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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 AUBREY D. MCFALL,

12 Plaintiff,

13 v.

14 LELAND DUDEK, Commissioner of Social
15 Security,¹

16 Defendant.
17
18

Case No. 1:21-cv-00562-JLT-BAM

**FINDINGS AND RECOMMENDATIONS
REGARDING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

(Doc. 20)

19 **INTRODUCTION**

20 Plaintiff Aubrey D. McFall ("Plaintiff") seeks judicial review of a final decision of the
21 Commissioner of Social Security ("Commissioner") denying his application for Supplemental
22 Security Income under Title XVI of the Social Security Act. The parties' briefing on the motion was
23 submitted, without oral argument, to Magistrate Judge Barbara A. McAuliffe for findings and
24 recommendations. (Docs. 20, 25.) Having considered the parties' briefs, along with the entire record
25 in this case, the Court finds that the decision of the Administrative Law Judge ("ALJ") was supported
26

27 ¹ Leland Dudek became the Commissioner of Social Security in February 2025
28 Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Leland Dudek is substituted
for Kilolo Kijakazi as Defendant in this suit.

1 by substantial evidence in the record and was based upon proper legal standards. Accordingly, this
2 Court will recommend affirming the agency's determination to deny benefits.

3 **FACTS AND PRIOR PROCEEDINGS**

4 Plaintiff applied for Title XVI Supplemental Security Income on May 19, 2017, alleging that
5 he became disabled on September 14, 2009. AR 82-83.² The claim was denied initially on August
6 30, 2017, and on reconsideration on December 15, 2017. AR 97-101, 104-107. Plaintiff requested a
7 hearing before an administrative law judge ("ALJ") and ALJ Scott Bryant held a hearing on October
8 29, 2019. AR 41-63. ALJ Bryant issued an order denying benefits on the basis that Plaintiff was not
9 disabled on November 20, 2019. AR 22-39. Plaintiff sought review of the ALJ's decision, which the
10 Appeals Council denied. AR 14-18. This appeal followed.

11 **October 29, 2019 Hearing Testimony**

12 ALJ Scott Bryant held a hearing on October 29, 2019. AR 41-63. Amanda Munzer, an
13 impartial vocational expert, also appeared and testified. AR 58-61. Plaintiff's attorney Al Leibovic
14 was also present. The ALJ began by confirming Plaintiff's social security number and date of birth
15 and Plaintiff confirmed that he was 56 years old. AR 43. Plaintiff stated that he had received his
16 GED. *Id.* Plaintiff's attorney then confirmed that the record was complete, and the ALJ admitted
17 Exhibits 1A through 7F into evidence. AR 44. Plaintiff's attorney also stated that Plaintiff agreed to
18 amend the onset date of September 14, 2009 to the protective filing date of May 19, 2017. *Id.*

19 Upon examination by the ALJ, Plaintiff testified that he was not currently working in any
20 capacity, and that his last job was in 2008 through Exact Staff at a recycle company. AR 45. Plaintiff
21 said that he did not recall working in 2006. *Id.* The ALJ noted that his review of the record did not
22 show anything "clearly indicative of SGA" and he would move past that step unless the vocational
23 suggested otherwise, which she did not. AR 45-46.

24 Upon examination by his attorney, Plaintiff testified that he could not work a full-time job due
25 to irritable bowel syndrome, anxiety, major gout, neuropathy, kidney disease causing pain in his left
26

27 ² References to the Administrative Record will be designated as "AR," followed by the appropriate
28 page number.

1 lower back area, and diabetes. AR 46-47. Plaintiff testified that he was taking 400 milligrams of
2 Gabapentin for gout and neuropathy and that he did not take anything for pain because his insurance
3 did not cover it. AR 47. He stated that he was following his diet for gout as strictly as he could but
4 that his feet still hurt. *Id.* He said that his gout pain was constant but that he also got flareups “pretty
5 much all the time” that involved a stabbing, shooting pain. AR 48. Plaintiff said that he had not taken
6 any medications for kidney disease and had not had any treatment for his kidneys or for irritable bowel
7 syndrome. *Id.* He testified that he used a cane but that he did not go out as much as he used to, so did
8 not feel the need for the cane. *Id.* He said that he was given his cane by Dr. Kathy Sistan at VFC
9 Family Health approximately two years prior to the hearing. AR 49. Plaintiff testified that he was
10 taking Lorazepam for anxiety and previously had a psychiatrist until six to eight months prior to the
11 hearing. AR 49-50.

12 Plaintiff testified that his neuropathy and gout rated a ten out of ten as it always hurt and
13 walking the day of the hearing “was a real task.” AR 50. He said that when his pain was at its
14 maximum, he would avoid walking and would usually end up laying down because sitting would put
15 pressure on his stomach and not allow him to stretch out. *Id.* He stated that he spent approximately 75
16 percent of the day laying down because of back and kidney pain. AR 50-51. Plaintiff said that he
17 could stand and walk approximately ten minutes at a time before having to sit down and that he would
18 need to rest at least a half hour before he could stand and walk again. AR 51. He also stated that he
19 could sit ten to 15 minutes before needing to stand up. *Id.* Plaintiff stated that he could lift up to ten
20 pounds at one time comfortably because of his back, lack of grip, and his carpal tunnel surgery from
21 ten to 15 years prior to the hearing. AR 51-52. He said that he experienced gout flares as pain in his
22 feet, legs, and calves, and experienced neuropathy as pain in his feet. AR 52. He added that he did
23 not have issues with his hands “for a while” due to neuropathy though it previously “seemed like it
24 was getting to” his hands. *Id.* Plaintiff testified that, regarding personal care, putting socks on was
25 “kind of hard” as he could not get them all the way up while on the bed or bending down. *Id.* He said
26 that no one helped him with that and that he would “make do” but that he probably needed help with
27 other personal care and was hesitant to receive it. AR 52-53. He said that he lived with three other
28 adults but that they did not cook meals together. AR 53. Plaintiff testified that the other adults did not

1 help him in any way. AR 53-54. He further stated that he performed his own chores at home,
2 including making his own bed and doing his own laundry. AR 54. Plaintiff said that he was able to
3 do his own dishes but that he did not have too many dishes that needed to be cleaned. *Id.* He testified
4 that he went grocery shopping by himself and could push a cart and grab things from the shelves
5 normally for about 20 minutes. *Id.* He stated that he has had a few anxiety attacks while shopping and
6 felt the need to leave a few times while shopping in the store. *Id.* He said that he did not think anxiety
7 affected his ability to concentrate or remember things but assumed it had some effect on his memory
8 and concentration. AR 55. Plaintiff testified that he was an easygoing person, would usually stick to
9 himself, and could be a little confrontational. *Id.* He said that he did not attend church or social
10 organizations, did not have friends besides those he lived with, and was not using drugs or alcohol
11 currently. *Id.* Plaintiff said that he would use marijuana occasionally for his pain and for insomnia.
12 *Id.* He said that his doctors had not commented on his marijuana use. AR 56.

13 In addition to the other conditions, Plaintiff stated that his stomach was an issue, that he was
14 always gassy, and was diagnosed with GERD and gastrointestinal issues. *Id.* He said that he would
15 get further testing done regarding his stomach. *Id.* Plaintiff further testified that he could drive for an
16 hour or two hours if he was having a good day and not having limitations with his abdomen. AR 57.
17 He said that his ability to drive was affected by his side hurting and nausea and depended upon his
18 condition. AR 57-58.

19 Following Plaintiff's testimony, the ALJ elicited testimony from vocational expert ("VE")
20 Amanda Munzer. AR 58-61. Plaintiff's attorney did not object to Ms. Munzer testifying as VE, and
21 the VE stated that there was nothing more she needed before testifying. AR 58. The VE said that she
22 would inform the ALJ if and how her testimony differed from the DOT or DOT/SCO. *Id.*

23 The ALJ stated that he would move past the first step and proceeded with hypothetical
24 questions. *Id.* For the first hypothetical, the ALJ asked the VE to assume an individual with
25 Plaintiff's age, education, work experience, and ability to perform a full-range of medium exertional
26 work with the limitations that the individual could only frequently reach, handle, finger, feel, push or
27 pull with the bilateral upper extremities; could only frequently manipulate foot controls with the
28 bilateral lower extremities; would have no requirement to climb ladders, ropes, scaffolds; would have

1 no requirement to work in proximity to unprotected heights or hazardous machinery; could only
2 occasionally climb ramps or stairs; could only occasionally balance; could only frequently stoop,
3 kneel, crouch, or crawl; could have only occasional exposure to cold temperature extremes; could only
4 have occasional exposure to vibrations; would be limited to simple and routine tasks in the workplace
5 and would not be capable of engaging in complex analysis or judgment; would be capable of
6 maintaining pace in a simple and routine setting not requiring complex judgment or analysis
7 requirements; could also interact with supervisors and co-employees with any simple and routine
8 setting; and could adapt to changes within a simple and routine setting. AR 58-59. The VE testified
9 that there were jobs in the national economy given those restrictions, including: Hospital Cleaner
10 (DOT No. 323.687-010, medium, SVP 2, with 39,000 jobs nationally); Floor Waxer (DOT No.
11 381.687-034, medium, SVP 2, approximately 15,000 jobs nationally); and Laundry Worker I (DOT
12 No. 361.684-014, medium, SVP 2, with 3,800 jobs nationally). AR 59-60. The VE testified that those
13 positions were most of the work available and that none of those positions required constant use of
14 bilateral extremities, noting that the Hospital Cleaner included frequent reaching and handling and
15 occasional fingering while the Floor Waxer and Laundry Worker I jobs involved only occasional use
16 of the bilateral extremities. AR 60. The VE testified that the hypothetical individual would not be
17 able to successfully perform any jobs in the national economy if expected to be off task an average of
18 20 percent of the workday to manage his condition. AR 60-61. Upon examination by Plaintiff's
19 attorney, the VE testified that there would be no work if the lifting and carrying in the first
20 hypothetical were reduced to 20 pounds occasionally and ten pounds frequently. AR 61. The VE
21 testified that an individual with those restrictions would be limited to light work. *Id.* The ALJ
22 concluded the hearing by confirming Plaintiff's address. AR 62.

23 **Medical Record**

24 The relevant medical record was reviewed by the Court and will be referenced below as
25 necessary to this Court's decision.

26 **The ALJ's Decision**

27 Using the Social Security Administration's five-step sequential evaluation process, the ALJ
28 determined that Plaintiff was not disabled under the Social Security Act. AR 22-39. Specifically, the

1 ALJ found that Plaintiff had not engaged in substantial gainful activity since the application date of
2 May 19, 2017. AR 27. The ALJ identified the following severe impairments: diabetes mellitus,
3 peripheral neuropathy, gout, and depression. *Id.* The ALJ also noted that Plaintiff suffered from
4 irritable bowel syndrome but that impairment either improved within one year or was mild in nature,
5 such that it did not affect Plaintiff's ability to work. *Id.* The ALJ further determined that Plaintiff did
6 not have an impairment or combination of impairments that met or medically equaled any of the listed
7 impairments. AR 28-29.

8 Based on a review of the entire record, the ALJ found that Plaintiff retained the RFC to
9 perform medium work with the limitations that Plaintiff: could frequently reach, handle, finger, feel,
10 push, and pull with the bilateral upper extremities; could frequently manipulate foot controls with the
11 bilateral lower extremities; could occasionally work in proximity to unprotected heights or hazardous
12 machinery; could occasionally climb ramps and stairs, ladders, ropes, and scaffolds, as well as
13 balance; could frequently stoop, kneel, crouch, and crawl; could have occasional exposure to extreme
14 temperatures and workplace vibrations; would be limited to simple, routine tasks, and would not be
15 capable of engaging in complex analysis or judgment; could maintain pace in a simple and routine
16 setting; and could interact with supervisors and co-employees, and adapt to changes within a simple
17 and routine work setting. AR 30. The ALJ considered "all symptoms and the extent to which these
18 symptoms can reasonably be accepted as consistent with the objective medical evidence and other
19 evidence," as well as "medical opinion(s) and prior administrative medical finding(s)." *Id.*

20 The ALJ found that Plaintiff had no past relevant work, was an individual closely approaching
21 advanced age as of the application date and subsequently changed age category to advanced age, had
22 at least a high school education and could communicate in English, and that transferability of job skills
23 was not an issue because Plaintiff did not have past relevant work. AR 33. Given Plaintiff's age,
24 education, work experience, and RFC, the ALJ found that there were jobs that existed in significant
25 numbers in the national economy that Plaintiff could perform. AR 33-34. The ALJ noted that
26 examples of jobs consistent with Plaintiff's age, education, work experience, and RFC included: (1)
27 Hospital Cleaner (DOT No. 323.687-010, Medium, SVP 2, with 39,000 jobs in the national economy);
28 (2) Floor Waxier (DOT No. 381.687-034, Medium, SVP 2, with 15,000 jobs in the national economy);

1 and (3) Laundry Worker I (DOT No. 361.684-014, Medium, SVP 2, with 3,800 jobs in the national
2 economy). AR 34. The ALJ therefore concluded that Plaintiff had not been disabled since the
3 application date of May 19, 2017. *Id.*

4 **SCOPE OF REVIEW**

5 Congress has provided a limited scope of judicial review of the Commissioner's decision to
6 deny benefits under the Act. In reviewing findings of fact with respect to such determinations, this
7 Court must determine whether the decision of the Commissioner is supported by substantial evidence.
8 42 U.S.C. § 405(g). Substantial evidence means "more than a mere scintilla," *Richardson v. Perales*,
9 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112,
10 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a reasonable mind might accept as
11 adequate to support a conclusion." *Richardson*, 402 U.S. at 401. The record as a whole must be
12 considered, weighing both the evidence that supports and the evidence that detracts from the
13 Commissioner's conclusion. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the
14 evidence and making findings, the Commissioner must apply the proper legal standards. *E.g.*,
15 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the Commissioner's
16 determination that the claimant is not disabled if the Commissioner applied the proper legal standards,
17 and if the Commissioner's findings are supported by substantial evidence. *See Sanchez v. Sec'y of*
18 *Health and Human Servs.*, 812 F.2d 509, 510 (9th Cir. 1987).

19 **REVIEW**

20 In order to qualify for benefits, a claimant must establish that he or she is unable to engage in
21 substantial gainful activity due to a medically determinable physical or mental impairment which has
22 lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §
23 1382c(a)(3)(A). A claimant must show that he or she has a physical or mental impairment of such
24 severity that he or she is not only unable to do his or her previous work, but cannot, considering his or
25 her age, education, and work experience, engage in any other kind of substantial gainful work which
26 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989). The
27 burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir.
28 1990).

1 **DISCUSSION**³

2 Plaintiff argues that the ALJ failed to provide clear and convincing reasons for discounting
3 Plaintiff's subjective symptoms. (Doc. 20 at 5-9.)

4 **A. Plaintiff's Subjective Complaints**

5 Plaintiff contends that the ALJ committed harmful error by failing to provide clear and
6 convincing reasons for rejecting Plaintiff's testimony as inconsistent with the evidence. (Doc. 20 at 5-
7 9.) In deciding whether to admit a claimant's subjective complaints, the ALJ must engage in a two-
8 step analysis. *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014); *Batson v. Comm'r*, 359 F.3d
9 1190, 1196 (9th Cir. 2004). First, the claimant must produce objective medical evidence of her
10 impairment that could reasonably be expected to produce some degree of the symptom or pain alleged.
11 *Garrison*, 759 F.3d at 1014. If the claimant satisfies the first step and there is no evidence of
12 malingering, the ALJ may reject the claimant's testimony regarding the severity of her symptoms only
13 by offering specific, clear and convincing reasons for doing so. *Id.* at 1015.

14 Here, the ALJ found that Plaintiff's medically determinable impairments could reasonably be
15 expected to cause the alleged symptoms. AR 32. However, the ALJ discounted Plaintiff's statements
16 concerning the intensity, persistence, and limiting effects of those symptoms, noting that the
17 statements were not consistent with medical evidence and other evidence in the record. *Id.* The ALJ
18 was therefore required to provide specific, clear and convincing reasons for discounting Plaintiff's
19 subjective complaints.

20 First, the ALJ noted that despite Plaintiff's allegations, "the claimant admitted he is generally
21 capable of managing his personal care and hygiene, preparing meals, performing typical household
22 chores, driving, going shopping, managing his own finances, going to clubs, walking, and spending
23 time with others. (Hearing Testimony, Exhibit 8E)." AR 31; 41-63 (hearing testimony); 238-46 (July
24 2017 Function Report). An ALJ may properly discount a claimant's subjective complaints when the
25 daily activities demonstrate an inconsistency between what the claimant can do and the degree that
26

27 ³ The parties are advised that this Court has carefully reviewed and considered all of the briefs, including
28 arguments, points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific
argument or brief is not to be construed that the Court did not consider the argument or brief.

1 disability is alleged. *Molina v. Astrue*, 674 F.3d 1104, 1112–13 (9th Cir. 2012) (an ALJ may consider
2 “whether the claimant engages in daily activities inconsistent with the alleged symptoms”), superseded
3 by regulation on other grounds. Even where a plaintiff's activities suggest some difficulty functioning,
4 they may be grounds for discrediting the claimant's testimony to the extent that they contradict claims
5 of a totally debilitating impairment. *Id.* at 1113.

6 Here, the ALJ noted that Plaintiff “alleges that he suffers from medical conditions that cause
7 him to experience pain, fatigue, stiffness, numbness, weakness, nausea, depression, and difficulty
8 lifting, squatting, bending, standing, walking, kneeling, climbing stairs, remembering, completing
9 tasks, and using his hands. Specifically, the claimant alleged he can only stand and/or walk for up to
10 ten minutes followed by at least thirty minutes rest, carry up to ten pounds, sit for up to fifteen
11 minutes, and has a variable ability to follow instructions.” AR 31. However, the ALJ then cited to
12 hearing testimony and Plaintiff’s self-reporting in a July 2017 Function Report to find that Plaintiff
13 “admitted he is generally capable of managing his personal care and hygiene, preparing meals,
14 performing typical household chores, driving, going shopping, managing his own finances, going to
15 clubs, walking, and spending time with others.” *Id.*

16 Indeed, during the hearing, Plaintiff testified that no one he lived with helped him in any way
17 and though it was “kind of hard” to put on socks, he was able to “make do” with personal care. AR
18 52-54. Plaintiff also testified that he performed his own chores at home, including making his bed,
19 doing laundry, and washing the few dishes that needed to be cleaned. AR 54. Plaintiff further stated
20 that he went grocery shopping by himself, could push a cart, and could grab items from shelves for
21 approximately 20 minutes, though sometimes he had anxiety attacks while shopping. *Id.* He testified
22 that he did not think his anxiety affected his ability to concentrate or remember things though assumed
23 it had some effect, and that he was generally an easygoing person and would usually stick to himself.
24 AR 54-55. Plaintiff additionally testified that he was able to drive, though that was affected by pain
25 and nausea. AR 57-58.

26 Furthermore, in the Function Report dated July 21, 2017, Plaintiff reported that his daily
27 activities included waking up, taking his medication, trying to eat, cleaning his room, trying to loosen
28 up his legs and feet, walking if up to it, and mostly relaxing due to feet pain. AR 239. Regarding

1 personal care, Plaintiff reported that that it was “difficult” to put on shoes and socks but that he did not
2 need special reminders to take care of personal needs and grooming and did not need help or
3 reminders to take his medicine. AR 239-240. Regarding meals, Plaintiff reported that he prepared his
4 own meals daily, which took him 20 minutes and that he would eat soups and vegetables. AR 240.
5 Regarding house and yard work, Plaintiff wrote that he did laundry and some cleaning and would do
6 “basic stuff” for the “average time,” but did not require help or encouragement with those things and
7 would do it when he felt he could. *Id.* Regarding getting around, Plaintiff wrote that he tried to get
8 out as much as possible, traveled by car, could go out alone, and could drive. AR 241. He wrote that
9 he would do his shopping in stores and would go “as often as needed” for the “regular time” and that
10 his illnesses did not affect his ability to handle money - he was able to pay bills, count change, handle
11 a savings account, and use a checkbook/money orders. AR 241-42. Regarding hobbies, interests, and
12 social activities, Plaintiff reported he would watch TV, walk, and go out to clubs as often as he could,
13 although that was dependent on his feet pain. He wrote that he spent time with others and would talk
14 on the phone, walk, and play chess when he could, though he noted that he did less than half of the
15 things that he used to do and listed “none” when asked the places he went on a regular basis. AR 242-
16 43. He checked that he did not need to be reminded to go places, he did not need someone to
17 accompany him, and that he did not have any problems getting along with family, friends, neighbors,
18 or others. *Id.* Plaintiff reported that his conditions affected his memory and his abilities to lift, squat,
19 bend, stand, walk, kneel, climb stairs, complete tasks, and use his hands, but that that he could finish
20 what he started, could follow written instructions if he was “up to it,” was “good” at following written
21 instructions, was “good” at getting along with authority figures, had not been laid off from a job
22 because of problems with getting along with other people, handled stress and changes in routine “ok,”
23 and never needed to use assistive devices. AR 243-44. By contrasting Plaintiff’s alleged disabilities
24 with Plaintiff’s reported daily activities, the ALJ appropriately used Plaintiff’s reported daily activities
25 to discount his symptoms testimony. *Molina*, 674 F.3d at 1112-13.

26 Plaintiff argues that the ALJ overstated the evidence of daily activities. (Doc. 20 at 6-7.)
27 Plaintiff notes that in the Function Report, Plaintiff wrote “none” when asked the places he went on a
28 regular basis and wrote that he only did chores when he felt he could and had difficulties putting on

1 shoes and socks. AR 239-42. However, Plaintiff does not address the hearing testimony in which he
2 testified that no one who he lived with helped him in any way and though it was “kind of hard” to put
3 on socks he was able to “make do” with personal care. AR 52-54. Plaintiff further ignores that he
4 indicated that, despite difficulties, he did not need special reminders to take care of personal needs and
5 was able to do basic chores in the “average time” and did not require help or encouragement with
6 those chores. AR 239-40. The ALJ reasonably examined the record regarding Plaintiff’s daily
7 activities, and when “the evidence before the ALJ is subject to more than one rational interpretation,
8 we must defer to the ALJ's conclusion.” *Batson*, 359 F.3d at 1198 (citing *Andrews v. Shalala*, 53 F.3d
9 1035, 1041 (9th Cir. 1995)). Plaintiff’s argument that the ALJ overstated Plaintiff’s reported daily
10 activities in discounting his symptoms testimony therefore fails.

11 Plaintiff also argues that basic self-care and household chores do not contradict Plaintiff’s
12 alleged limitations, citing Ninth Circuit caselaw. *See Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir.
13 1987) (“evidence that [claimant] could assist with some household chores was not determinative of
14 disability. ‘Disability does not mean that a claimant must vegetate in a dark room excluded from all
15 forms of human and social activity.’”) (quoting *Smith v. Califano*, 637 F.2d 968, 971 (3d Cir. 1981));
16 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (“This court has repeatedly asserted that the
17 mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car,
18 or limited walking for exercise, does not in any way detract from her credibility as to her overall
19 disability.”)

20 In *Vertigan*, the claimant was “able to go grocery shopping with assistance, walk
21 approximately an hour in the malls, get together with her friends, play cards, swim, watch television,
22 and read.” *Vertigan*, 260 F.3d at 1049. The ALJ in that case relied on this evidence to conclude that
23 the claimant's daily activities “involved physical functions that were inconsistent with her claims of
24 pain.” *Id.* at 1150. The Ninth Circuit determined that this conclusion was not supported by substantial
25 evidence because “these physical activities did not consume a substantial part of [the claimant's] day”
26 and because walking and swimming are activities that one might do for therapeutic reasons despite
27 pain. *Id.* However, the Ninth Circuit elsewhere has upheld a determination that the claimant's daily
28 activities are inconsistent with testimony regarding the claimant's limitations. *See, e.g., Burch v.*

1 *Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005) (upholding adverse credibility determination based on
2 claimant's ability to care for personal needs, cook, clean, shop, manage finances, and interact with
3 boyfriend); *Morgan v. Apfel*, 169 F.3d 595, 600 (9th Cir. 1999) (claimant's ability to fix meals, do
4 laundry, work in the yard, and occasionally care for his friend's child was evidence of claimant's
5 ability to work); *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1991) (claimant's ability to "take
6 care of her personal needs, prepare easy meals, do light housework, and shop for some groceries ...
7 may be seen as inconsistent with the presence of a condition which would preclude all work activity").

8 Here, Plaintiff's reports of his daily activities are greater than those in *Vertigan* and are more
9 similar to the claimants in *Burch*, *Morgan*, and *Curry*. In determining that Plaintiff's reported daily
10 activities indicated that he can perform basic work-related activities, the ALJ considered Plaintiff's
11 reports that he can manage his personal care and hygiene, prepare meals, perform typical household
12 chores, drive, go shopping, manage his own finances, go to clubs, walk, and spend time with others.
13 AR 31. Considered collectively, this evidence shows that activities requiring skills transferable to the
14 workplace comprise a substantial portion of Plaintiff's typical day. Just as in *Burch*, *Morgan*, and
15 *Curry*, this evidence undermines Plaintiff's allegations that his medical conditions cause pain, fatigue,
16 stiffness, numbness, weakness, nausea, depression, and difficulty lifting, squatting, bending, standing,
17 walking, kneeling, climbing stairs, remembering, completing tasks, and using his hands which hinder
18 his ability to perform work. *Id.* The ALJ here appropriately contrasted Plaintiff's alleged limitations
19 with his reported activities as part of his discounting of Plaintiff's symptoms testimony. Plaintiff's
20 arguments that the ALJ did not appropriately consider Plaintiff's reported daily activities therefore
21 fails.

22 Second, the ALJ found that Plaintiff's allegations were not fully consistent with the medical
23 and other evidence, noting that "the objective findings in this case fail to provide strong support for the
24 claimant's allegations of disabling symptoms and limitations" and that "specifically, the medical
25 findings do not support the existence of limitations greater than those reported in the residual
26 functional capacity statement above." AR 31. Although lack of supporting medical evidence cannot
27 form the sole basis for discounting testimony, it is a factor that the ALJ can consider. *See Burch*, 400
28 F.3d at 681 (9th Cir. 2005).

1 Here, the ALJ contrasted Plaintiff's allegations with the objective findings as follows:

2 As for the claimant's statements about the intensity, persistence, and
3 limiting effects of his or her symptoms, they are inconsistent because
4 they are not fully supported by the objective medical evidence. In terms
5 of the claimant's diabetes, peripheral neuropathy, and gout, these
6 impairments were historically not well controlled, in part due to poor
7 self-management. (see, Exhibits 1F, 2F). Since the claimant's May 2017
8 application, the claimant continued to have poor management of his
9 diabetic symptoms and blood glucose, despite using injected insulin.
10 However, treatment providers typically noted the claimant reported poor
11 dietary and medication compliance and generalized lack of motivation to
12 manage his symptoms. Despite this, his physical examinations typically
13 demonstrated normal findings without significant motor or neurological
14 deficits. Moreover, despite numerous reminders to maintain normal
15 dietary intake and use insulin consistently, the claimant frequently failed
16 to adhere to these treatment recommendations. Additionally, despite the
17 claimant's complaints of neuropathy, he often only complained of
18 nausea symptoms in clinical follow up sessions. (Exhibits 2F, 3F, 4F). In
19 April 2019, the claimant presented for a consultative examination with
20 Rustom Damania, M.D. There, he reported a history of diabetes and
21 gout with paresthesias in the extremities. His physical examination
22 indicated normal range of motion throughout the spine and extremities.
23 Additionally, the claimant was neurologically intact, including normal
24 cranial nerves and full motor strength. Some slight sensory impairment
25 was appreciated in the bilateral lower extremities, but he exhibited
26 normal cerebellar function and reflexes. Finally, the claimant
27 demonstrated a gait that was within normal limits, though he exhibited
28 some difficulty walking on his toes due to pain. (Exhibit 5F).

Turning to the claimant's mental impairment, the record indicates a
history of depression with some difficulty managing his physical
impairments due to lack of motivation and pervasive depressive
symptoms. However, there is little evidence of formal mental health
treatment. A psychological consultative examination from April 2019
indicates the claimant presented with reports of depressive symptoms
over the prior ten years, accompanied by insomnia and low energy. His
mental status examination indicated the claimant kept fair eye contact
and exhibited generally normal speech with a slight latency. Though he
presented with a depressed mood and restricted affect, the claimant had
goal-directed thought processes without evidence of delusions, and he
was well oriented with intact concentration and recall. The claimant was
also capable of performing simple mathematical calculations, and recall
some information, but he struggled with more remote memory. (Exhibit
6F).

AR 31-32.

1 The ALJ first noted Plaintiff's allegations of "pain, fatigue, stiffness, numbness, weakness,
2 nausea, depression, and difficulty lifting, squatting, bending, standing, walking, kneeling, climbing
3 stairs, remembering, completing tasks, and using his hands" and that "he can only stand and/or walk
4 for up to ten minutes followed by at least thirty minutes rest, carry up to ten pounds, sit for up to
5 fifteen minutes, and has a variable ability to follow instructions." AR 31. The ALJ then contrasted
6 those allegations and the findings of diabetes mellitus, peripheral neuropathy, gout, and depression
7 with relatively normal physical examination findings, including Plaintiff only complaining of nausea
8 despite poorly controlled diabetes and generally normal neurological and motor results). AR 31-32;
9 *see* 292 (July 2015 report noting diabetes mellitus type 2 and bilateral foot pain but normal physical
10 exam findings); 296 (September 2015 report noting normal abdominal and neurological findings,
11 denying abdominal pain, nausea, vomiting, numbness, weakness); 345 (January 2016 report noting
12 poorly controlled diabetes mellitus type 2 and was nauseated at prior visit); 351-52 (March 2016
13 report noting poorly controlled diabetes but generally normal physical exam findings); 355-56 (June
14 2016 report noting poorly controlled diabetes and lower extremity pain but otherwise normal physical
15 exam findings); 366-67 (November 2016 report noting poorly controlled diabetes but generally normal
16 physical exam findings); 372-73 (December 2016 report noting Plaintiff "continues to make poor
17 food choices as evidenced by blood sugar of 440... ADVISED IF BS DO NOT IMPROVE WILL
18 HAVE MAJOR COMPLICATIONS" and assessment of diabetes, resolving gout, and neuropathy but
19 normal physical exam findings); 387-88 (June 2017 report noting poorly controlled diabetes but
20 generally normal exam findings and negative for nausea, vomiting, and abdominal pain); 421-22 (July
21 2017 report noting poorly controlled diabetes and nausea complaint but generally normal exam
22 findings and negative for nausea, vomiting, and abdominal pain); 454 (April 2019 examination report
23 finding "Cranial nerves II through XII were grossly intact. Motor strength was 5/5 in all extremities
24 with good tone bilaterally with good active range of motion. Slight sensory impairment lower
25 extremities. Reflexes were normal and symmetric bilaterally at 2+ with no clonus. Cerebellar function
26 was normal with finger-to-nose examination intact and Romberg negative"); 454 (April 2019
27 examination report noting gait was "Within normal limits. He did not use assistive device although he
28 had difficulty walking on his toes because of the burning pain.").

1 Regarding Plaintiff's depression and mental impairments, the ALJ noted that despite a history
2 of depression, there was little evidence of formal mental health treatment and an April 2019 mental
3 status examination showed relatively normal findings. AR 32; 464 (April 2019 report noting
4 depressed mood and restricted affect but fairly groomed, adequate personal hygiene, normal gait and
5 posture, fair eye contact, normal speech with slight latency, normal body movement, denial of suicidal
6 or homicidal ideations, goal-directed thought process, non-delusional thought content, denial of
7 hallucinations or paranoid ideations, generally normal cognitive skills test results). In examining the
8 record regarding all of Plaintiff's severe impairments, the ALJ appropriately discussed the medical
9 evidence as one factor in discounting Plaintiff's symptoms testimony.

10 Plaintiff argues that the ALJ failed to state with any specificity how the objective findings
11 contradict Plaintiff's alleged limitations in any way, contending that the ALJ cited a mix of limitations
12 and normal findings but did not reconcile those findings with Plaintiff's allegations. Plaintiff cites
13 principally to *Brown-Hunter v. Colvin*, in which the Ninth Circuit held that "an ALJ does not provide
14 specific, clear, and convincing reasons for rejecting a claimant's testimony by simply reciting the
15 medical evidence in support of his or her residual functional capacity determination." *Brown-Hunter*
16 *v. Colvin*, 806 F.3d 487, 489 (9th Cir. 2015).

17 In contrast with *Brown-Hunter*, the ALJ here did not automatically reject statements
18 inconsistent with the ALJ's RFC assessment or simply recite the medical evidence. Instead, the ALJ
19 first laid out the severe impairments and alleged limitations and then explained how the medical
20 records and examination reports contrast with the allegations. AR 31-32. The ALJ discussed how the
21 relatively normal examination findings and limited nausea complaints compared with Plaintiff's more
22 severe reported symptoms from diabetes, peripheral neuropathy, and gout. *Id.* The ALJ also
23 discussed how an April 2019 mental status examination report undermined Plaintiff's reported
24 limitations with depression, memory, and completing tasks. AR 32; 464-65. Plaintiff's argument that
25 the ALJ did not adequately explain the reasoning in examining the objective findings is therefore
26 unavailing.

27 Plaintiff additionally argues that the ALJ inappropriately appeared to discount Plaintiff's
28 symptoms testimony based upon Plaintiff's noncompliance with diet and medication related to his

1 diabetes. (Doc. 20 at 8-9.) However, a plain reading of the ALJ's opinion shows that the ALJ was not
2 discounting Plaintiff's symptoms based on noncompliance but instead finding that even during periods
3 of noncompliance or poor control of Plaintiff's diabetes, the record showed few symptoms beyond
4 nausea. AR 31-32. This discussion contributed to the ALJ's examination of the objective findings
5 and was not a separate basis for discounting Plaintiff's symptoms testimony. *Id.* The ALJ's
6 discounting of symptoms testimony was therefore based on appropriate rationale, and Plaintiff's
7 argument fails.

8 Accordingly, the Court concludes that the ALJ did not err in discounting Plaintiff's subjective
9 complaints.

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1 **CONCLUSION AND RECOMMENDATION**

2 Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial
3 evidence in the record as a whole and is based on proper legal standards. Accordingly, IT IS
4 HEREBY RECOMMENDED as follows:

- 5 1. Plaintiff's appeal from the administrative decision of the Commissioner of Social
6 Security be denied; and
7 2. The Clerk of this Court be directed to enter judgment in favor of Defendant Leland
8 Dudek, Acting Commissioner of Social Security, and against Plaintiff Aubrey D.
9 McFall.

10 These Findings and Recommendations will be submitted to the United States District Judge
11 assigned to the case, as required by 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being
12 served with these findings and recommendations, the parties may file written objections with the
13 Court. The document should be captioned "Objections to Magistrate Judge's Findings and
14 Recommendations." The parties are advised that the failure to file objections within the specified time
15 may result in the waiver of the "right to challenge the magistrate's factual findings" on appeal.
16 *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391,
17 1394 (9th Cir. 1991)).

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19 IT IS SO ORDERED.

20 Dated: March 7, 2025

21 /s/ Barbara A. McAuliffe
22 UNITED STATES MAGISTRATE JUDGE
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