 The ALJ considered that Plaintiff received treatment for his diabetes and hypertension  
6 which were managed by conservative treatment. (AR 28-29.) In October 2013, Plaintiff  
7 reported no back pain or joint pain, and pain was noted to be 0/10. (AR 28-29, 424.) Plaintiff  
8 had a normal gait and no edema. (AR 28, 424.) Plaintiff was to continue his conservative  
9 treatment which was prescription medication and increased exercise. (AR 28, 425.)

10 In November 2013, Plaintiff continued to report no back pain or joint pain, with normal  
11 examination. (AR 238.) Plaintiff was also seen for a foot examination which confirmed some  
12 loss of sensation and varicosity of the ankles. (AR 28, 241.)

13 Plaintiff had an internal medicine consultative evaluation by Dr. Rios on November 21,  
14 2013. (AR 29, 242-246.) Dr. Rios noted that no medical records were available for review, but  
15 Plaintiff complained of chronic back pain, diabetes, and asthma. (AR 29, 242.) Plaintiff  
16 admitted that he was not taking any medication for pain and was smoking 30 packs of cigarettes  
17 a year by history. (AR 29, 242.) Plaintiff reported some peripheral neuropathy, but no  
18 significant visual acuity. (AR 29, 242.) Physical examination was largely unremarkable. (AR  
19 29, 243-244.) Plaintiff was noted to walk around the examination room with ease. (AR 29,  
20 243.) Station and tandem gait were normal. (AR 29, 244.) Romberg was negative and Plaintiff  
21 required no assistive devices. (AR 29, 244.) Ranges of motion were within normal limits and  
22 straight leg raise was negative. (AR 29, 244.) Examination of the neck revealed tenderness  
23 along the left paracervical region and upper trapezius region. (AR 29, 245.) Spurling’s test was  
24 negative for nerve root irritation. (AR 29, 245.) There was no wasting of the upper extremities  
25 and reflexes of the biceps and triceps were normal and symmetric at 2+. (AR 29, 245.)  
26 Examination of the lower back revealed no findings of nerve root irritation on provocative  
27 maneuvers. (AR 29, 245.) No limitation of range of motion was observed. (AR 29, 245.)

28 Plaintiff had motor strength of 5/5 throughout the upper and lower extremities. (AR 29,

1 245.) Grip strength was normal at 5/5. (AR 29, 245.) Plaintiff had normal muscle bulk and tone  
2 without any atrophy, spasms, or fasciculation. (AR 29, 245.) Light touch and pinprick were  
3 intact throughout the upper and lower extremities. (AR 29, 245.) Deep tendon reflexes were 2+  
4 in the bilateral upper and lower extremities. (AR 29, 245.)

5 Dr. Rios opined that Plaintiff had no exertional limitations, but would have workplace  
6 environmental limitations. (AR 29, 246.) The ALJ gave this opinion significant weight because  
7 it was consistent with the medical evidence of record and Plaintiff's acknowledged daily  
8 activities of daily living. (AR 29.) However, the ALJ found that additional limitations were  
9 warranted based on the totality of the medical evidence which Dr. Rios did not have the benefit  
10 of reviewing, and Plaintiff's subjective complaints. (AR 29.)

11 The ALJ found that review of the subsequent medical evidence did not establish a  
12 significant deterioration of Plaintiff's overall condition. (AR 29.) For example, treatment notes  
13 from February 2014 show that Plaintiff was seen for sinusitis but review of the symptoms were  
14 otherwise normal, physical examination was normal, and there were no musculoskeletal deficits  
15 noted. (AR 29, 250-251.)

16 In September 2014, Plaintiff continued to receive care for sinusitis, but he was in no  
17 apparent distress, no musculoskeletal deficits were noted, and he ambulated without assistance.  
18 (AR 30, 257.)

19 The first findings regarding back pain in Plaintiff's treatment notes are on December 5,  
20 2014. (AR 288-290.) Plaintiff reported that he was in no pain, but had back pain that was  
21 relieved by over the counter medications, naproxen, and physical therapy. (AR 288.)  
22 Examination of the cervical spine, thoracic spine, and lumbar spine showed tenderness with  
23 mildly reduced range of motion. (AR 290.) Plaintiff was prescribed naproxen and referred to  
24 physical therapy. (AR 290.)

25 On December 8, 2014, Plaintiff an x-ray of the lumbar spine. (AR 284.) The x-ray  
26 revealed minimal wedging deformity at L1, and moderate multilevel degenerative spondylosis.  
27 (AR 284.) Plaintiff had an x-ray of the cervical spine that showed moderate to severe multilevel  
28 degenerative spondylosis; osseous foraminal stenosis bilaterally at multiple levels most

1 prominent on left at C5-6; and 2 x 5 cm well circumscribed lucency in the left mandible. (AR  
2 285.) Plaintiff had an x-ray of his thoracic spine that showed mild multilevel degenerative  
3 spondylosis and bridging osteophytosis. (AR 287.) Plaintiff was seen this same day and found  
4 to have normal strength in the bilateral lower extremities. (AR 281.)

5 On February 4, 2015, Plaintiff had an MRI of the lumbar spine. (AR 276-277.) Plaintiff  
6 reported that he was having back pain that was shooting down both legs with numbness. (AR  
7 276.) The MRI showed disc and osteophytes at T12-L1, L3-4, L4-5 and then most pronounced  
8 disc protrusion at L5-S; only minimal narrowing of the spinal canal at T12, L1-4, L4-5, and even  
9 at L5-S1. (AR 276.) There was minimal neural foraminal encroachment at L2-3, mild at L3-4,  
10 L4-5, mild left and mild to moderate right at L5-S1 just abutting the nerve root on the right. (AR  
11 276.) There was mild to moderate degenerative changes in the facet joints throughout the lumbar  
12 spine as described. (AR 276.)

13 Plaintiff also had a MRI of the cervical spine the same day. (AR 278-279.) The MRI  
14 revealed “slight reversal of the curvature of the cervical spine with degenerative changes  
15 throughout the cervical spine minimal to moderate disc bulging from C3 to T1. This leads to  
16 neural foraminal encroachment minimal at C3-4, C4-5, minimal to mild C5-6 and mild at C6-7  
17 where it does abut the cord and there is no fluid around the cord.” AR 279.) There was minimal  
18 neural foraminal encroachment to the left at C2-3, mild bilateral at C3-4, mild right at C4-5,  
19 marked left, moderate right at C5-6, moderate left and mild right at C6-7 and mild left at C7-T1.  
20 (AR 279.)

21 On February 10, 2015, Plaintiff was seen by Dr. Lee for back pain, musculoskeletal pain,  
22 neck pain and MRI results. (AR 272.) Plaintiff complained of back pain with a severity of 10 in  
23 his upper back and neck. (AR 272.) Plaintiff also complained of musculoskeletal pain with a  
24 severity of 10 that radiates to his legs bilaterally. (AR 272.) Plaintiff stated that he has pain  
25 from his hips all the way to his feet feeling like needles and numbness. (AR 272.) Plaintiff  
26 further complained of bilateral lateral neck, bilateral posterior neck, bilateral shoulder and  
27 bilateral upper back pain. (AR 272.) Dr. Lee noted that the MRI of the cervical and lumbar  
28 spine showed degenerative changes. (AR 272.) Plaintiff had a normal examination except for a

1 tender cervical and lumbar spine with a moderately reduced range of motion. (AR 274.) Dr. Lee  
2 diagnosed Plaintiff with cervical and lumbar degenerative disc disease, and fibromyalgia. (AR  
3 274.)

4 The ALJ noted that the medical record from February 2015 confirm that Plaintiff had  
5 some cervical and lumbar degenerative disc disease, but Plaintiff declined muscle relaxant and  
6 opioid analgesics and was to proceed with physical therapy and pain management. (AR 30,  
7 274.) On March 2015, Plaintiff reported sinus and respiratory complaint, and had a normal  
8 physical examination. (AR 30, 266-268.)

9 Plaintiff argues that the ALJ improperly evaluated the x-rays and MRIs to determine that  
10 his condition was benign, however the ALJ considered that while Plaintiff's record established  
11 that he had some cervical and lumbar degenerative disc disease, he refused muscle relaxants and  
12 opioid analgesics and was treated conservatively with physical therapy and pain management.  
13 Further, the ALJ considered that on his subsequent visit in March of 2015, Plaintiff did not  
14 complain of back pain and had a normal physical examination. Plaintiff argues that the majority  
15 of his treatment has been focused on his diabetes, neuropathy, and recurring sinusitis which  
16 explains the lack of medical evidence regarding his back, but the fact that the record is largely  
17 devoid of complaints or treatment regarding Plaintiff's back problems is substantial evidence to  
18 support the ALJ's findings.

19 Finally, at the February 23, 2015 hearing, the ALJ questioned Plaintiff on why he was  
20 unable to work. Plaintiff went into detail about pain from his arthritis in his neck, pain in his left  
21 shoulder, difficulty gripping due to arthritis in his hands, numbness in his toes, and pain in his  
22 legs, feet, and toes. (AR 42-45, 53-58.) The only testimony regarding Plaintiff's back was in  
23 response to the ALJ's question, "Are there any other major health issues you're having we  
24 haven't covered with you can think of right now, Mr. Jackson." (AR 57.) Plaintiff responded,  
25 "No, just that I'm in my neck, back and my feet and my legs, that's about it." (AR 57.)

26 The Court finds that substantial evidence supports the ALJ's residual functional capacity  
27 assessment as to Plaintiff's spinal impairment.

28 **B. Dr. Lee's Opinion**

1 After the ALJ issued his opinion finding Plaintiff to not be disabled, Plaintiff submitted  
2 the opinion of Dr. Lee to the Appeals Counsel. Plaintiff argues that the Appeals Counsel erred  
3 by failing to provide specific and legitimate reasons to reject the opinion. Defendant responds  
4 that the Court does not have the jurisdiction to review the reasons given to reject Dr. Lee's  
5 opinion. Defendant contends that while the Court should consider the evidence submitted to the  
6 Appeals Counsel in this appeal in determining if the decision is supported by substantial  
7 evidence in the record, there is no reasonable possibility that this conclusory opinion would  
8 change the ALJ's decision. Plaintiff replies that Dr. Lee's opinion demonstrates that the ALJ's  
9 opinion is not based on substantial evidence.

10 The parties disagree on the standard to be applied to the new evidence submitted to the  
11 Appeals Counsel after the ALJ issued his decision finding Plaintiff was not disabled. Here, the  
12 evidence was incorporated into the record and considered by the Appeals Counsel. The Social  
13 Security regulations provide that the Appeal's Council will review a case if "the Appeals Council  
14 receives additional evidence that is new, material, and relates to the period on or before the date  
15 of the hearing decision, and there is a reasonable probability that the additional evidence would  
16 change the outcome of the decision." 20 C.F.R. § 404.970(a)(5). Where a claimant submits  
17 additional material that the Appeals Council addressed in the context of denying the claimant's  
18 request for review, the district court must consider the additional material in deciding the  
19 claimant's Social Security appeal. Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993);  
20 Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1162 (9th Cir. 2012). Therefore, the  
21 Court considers whether there is a reasonable possibility that Dr. Lee's opinion would change the  
22 outcome of the decision.

23 On June 30, 2015, Dr. Lee completed a questionnaire. (AR 434-435.) Dr. Lee opined  
24 that Plaintiff's medical problems prevented him from performing fulltime work. (AR 434.)  
25 Plaintiff was impaired due to cervical and lumbar degenerative disc disease, bilateral hand  
26 arthritis, bilateral arthralgia, and fibromyalgia. (AR 434.) Dr. Lee's opinion was based on  
27 cervical and lumbar spine tenderness and reduced range of motion, joint pain and swelling in  
28 both hands, and patella tenderness in both knees. (AR 434.) Plaintiff was able to sit 2 to 3 hours

1 in an 8 hour workday and stand/walk 2-3 hours in an 8 hour workday. (AR 434.) Plaintiff was  
2 required to lie down or elevate his legs 1 to 2 hours in an 8 hour workday. (AR 434.) Plaintiff  
3 had additional limitations due to difficulty with hand movements. (AR 434.) Dr. Lee opined  
4 that Plaintiff had hand arthritis and possibly carpal tunnel syndrome or other neuropathy. (AR  
5 434.) This finding was based on an x-ray showing osteoarthritis of the DIP joints. (AR 434.)  
6 Plaintiff was able to lift less than 5 pounds frequently, 5 pounds occasionally, and could  
7 reach/grasp, handle, feel, push/pull/ and perform fine finger manipulation 2 to 3 hours in an 8  
8 hour workday. (AR 435.) Plaintiff was able to perform these activities for less than 1 minute  
9 without resting the hand. (AR 435.) Dr. Lee opined that Plaintiff had been disabled to this  
10 degree since July 2014. (AR 435.)

11 Plaintiff also includes two additional treatment records. On April 1, 2015, Plaintiff was  
12 seen for follow up on his sinus symptoms. (AR 367.) Plaintiff had a normal examination, other  
13 than some excess cerumen in the ear canals. (AR 369.) Plaintiff was seen again on April 9,  
14 2015, for diabetes and a cough. (AR 362.) Plaintiff had a normal examination and was  
15 diagnosed with diabetes with neurological manifestations type ii; microalbuminuria, essential  
16 hypertension; and chronic sinusitis. (AR 365.)

17 Significantly, all the evidence that Dr. Lee relies on in his June 30, 2015 opinion was  
18 included in the record and considered by the ALJ in making the determination that Plaintiff was  
19 not disabled. While Dr. Lee opines that Plaintiff has functional limitations due to his back  
20 impairments that existed as of July 2014, other than Dr. Rios examination on November 21,  
21 2013, the treatment record that is devoid of any treatment or spinal findings prior to December  
22 2014, or after February 2015. Further, Dr. Rios performed a comprehensive physical  
23 examination, and considering Plaintiff's complaints of chronic severe back pain, opined that  
24 Plaintiff had no functional limitations. The records from Plaintiff's treating physicians only  
25 show findings regarding Plaintiff's back on December 5, 2014, and February 10, 2015.  
26 Although Plaintiff continued to receive medical treatment after February 2015, the record does  
27 not document Plaintiff's complaints of back pain or any findings as to Plaintiff's back. Dr. Lee's  
28 opinion that Plaintiff had functional limitations due to his back impairment since July 2014 is not

1 consistent with the medical evidence in the record.

2 Further, Dr. Lee opined that Plaintiff had additional limitations due to difficulty with  
3 hand movements. (AR 434.) Dr. Lee opined that Plaintiff had hand arthritis and possibly carpal  
4 tunnel syndrome or other neuropathy. (AR 434.) This finding was based on an x-ray showing  
5 osteoarthritis of the DIP joints. (AR 434.) Plaintiff was able to lift less than 5 pounds  
6 frequently, 5 pounds occasionally, and could reach/grasp, handle, feel, push/pull/ and perform  
7 fine finger manipulation 2 to 3 hours in an 8 hour workday. (AR 435.) Plaintiff was able to  
8 perform these activities for less than 1 minute without resting the hand. (AR 435.) Dr. Lee  
9 opined that Plaintiff had been disabled to this degree since July 2014. (AR 435.)

10 Review of the medical record demonstrates that there are no objective findings to support  
11 the hand limitations opined by Dr. Lee. There is no x-ray of Plaintiff's hands contained in the  
12 medical record. Dr. Lee also opined that Plaintiff had joint pain and swelling in both hands, but  
13 the record is devoid of such findings. Plaintiff's medical records consistently show findings of  
14 no edema, normal range of motion and strength in the extremities, or reflect no findings. (AR  
15 238, 244, 245, 251, 268, 274, 300, 312, 316, 319, 325, 331, 335, 365, 369, 373.) Specifically, no  
16 edema in the extremities is noted on August 14, 2014; September 9, 2014; April 1, 2015; and  
17 April 9, 2015. (AR 331, 335, 365, 369.) On September 20, 2014, the record reflects that  
18 extremities were within normal limits. (AR 325.) On October 4, 2014, the record notes  
19 overview of all four extremities is normal. (AR 316.) Dr. Lee found no edema of the extremities  
20 and the record reflects no hand findings on December 5, 2014, and February 10, 2015. (AR 274,  
21 290.) The ALJ need not accept the opinion of any physician that is brief, conclusory, and  
22 unsupported by clinical findings. Thomas, 278 F.3d at 957. Accordingly, the Court finds that  
23 there is no reasonable probability that the additional evidence would change the outcome of the  
24 decision.

25 **C. Step Five**

26 Plaintiff argues that due to errors in determining his RFC, the ALJ did not carry his  
27 burden at Step Five to show that there are a significant number of jobs that he can perform.  
28 Defendant responds that the RFC finding and the hypothetical that was presented to the

1 vocational expert contained the only limitations that were supported by substantial evidence in  
2 the record.

3 At Step Five, the burden shifts to the Commissioner “to identify specific jobs existing in  
4 substantial numbers in the national economy that [a] claimant can perform despite [his]  
5 identified limitations.” Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir.1995); see also 20  
6 C.F.R. § 416.920(g). At this step, the ALJ considers potential occupations that the claimant may  
7 be able to perform. Zavalin v. Colvin, 778 F.3d 842, 845 (9th Cir. 2015); see 20 C.F.R. §  
8 416.966.

9 The ALJ relies on the DOT, which is the Social Security Administrations “primary  
10 source of reliable job information” regarding jobs that exist in the national economy, in making  
11 this determination. Terry v. Sullivan, 903 F.2d 1273, 1276 (9th Cir.1990). “The DOT describes  
12 the requirements for each listed occupation, including the necessary General Educational  
13 Development (‘GED’) levels; that is, ‘aspects of education (formal and informal) ... required of  
14 the worker for satisfactory job performance.’ ” Zavalin, 778 F.3d at 845 (quoting DOT, App. C,  
15 1991 WL 688702 (4th ed.1991)).

16 Along with the DOT, the ALJ will rely on the testimony of a vocational expert who  
17 testifies about specific occupations that a claimant is able to perform based on his residual  
18 functional capacity. Valentine v. Comm’r Soc. Sec. Admin., 574 F.3d 685, 689 (9th Cir.2009);  
19 20 C.F.R. § 416.966(e). In order for the VE’s testimony to be considered reliable, “the  
20 hypothetical posed must include ‘all of the claimant’s functional limitations, both physical and  
21 mental’ supported by the record.” Thomas, 278 F.3d at 956.

22 Here, the ALJ found that Plaintiff retained the functional capacity to perform a full range  
23 of medium work. Specifically, Plaintiff can lift and/or carry 50 pounds occasionally and 25  
24 pounds frequently; stand and/or walk 6 hours out of an 8 hour workday with regular breaks;  
25 never climb ladders, ropes, or scaffolds; occasionally climb ramps or stairs; never work around  
26 hazards, like moving dangerous machinery or unprotected heights; cannot work around  
27 concentrated fumes, odors, dust, gases, poor ventilation or other environmental irritants; and  
28 cannot operate motor vehicles. (AR 27.) At the February 23, 2015 hearing, the ALJ presented a

1 hypothetical of an individual of Plaintiff's age, educational background, and work experience,  
2 who could sit, stand, walk 6 out of 8 hours each with normal breaks; lift and or carry 50 pounds  
3 occasionally and 25 pounds frequently; never climb ladders, ropes or scaffolds; could  
4 occasionally climb ramps or stairs; could never work around hazards like moving, dangerous  
5 machinery or unprotected heights; could not work around concentrated fumes, odors, dust, gases,  
6 poor ventilation, or other environmental irritants,; and could not operate motor vehicles. (AR  
7 60.)

8 The hypothetical presented to the VE was consistent with the ALJ's residual functional  
9 capacity assessment of Plaintiff. The VE opined that this individual would be able to perform  
10 jobs that were available in significant numbers in the national economy. (AR 61.) The ALJ did  
11 not err at Step Five in determining that there were jobs available in significant numbers in the  
12 national economy that Plaintiff would be able to perform.

#### 13 **D. Plaintiff's Credibility**

14 Plaintiff argues that the ALJ erred in finding Plaintiff's subjective complaints to be not  
15 credible.

16 "An ALJ is not required to believe every allegation of disabling pain or other non-  
17 exertional impairment." Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (internal punctuation  
18 and citations omitted). Determining whether a claimant's testimony regarding subjective pain or  
19 symptoms is credible, requires the ALJ to engage in a two-step analysis. Molina v. Astrue, 674  
20 F.3d 1104, 1112 (9th Cir. 2012). The ALJ must first determine if "the claimant has presented  
21 objective medical evidence of an underlying impairment which could reasonably be expected to  
22 produce the pain or other symptoms alleged." Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th  
23 Cir. 2007) (internal punctuation and citations omitted). This does not require the claimant to  
24 show that his impairment could be expected to cause the severity of the symptoms that are  
25 alleged, but only that it reasonably could have caused some degree of symptoms. Smolen, 80  
26 F.3d at 1282.

27 Then "the ALJ may reject the claimant's testimony about the severity of those symptoms  
28 only by providing specific, clear, and convincing reasons for doing so." Brown-Hunter v.

1 Colvin, 806 F.3d 487, 488–89 (9th Cir. 2015). “The ALJ must specifically make findings that  
2 support this conclusion and the findings must be sufficiently specific to allow a reviewing court  
3 to conclude the ALJ rejected the claimant’s testimony on permissible grounds and did not  
4 arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.  
5 2004) (internal punctuation and citations omitted). Factors that may be considered in assessing a  
6 claimant’s subjective pain and symptom testimony include the claimant’s daily activities; the  
7 location, duration, intensity and frequency of the pain or symptoms; factors that cause or  
8 aggravate the symptoms; the type, dosage, effectiveness or side effects of any medication; other  
9 measures or treatment used for relief; functional restrictions; and other relevant factors.  
10 Lingenfelter, at 1040; Thomas, 278 F.3d at 958. In assessing the claimant’s credibility, the ALJ  
11 may also consider “(1) ordinary techniques of credibility evaluation, such as the claimant’s  
12 reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony  
13 by the claimant that appears less than candid; [and] (2) unexplained or inadequately explained  
14 failure to seek treatment or to follow a prescribed course of treatment. . . .” Tommasetti v.  
15 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting Smolen, 80 F.3d at 1284). The district  
16 court is constrained to review those reasons that the ALJ provided in finding the claimant’s  
17 testimony not credible. Brown-Hunter, 806 F.3d at 492.

18 The ALJ found that Plaintiff’s credibility was reduced by several factors.

19 1. Daily activities

20 First, the ALJ found that Plaintiff was engaged in a somewhat normal level of daily  
21 activity and interaction. (AR 28.) Plaintiff admitted during the consultative examination that he  
22 was independent in his activities of daily living and is able to drive a vehicle. (AR 28.) The ALJ  
23 found that while Plaintiff’ activities of daily living are somewhat limited, some of the physical  
24 and mental abilities and social interactions required to perform these activities are the same as  
25 those necessary for obtaining and maintaining employment and are inconsistent with the  
26 presence of an incapacitating or debilitating condition. (AR 28.)

27 There are two grounds to use daily activities for an adverse credibility finding. Orn, 495  
28 F.3d at 639. First, daily activities can form the basis of an adverse credibility determination if

1 the claimant’s activity contradicts his testimony. Id. Secondly, “daily activities may be grounds  
2 for an adverse credibility finding ‘if a claimant is able to spend a substantial part of his day  
3 engaged in pursuits involving the performance of physical functions that are transferable to a  
4 work setting.’ ” Id. (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). The ALJ must  
5 make specific findings as to the daily activities and their transferability to conclude that the  
6 claimant’s daily activities warrant an adverse credibility determination. Orn, 495 F.3d at 639.

7 Here, while the ALJ stated that some of Plaintiff’s daily activities were the same as those  
8 activities necessary for obtaining and maintaining employment, the ALJ did not identify those  
9 activities or how they were transferable to the work setting. The ALJ did not establish that  
10 Plaintiff’s daily activities are transferable to a work setting.

11 “[T]he mere fact that a plaintiff has carried on certain daily activities . . . does not in any  
12 way detract from her credibility as to her overall disability.” Orn, 495 F.3d at 639 (citing  
13 Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001)). While the ALJ make a conclusory  
14 statement that Plaintiff’s daily activities were inconsistent with the presence of a debilitating or  
15 incapacitating condition, the ALJ did not identify any such activities or how they are inconsistent  
16 with Plaintiff’s testimony.

17 Plaintiff’s daily activities are not a clear and convincing reason to reject his credibility.  
18 The Commissioner concedes that the ALJ’s reliance on daily activities was error as he did not  
19 specifically identify what the activities were, how they translated into the ability to work, or how  
20 they were in excess of Plaintiff’s stated limitations. However, the Commissioner argues that the  
21 error was harmless as the ALJ provided other clear and convincing reasons for the adverse  
22 credibility finding.

## 23 2. Conservative Treatment

24 The ALJ found that Plaintiff’s credibility regarding the severity of his symptoms and  
25 limitations was diminished because he received routine conservative treatment for his  
26 impairments. (AR 28.) Evidence of conservative treatment is sufficient to discount a claimant’s  
27 testimony regarding the severity of the impairment. Parra v. Astrue, 481 F.3d 742, 751 (9th Cir.  
28 2007). The ALJ noted that Plaintiff received only conservative treatment for his diabetes, high

1 blood pressure, and peripheral neuropathy. (AR 29.) Further, while Plaintiff was diagnosed with  
2 cervical and lumbar degenerative disc disease, he declined muscle relaxants and opioid treatment  
3 and was treated with physical therapy and pain management. (AR 30.)

4 Review of the record demonstrates that substantial evidence supports that ALJ's finding  
5 that Plaintiff receiving only routine and conservative treatment for his impairments. (AR 239,  
6 241, 252, 262, 269, 271, 274, 282, 290, 301, 307, 312, 314, 317, 320, 325, 332, 335, 365, 369,  
7 425.) Further, despite Plaintiff's complaints of severe back pain of 10 out of 10, he declined  
8 opioid narcotics and muscle relaxants. (AR 274.)

9 3. Objective Medical Evidence

10 The ALJ also considered that objective medical clinical and diagnostic findings do not  
11 support the level of impairment alleged. The determination that a claimant's complaints are  
12 inconsistent with clinical evaluations can satisfy the requirement of stating a clear and  
13 convincing reason for discrediting the claimant's testimony. Regennitter v. Commissioner of  
14 Social Sec. Admin., 166 F.3d 1294, 1297 9th Cir. 1999). The ALJ properly considered this  
15 evidence in weighing Plaintiff's credibility. "While subjective pain testimony cannot be rejected  
16 on the sole ground that it is not fully corroborated by objective medical evidence, the medical  
17 evidence is still a relevant factor in determining the severity of the claimant's pain and its  
18 disabling effects." Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001) (citing 20 C.F.R. §  
19 404.1529(c)(2)).

20 The ALJ properly found that the objective medical evidence did not support Plaintiff's  
21 testimony regarding his symptoms and limitations.

22 4. The ALJ Provided Clear and Convincing Reasons for the Credibility Finding

23 The ALJ erred in finding that Plaintiff's daily activities warranted an adverse credibility  
24 finding. However any such error is harmless as the ALJ provided other clear and convincing  
25 reasons for the adverse credibility finding. McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir.  
26 2011). Accordingly, the Court finds that any error in the daily activities finding is harmless and  
27 the ALJ provided clear and convincing reasons that are supported by substantial evidence in the  
28 record to find Plaintiff's testimony not credible.

V.

**CONCLUSION AND ORDER**

Based on the foregoing, the Court finds that the ALJ did not err in considering Plaintiff's spinal limitations, finding Plaintiff's testimony not credible, and there is no reasonable probability that Dr. Lee's June 2015 report would change the outcome of the decision.

Accordingly, IT IS HEREBY ORDERED that Plaintiff's appeal from the decision of the Commissioner of Social Security is DENIED. It is FURTHER ORDERED that judgment be entered in favor of Defendant Commissioner of Social Security and against Plaintiff Donald Jackson. The Clerk of the Court is directed to CLOSE this action.

IT IS SO ORDERED.

Dated: November 27, 2017



UNITED STATES MAGISTRATE JUDGE