

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

FRED MCMILLEN,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. 1:22-cv-00925-SAB

ORDER DENYING PLAINTIFF’S SOCIAL
SECURITY APPEAL

(ECF Nos. 15, 18, 23)

I.
INTRODUCTION

Plaintiff Fred McMillen (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for Social Security benefits pursuant to Title II of 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 For the reasons set forth below, Plaintiff’s appeal shall be denied.

¹ The parties have consented to the jurisdiction of the United States Magistrate Judge and this action has been assigned to Magistrate Judge Stanley A. Boone for all purposes. (ECF Nos. 10, 12, 24.)

1 **II.**

2 **BACKGROUND²**

3 **A. Procedural Background**

4 This is an appeal of a Social Security decision issued subsequent to remand of Plaintiff's
5 appeal of a prior decision by the Commissioner.

6 Plaintiff filed his original application for Social Security benefits under Title II on October
7 31, 2012, alleging disability beginning June 1, 2011. (See Admin. Rec. ("AR") 158–60, ECF
8 Nos. 14-1, 14-2.) Plaintiff's claims were initially denied on June 13, 2013, and denied upon
9 reconsideration on March 10, 2014. (AR 101–06, 107–12.) On October 15, 2015, Plaintiff,
10 represented by counsel,³ appeared for an administrative hearing before Administrative Law Judge
11 Vincent Misenti in Fresno, California. (AR 41–74.) Vocational expert ("VE") Cheryl R.
12 Chandler, also testified at the hearing. With leave from Judge Misenti, Plaintiff submitted
13 additional medical records subsequent to the hearing, which were also considered before Judge
14 Misenti issued his decision. (See AR 21 (citing AR 226–27 (Ex. 16E), 504–904 (Exs. 11F–
15 20F)).) On January 25, 2016, Judge Misenti issued a decision denying benefits. (AR 18–37.) On
16 March 9, 2017, the Appeals Council denied Plaintiff's request for review, making the Judge
17 Misenti's decision the final decision of the Commissioner. (AR 1–6.)

18 Plaintiff challenged this decision in federal court on May 13, 2017, seeking judicial
19 review of the Commissioner's decision under 42 U.S.C. 405(g). (AR 1065–71); see McMillen v.
20 Berryhill (McMillen I), No. 1:17-cv-00664-SKO, Dkt. 1 (E.D. Cal. May 13, 2017). On appeal,
21 Plaintiff challenged the original ALJ's decision as to his evaluation of Dr. Stacey's medical
22 opinion, the opinion of NP Practitioner ("NP") Rico, and Plaintiff's subjective complaints, and
23 Plaintiff argued the RFC determination did not adequately reflect the opinion of Dr. Damania.
24 McMillen I, Dkt. 17 (E.D. Cal. Feb. 28, 2018). On August 7, 2018, the district court reversed the

25 _____
26 ² For ease of reference, the Court will refer to the administrative record by the pagination provided by the
Commissioner and as referred to by the parties, and not the ECF pagination. However, the Court will refer to the
parties' briefings by their ECF pagination.

27 ³ Plaintiff was represented by non-attorney representative Mario A. Davila at the first hearing, and by Mr. Davila and
28 Stephen Tow at the administrative level prior to Plaintiff's first appeal. (See AR 21, 148, 155.) Plaintiff was later
represented by Jacqueline Anna Forslund, of Forslund Law LLC, on appeal in federal court. See McMillen I.

1 decision of the Commissioner and remanded the case for further administrative proceedings. (AR
2 1072–1111); McMillen I, 2018 WL 3769829 (E.D. Cal. Aug. 7, 2018) (Dkt. 28). More
3 specifically, the district court found that Judge Misenti’s evaluation of the opinions of Dr. Stacey
4 and NP Rico was appropriate, id. at *10–14, and the ALJ’s discounting of Plaintiff’s subjective
5 testimony was well-supported, id. at *15–20. However, the district court found Judge Misenti
6 erroneously disregarded portions of Dr. Damania’s opinion by failing to consider all of the
7 limitations imposed by Dr. Damania, even after according “significant weight” to the opinion. Id.
8 at *12. Because Dr. Damania’s opinion was inconsistent with the ultimate finding of
9 nondisability, the district court determined the error was harmful and remand was warranted. Id.
10 at *13.

11 On September 14, 2018, in accordance with the district court’s ruling, the Appeals
12 Council vacated Judge Misenti’s decision and remanded the case to a new administrative law
13 judge for further proceedings. (AR 1114.) Specifically, the Appeals Council directed the new
14 administrative law judge to “consider the medical evidence as a whole, and either properly credit
15 Dr. Damania’s opinion, or provide specific and legitimate reasons, supported by substantial
16 evidence, for rejecting Dr. Damania’s opinion. The ALJ shall then assess Plaintiff’s RFC and
17 proceed through Steps Four and Five to determine what work if any, Plaintiff is capable of
18 performing.” (AR 973 (citing AR 1110).)

19 On September 26, 2019, Administrative Law Judge Shiva Bozarth (the “ALJ”) held a
20 second hearing, in Fresno, California. (AR 992–1026.) Plaintiff appeared, represented by new
21 counsel.⁴ Plaintiff submitted additional medical records prior to the hearing, which the ALJ
22 admitted into evidence and considered when rendering her decision. (See AR 973–74.) Medical
23 Expert Kweli J. Amusa testified at the hearing. VE Cheryl R. Chandler again testified at the
24 hearing. On January 2, 2020, the ALJ issued a new decision denying benefits. (AR 970–91.) On
25 May 26, 2022, the Appeals Council denied Plaintiff’s request for review, making the ALJ’s
26 decision the final decision of the Commissioner. (AR 957–62.)

27 ⁴ Plaintiff was represented by Sengthiene Bosavanh at the hearing, and by attorney Jeffrey L. Milam, of Milam Law,
28 at the administrative level, post-remand. (See AR 973, 1167.) Plaintiff is currently represented by attorney
Francesco Paulo Benavides, of the Law Offices of Francesco Benavides. (See ECF No. 15 at 1.)

1 Plaintiff initiated the instant action in federal court on July 26, 2022, once again seeking
2 judicial review of the denial of his application for benefits. (ECF No. 1.) The Commissioner
3 lodged the administrative record on November 8, 2022. (ECF No. 14.) On December 23, 2022,
4 Plaintiff filed a motion for summary judgment appealing the Commissioner’s decision. (ECF No.
5 15.) On March 9, 2023, Defendant filed a cross-motion in opposition to Plaintiff’s motion. (ECF
6 No. 18.) On March 22, 2023, Plaintiff filed a reply brief (ECF No. 23), and the matter is now
7 deemed submitted on the pleadings.

8 **B. Relevant Medical Evidence**

9 1. Mountain Diagnostics

10 On May 9, 2005, Plaintiff had a magnetic resonance imaging (“MRI”) scan performed of
11 his thoracic spine at Mountain Diagnostics in Las Vegas, Nevada. (AR 888.) The results were
12 compared to an MRI of Plaintiff’s thoracic spine from November 2003 and revealed “slight
13 dorsal spinal cord displacement at T7–8 and intermittent mild spinal cord encroachment[.]” (Id.)

14 2. Michelle Stacey, M.D.

15 On June 3, 2010, Plaintiff presented to Dr. Stacey to follow up on previous lab tests and
16 refill his medication. (AR 362.) Dr. Stacey’s physical examination of Plaintiff was unremarkable
17 except for mild tenderness upon palpation in the lumbar spine and decreased deep tendon reflex at
18 the knee on the right side. (AR 363.) Dr. Stacey ordered an MRI of Plaintiff’s thoracic and
19 lumbar spine and opined that Plaintiff would benefit from pain management and a surgery
20 evaluation. (AR 364.) Dr. Stacey also ordered an ultrasound of Plaintiff’s thyroid following
21 complaints of pain and swelling on the right side of his neck. (AR 362, 364.)

22 On July 1, 2010, Plaintiff told Dr. Stacey his back was bothering him more than usual and
23 he had increasing pain that radiated down his right leg. (AR 357.) When Plaintiff returned to Dr.
24 Stacey on July 30, 2010 to review the results of his MRI, Plaintiff complained of neck problems
25 and continued back pain. (AR 350–51.) The MRI of Plaintiff’s thoracic spine revealed
26 mild degenerative disc disease, a prominent posterior disc bulge at T8–T9 without spinal
27 stenosis or neural impingement, and no acute or subacute compression fractures. (AR 355.) The
28 MRI of Plaintiff’s lumbar spine revealed a moderate central disc bulge at L4–L5 with moderate

1 narrowing of the lateral recess, minimal degenerative disc disease of L5–S1, an annular tear with
2 a mild to moderate diffuse central disc bulge, and minor narrowing of the left compared with the
3 right lateral recess. (AR 353.)

4 On August 27, 2010, Dr. Stacey received the results of the ultrasound on Plaintiff’s
5 thyroid, which revealed several thyroid nodules, particularly on the right side. (AR 345, 349.)
6 Plaintiff continued to experience pain and swelling in his neck so his back surgery consultation
7 was put on hold until after his thyroid surgery. (AR 322, 324, 326.) On November 29, 2010,
8 Plaintiff underwent a total thyroidectomy. (AR 335–36.) Plaintiff’s surgeon wrote a letter to Dr.
9 Stacey stating that Plaintiff “did great” with the surgery and his pathology was benign. (AR 333.)

10 On January 20, 2011, Plaintiff continued to complain of back pain, but his back surgery
11 consultation was delayed because he failed to provide the court in his workers’ compensation
12 case with his medical records in a timely manner. (AR 313.) Dr. Stacey noted Plaintiff
13 had radiculopathy symptoms in his legs, but was in no acute distress. (AR 314.) Plaintiff
14 reported that taking oxycodone instead of Percocet and Lortab was “working out well for his
15 stomach,” but he would like to increase the dosage to adequately control his pain. (Id.)

16 On February 17, 2011, Plaintiff reported that he initially felt okay after his thyroidectomy,
17 but he was experiencing pain at the incision site, which worsened when he laid down. (AR 310–
18 11.) Plaintiff also complained of continued back pain that radiated down to his leg. (AR 311.)
19 Plaintiff’s symptoms continued at his appointment on March 17, 2011, but he reported his pain
20 was “fairly well controlled with his medication.” (AR 307.) Dr. Stacey noted that Plaintiff had a
21 surgery consultation pending, but was still waiting for his workers’ compensation case to be
22 processed. (Id.) Dr. Stacey started Plaintiff on Neurontin for his neuropathy. (AR 308.)

23 On April 14, 2011, Plaintiff reported the Neurontin worked “really well” at controlling his
24 neck pain, which was almost completely resolved. (AR 304.) Dr. Stacey noted Plaintiff’s
25 condition was stable and Plaintiff had a hearing coming up in June in his workers’ compensation
26 case, which Dr. Stacey hoped would allow Plaintiff’s back surgery to move forward. (Id.)
27 Plaintiff reported he had gone back to work, which had exacerbated his pain, but he did not want
28 to change his pain medication. (Id.) Plaintiff continued to have pain in his lower back and legs at

1 his appointment on May 11, 2011. (AR 296.)

2 In a letter dated August 14, 2012, Dr. Stacey wrote that Plaintiff suffered from multiple
3 medical issues including degenerative disc disease confirmed by MRI, hypothyroidism status
4 post thyroidectomy, nephrolithiasis, gout, and hypertension. (AR 604.) Dr. Stacey stated that
5 Plaintiff remained symptomatic with numbness and tingling in his bilateral lower extremities and
6 chronic neck and back pain, despite medical therapy. (Id.) Dr. Stacey also stated Plaintiff
7 “need[ed] further evaluation by pain management, orthopedic surgery, and further testing
8 (potentially neurologic evaluation).” (Id.) Finally, Dr. Stacey opined that Plaintiff had been
9 unable to work because of his chronic back problems and side effects of his opioid medications.
10 (Id.)

11 3. Physician’s Assistant David Armitage

12 On December 22, 2010, Plaintiff presented to Dr. Stacey’s physician’s assistant, PA
13 Armitage, to follow up on the results of his thyroidectomy performed during the previous month.
14 (AR 317.) Plaintiff reported his pain medication was no longer as effective as it used to be and
15 his blood pressure increased whenever he took the medication. (Id.) Upon examination, PA
16 Armitage found Plaintiff to be alert, oriented, and in no acute distress. (AR 317–18.)

17 On June 8, 2011, PA Armitage noted that when Plaintiff walked, “he held his back really
18 straight” and he would use his arm to push himself up when he stood up out of a chair. (AR 293.)
19 PA Armitage recommended Plaintiff continue wearing his back brace and increased
20 his Neurontin prescription. (AR 294.) On July 5, 2011, Plaintiff reported that his back was “just
21 killing him” and he felt like he had “a knife stuck between his shoulder blades all the time.” (AR
22 285.) The oxycodone helped alleviate Plaintiff’s pain, but its effectiveness wore off quickly.
23 (Id.) Plaintiff further reported that his hands were going numb and he was losing fine motor
24 coordination in his left hand. (Id.) Plaintiff also stated his workers’ compensation case was
25 “dragging on and on” so he would look into private insurance because his back pain was getting
26 worse and he wanted the surgery to fix it. (Id.) Upon examination, PA Armitage noted Plaintiff
27 had +4 strength in all muscle groups of his upper extremities and a marked tremor against
28 resistance or exertion of his left upper extremity, as well as neuropathy and radiculopathy of the

1 upper and lower extremities. (AR 286.) PA Armitage also noted that Plaintiff had good fine and
2 gross motor control; was able to sit, stand, and walk without difficulty; and had a normal gait.
3 (Id.) PA Armitage prescribed Contin and recommended Plaintiff cut back on oxycodone. (AR
4 286–87.) PA Armitage also ordered another MRI of Plaintiff’s thoracic and lumbar spine. (AR
5 287.)

6 On August 30, 2011, Plaintiff reported that his medications were “really, really helping”
7 and he was doing “much, much better.” (AR 274.) PA Armitage reviewed the results of
8 Plaintiff’s MRI with him. (Id.) According to the doctor that interpreted the images, the MRI of
9 Plaintiff’s thoracic spine was normal, but the MRI of the lumbar spine revealed desiccation of
10 L4–L5 and L5–S1; right paracentral/neuroforaminal disc protrusion associated with an annular
11 tear at L4–L5; questionable contact with the exiting right nerve root; and a mild, broad-based disc
12 bulge at L5–S1 with no significant associate stenosis. (AR 274, 288–89.) PA Armitage provided
13 a referral to orthopedic spine surgeon Dr. William Smith, M.D. (AR 275.)

14 On September 27, 2011, Plaintiff reported to PA Armitage that he was doing “pretty
15 good,” but that his back pain was getting worse. (AR 271.) Plaintiff was also doing “really
16 good” on November 28, 2011, even though he recently returned from a vacation where he was
17 not able to refill his prescription and had to drastically cut down on the medication to make it last.
18 (AR 265.) On December 27, 2011, Plaintiff again reported he was doing “pretty good,” but that
19 his back and legs still hurt. (AR 260.) On March 22, 2012, Plaintiff stated he was having
20 financial trouble and may need to cut back on his medication, but was going to Virginia for a
21 couple months to visit family and would also visit the Spinal Institute to see if a doctor there
22 could offer any assistance for his back pain. (AR 249.)

23 4. William Smith, M.D.

24 On October 3, 2011, Plaintiff presented to Dr. Smith, an orthopedic surgeon, with
25 complaints of increasing back pain for the previous seven years. (AR 239.) Dr. Smith noted
26 Plaintiff had percussion tenderness of this mid-thoracic and lower lumbar spine with flexion and
27 extension that was 80% of normal and “quite painful.” (AR 241.) Dr. Smith further noted that
28 Plaintiff had right sciatic tenderness as well as diminished sensation in the left and right L5

1 dermatomes. (Id.) Deep tendon reflexes were normal, active, and symmetrical, and Plaintiff
2 walked with an antalgic gait. (Id.) Dr. Smith opined that although Plaintiff's thoracic spine
3 MRI was read as normal, there was a loss of discal height at T8 and T7. (AR 242.) Dr. Smith
4 ordered a CT scan of Plaintiff's thoracic spine and x-rays of his lumbar spine, and referred him to
5 pain management for epidural steroid injections. (Id.) Dr. Smith instructed Plaintiff to return
6 after these studies were done. (Id.)

7 The CT scan of Plaintiff's thoracic spine revealed mild degenerative changes, but no
8 significant canal narrowing, only mild canal narrowing at T7–T8, and mild to moderate foraminal
9 narrowing at the T9–T10 level. (AR 255.) Plaintiff reported to PA Armitage that he attempted
10 several times to make a subsequent appointment with Dr. Smith, but he was unable to get through
11 and Dr. Smith sent him a “massive bill” that he was trying to work out. (AR 257, 260.)

12 5. Saint Agnes Medical Center

13 On April 23, 2013, Plaintiff presented to the Saint Agnes Medical Center emergency room
14 complaining of neck and shoulder pain. (AR 428.) Plaintiff rated his pain as an eight on a scale
15 of one to ten. (AR 432.) The doctor noted Plaintiff was alert, in no acute distress, and had
16 normal range of motion and normal strength with no swelling or deformities. (AR 429.)
17 Plaintiff's diagnosis was radicular right arm pain. (Id.) Plaintiff was instructed to take ibuprofen
18 for his pain and follow up with his doctor if the pain did not go away. (AR 437.)

19 6. Rustom F. Damania, M.D.

20 On May 16, 2013, Dr. Damania performed an internal medicine evaluation of Plaintiff at
21 the request of state agency. (AR 414–19.) Plaintiff reported he experienced continuous lower
22 back pain since 2003 when he suffered an injury at work. (AR 414.) According to Plaintiff, the
23 pain radiated to his left leg and was associated with paresthesia, numbness, and weakness. (Id.)
24 The pain in his thoracic spine radiated to both shoulders, upper back, and into both arms with
25 paresthesia. (Id.) Plaintiff stated he had used a cane since 2011 because he was unable to stand
26 up from a seated position due to pain and weakness in his left leg. (Id.) Plaintiff also stated he
27 did not have workers' compensation or medical insurance and had not been to a doctor for a
28 follow up appointment since May 2012. (Id.)

1 Upon physical examination, Dr. Damania observed Plaintiff's neck and upper and lower
2 extremities to have full range of motion within normal limits. (AR 416–17.) Dr. Damania's
3 examination also revealed tenderness at the T7–T8 level, but no signs of radiculopathy in the
4 upper extremities; positive straight leg raise test on the left at 45 degrees in the sitting position;
5 and reduced forward flexion, extension, and lateral flexion in Plaintiff's back. (Id.) Plaintiff's
6 muscle strength in the right lower extremity was 5/5 and 4/5 in the left lower extremity with no
7 obvious wasting. (AR 418.) Plaintiff had sensory impairment in the L4–L5 distribution of the
8 left lower leg and normal deep tendon reflexes. (Id.)

9 7. Nurse Practitioner Helen Monnens

10 On November 5, 2013, NP Helen Monnens ordered x-rays of Plaintiff's cervical spine and
11 thoracic spine because Plaintiff reported experiencing pain in his bilateral mandibles and
12 numbness in his hands. (AR 448, 461.) The x-rays of Plaintiff's cervical spine revealed mild
13 degenerative changes of the cervical spine with neural foraminal narrowing and straightening of
14 the normal cervical lordosis that might have been due to Plaintiff's positioning and/or muscle
15 spasm. (AR 449, 459.) The x-rays of the thoracic spine revealed mild degenerative changes and
16 a suggestion of diffuse osseus demineralization. (AR 450, 460.)

17 MRIs of Plaintiff's cervical spine and thoracic spine were also performed on December
18 11, 2013. (AR 452–58.) The MRI of Plaintiff's cervical spine revealed degenerative changes in
19 the cervical spine; mild reversal of the normal cervical lordosis at C4–C5; a two-millimeter left
20 paracentral disc osteophyte complex at C4–C5, which mildly indented the left ventral surface of
21 the spinal cord; a two-millimeter central protrusion with associated annular fissuring at the C5–
22 C6 level, which caused a mild impression on the ventral surface of the spinal cord; and a one-
23 millimeter central protrusion with associated annular fissuring, which indented the thecal sac at
24 the C6–C7 level. (AR 453.) The MRI of Plaintiff's thoracic spine revealed mild chronic
25 wedging of the T6 vertebral body with approximately 15% loss of height, with the rest of the rest
26 of the heights preserved; a normal thoracic spinal cord; and a small central protrusion with
27 associated annular fissuring, which indented the thecal sac, but did not contact the spinal cord.
28 (AR 455–56.) No spinal canal stenosis, neural foraminal narrowing, or abnormal signal in the

1 ligaments or paraspinal muscles, were noted. (Id.)

2 NP Monnens's treatment notes from December 19, 2013, state she was referring Plaintiff
3 to a neurosurgeon. (AR 457.)

4 8. Nurse Practitioner Pamela Rico, FNP/ Dr. Kathleen Baron, M.D.

5 On February 13, 2014, Plaintiff presented to NP Rico at Primary Care Consultants to
6 establish care. (AR 613.) According to Plaintiff, he established care at Primary Care Consultants
7 because his previous provider "dropped the ball" and he was waiting for a referral to a
8 neurosurgeon that was never provided. (Id.) Plaintiff reported he had "weaned himself off all
9 meds," but did have a bottle of Norco from his previous provider that he was trying to stretch as
10 long as possible. (Id.) Plaintiff also reported he was angry that he was not getting the disability
11 benefits to which he felt entitled and had not attended physical therapy recently because he could
12 not afford to travel to Oakhurst one to two times a week. (Id.)

13 Plaintiff complained of muscle cramps, joint pain, back pain, muscle weakness, and loss
14 of strength. (AR 617.) On physical examination, NP Rico observed Plaintiff to be in no acute
15 distress and have normal, full range of motion in all joints, with weakness to upper extremity
16 grips. (Id.) NP Rico noted Plaintiff had a steady gait and changed position with ease, but had
17 spasms in his cervical spine and upper shoulder area. (Id.) NP Rico prescribed Norco and
18 Synthroid, ordered several additional tests, and referred Plaintiff for a physical therapy
19 consultation. (AR 620.) Plaintiff's treatment notes from his February 13, 2014 appointment were
20 electronically signed by both NP Rico and Dr. Kathleen Baron, M.D. (AR 621.)

21 Plaintiff returned to NP Rico on March 4, 2014, to follow up on his test results. (AR 642.)
22 NP Rico reviewed Plaintiff's previous MRIs and explained to Plaintiff that his MRI results were
23 not severe enough to warrant surgery at that time. (Id.) NP Rico encouraged Plaintiff to
24 participate in physical therapy because if he did not show improvement, it would help show the
25 neurologist that he had tried everything before surgery. (Id.) Plaintiff refused to try physical
26 therapy because he said he could not afford to travel to Oakhurst twice a week; however, NP Rico
27 reminded Plaintiff of a service that would provide free transportation to his appointments. (Id.)

28 NP Rico's treatment notes, co-signed by Dr. Baron, for Plaintiff's appointments on April

1 10, May 2, May 28, July 1, July 22, and September 12, 2014, indicate his condition generally
2 remained unchanged. (AR 657, 663, 673–74, 680, 686, 854.) Specifically, Plaintiff continued to
3 be in no acute distress, walk with a steady gait, change positions with ease, and have normal
4 range of motion in his extremities with weakness in his upper extremity grips and spasms in his
5 cervical spine and upper shoulder area. (AR 656, 662, 672–73, 679, 685, 853.)

6 An MRI of Plaintiff’s lumbar spine was performed on August 13, 2014. (AR 840.) The
7 MRI revealed degenerative changes in the lumbar spine, a three-millimeter central protrusion
8 with associated annular fissuring at the L5–S1 level, and a two-millimeter right paracentral
9 protrusion with associated annular fissuring at the L4–L5 level. (Id.) Plaintiff also had MRIs
10 taken of his cervical spine and thoracic spine on September 4, 2014. (AR 844–49.) The MRI of
11 the cervical spine revealed unchanged findings from the earlier MRI on December 11, 2013. (AR
12 844.) The MRI of the thoracic spine revealed degenerative changes similar to the MRI in
13 December 2013, as well as fissuring of the posterior portion of the annulus at the T5–T6 level and
14 a one-millimeter central protrusion with associated annular fissuring at the T7–T8 level. (AR
15 848.) The reviewing doctor also noted mild chronic anterior wedging of the T6 vertebral body,
16 with approximately 15% loss of height, which was unchanged compared to the prior MRI in
17 December 2013. (Id.)

18 On September 14, 2014, NP Rico completed a Disability Impairment Questionnaire for
19 Plaintiff. (AR 499–503.) NP Rico diagnosed Plaintiff with neck pain, thoracic pain, lumbar back
20 pain, herniated discs (cervical and lumbar), and nerve root and plexus disorder. (AR 499.) As
21 support for her diagnosis, NP Rico generally cited “multiple images” without specifying any
22 particular images and stated Plaintiff had “seen specialists” and had a pending surgery. (Id.) NP
23 Rico opined that Plaintiff could perform a job in a seated position for less than one hour in an
24 eight-hour workday and needed to get up from a seated position every thirty minutes for five to
25 ten minutes. (AR 501.) NP Rico also opined that Plaintiff could perform a job in a standing
26 and/or walking position for less than one hour in an eight-hour day, and had significant
27 limitations in reaching, handling, or fingering. (AR 501–02.) According to NP Rico, Plaintiff
28 could occasionally lift and carry up to ten pounds, but could never lift or carry more than ten

1 pounds. (AR 501.) NP Rico concluded Plaintiff would need several unscheduled breaks of ten to
2 fifteen minutes, and on average, would likely be absent more than three times per month due to
3 his impairments. (AR 502–03.) NP Rico opined Plaintiff’s limitations and symptoms applied as
4 far back as March 1, 2010.⁵ (AR 503.)

5 On May 25, 2016, NP Rico and Dr. Baron completed an updated letter, asserting that
6 Plaintiff would be limited to sitting for less than one hour and standing and/or walking for less
7 than one hour in an eight-hour day; could only occasionally lift and carry up to ten pounds; would
8 need to get up and move around every 30 minutes for five to ten minutes; and his symptoms
9 would likely increase if he were placed in a competitive work environment. (AR 956.)

10 9. William J. Jawien, M.D.

11 On April 4, 2014, Plaintiff saw Dr. Jawien for a hematology/oncology consultation. (AR
12 473.) Dr. Jawien’s examination of Plaintiff’s back and spine revealed no kyphosis, scoliosis,
13 compression fractures, or tenderness. (AR 474.) Plaintiff had a normal gait and normal range of
14 motion with no obvious weakness. (AR 474–75.) Dr. Jawien assessed Plaintiff with
15 leukocytosis, chronic neck and back pain, and questionable hepatomegaly with increased hepatic
16 echogenicity. (AR 475.) On May 6, 2014, Plaintiff returned to Dr. Jawien for a follow up
17 appointment and Plaintiff’s physical examination remained unremarkable. (AR 478.)

18 10. Rohini J. Joshi, M.D.

19 On April 30, 2014, Plaintiff presented to neurologist Dr. Joshi complaining of numbness
20 and tingling in his limbs and ringing in his ears. (AR 468.) Upon physical examination, Dr. Joshi
21 found Plaintiff to have normal muscle tone and strength in his upper and lower extremities, with
22 normal bilateral sensation and reflexes. (AR 469–70.) Dr. Joshi noted Plaintiff’s coordination
23 and gait were normal. (AR 470.) Dr. Joshi diagnosed Plaintiff with cervical spondylosis and
24 referred Plaintiff for pain management and neurological surgery. (Id.) Dr. Joshi ordered a
25 neurologic evaluation of Plaintiff, which was performed by Dr. Boota Cahil, M.D. on July 28,
26 2014. (AR 472.) Dr. Cahil found that motor and sensory nerve conduction studies of the right

27
28 ⁵ According to Plaintiff, both NP Rico and Dr. Baron signed the opinion, but the purported signature of Dr. Baron is illegible. (AR 70, 503; see also Doc. 17 at 24.)

1 and left median and ulnar nerves were normal. (Id.) There was no evidence of compression
2 neuropathy, polyneuropathy, or ongoing cervical radiculopathy. (Id.)

3 Dr. Joshi's examination on August 21, 2014 yielded similar findings to Plaintiff's April
4 appointment. (AR 466–67.) On October 1, 2014, Dr. Joshi noted Plaintiff had restricted range of
5 motion of the proximal upper extremity with positional pain in the neck. (AR 462.) Dr. Joshi's
6 examination of Plaintiff yielded otherwise unremarkable results with Plaintiff showing normal
7 muscle tone and strength, reflex, coordination, and gait. (AR 464.)

8 11. State Agency Physicians

9 On June 10, 2013, W. Jackson, M.D., a Disability Determination Services medical
10 consultant, reviewed the medical evidence of record and concluded Plaintiff could lift and carry
11 twenty pounds occasionally and ten pounds frequently; stand and walk four hours in an eight-
12 hour day with normal breaks; sit six hours in an eight-hour day with normal breaks; and perform
13 postural activities occasionally. (AR 81–82.) Dr. Jackson identified no manipulative, visual,
14 communicative, or environmental limitations. (AR 82.) Upon reconsideration, on March 8,
15 2014, another Disability Determination Services medical consultant, Lisa Mani, M.D., performed
16 an independent review of Plaintiff's medical records and affirmed Dr. Jackson's opinion. (AR
17 94–95.)

18 12. Nurse Practitioner James Tram FNP-BC/ Dr. Ripul Panchal, DO

19 On August 12, 2015, imaging of the c-spine revealed straightening of the spine, C4/5 with
20 left paracentral disc bulge, C5/6 central disc bulge, and C6/7 broad disc bulge. It was noted there
21 were no symptoms changes from the previous study from September 4, 2014. (AR 920.)
22 Physical examination revealed intact cranial nerves, no pronator drift, steady gait with some
23 difficulty walking heel and toe, and negative Hoffman's test. (AR 922.) Plaintiff demonstrated a
24 full range of motion of the cervical spine. NP Tram developed a care plan with Plaintiff, which
25 was later signed off on by Dr. Panchal, that included a recommendation for C-spine surgery. (AR
26 918–21.)

27 Progress notes indicate Plaintiff proceeded with “elective neurological surgery”—anterior
28 cervical discectomy and fusion surgery on his cervical spine at C4/5, C5/6, and C6/7—on

1 October 22, 2015. (AR 914–18; see also AR 933–36.)

2 On November 18, 2015, Plaintiff reported neck and upper extremity pain at a 10/10, but it
3 was advised he take some more time to for post-operative improvement. (AR 912–13.)

4 13. Medical Expert Dr. Kweli Amusa

5 Medical Expert, Dr. Amusa, testified at the September 26, 2019 hearing. Dr. Amusa
6 reviewed all of Plaintiff’s records, through Exhibit 25F (AR 1280–93 (records through April 20,
7 2016)), though the ALJ noted the period of particular relevance was between June 1, 2011 (the
8 date of alleged disability onset) and March 31, 2014 (the date last insured). (AR 1000–01.) Dr.
9 Amusa noted Plaintiff’s chronic pain related to the spine at the cervical, thoracic, and lumbar
10 levels and that multiple images—including images from 2010, 2011, 2013, and later, beyond the
11 relevant period—show varying degrees of degenerative changes at each level. (AR 1001.) Dr.
12 Amusa opined Plaintiff’s severe impairments included degenerative disc disease. Dr. Amusa
13 noted Plaintiff had thyroid cancer in 2011, which required surgery and treatment, but that this
14 condition did not last 12 months (as required by the Regulations), and was resolved after surgery.
15 (AR 1001–02.) Dr. Amusa opined Plaintiff’s hypertension was non-severe, as there was no
16 evidence in the records of any organ damage. (AR 1002.) While Plaintiff’s degenerative changes
17 to the spine were deemed severe, Dr. Amusa determined they did not meet or equal Listing 1.04
18 (disorders of the spine), because the medical record does not contain evidence of abnormalities
19 required under the Listing. (Id.) Dr. Amusa opined Plaintiff would be limited to work at the
20 sedentary level. (Id.) However, Dr. Amusa noted that, towards the end of the relevant period,
21 from 2013–2014, pain management and primary care records indicate the neck and upper
22 extremities were more problematic, despite continuing complaints of pain in the lower and mid-
23 back. (AR 1002–03.) On these records—especially the imaging, neurologic evaluation, and
24 nerve conduction studies at Exhibits 4F, 5F, 6F, 7F, and 8F (AR 411–72), as well as Plaintiff’s
25 reports of pain and findings of some weakness in the extremities—Dr. Amusa opined Plaintiff
26 could stand and walk two hours in an eight-hour day, and sit for six hours in an eight-hour day.
27 (AR 1003–04, 1007.) Dr. Amusa opined Plaintiff could never climb ladders, ropes, or scaffolds;
28 only occasionally reach overhead; only frequently reach in all other directions; only frequently

1 handle and finger (bilaterally); only occasionally operate foot controls; must avoid any
2 unprotected heights or dangerous machinery; and could tolerate only occasional exposure to any
3 uneven terrain. (AR 1003.) Based on review of Plaintiff's medical records subsequent to the
4 relevant disability period, Dr. Amusa opined Plaintiff's condition has not improved in any way
5 since March 31, 2014. (Id.)

6 With respect to Dr. Damania's opinion that Plaintiff was limited to sitting for two to four
7 hours out of an eight-hour day (AR 419), Dr. Amusa testified that such a limitation was not
8 warranted by the record. (AR 1006–07.) Specifically, Dr. Amusa noted Plaintiff did not require
9 an assistive device, and nothing in the examinations, and nothing documented in Dr. Damania's
10 report supported that sitting limitation. (AR 1007.)

11 On cross-examination by Plaintiff's attorney, Dr. Amusa also opined Plaintiff would
12 require some absence from work for doctor's visits. More specifically, Dr. Amusa noted the
13 records only indicated one visit in April 2013 (the emergency visit) which would have fallen
14 outside of the routine office visit; therefore, Dr. Amusa testified the evidence did not support an
15 average of two absences per month. When asked on cross-examination, Dr. Amusa testified that
16 Plaintiff's absences may possibly average out to one absence per month, but "I did not count."
17 (AR 1004–05.) Dr. Amusa testified that Plaintiff likely would not require an overhead reaching
18 limitation more limiting than "occasional," nor would Plaintiff require more than a "frequent"
19 limitation for the other functions because there was no evidence of radiculopathy based on the
20 objective testing of the nerves. (AR 1004–06.)

21 **C. Relevant Non-Medical Evidence**

22 1. Plaintiff's Symptom Testimony

23 In applying for benefits, Plaintiff alleged disability due to hypothyroidism, lumbar and
24 thoracic spine impairment, herniated disc, and severe back pain. (AR 176, 191–92)

25 At the October 15, 2015 hearing, Plaintiff testified that he suffers from disabling neck and
26 back pain, but his neck is the more significant issue. (AR 48.) Plaintiff testified that his neck
27 pain began around January 2013 and caused him to lose control of his fine motor skills. (Id.)
28 According to Plaintiff, he experiences a burning sensation that radiates from his jaw, down to his

1 shoulders, arms, hands, chest, and rib area and a stabbing sensation in his jaw after he eats. (AR
2 48–49.) Plaintiff takes several medications, which help alleviate the pain. (AR 49.) Plaintiff also
3 participates in pain management therapy and uses a TENS unit, which helps with the
4 inflammation. (AR 49.) Plaintiff also testified he was undergoing surgery on his neck one week
5 after testifying at the hearing in October 2015. (AR 50–51.) Plaintiff testified that the neck
6 surgery took over two years to schedule because Plaintiff does not have medical insurance. (AR
7 59.)

8 With regard to his back pain, Plaintiff testified that it started when he fell at work in 2004.
9 (AR 51.) Plaintiff stated that he feels like there is “a knife or something stuck in the middle of
10 my back all the time” and the pain radiates around his ribs to his sternum/chest area. (AR 52.)
11 The pain also radiates down his legs such that he experiences numbness and a burning sensation
12 in his legs, especially in his thighs, which is worse in his left leg. (AR 61.) However, Plaintiff
13 also testified the burning sensation has “been temporarily stuck to my shoulders and arms, but not
14 my legs” and “it’s just been numbness and sometimes shooting pain down my legs.” (AR 62.)
15 He experiences pain every day that fluctuates depending on what he is doing. (AR 52.)
16 According to Plaintiff, standing and stooping make the pain worse, but he can alleviate the pain
17 by “lean[ing] up against the wall with the flat of [his] back and lock[ing] [his] legs.” (AR 52–53.)
18 Plaintiff testified that, despite experiencing continuous pain for eleven years, he has not had any
19 surgeries performed on his back and is not receiving any treatment for his back. (AR 53.)
20 Plaintiff explained that he was waiting to complete the neck surgery before addressing his back
21 and delayed the back surgery “until technology caught up” because he felt the back surgery was
22 too invasive for the problems he was experiencing at the time. (Id.)

23 Plaintiff testified that, as a result of his neck and back pain, he can sit for a couple hours
24 before he needs to get up and move around for five to ten minutes. (AR 54–55.) He can stand for
25 around a half hour without sitting before he needs to sit for ten to fifteen minutes. (Id.) He can
26 walk a quarter mile at a time and lift five to ten pounds. (AR 55.) He does not experience any
27 side effects from his medication, other than his blood pressure medication, which sometimes
28 makes him drowsy. (AR 57.) Plaintiff testified that he was uncertain as to whether he could go

1 back to work at a job that involved mostly sitting, some standing or walking, and light lifting.
2 (AR 59.)

3 On a typical day, Plaintiff wakes up and helps his wife get ready for work. (AR 56.) He
4 is capable of independently handling his daily personal care including dressing, bathing,
5 grooming, and toileting. (AR 57.) He takes care of the animals at his house, which include three
6 dogs and a chicken, and helps with laundry and cooking. (AR 56.) When he cooks, he has
7 trouble chopping and using a knife, but he can prepare quick and simple meals. (AR 61.) He
8 does some cleaning, but no vacuuming, and he does not clean the dishes because he has broken
9 too many dishes due to his deteriorating fine motor skills. (AR 56.) Plaintiff testified that he
10 does not go shopping and has not driven for the past few months because his doctors advised that
11 he not drive until he gets surgery on his neck. (AR 47, 57.) When he leaves the house, Plaintiff
12 generally goes to visit with his in-laws who live less than a half mile away. (AR 57.)

13 Plaintiff testified he is capable of using a computer including typing and manipulating the
14 mouse, but does not have a computer because he cannot afford one. (AR 57–58, 60.) He has
15 difficulty with writing and pushing buttons, and cannot raise his arms above his shoulders. (AR
16 60–61.) His legs give out on him a couple times a month, usually after getting up from sitting
17 down for extended periods. (AR 62.) If he lays down flat, his arms and shoulders go completely
18 numb, so the most comfortable position is lying down with his upper body and legs elevated.
19 (AR 62–63.) According to Plaintiff, he sleeps four hours total each night, which is interrupted
20 every hour for him to move, and takes a nap for up to an hour in the afternoon. (AR 63.)

21 At the September 26, 2019 hearing, Plaintiff testified he hasn't driven in years, but was
22 still driving occasionally in 2013 for short trips, such as driving to the grocery store. (AR 1014–
23 15.) He testified that he did not have any difficulties or challenges at the grocery store at that
24 time. (AR 1015.) He reported he had to change positions every 20 minutes due to pain. (AR
25 1016.) Plaintiff reported he was taking pain medications (Norco), diabetes medications, and high
26 blood pressure medications, but that he no longer takes pain medications due to negative side
27 effects related to his liver. (AR 1017.) He also reported his neck pain went down his shoulders to
28 his hands. (Id.) Plaintiff testified he could only use his hands for five minutes, then would need

1 to massage them for approximately five to ten minutes because they went completely numb, “It
2 feels like I’m wearing mitts.” (AR 1017–18.) Plaintiff testified that he dropped things, and was
3 not able to carry a gallon of milk. (AR 1018.)

4 2. Lay Witness Testimony (Plaintiff’s Spouse)

5 On or around October 15, 2015, Plaintiff’s wife, Lisa McMillen, submitted a third-party
6 statement noting Plaintiff’s difficulties and pain. (AR 226–27.) She claimed Plaintiff had
7 constant pain since he injured his back in October 2004. (AR 226.) She reported a decrease in
8 Plaintiff’s activities, like camping, riding their four-wheeler, or walking the dogs, or sitting in the
9 car for prolonged periods of time, stating “[h]is quality of life is pretty much non-existent.” (Id.)
10 She also reported Plaintiff could not go grocery shopping because he could not walk very long.
11 (Id.) Mrs. McMillen reported that, since his bilateral thyroidectomy in November 2010, Plaintiff
12 had “neck pain that radiate[d] through his jaw down to his shoulders all the way to his hands and
13 fingers,” and resulted in lost dexterity and feeling in his hands. (Id.) She reported Plaintiff
14 underwent chiropractic treatment and epidural injections without relief. (Id.) She reported
15 Plaintiff’s neurologist, Dr. Joshi, advised him he had “old bones” in his back and three discs in
16 his neck pushing on his spinal cord. (Id.) She also reported Plaintiff waited nine months to see a
17 neurosurgeon at UC Davis, and he was currently awaiting surgery. (Id.)

18 3. Vocational Expert Testimony, Cheryl Chandler

19 The VE testified that her testimony was consistent with the Dictionary of Occupational
20 Titles (“DOT”) and its companion publications. (AR 1020.) She testified that Plaintiff’s prior
21 work, based on his testimony, could be characterized as “tractor trailer truck driver,” (DOT
22 904.383-010, semi-skilled, specific vocational preparation (“SVP”) level 4, medium exertion per
23 the DOT, heavy as performed), “chauffer” (DOT 359.683-010, SVP level 3, semi-skilled, light
24 exertion), and “personal attendant” (DOT 309.674-014, SVP level 3, light exertion). (AR 1020–
25 21.) The VE determined that a hypothetical person with Plaintiff’s age, education, work
26 experience, and the ability to lift/carry 10 pounds occasionally, less than 10 pounds frequently;
27 stand/walk two hours in an eight-hour day; sit for at least six hours in an eight-hour day; never
28 climb ladders/scaffolds; occasionally climb ramps/stairs; occasionally balance, stoop, crouch,

1 crawl, or kneel; occasionally reach overhead bilaterally; frequently reach in directions other than
2 overhead; frequently handle and finger bilaterally; never work at unprotected heights or around
3 dangerous machinery; occasionally operate foot controls bilaterally; and occasionally walk on
4 uneven terrain—could not perform Plaintiff’s past work. However, the VE testified that other
5 jobs did exist in the national economy that the aforementioned hypothetical person could perform,
6 such as ticket counter worker, table worker, and lens inserter. (AR 1022–23.) Finally, as to the
7 optional differences between bilateral and single extremity limitations, reaching overhead versus
8 shoulder height, and other variations of reaching, as well as time off-task, the VE testified that her
9 testimony was not based on the DOT, but on her years of training, education, and experience.
10 (AR 1024–25.)

11 **D. The ALJ Findings of Fact and Conclusions of Law**

12 The ALJ conducted the five-step disability analysis and made the following findings of
13 fact and conclusions of law as of the date of the decision, January 2, 2020 (AR 975–84):

14 At step one, the ALJ determined Plaintiff meets the insured status requirements of the
15 Social Security Act through March 31, 2014,⁶ and Plaintiff has not engaged in substantial gainful
16 activity from June 1, 2011, the alleged onset date, through his date last insured (March 31, 2014).
17 (AR 976 (citing 20 C.F.R. §§ 404.1571 et seq.).)

18 At step two, the ALJ determined Plaintiff has the following severe impairments through
19 the date last insured: degenerative disc disease and osteoporosis. (*Id.* (citing 20 C.F.R. §
20 404.1520(c).) The ALJ also noted Plaintiff had non-severe impairments of thyroid cancer (for
21 less than 12 months), hypertension, obesity, and kidney stones. These impairments were deemed
22 non-severe because the ALJ found no evidence in the medical records of functional limitations
23 resulting from these conditions, Plaintiff has not required any significant treatment for these
24 conditions, and there is no evidence that these conditions have more than a minimal effect on
25 Plaintiff’s ability to work. (*Id.*) Nonetheless, the ALJ took Plaintiff’s non-severe impairments

26
27 ⁶ A claimant must establish disability on or before the last date of disability insurance coverage in order to be entitled
28 to a period of disability and disability insurance benefits. Here, the ALJ determined from Plaintiff’s earnings records
that he acquired sufficient quarters of coverage to remain insured through March 31, 2014; Plaintiff does not dispute
that this is the “date last insured.”

1 into consideration as well. (Id.)

2 At step three, the ALJ determined Plaintiff did not, through the date last insured, have an
3 impairment or combination of impairments that meets or medically equals the severity of one of
4 the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Id. (citing 20 C.F.R. §§
5 404.1520(d); 404.1525; 404.1526).)

6 Before proceeding to step four, the ALJ determined Plaintiff has the RFC to perform:

7 **sedentary work as defined in 20 CFR 404.1567(a) except lift**
8 **and carry 10 pounds occasionally and less than 10 pounds**
9 **frequently, stand and walk 2 hours of an 8-hour day and sit for**
10 **6 hours in an 8-hour day. He can occasionally climb ramps and**
11 **stairs, balance, stoop, kneel, crouch or crawl. He cannot climb**
12 **ladders or scaffolds. He can occasionally reach overhead with**
13 **the bilateral upper extremities. He can frequently reach other**
14 **than overhead, and handle and finger with the bilateral upper**
15 **extremities. He can never work at unprotected heights or**
16 **dangerous machinery. He can only occasionally walk on uneven**
17 **terrain. He can occasionally operate foot controls with the**
18 **bilateral lower extremities.**^[7]

14 (AR 976–82 (citing 20 C.F.R. §§ 404.1529; 404.1527; SSR 16-3p, available at 2016 WL 1119029
15 (Mar. 16, 2016) (emphasis in original).)

16 At step four, the ALJ found Plaintiff was unable to perform any past relevant work. (AR
17 983 (citing 20 C.F.R. § 404.1565).)

18 At step five, the ALJ noted Plaintiff was born on March 22, 1972, and was 42 years old
19 (which is defined as a younger individual age 18–44) on the date last insured, Plaintiff has at least
20 a high school education and is able to communicate in English; and transferability of job skills is
21 not material to the determination of disability because using the Medical-Vocational Rules as a
22 framework supports a finding that Plaintiff is “not disabled,” whether or not Plaintiff has
23 transferrable job skills. (Id. (citing 20 C.F.R. §§ 404.1563; 404.1564; SSR 82-41, available at
24 1982 WL 31389 (Jan. 1, 1982); 20 C.F.R. Part 404, Subpart P, Appendix 2).) Considering

25 _____
26 ⁷ The Court notes this RFC is markedly similar to the RFC determination reached by Judge Misenti during the
27 original social security case. (See AR 29.) However, the instant RFC includes additional limitations, such as
28 reducing the lift/carry restriction from 20 pounds occasionally to 10 pounds occasionally; reducing the prior
restriction of occasionally working around moving mechanical parts to never doing so; and adding new restrictions
limiting Plaintiff to occasional overhead reaching, frequent reaching in other directions, and frequent
handling/fingering.

1 Plaintiff's age, education, work experience, and RFC, the ALJ determined there were jobs that
2 existed in significant numbers in the national economy that Plaintiff could have performed
3 through the date last insured, such as:

- 4 • Ticket Counter Worker (DOT 219.587-010), a sedentary work position with an SVP level
5 of 2, and approximately 50,000 jobs available in the national economy;
- 6 • Table Worker (DOT 739.687-182), a sedentary work position with an SVP level of 2, and
7 approximately 2,000 jobs available in the national economy; and
- 8 • Lens Inserter (DOT 713.687-026), a sedentary work position with an SVP level of 2, and
9 approximately 50,000 jobs available in the national economy.

10 (AR 983–84 (citing 20 C.F.R. §§ 404.1569; 404.1569(a); 20 C.F.R. Part 404, Subpart P,
11 Appendix 2; SSR 83-11, available at 1983 WL 31252 (Jan. 1, 1983); SSR 83-12, available at
12 1983 WL 31253 (Jan. 1, 1983); SSR 83-14, available at 1983 WL 31254 (Jan. 1, 1983); SSR 85-
13 15, available at 1985 WL 56857 (Jan. 1, 1985)).) To determine the extent to which Plaintiff's
14 limitations erode the unskilled sedentary occupational base, through the date last insured, the ALJ
15 asked the VE whether jobs existed in the national economy for an individual with Plaintiff's age,
16 education, work experience, and RFC. (AR 983–84.) With respect to the identified jobs, the ALJ
17 noted the VE's testimony was consistent with the DOT and otherwise properly based on the VE's
18 experience and expertise. (AR 984.)

19 Therefore, the ALJ found Plaintiff has not been under a disability, as defined in the Social
20 Security Act, at any time from June 1, 2011 (the alleged onset date), through March 31, 2014 (the
21 date last insured). (Id. (citing 20 C.F.R. § 404.1520(g)).)

22 III.

23 LEGAL STANDARD

24 A. The Disability Standard

25 To qualify for disability insurance benefits under the Social Security Act, a claimant must
26 show he is unable “to engage in any substantial gainful activity by reason of any medically
27 determinable physical or mental impairment⁸ which can be expected to result in death or which

28 ⁸ A “physical or mental impairment” is one resulting from anatomical, physiological, or psychological abnormalities

1 has lasted or can be expected to last for a continuous period of not less than 12 months.” 42
2 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five-step sequential evaluation
3 process to be used in determining if a claimant is disabled. 20 C.F.R. § 404.1520;⁹ Batson v.
4 Comm’r of Soc. Sec. Admin., 359 F.3d 1190, 1194 (9th Cir. 2004). The five steps in the
5 sequential evaluation in assessing whether the claimant is disabled are:

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

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

10 Step three: Does the claimant’s impairment, or combination of
11 impairments, meet or equal an impairment listed in 20 C.F.R., pt.
12 404, subpt. P, app. 1? If so, the claimant is disabled. If not,
13 proceed to step four.

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

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

18 Stout v. Comm’r, Soc. Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006). The burden of proof is
19 on the claimant at steps one through four. Ford v. Saul, 950 F.3d 1141, 1148 (9th Cir. 2020). A
20 claimant establishes a *prima facie* case of qualifying disability once he has carried the burden of
21 proof from step one through step four.

22 Before making the step four determination, the ALJ first must determine the claimant’s
23 RFC. 20 C.F.R. § 416.920(e); Nowden v. Berryhill, No. EDCV 17-00584-JEM, 2018 WL
24 1155971, at *2 (C.D. Cal. Mar. 2, 2018). The RFC is “the most [one] can still do despite [his]

25 that are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. 42 U.S.C. § 423(d)(3).

26 ⁹ The regulations which apply to disability insurance benefits, 20 C.F.R. §§ 404.1501 et seq., and the regulations
27 which apply to SSI benefits, 20 C.F.R. §§ 416.901 et seq., are generally the same for both types of benefits.
28 Accordingly, while Plaintiff seeks only Social Security benefits under Title II in this case, to the extent cases cited
herein may reference one or both sets of regulations, the Court notes these cases and regulations are applicable to the
instant matter.

1 limitations” and represents an assessment “based on all the relevant evidence.” 20 C.F.R. §§
2 404.1545(a)(1); 416.945(a)(1). The RFC must consider all of the claimant’s impairments,
3 including those that are not severe. 20 C.F.R. §§ 416.920(e); 416.945(a)(2); Social Security
4 Ruling (“SSR”) 96-8p, available at 1996 WL 374184 (Jul. 2, 1996).¹⁰ A determination of RFC is
5 not a medical opinion, but a legal decision that is expressly reserved for the Commissioner. See
6 20 C.F.R. §§ 404.1527(d)(2) (RFC is not a medical opinion); 404.1546(c) (identifying the ALJ as
7 responsible for determining RFC). “[I]t is the responsibility of the ALJ, not the claimant’s
8 physician, to determine residual functional capacity.” Vertigan v. Halter, 260 F.3d 1044, 1049
9 (9th Cir. 2001).

10 At step five, the burden shifts to the Commissioner, who must then show that there are a
11 significant number of jobs in the national economy that the claimant can perform given his RFC,
12 age, education, and work experience. 20 C.F.R. § 416.912(g); Lounsbury v. Barnhart, 468 F.3d
13 1111, 1114 (9th Cir. 2006). To do this, the ALJ can use either the Medical Vocational Guidelines
14 (“grids”), or rely upon the testimony of a VE. See 20 C.F.R. § 404 Subpt. P, App. 2; Lounsbury,
15 468 F.3d at 1114; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). “Throughout the
16 five-step evaluation, the ALJ is responsible for determining credibility, resolving conflicts in
17 medical testimony, and for resolving ambiguities.’ ” Ford, 950 F.3d at 1149 (quoting Andrews v.
18 Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)).

19 **B. Standard of Review**

20 Congress has provided that an individual may obtain judicial review of any final decision
21 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g). In
22 determining whether to reverse an ALJ’s decision, the Court reviews only those issues raised by
23 the party challenging the decision. See Lewis v. Apfel, 236 F.3d 503, 517 n.13 (9th Cir. 2001).
24 Further, the Court’s review of the Commissioner’s decision is a limited one; the Court must find
25 the Commissioner’s decision conclusive if it is supported by substantial evidence. 42 U.S.C. §

26 _____
27 ¹⁰ SSRs are “final opinions and orders and statements of policy and interpretations” issued by the Commissioner. 20
28 C.F.R. § 402.35(b)(1). While SSRs do not have the force of law, the Court gives the rulings deference “unless they
are plainly erroneous or inconsistent with the Act or regulations.” Han v. Bowen, 882 F.2d 1453, 1457 (9th Cir.
1989); see also Avenetti v. Barnhart, 456 F.3d 1122, 1124 (9th Cir. 2006).

1 405(g); Biestek v. Berryhill, 139 S. Ct. 1148, 1153 (2019). “Substantial evidence is relevant
2 evidence which, considering the record as a whole, a reasonable person might accept as adequate
3 to support a conclusion.” Thomas v. Barnhart (Thomas), 278 F.3d 947, 954 (9th Cir. 2002)
4 (quoting Flaten v. Sec’y of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)); see also
5 Dickinson v. Zurko, 527 U.S. 150, 153 (1999) (comparing the substantial-evidence standard to
6 the deferential clearly-erroneous standard). “[T]he threshold for such evidentiary sufficiency is
7 not high.” Biestek, 139 S. Ct. at 1154. Rather, “[s]ubstantial evidence means more than a
8 scintilla, but less than a preponderance; it is an extremely deferential standard.” Thomas v.
9 CalPortland Co. (CalPortland), 993 F.3d 1204, 1208 (9th Cir. 2021) (internal quotations and
10 citations omitted); see also Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996). Even if the
11 ALJ has erred, the Court may not reverse the ALJ’s decision where the error is harmless. Stout,
12 454 F.3d at 1055–56. Moreover, the burden of showing that an error is not harmless “normally
13 falls upon the party attacking the agency’s determination.” Shinseki v. Sanders, 556 U.S. 396,
14 409 (2009).

15 Finally, “a reviewing court must consider the entire record as a whole and may not affirm
16 simply by isolating a specific quantum of supporting evidence.” Hill v. Astrue, 698 F.3d 1153,
17 1159 (9th Cir. 2012) (quoting Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)).
18 Nor may the Court affirm the ALJ on a ground upon which she did not rely; rather, the Court may
19 review only the reasons stated by the ALJ in her decision. Orn v. Astrue, 495 F.3d 625, 630 (9th
20 Cir. 2007); see also Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003). Nonetheless, it is not
21 this Court’s function to second guess the ALJ’s conclusions and substitute the Court’s judgment
22 for the ALJ’s; rather, if the evidence “is susceptible to more than one rational interpretation, it is
23 the ALJ’s conclusion that must be upheld.” Ford, 950 F.3d at 1154 (quoting Burch v. Barnhart,
24 400 F.3d 676, 679 (9th Cir. 2005)).

25 IV.

26 DISCUSSION

27 Plaintiff raises five issues on appeal, which the Court characterizes as follows: (1) whether
28 the ALJ provided specific, clear, and convincing reasons for discounting Plaintiff’s pain

1 allegations; (2) whether the ALJ provided specific and legitimate reasons for discounting the
2 medical opinions of (a) treating physicians Pam Rico and Kathleen Baron, and (b)
3 examining/consulting physician Rustom Damania; (3) whether the ALJ provided germane
4 reasons for discounting the lay witness statement; and (4) whether the ALJ resolved any apparent
5 inconsistencies between the VE’s testimony and the DOT. (ECF No. 15 at 11–27.)

6 **A. Evaluation of Plaintiff’s Pain Allegations**

7 Plaintiff argues the ALJ failed to identify specific, clear, and convincing reasons for
8 discounting Plaintiff’s allegations of pain and physical dysfunction. (Id. at 11–18.)

9 1. Legal Standard¹¹

10 The ALJ is responsible for determining credibility,¹² resolving conflicts in medical
11 testimony, and resolving ambiguities. Andrews, 53 F.3d at 1039. A claimant’s statements of
12 pain or other symptoms are not conclusive evidence of a physical or mental impairment or
13 disability. 42 U.S.C. § 423(d)(5)(A); SSR 16-3p; see also Orn, 495 F.3d at 635 (“An ALJ is not
14 required to believe every allegation of disabling pain or other non-exertional impairment.”).

15 Rather, an ALJ performs a two-step analysis to determine whether a claimant’s testimony
16 regarding subjective pain or symptoms is credible. See Garrison v. Colvin, 759 F.3d 995, 1014
17 (9th Cir. 2014); Smolen, 80 F.3d at 1281; SSR 16-3p, at *3. First, the claimant must produce
18 objective medical evidence of an impairment that could reasonably be expected to produce some
19 degree of the symptom or pain alleged. Garrison, 759 F.3d at 1014; Smolen, 80 F.3d at 1281–82.
20 If the claimant satisfies the first step and there is no evidence of malingering, “the ALJ may reject
21 the claimant’s testimony about the severity of those symptoms only by providing specific, clear,
22

23 ¹¹ Although Defendant emphasizes disagreement with the “clear and convincing reasons” standard in order to
24 preserve the issue for future appeals, Defendant acknowledges the clear and convincing reasons standard is part of
25 this Circuit’s law, and argues the ALJ’s reasons suffice under any standard. (ECF No. 24 at 12 n.6.) The Court
26 further notes that, subsequent to the filings in this case, the Ninth Circuit provided additional clarification regarding
27 this issue in Smartt v. Kijakazi, in which the appellate court indicated that the specific, clear, and convincing reasons
28 requirement must fit within the overall substantial evidence standard. Smartt, 53 F.4th 489, 499 (9th Cir. 2022)
(holding clear and convincing standard is the applicable standard for weighing credibility in the Ninth Circuit).

¹² SSR 16-3p applies to disability applications heard by the agency on or after March 28, 2016. Ruling 16-3p
eliminated the use of the term “credibility” to emphasize that subjective symptom evaluation is not “an examination
of an individual’s character” but an endeavor to “determine how symptoms limit ability to perform work-related
activities.” SSR 16-3p, at *1-2.

1 and convincing reasons for doing so.” Lambert v. Saul, 980 F.3d 1266, 1277 (9th Cir. 2020)
2 (citations omitted).

3 If an ALJ finds that a claimant’s testimony relating to the intensity
4 of his pain and other limitations is unreliable, the ALJ must make a
5 credibility determination citing the reasons why the testimony is
6 unpersuasive. The ALJ must specifically identify what testimony is
7 credible and what testimony undermines the claimant’s complaints.
8 In this regard, questions of credibility and resolutions of conflicts in
9 the testimony are functions solely of the Secretary.

10 Valentine v. Astrue, 574 F.3d 685, 693 (9th Cir. 2009) (quotation omitted); see also Lambert, 980
11 F.3d at 1277.

12 Subjective pain testimony “cannot be rejected on the sole ground that it is not fully
13 corroborated by objective medical evidence.” See Vertigan, 260 F.3d at 1049 (“The fact that a
14 claimant’s testimony is not fully corroborated by the objective medical findings, in and of itself,
15 is not a clear and convincing reason for rejecting it.”); see also 20 C.F.R. § 404.1529(c)(2) (“[W]e
16 will not reject your statements about the intensity and persistence of your pain or other symptoms
17 or about the effect your symptoms have on your ability to work solely because the available
18 objective medical evidence does not substantiate your statements.”). Rather, where a claimant’s
19 symptom testimony is not fully substantiated by the objective medical record, the ALJ must
20 provide an additional reason for discounting the testimony. See Burch, 400 F.3d at 680–81; see
21 also Stobie v. Berryhill, 690 Fed. App’x 910, 911 (9th Cir. 2017) (finding ALJ gave two specific
22 and legitimate clear and convincing reasons for rejecting symptom testimony: (1) insufficient
23 objective medical evidence to establish disability during the insured period; and (2) symptom
24 testimony conflicted with the objective medical evidence).

25 Nevertheless, the medical evidence “is still a relevant factor in determining the severity of
26 [the] claimant’s pain and its disabling effects.” Burch, 400 F.3d at 680–81; Rollins v. Massanari,
27 261 F.3d 853, 857 (9th Cir. 2001); SSR 16-3p (citing 20 C.F.R. § 404.1529(c)(2)). Indeed, Ninth
28 Circuit caselaw has distinguished testimony that is “uncorroborated” by the medical evidence
from testimony that is “contradicted” by the medical records, deeming the latter sufficient on its
own to meet the clear and convincing standard. See Hairston v. Saul, 827 Fed. App’x 772, 773
(9th Cir. 2020) (quoting Carmickle v. Comm’r, Soc. Sec. Admin., 533 F.3d 1155, 1160 (9th Cir.

1 2008) (affirming ALJ’s determination claimant’s testimony was “not entirely credible” based on
2 contradictions with medical opinion)) (“[c]ontradiction with the medical record is a sufficient
3 basis for rejecting the claimant’s subjective testimony.”); see also Woods v. Comm’r of Soc. Sec.
4 (Woods I), No. 1:20-cv-01110-SAB, 2022 WL 1524772, at *10 n.4 (E.D. Cal. May 13, 2022)
5 (“While a *lack* of objective medical evidence may not be the sole basis for rejection of symptom
6 testimony, inconsistency with the medical evidence or medical opinions can be sufficient.”
7 (emphasis in original)).

8 Additional factors an ALJ may consider include the location, duration, and frequency of
9 the pain or symptoms; factors that cause or aggravate the symptoms; the type, dosage,
10 effectiveness or side effects of any medication; other measures or treatment used for relief;
11 conflicts between the claimant’s testimony and the claimant’s conduct—such as daily activities,
12 work record, or an unexplained failure to pursue or follow treatment—as well as ordinary
13 techniques of credibility evaluation, such as the claimant’s reputation for lying, internal
14 contradictions in the claimant’s statements and testimony, and other testimony by the claimant
15 that appears less than candid. See Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014);
16 Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008); Lingenfelter v. Astrue, 504 F.3d
17 1028, 1040 (9th Cir. 2007); Smolen, 80 F.3d at 1284. Thus, the ALJ must examine the record as
18 a whole, including objective medical evidence; the claimant’s representations of the intensity,
19 persistence and limiting effects of his symptoms; statements and other information from medical
20 providers and other third parties; and any other relevant evidence included in the individual’s
21 administrative record. SSR 16-3p, at *5.

22 Finally, so long as substantial evidence supports the ALJ’s assessment of a claimant’s
23 subjective complaint, the Court “will not engage in second-guessing.” Thomas, 278 F.3d at 959.

24 2. Analysis

25 Here, the ALJ noted Plaintiff’s original allegations of disability due to hypothyroidism,
26 lumbar and thoracic spine impairment, herniated disc, and severe back pain; and compared
27 Plaintiff’s 2015 testimony with his testimony from the September 26, 2019 hearing. (AR 977.)
28 The ALJ noted Plaintiff originally testified he had not been driving (per advice from a

1 neurosurgeon, until he got his neck operated on) starting in January 2013; but later testified he
2 had not driven in years but was still driving occasionally in 2013. The ALJ also noted Plaintiff
3 testified in 2015 that he had no control of his hands and arms; had difficulty stooping; could sit
4 comfortably; and could only stand for 30 minutes, walk half a mile, and lift five to ten pounds;
5 whereas the ALJ noted in 2019, Plaintiff testified that he had to change positions every 20
6 minutes due to pain; and he could use his hands for only five minutes. (AR 977, 982.)

7 Upon review of the evidence on file, the ALJ concluded Plaintiff’s severe impairments
8 included degenerative disc disease and osteoporosis; but Plaintiff’s other reported impairments—
9 hypertension, obesity, kidney stones, and thyroid cancer (which lasted less than 12 months)—
10 were non-severe. (AR 976.) Plaintiff has not challenged this finding.¹³ The ALJ concluded
11 Plaintiff’s medically determinable impairments could reasonably be expected to cause the alleged
12 symptoms; however, the ALJ found Plaintiff’s statements concerning the intensity, persistence
13 and limiting effects of his symptoms, “to the extent they are inconsistent with the [RFC
14 assessment], which does incorporate certain limitations that are well supported by the medical
15 evidence of record,” are “not entirely consistent with the medical evidence and other evidence in
16 the record,” and are “not credible.” (AR 977, 982.) More specifically, the ALJ reached an
17 adverse credibility determination because she found Plaintiff’s testimony was inconsistent with
18 (1) the objective medical evidence of record, (2) Plaintiff’s activities of daily living (“ADLs”),
19 and (3) his ability to effectively manage his symptoms using conservative treatment methods
20 without hospitalization or surgery. (AR 977–82.) Plaintiff challenges these findings.

21 **a. Allegations Inconsistent with the Objective Medical Evidence**

22 One reason the ALJ provided for discounting Plaintiff’s subjective complaints is that
23 Plaintiff’s testimony is inconsistent with and unsupported by the objective medical evidence. The
24 ALJ noted that Plaintiff’s MRI results revealed many “mild” findings in addition to the findings
25 of disc bulges and mild to moderate narrowing of lateral recesses, such as mild spinal cord
26 encroachment and mild degenerative disc disease. (AR 978 (citing AR 888 (2005 MRI of

27 ¹³ See Lewis, 236 F.3d at 517 n.13; Indep. Towers of Wash. v. Wash., 350 F.3d 925, 929 (9th Cir. 2003) (stating
28 court “will not consider any claims that were not actually argued in appellant’s opening brief” and will only “review
... issues which are argued specifically and distinctly in a party’s opening brief.”).

1 thoracic spine, slight dorsal spinal cord displacement at T7-8 and intermittent mild spinal cord
2 encroachment); AR 355, 505–07, 886–87 (Jul. 20, 2010 MRI of thoracic spine, mild degenerative
3 disc disease, prominent posterior disc bulge at T8-T9 without spinal stenosis or neural
4 impingement, and no acute or subacute compression fractures) AR 353, 885; (July 2010 MRI of
5 lumbar spine, moderate central disc bulge at L4-L5 with minimal degenerative disc disease); AR
6 290, 880 (August 2011 MRI of thoracic spine was “normal”); AR 255, 877 (October 2011 MRI
7 of thoracic spine revealed mild degenerative changes); AR 459–60 (Nov. 13, 2013 MRIs of
8 cervical and thoracic spine revealed mild degenerative changes); AR 452–53 (Dec. 11, 2013
9 MRIs showed degenerative changes, mild impression on ventral surface of spinal cord, mild
10 chronic anterior wedging)).) The ALJ also noted Plaintiff had a total thyroidectomy in November
11 2010, after which his pathology was “benign.” (Id. (citing AR 290, 880).)

12 The ALJ also noted Plaintiff’s “normal” examination results, such as when Plaintiff
13 visited the emergency room on April 23, 2013 for complaints of neck and shoulder pain, but
14 demonstrated no acute distress, normal range of motion, normal strength, no swelling or
15 deformity, no focal neurological deficits, and Plaintiff was told to take Ibuprofen for pain. (Id.
16 (citing AR 437).) In another example, the ALJ noted NP Rico examined Plaintiff on February 13,
17 2014, noting Plaintiff was “angry he was not getting the benefits he was entitled to get” because
18 he was given a 20% disability from Worker’s Compensation, and finding that, even though
19 Plaintiff had cervical spine and upper shoulder area spasms, and weakness to upper extremity
20 grips, Plaintiff also presented as well developed, in no acute distress, had a steady gait, changed
21 positions with ease, and had normal full range of motion of all joints. (AR 979 (citing AR 489).)
22 In yet another example, the ALJ noted NP Rico explained to Plaintiff during a March 2014
23 appointment that his MRI findings were not severe enough to warrant surgery, and Plaintiff was
24 encouraged to participate in physical therapy. (Id. (citing AR 672).) The ALJ noted several of
25 such examinations, in which “essentially normal” findings were revealed. (AR 979–80 (citing,
26 e.g., AR 478 (May 2014 “essentially normal” physical examination); AR 672 (NP Rico noted
27 essentially normal physical examination); AR 468–70 (Apr. 30, 2014 examination revealed
28 normal muscle strength and tone, sensation, and reflexes); AR 465–67 (August 2014 exam,

1 same); AR 463–64 (Oct. 1, 2014 exam, same); AR 472 (Jul. 28, 2014 nerve conduction studies
2 showed normal median nerves and no evidence of compression neuropathy, polyneuropathy or
3 ongoing cervical radiculopathy); AR 843–44 (Sept. 2014 MRI revealed no changes from Dec.
4 2013 MRI); AR 363 (Jun. 2010 normal physical exam)).) The ALJ’s reference to this medical
5 evidence is sufficiently specific, and supports the ALJ’s finding that Plaintiff’s symptom
6 testimony was inconsistent with the objective medical evidence. See Smartt, 53 F.4th at 498
7 (“When objective medical evidence in the record is *inconsistent* with the claimant’s subjective
8 testimony, the ALJ may indeed weigh it as undercutting such testimony”) (emphasis in original).

9 Furthermore, the ALJ noted Plaintiff’s allegations were inconsistent with the medical
10 opinion evidence. As discussed in greater detail herein, the ALJ accorded great weight to Dr.
11 Amusa’s opinion, which included a limitation for standing/walking for two hours in an eight-hour
12 day. (AR 1003–04, 1007.) This limitation is inconsistent with Plaintiff’s testimony that he can
13 only stand for 30 minutes. (See AR 54–55.) This also constitutes a clear and convincing reason
14 for the ALJ to discount Plaintiff’s pain allegations. See Carmickle, 533 F.3d at 1160 (affirming
15 ALJ’s finding that claimant’s testimony that he could only lift ten pounds occasionally was “not
16 entirely credible” based on contradictions with medical opinions that he could lift ten pounds
17 frequently and 20 pounds occasionally); see also Stubbs-Danielson v. Astrue, 539 F.3d 1169,
18 1175 (9th Cir. 2008) (affirming the ALJ’s rejection of claimant’s subjective allegations in part
19 because of the medical opinions and prior administrative findings); SSR 16-3p (“State agency
20 medical and psychological consultants and other program physicians and psychologists may offer
21 findings about the existence and severity of an individual’s symptoms. We will consider these
22 findings in evaluating the intensity, persistence, and limiting effects of the individual’s
23 symptoms.”).

24 In challenging the ALJ’s findings, Plaintiff argues the diagnostic and examination
25 evidence did not support Plaintiff’s symptom allegations, that the ALJ’s characterization of the
26 medical records as including “mild” and “normal” findings was inaccurate, and he points to
27 various records in support of his allegations of debilitating neck and back pain with radicular
28 symptoms. (ECF No. 15 at 15–17.) For example, Plaintiff argues that imagining of Plaintiff’s

1 cervical spine showed multiple cord impingements, which seemed to account for Plaintiff’s pain.
2 (AR 850); MRIs showed multilevel disc protrusions compressing or indenting the spinal cord
3 (AR 844, 907); neurosurgical evidence of decreased sensation along cervical and lumbar nerve
4 distributions (AR 731); upper extremity weakness (AR 617–18, 628, 645, 656, 662, 672–73, 679,
5 685, 692, 699, 705, 712, 738, 745, 751, 853, 860); a CT scan of the thoracic spine showed
6 significant herniation, and a Myelogram showed impingement at T7-8 with ventral cord
7 effacement (AR 352); and Dr. Smith noted Plaintiff had a new disc rupture at L4-5 in October
8 2011, with right L5 and S1 nerve root compression, and he observed diminished sensation in
9 Plaintiff’s L5 nerve distribution (AR 241–42).

10 However, “[e]ven assuming without deciding that the medical evidence could support
11 conflicting inferences, the court must defer to the Commissioner where the evidence is
12 susceptible to more than one rational interpretation.” Quinones v. Astrue, No. CV 08-7225 AGR,
13 2009 WL 3122880, at *3 (C.D. Cal. Sept. 25, 2009) (citing Moncada v. Chater, 60 F.3d 521, 523
14 (9th Cir. 1995)); see also Andrews, 53 F.3d at 1039 (“The ALJ is responsible for determining
15 credibility, resolving conflicts in medical testimony, and for resolving ambiguities.”). Here,
16 Plaintiff cites to much of the same evidence identified and discussed by the ALJ, but merely
17 offers an alternative rational interpretation of the records. As previously noted, this is not
18 sufficient to establish reversible error and the Court “will not engage in second-guessing.”
19 Thomas, 278 F.3d at 959; Ford, 950 F.3d at 1154; Burch, 400 F.3d at 679; see also Davis v.
20 Berryhill, 736 Fed. App’x 662, 665 (9th Cir. 2018) (“Though [the claimant] may disagree with
21 the ALJ’s interpretation of the record, the latter’s interpretation is supported by substantial
22 evidence, which precludes the Court from engaging in second-guessing.”).

23 Importantly, the Court notes the ALJ’s adverse credibility determination does not indicate
24 a complete rejection of Plaintiff’s pain allegations. To the contrary, the ALJ carefully considered
25 Plaintiff’s allegations and the objective medical evidence supporting much of Plaintiff’s pain
26 testimony (see AR 977–82); this is reflected in the RFC determination, which limits Plaintiff to
27 sedentary work only, plus several additional functional restrictions, such as lift/carry limitations,
28 stand/walk limitations, sitting limitations, reaching limitations, and handling/fingering limitations.

1 (AR 976–77.) Thus, in noting Plaintiff’s testimony of debilitating symptoms was inconsistent
2 with the record, the ALJ expressly noted her finding that Plaintiff’s testimony was inconsistent
3 with the record “to the extent [it is] inconsistent with the [limitations already included in the RFC
4 assessment], which does incorporate certain limitations that are well supported by the medical
5 evidence of record.” (AR 977, 982.)

6 Thus, the Court finds the ALJ’s reference to the medical records to identify
7 inconsistencies in Plaintiff’s testimony constitutes a specific, clear, and convincing reason
8 supported by substantial evidence in the record that supports the ALJ’s adverse credibility
9 determination.¹⁴ Lambert, 980 F.3d at 1277; Hairston, 827 Fed. App’x at 773; Carmickle, 533
10 F.3d at 1160; Woods I, 2022 WL 1524772, at *10 n.4.

11 **b. Activities of Daily Living**

12 Another reason the ALJ provided for discounting Plaintiff’s testimony was his ADLs. As
13 the ALJ noted, Plaintiff testified at the 2015 hearing that he read books and magazines regularly
14 and could use a computer, which was at odds with his complaints of limited use of his hands.
15 (AR 57–58, 60, 982.) The ALJ also noted Plaintiff was able to run errands to the post office or
16 grocery store without assistance, drove a car, and was able to do light housekeeping, take care of
17 three dogs and a chicken, engage in personal care, do some cleaning, help cook, visit with family,
18 and go fishing. (AR 56–58, 191–92, 982.) On this record, the ALJ concluded that Plaintiff’s
19 activities cut against his allegations of totally disabling symptoms. (AR 982.)

20 Plaintiff takes issue with the ALJ’s finding regarding his ADLs and argues the ALJ

21 ¹⁴ The Court notes Defendant additionally argues that, under the law of the case doctrine, the district court’s
22 determination in Plaintiff’s first appeal that the ALJ provided sufficient clear and convincing reasons for discounting
23 Plaintiff’s symptom testimony should similarly be upheld here. (See ECF No. 18 at 11–12.) The Ninth Circuit has
24 applied the law of the case doctrine to the social security context. See Stacy v. Colvin, 825 F.3d 563, 567 (9th Cir.
25 2016). The court cautioned the doctrine should not be applied when the evidence on remand is substantially
26 different, when the controlling law has changed, or when applying the doctrine would be unjust. Id. Here, Plaintiff
27 originally appealed a decision set forth by a different ALJ than the one who authored the decision presently on
28 appeal, the ALJs identified different severe impairments and limitations in Plaintiff’s RFC determinations, and the
second ALJ had additional medical evidence in the record to consider, as well as Plaintiff’s testimony from the
second administrative hearing, and new testimony from a medical expert. Therefore, while the Court notes both
decisions require application of the same legal standards, both decisions relied upon largely the same medical record,
and there are striking similarities between the two decisions as to this issue, it declines to apply the law of the case
doctrine to the instant issue. In any event, the Court has concluded the current ALJ’s decision sets forth clear and
convincing reasons that are adequately supported by substantial evidence from the record to reach an adverse
credibility determination against Plaintiff.

1 overstated his activities and failed to elaborate on how these activities contradicted his testimony.
2 (ECF No. 15 at 17–18.) For example, while Plaintiff reported he used a computer, he also
3 testified that he did not own one. (AR 58.) Plaintiff also argues his wife reported he could not go
4 grocery shopping because he could not walk very long, and he could not sit in the car for
5 prolonged periods of time. (AR 226.) Thus, Plaintiff argues, the record indicates Plaintiff’s
6 activities were less expansive than the ALJ indicated. However, the Court finds the ALJ
7 sufficiently identified “which daily activities conflicted with which part of Claimant’s testimony.”
8 Burrell v. Colvin, 775 F.3d 1133, 1138 (9th Cir. 2014) (emphasis removed). Specifically, the
9 ALJ explained Plaintiff’s claim that he had limited use of his hands conflicted with his ability to
10 regularly read books and magazines and use a computer. (AR 30.) Plaintiff’s testimony is
11 inconsistent with his activities of daily living because if Plaintiff could not control his fingers and
12 felt like he was wearing mitts, as he testified (AR 48, 60), he would not be able to regularly pick
13 up and read books and magazines or push the buttons on a keyboard when using a computer.
14 Accordingly, the ALJ properly found that Plaintiff’s testimony of debilitating fine motor skills
15 conflicted with his daily activities. This finding constitutes a clear and convincing reason to
16 support the ALJ’s credibility determination. Molina v. Astrue, 674 F.3d 1104, 1112–13 (9th Cir.
17 2012), superseded by regulation on other grounds; Valentine, 574 F.3d at 693.

18 Furthermore, Ninth Circuit caselaw demonstrates that ADLs may be grounds for
19 discounting allegations that an impairment is so severe it is totally debilitating, even if such
20 activities are not directly transferrable to a work setting. See Molina, 674 F.3d at 1112–13
21 (noting “the ALJ may discredit a claimant’s testimony when the claimant reports participation in
22 everyday activities indicating capacities that are transferrable to a work setting ... Even where
23 those activities suggest some difficulty functioning, they may be grounds for discrediting the
24 claimant’s testimony to the extent that they contradict claims of a totally debilitating
25 impairment.”) (internal citations omitted); see also Fair v. Bowen, 885 F.2d 597, 604 (9th Cir.
26 1989) (affirming the ALJ’s decision where the claimant’s allegations were inconsistent with
27 activities of personal care, shopping, chores, riding public transportation, and driving); Burch,
28 400 F.3d at 680 (finding the ALJ properly discounted the claimant’s allegations where the

1 claimant’s activities suggest higher functionality, including caring for personal needs, cooking,
2 cleaning, shopping, and interacting with family). As the Ninth Circuit has explained, “[e]ven
3 where those activities suggest some difficulty functioning, they may be grounds for discrediting
4 the claimant’s testimony to the extent that they contradict claims of a totally debilitating
5 impairment.” Molina, 674 F.3d at 1113; Valentine, 574 F.3d at 694 (while daily activities “did
6 not suggest [Plaintiff] could return to his old job [they] did suggest that [Plaintiff’s] later claims
7 about the severity of his limitations were exaggerated”). Thus, even if Plaintiff’s activities were
8 not particularly extensive, the ALJ’s conclusion that he was not as limited as he claimed was a
9 reasonable and valid basis for discounting his allegations.

10 In Valentine v. Astrue, for example, the ALJ determined the claimant “demonstrated
11 better abilities than he acknowledged in his written statements and testimony” and that his “non-
12 work activities ... are inconsistent with the degree of impairment he alleges.” Valentine, 574
13 F.3d at 693. The ALJ further remarked on the claimant’s ADLs, but acknowledged these
14 activities did not suggest that the claimant could return to his old job. Id. Instead, the ALJ
15 indicated she thought the ADLs suggested the claimant’s later claims about the severity of his
16 limitations were exaggerated. Id. The Ninth Circuit found the ALJ provided clear and
17 convincing reasons to reject the claimant’s subjective complaint testimony because she identified
18 evidence that directly contradicted the claimant’s claims that his PTSD was so severe that he was
19 unable to work, including contentions about how debilitating his fatigue was. Id. Thus, as
20 demonstrated, evidence of ADLs need not directly contradict or disprove a specific alleged
21 limitation, but may cut against the ultimate claim of disability based on the allegation that
22 impairments are “totally debilitating.” Here, the ALJ found the aforementioned ADLs constituted
23 activities that were inconsistent with Plaintiff’s allegations of total disability. Importantly, the
24 substantial evidence inquiry “defers to the presiding ALJ, who has seen the hearing up close.”
25 Biestek, 139 S. Ct. at 1157. Here, the Court cannot say that the ALJ’s interpretation of the
26 available evidence was not rational, Shaibi v. Berryhill, 883 F.3d 1102, 1108 (9th Cir. 2017);
27 therefore, it will not disturb the ALJ’s findings. See also Burch, 400 F.3d at 680–81 (the ALJ is
28 the fact-finder, and is entitled to choose between competing interpretations of the record); Rollins,

1 261 F.3d at 857 (affirming ALJ’s credibility determination even where the claimant’s testimony
2 was somewhat equivocal about how regularly she was able to keep up with all of the activities
3 and noting that the ALJ’s interpretation “may not be the only reasonable one”).

4 **c. Conservative Treatment/Lack of Treatment**

5 Evidence that a claimant’s medical treatment was relatively conservative may properly be
6 considered in evaluating a claimant’s subjective complaints. See Tommasetti, 533 F.3d at 1039–
7 40; Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (“[E]vidence of ‘conservative treatment’ is
8 sufficient to discount a claimant’s testimony regarding severity of an impairment.”) (citation
9 omitted). The ALJ noted that Plaintiff “has never undergone surgery or hospitalization and has
10 managed conservatively with scant evidence of medical treatment during the last several years.”¹⁵
11 (AR 982.) Providing other examples, the ALJ noted that, in January 2011, Plaintiff reported his
12 pain was “fairly well controlled” with medication (AR 980 (citing AR 307)); when Plaintiff went
13 to the emergency room in April 2013 complaining of neck and shoulder pain, he was only treated
14 with Ibuprofen (AR 978 (citing AR 429, 437)); and when Plaintiff was examined by NP Rico in
15 March 2014, she explained to him that his MRI findings were not severe enough to warrant
16 surgery, but she encouraged him to participate in physical therapy (AR 979 (citing AR 642)).

17 “The ALJ is permitted to consider lack of treatment in his credibility determination.”
18 Burch, 400 F.3d at 681. Further, “[i]mpairments that can be controlled effectively with
19 medication are not disabling for the purpose of determining eligibility for SSI benefits.” Warre v.

20
21 ¹⁵ The Court notes the ALJ additionally found that, following Plaintiff’s 2003 injury from which his instant
22 allegations of disability arise, Plaintiff “was able to work successfully for a number of years after [the] accident.”
23 (AR 982.) Plaintiff argues it was error for the ALJ to consider his ability to work prior to the alleged onset date of
24 June 1, 2011, as that time falls outside the relevant disability period. The Court agrees (and Defendant appears to
25 concede this point). (See ECF No. 18 at 14 n.5); see also Dotson v. Astrue, No. 1:10-cv-00243 SKO, 2011 WL
26 1883468, at *6 (E.D. Cal. May 17, 2011) (medical opinion rendered a year outside of the relevant disability period
27 deemed “stale and not time-relevant to [the claimant’s] current claim of disability.”). However, the Court finds such
28 error is harmless, because the ALJ cited to multiple other records occurring during the relevant disability period
which support her finding of conservative treatment. The Court further notes that, even if the ALJ’s reference to
Plaintiff’s pre-onset date renders her entire finding of conservative treatment to be in error, the ALJ nonetheless
identified other clear and convincing reasons—i.e., that Plaintiff’s allegations were inconsistent with the medical
record and with his ADLs—to support her adverse credibility determination, which were “sufficiently specific to
allow a reviewing court to conclude the ALJ rejected the claimant’s testimony on permissible grounds.” Moisa v.
Barnhart, 367 F.3d 882, 885 (9th Cir. 2004); see also Wells v. Comm’r Soc. Sec., No. 1:17-cv-00078-SKO, 2017 WL
3620054, at *10 (E.D. Cal. Aug. 23, 2017) (“While the ALJ erred in providing one invalid reason for the credibility
finding ... that error was harmless, as substantial evidence still supports the ALJ’s credibility determination
notwithstanding the single errant rationale.”).

1 Comm’r of Soc. Sec. Admin., 439 F.3d 1001, 1006 (9th Cir. 2006); see also Tommasetti, 533
2 F.3d at 1040 (favorable response to conservative treatment undermined claimant’s testimony of
3 subjective complaints). Physical therapy, similarly, constitutes conservative treatment. See id. at
4 1039–40 (claimant’s treatment, including physical therapy, the use of anti-inflammatory
5 medication, a transcutaneous electrical nerve stimulation unit, and a lumbosacral corset, were
6 deemed “conservative”). Thus, the ALJ identified specific, substantial evidence in the medical
7 record in support of her finding that Plaintiff’s treatment was overall conservative in nature,
8 constituting a clear and convincing reason to discount Plaintiff’s pain allegations. Tommasetti,
9 533 F.3d at 1039–40; Parra, 481 F.3d at 751.

10 Notably, Plaintiff does not dispute the ALJ’s findings as to his lack of hospitalization and
11 medical records. Rather, Plaintiff disputes the adverse credibility finding due to the lack of
12 surgery finding on two grounds. First, Plaintiff argues that his doctor advised that he needed back
13 surgery, but the surgery was denied by his workers’ compensation insurance. (ECF No. 15 at 16
14 (citing AR 293, 304, 352).) This argument is unavailing. Generally, a claimant’s inability to pay
15 for treatment cannot support an adverse credibility finding. Trevizo v. Berryhill, 871 F.3d 664,
16 681 (9th Cir. 2017). However, the Ninth Circuit has also held that an “unexplained, or
17 inadequately explained, failure to seek treatment ... can cast doubt on the sincerity of the
18 claimant’s [subjective symptom] testimony.” Fair, 885 F.2d at 603. Similarly, where the ALJ
19 determines the claimant’s proffered reason for failing to seek treatment is not believable, this, too,
20 can cast doubt on the sincerity of the claimant’s pain testimony. Molina, 674 F.3d at 1114. Here,
21 the record indicates multiple credibility problems with both of Plaintiff’s allegations—that he was
22 referred for surgery, and that he did not undergo that surgery because it was denied by his
23 worker’s compensation insurance. Notably, Plaintiff does not indicate when the at-issue surgery
24 referral was made; but the records indicate one referral was made sometime prior to August 2010
25 (see AR 352), or alternatively, a referral was made in August 2015 by Plaintiff’s new doctor (AR
26 918–21). As previously noted, however, the ALJ need not consider stale medical records that
27 predate the alleged date of onset of disability (here, June 1, 2011), or records that post-date the
28 relevant disability period (here, March 31, 2014). See Dotson, 2011 WL 1883468, at *6; see also

1 Thomas v. Berryhill, No. 1:16-cv-01337-JLT, 2018 WL 534012, at *5–6 (E.D. Cal. Jan. 24,
2 2018) (rejecting claimant’s argument that an ALJ may not simply ignore medical records because
3 they pre-date the onset date of disability or post-date the last insured date, and finding ALJ did
4 not err in failing to address treating physician’s opinion which predated date of onset for instant
5 matter). The Court notes the surgery appears to have also been endorsed by Dr. Stacey in August
6 2010, in a note in which Dr. Stacey indicated she believed Plaintiff would need surgery, even
7 though his current MRI did not indicate such. (AR 352.) However, the ALJ accorded Dr.
8 Stacey’s opinion “no significant weight” because it was inconsistent with the “rather mild
9 objective findings noted in [her] progress notes” and the medical record (AR 980)—a finding that
10 Plaintiff does not challenge in the instant appeal (and has therefore waived), Lewis, 236 F.3d at
11 517 n.13; Indep. Towers of Wash., 350 F.3d at 929. Indeed, the ALJ notes that on March 4,
12 2014, Plaintiff was informed his MRI findings were not severe enough to warrant surgery. (AR
13 979 (citing AR 642).) As previously noted by the Court, it is within the ALJ’s province to
14 resolve conflicts and ambiguities in the record, and determine credibility. Lingenfelter, 504 F.3d
15 at 1042; Andrews, 53 F.3d at 1039. On this record, the ALJ appropriately resolved the conflict as
16 to whether surgery was warranted during the relevant disability period, and therefore adequately
17 justified her rejection of Plaintiff’s surgery allegations.

18 Second, Plaintiff disputes the ALJ’s adverse credibility finding due to lack of surgery on
19 the basis that he did, in fact, have surgery. But Plaintiff’s surgery was not performed until
20 October 2015, well after the relevant disability period. Waters v. Gardner, 452 F.2d 855,
21 858 (9th Cir. 1971)) (a “long line of cases” has established that a claimant must establish
22 disability by the date last insured, and that “ ‘any deterioration in [his] condition subsequent to
23 that time is, of course, irrelevant.’ ”). Furthermore, the Court notes the medical records of
24 Plaintiff’s October 2015 surgery characterize it as “elective,” which is consistent with earlier
25 records indicating Plaintiff was requesting surgery, even when it was not recommended. (AR
26 914–18; see also AR 933–36.) Accordingly, the Court finds this argument, too, is unavailing.

27 Finally, Plaintiff takes issue with the ALJ’s characterization of his treatment as
28 “conservative” where he was taking opioid pain medications (oxycodone and Norco), and

1 receiving some epidural steroid injections and trigger point injections, because Plaintiff contends
2 this constitutes an “aggressive” form of treatment. (ECF No. 15 at 15 (citing AR 676, 688, 694,
3 701).) However, courts have reached varying conclusions based on the longitudinal records of
4 each particular case as to whether a treatment plan, on whole, may be considered “conservative.”
5 Compare, e.g., Walter v. Astrue, No. EDCV 09-1569 AGR, 2011 WL 1326529, at *3 (C.D. Cal.
6 Apr. 6, 2011) (ALJ permissibly discredited claimant’s allegations based on conservative
7 treatment consisting of Vicodin, physical therapy, and an injection) with Revels v. Berryhill, 874
8 F.3d 648, 667 (9th Cir. 2017) (“doubting” that epidural steroid shots qualified as “conservative”
9 medical treatment for fibromyalgia). Here, the Court finds Plaintiff’s treatment of narcotic
10 medications, physical therapy, and some injections—where surgery was not recommend during
11 the relevant disability period—was conservative within the context of the longitudinal record of
12 this case. See also Woods v. Kijakazi (Woods II), 32 F. 4th 785, 794 (9th Cir. 2022) (affirming
13 ALJ’s discounting of subjective testimony based on “very conservative” treatment of mostly
14 medication alone and a knee injection); Zaldana v. Colvin, No. CV 13-7820 RNB, 2014 WL
15 4929023, at *2 (C.D. Cal. Oct. 1, 2014) (finding that evidence of treatment including Tramadol,
16 ibuprofen, and “multiple steroid injections” was a legally sufficient reason on which the ALJ
17 could properly rely in support of his adverse credibility determination); Martin v. Colvin, No.
18 1:15-cv-01678-SKO, 2017 WL 615196, at *10 (E.D. Cal. Feb. 14, 2017) (“[T]he fact that
19 Plaintiff has been prescribed narcotic medication or received injections does not negate the
20 reasonableness of the ALJ’s finding that Plaintiff’s treatment as a whole was conservative,
21 particularly when undertaken in addition to other, less invasive treatment methods.”); Traynor v.
22 Colvin, No. 1:13-cv-1041-BAM, 2014 WL 4792593, at *9 (E.D. Cal. Sept. 24, 2014) (finding
23 evidence that Plaintiff’s symptoms were managed through “prescription medications and
24 infrequent epidural and cortisone injections” was “conservative treatment” and was sufficient for
25 the ALJ to discount the plaintiff’s testimony regarding the severity of impairment); Morris v.
26 Colvin, No. 13-6236, 2014 WL 2547599, at *4 (C.D. Cal. Jun. 3, 2014) (ALJ properly discounted
27 credibility when plaintiff received conservative treatment consisting of physical therapy, use of
28 TENS unit, chiropractic treatment, Vicodin, and Tylenol with Vicodin); Jones v. Comm’r of Soc.

1 Sec., No. 2:12-cv-01714-KJN, 2014 WL 228590, at *7–10 (E.D. Cal. Jan. 21, 2014) (ALJ
2 properly found that plaintiff’s conservative treatment, which included physical therapy, anti-
3 inflammatory and narcotic medications, use of a TENS unit, occasional epidural steroid
4 injections, and massage therapy, diminished plaintiff’s credibility). Thus, the ALJ did not err by
5 characterizing Plaintiff’s treatment as conservative.

6 In sum, the ALJ sufficiently identified multiple clear and convincing reasons in support of
7 her determination that Plaintiff’s treatment is inconsistent with the severity of his alleged
8 symptoms. Burrell, 775 F.3d at 1136; S.S.R. 16-3p at *10. While Plaintiff may seek to suggest
9 an alternative interpretation of the evidence, this is not sufficient to establish reversible error. See
10 Ford, 950 F.3d at 1154; Burch, 400 F.3d at 679 (citations omitted). Accordingly, the Court finds
11 the ALJ provided clear and convincing reasons supported by substantial evidence for discounting
12 Plaintiff’s subjective symptom testimony.

13 **B. Evaluation of the Medical Opinion Evidence**

14 1. Legal Standard

15 When evaluating claims filed before March 27, 2017, as here, the ALJ must explain the
16 weight he gives to all medical source opinions. See 20 C.F.R. § 404.1527(c). There are three
17 types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who
18 examine but do not treat the claimant (examining physicians); and (3) those who neither examine
19 nor treat the claimant [but who review the claimant’s file] (nonexamining [or reviewing]
20 physicians).” Holohan v. Massanari, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).
21 Generally, a treating physician’s opinion carries more weight than an examining physician’s
22 opinion, and an examining physician’s opinion carries more weight than a reviewing physician’s
23 opinion. Id. Indeed, the regulations provide that, “when a treating source’s medical opinion on
24 the issue(s) of the nature and severity of [a claimant’s] impairment(s) is well-supported by
25 medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the
26 other substantial evidence in [the record],” it must be given controlling weight. 20 C.F.R. §
27 404.1527(c)(2).

28 To evaluate whether an ALJ properly rejected a medical opinion, in addition to

1 considering its source, the court considers whether (1) contradictory opinions are in the record;
2 and (2) clinical findings support the opinions. If a treating or examining physician’s opinion is
3 uncontradicted, the ALJ may reject it only by offering “clear and convincing reasons that are
4 supported by substantial evidence.” Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005).
5 Conversely, “[i]f a treating or examining doctor’s opinion is contradicted by another doctor’s
6 opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported
7 by substantial evidence.” Id. (citing Lester v. Chater, 81 F.3d 821, 830–31 (9th Cir. 1995)).
8 Similarly, where a treating or examining doctor’s opinion is contradicted by medical evidence,
9 the ALJ may only reject it by providing specific and legitimate reasons supported by substantial
10 evidence in the record. See Andrews, 53 F.3d at 1041. The ALJ can satisfy the “specific and
11 legitimate” burden by setting out a detailed and thorough summary of the facts and conflicting
12 clinical evidence, stating his interpretation thereof, and making findings. Tommasetti, 533 F.3d
13 at 1041 (citing Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). While a treating
14 professional’s opinion generally is accorded superior weight, and the opinion of a non-examining
15 professional, by itself, is insufficient to reject the opinion of a treating or examining professional,
16 Lester, 81 F.3d at 831, a non-examining opinion may constitute substantial evidence if it is
17 consistent with other independent evidence in the record, and the ALJ is to resolve the conflict.
18 See Thomas, 278 F.3d at 957; Orn, 495 F.3d at 632–33; Andrews, 53 F.3d at 1041. Finally, “the
19 ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is
20 brief, conclusory and inadequately supported by clinical findings.” Bray v. Comm’r Soc. Sec.
21 Admin, 554 F.3d 1219, 1228 (9th Cir. 2009) (quotation and citation omitted); see also Thomas,
22 278 F.3d at 957; Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (treating physician’s
23 conclusory, minimally supported opinion rejected).

24 2. Analysis

25 Here, Plaintiff challenges the ALJ’s evaluation of the medical opinions issued by NP
26 Rico, Dr. Baron, and Dr. Damania. (ECF No. 15 at 18–23.)

27 a. **Treating Medical Providers NP Rico/Dr. Baron**

28 The ALJ noted that NP Rico completed a questionnaire dated September 14, 2014, which

1 appears to be signed by both NP Rico and Dr. Baron, in which NP Rico diagnosed Plaintiff with
2 neck pain, thoracic pain, lumbar pain, herniated discs (cervical and lumbar), and nerve root and
3 plexus disorder, and opined Plaintiff could sit and stand and/or walk for less than one hour in an
4 eight-hour day; sit for 30 minutes at a time; occasionally lift ten pounds; has significant
5 limitations reaching, handling, and fingering; would need several unscheduled breaks of 10–15
6 minutes; and would likely be absent more than three times per month due to his impairments.
7 (AR 980 (citing AR 499, 502–03).) The ALJ noted that NP Rico is not an acceptable medical
8 source and her opinion, alone, cannot constitute documentation of severe or disabling vocational
9 limitations; however, the ALJ nonetheless considered the report with respect to severity and
10 effect on function.¹⁶ (AR 980.) The ALJ discounted the opinion to the extent that there is no
11 objective evidence of “herniated” discs, but only “small, mild bulges.” (AR 981.) The ALJ
12 further discounted the opinion on the basis that NP Rico’s objective findings during physical
13 examinations do not support her opinion. (*Id.*) Finally, the ALJ discounted NP Rico’s opinion to
14 the extent it conflicted with that of medical expert Dr. Amusa, to whom the ALJ accorded more
15 weight. (*Id.*)

16 Assuming NP Rico was Plaintiff’s primary care provider, in conjunction with Dr. Baron,
17 beginning in February 2014 (AR 613–21), the Court evaluates the jointly-signed questionnaire

18 ¹⁶ Plaintiff argues NP Rico and Dr. Baron co-signed the disability impairment questionnaire (AR 499–503, 70);
19 therefore, the ALJ was required to accord greater weight to the opinion and explain the weight she gave to this
20 opinion, and she failed to do so by finding that NP Rico was not an acceptable medical source. (ECF No. 15 at 18–
21 20.) Plaintiff advanced a similar argument in his first appeal, which the district court declined to address in light of
22 its finding that the ALJ’s rejection of NP Rico/Dr. Baron’s opinion was properly supported. *See McMullen I.*, 2018
23 WL 3769829, at *13 n.5. As previously noted, this Court, having reviewed the medical records, expresses some
24 skepticism that the questionnaire, which includes an illegible signature and an unknown date, should be accorded the
25 same weight as that of a treating physician opinion under the Regulations, or that NP Rico was “acting as an agent”
26 of Dr. Baron in the manner contemplated by the Ninth Circuit, *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996)
27 (holding a nurse practitioner may qualify as an “acceptable medical source” by working “closely under the
28 supervision” of a doctor to the extent that she is “acting as an agent” of the doctor). Notably, in the treatment notes
generated by NP Rico, Dr. Baron did not electronically sign off on the notes until weeks after Plaintiff’s appointment;
and in at least one instance, she did not sign off on the treatment note at all. (*See* AR 658, 706, 693, 809.) This
record does not support a finding that NP Rico worked closely under the supervision of Dr. Baron. *See Randrup v.*
Berryhill, No. 1:16-cv-00436-SKO, 2017 WL 3334012, at *11 (E.D. Cal. Aug. 4, 2017) (finding that a nurse
practitioner was not an acceptable medical source where the only evidence of the relationship between the nurse
practitioner and doctor was the doctor’s electronic signatures on treatment notes weeks and months after the
claimant’s appointments). Regardless, even assuming the opinion was jointly authored with Dr. Baron, any error
with respect to the ALJ’s finding regarding NP Rico’s status was harmless, because the ALJ still considered the
opinion (AR 980), and supported her decision to discount the opinion for specific and legitimate reasons that are
supported by substantial evidence in the record, as discussed herein.

1 pursuant to the Regulations in effect at the time. As NP Rico’s opinion is contradicted by the
2 opinions of Dr. Damania and Drs. Jackson and Mani, who concluded Plaintiff could walk and/or
3 stand for four hours a day and frequently lift and carry ten pounds, the ALJ was required to state
4 “specific and legitimate” reasons, supported by substantial evidence, for rejecting NP Rico’s
5 opinion. Trevizo, 871 F.3d at 675 (citing Ryan v. Comm’r Soc. Sec., 528 F.3d 1194, 1198 (9th
6 Cir. 2008)). The inconsistency between NP Rico’s objective findings and her opinion, standing
7 alone, is a sufficient specific and legitimate reason for discrediting NP Rico’s
8 opinion. See Connett, 340 F.3d at 875; see also Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th
9 Cir. 2001).

10 As previously noted, the ALJ found NP Rico’s opinion was inconsistent with her
11 objective findings during her physical examinations and cited a specific example that NP Rico
12 opined Plaintiff suffered from “herniated discs,” while the record only reflected “small, mild
13 bulges.” (AR 980.) Plaintiff first appears to challenge the ALJ’s decision by arguing that her
14 statement of “objective findings during physical examinations were not supporting of the treating
15 medical opinion” was boilerplate and conclusory without further elaborations or citations to
16 supporting record evidence. (ECF No. 15 at 20–21.) The first argument is plainly unavailing
17 based on a contextual reading of the ALJ’s opinion, and her discussion in earlier pages of the
18 decision of NP Rico’s findings and their relation to the objective medical record. (See AR 978–
19 80); see also Molina, 674 F.3d at 1121 (“Even when an agency explains its decision with less than
20 ideal clarity, we must uphold it if the agency’s path may reasonably be discerned.”); see also
21 Magallanes, 881 F.2d at 755 (a reviewing court is “not deprived of [its] faculties for drawing
22 specific and legitimate inferences from the ALJ’s opinion,” provided “those inferences are there
23 to be drawn”); Rice v. Barnhart, 384 F.3d 363, 370 n.5 (7th Cir. 2004) (“Because it is proper to
24 read the ALJ’s decision as a whole, and because it would be a needless formality to have the ALJ
25 repeat substantially similar factual analyses at both steps three and five, we consider the ALJ’s
26 treatment of the record evidence in support of both his conclusions at steps three and five.”
27 (internal citation omitted)).

28 Next, Plaintiff appears to challenge the ALJ’s interpretation of the record as supporting a

1 showing of “bulges” rather than “herniated discs.” As to this argument, while Plaintiff reaches a
2 different conclusion from the ALJ by looking to MRIs from August 2015 (AR 907), the MRIs
3 from December 2013 and September 2014 are consistent with the ALJ’s decision. Specifically,
4 as the ALJ pointed out, the December 2013 MRI of Plaintiff’s cervical spine revealed
5 degenerative changes in the cervical spine; mild reversal of the normal cervical lordosis at C4–
6 C5; a two-millimeter left paracentral disc osteophyte complex at C4–C5, which mildly indented
7 the left ventral surface of the spinal cord; a two-millimeter central protrusion with associated
8 annular fissuring at the C5–C6 level, which caused a mild impression on the ventral surface of the
9 spinal cord; and a one millimeter central protrusion with associated annular fissuring, which
10 indented the thecal sac at the C6–C7 level. (AR 979–80 (citing AR 452–53).) However, these
11 mild degenerative changes were unchanged since Plaintiff’s MRI in September 2014. (*Id.* (citing
12 AR 844).) Further, as the ALJ pointed out, NP Rico herself explained to Plaintiff on March 4,
13 2014, just weeks before Plaintiff’s date last insured (March 31, 2014), that his MRI findings were
14 not severe enough to warrant surgery. (AR 979 (citing AR 642).) NP Rico strongly encouraged
15 Plaintiff to participate in physical therapy, but Plaintiff refused because he said he could not
16 afford to travel to Oakhurst twice a week, despite NP Rico reminding him of a service that would
17 provide free transportation to his appointments. (AR 642.) Additionally, as the ALJ identified in
18 her decision, NP Rico’s physical examinations of Plaintiff regularly found him to be in no acute
19 distress, able to change positions with ease, and have a steady gait and full range of motion in his
20 joints, with weakness to upper extremity grips. (AR 979 (citing AR 617, 672–73).) The Court
21 finds the aforementioned medical records cited by the ALJ sufficiently demonstrate the
22 contradictions between NP Rico’s opinion and treatment notes, and therefore constitute a
23 “specific and legitimate” reason for rejecting NP Rico’s opinion. Plaintiff’s attempts to establish
24 the contrary here appear to be a request for the Court to reweigh this medical evidence, which the
25 Court cannot do. Tommasetti, 533 F.3d at 1038 (the court will uphold the ALJ’s conclusion
26 where the evidence is susceptible to more than one rational interpretation).

27 Finally, Plaintiff argues the ALJ improperly accorded more weight to Dr. Amusa’s expert
28 testimony, which contradicted NP Rico/Dr. Baron’s opinion, because she only offered boilerplate

1 and conclusory assertions without explaining why she accorded more weight to Dr. Amusa's
2 opinion. (ECF No. 15 at 21.) Further, Plaintiff argues this contrary medical source did not
3 relieve the ALJ of her duty to provide specific and legitimate reasons for discounting NP Rico's
4 opinion. (Id.) Again, the Court finds Plaintiff's argument reads the ALJ's decision and the
5 record too narrowly and out of context, which does not constitute a basis for reversal. See
6 Molina, 674 F.3d at 1121; Magallanes, 881 F.2d at 755; Rice, 384 F.3d at 370 n.5. The ALJ
7 noted she accorded more weight to Dr. Amusa's opinion "as discussed below, as it is based on a
8 thorough review of the record made by a qualified physician." (AR 980.) Later in her decision,
9 the ALJ cites to and summarizes Dr. Amusa's expert testimony from the hearing, noting Dr.
10 Amusa based his opinion on the consultative examination of Dr. Damania, EMG studies, and
11 imaging studies reviewed in the record. (AR 981.) Furthermore, the ALJ's reliance on Dr.
12 Amusa's opinion was proper here because she also identified other specific and legitimate reasons
13 for discounting NP Rico's opinion (*i.e.*, inconsistencies with the record) and Dr. Amusa's opinion
14 was consistent with other independent evidence in the record. Thomas, 278 F.3d at 957; Orn, 495
15 F.3d at 632–33; Andrews, 53 F.3d at 1041. For these reasons, Plaintiff's arguments are
16 unavailing and the Court finds the ALJ identified sufficient specific and legitimate reasons for
17 discrediting NP Rico/Dr. Baron's opinion. See Lester, 81 F.3d at 830–31; Andrews, 53 F.3d at
18 1041; Thomas, 278 F.3d at 957; Bray, 554 F.3d at 1228; Meanel, 172 F.3d at 1114.

19 **b. Examining/Consultant Physician Dr. Damania**

20 As previously noted, Dr. Damania examined Plaintiff on March 16, 2013, and reviewed
21 his prior medical records. (AR 981 (citing AR 411–19).) Dr. Damania opined Plaintiff could lift
22 and carry twenty pounds occasionally and ten pounds frequently, stand and walk four hours out of
23 an eight-hour workday, and sit two to four hours out of an eight-hour workday. (Id. (citing AR
24 419).) Dr. Damania further opined that Plaintiff did not need an assistive device for ambulation
25 even though Plaintiff subjectively stated he needed a cane because of left lower extremity
26 weakness. (Id.) Dr. Damania limited Plaintiff to occasional bending, stooping, crouching,
27 crawling, or kneeling, and no climbing or balancing. (Id.) Dr. Damania identified no manipulative
28 impairments and no relevant visual or communicative impairments. (Id.)

1 The ALJ assigned “some weight” to Dr. Damania’s assessment and opinion, on the basis
2 that “it is generally consistent with the instant examination findings.” (Id.) The ALJ found the
3 overhead limitations were supported by further testing in the record, but the sitting limitations
4 opined by Dr. Damania were not supported by the record. (Id.) Further, to the extent Dr.
5 Damania’s opinion conflicted with Dr. Amusa’s opinion, the ALJ accorded greater weight to Dr.
6 Amusa’s opinion, which included review of medical evidence of record not available to Dr.
7 Damania at the time of his examination. (Id.) As Dr. Damania’s opinion is conflicts with the
8 opinion of Dr. Amusa, the ALJ was required to state “specific and legitimate” reasons, supported
9 by substantial evidence, for discounting Dr. Damania’s opinion. Trevizo, 871 F.3d at 675; Ryan,
10 528 F.3d at 1198.

11 Plaintiff takes issue with the ALJ’s rejection of Dr. Damania’s opinion with respect to the
12 sitting limitation. He argues the ALJ failed to provide the required specific and legitimate
13 reasons for discounting Dr. Damania’s opinion: namely, Plaintiff argues the ALJ merely noted
14 that Dr. Amusa’s opinion conflicted with Dr. Damania’s opinion, without sufficient explanation
15 as to why she accorded more weight to Dr. Amusa’s opinion than Dr. Damania’s. (ECF No. 15 at
16 21–22.) Plaintiff further argues that, while the ALJ asserted that she was according more weight
17 to Dr. Amusa’s opinion, which was purportedly based on a review of information not available to
18 Dr. Damania, the ALJ failed to identify what this “information” was or how it contradicted Dr.
19 Damania’s assessment of physical work restrictions. (Id. at 22–23.) The Court finds these
20 arguments unavailing.

21 Here, the ALJ specifically elicited testimony from Dr. Amusa about his opinion with
22 respect to Dr. Damania’s sitting restriction. (AR 1006–07.) Dr. Amusa’s opinion conflicted with
23 Dr. Damania’s. As the Court previously noted, a non-examining opinion may constitute
24 substantial evidence for contradicting a treating physician’s opinion if it is consistent with other
25 independent evidence in the record. See Thomas, 278 F.3d at 957; Orn, 495 F.3d at 632–33;
26 Andrews, 53 F.3d at 1041. The ALJ explained she accorded more weight to Dr. Amusa’s opinion
27 where it was more consistent with the record than Dr. Damania’s. Furthermore, Dr. Damania’s
28 opinion was issued May 16, 2013; therefore, it is plain that Dr. Damania did not have the benefit

1 of considering the lack of degenerative changes shown between Plaintiff’s 2013 and 2014 MRIs,
2 or the other medical notes regarding treatment Plaintiff received after May 2013, that were
3 considered by Dr. Amusa and discussed by the ALJ in her decision.

4 The Court also finds the ALJ identified substantial evidence from the record which
5 supported Dr. Amusa’s opinion and did not support Dr. Damania’s opinion. Bray, 554 F.3d at
6 1228; Meanel, 172 F.3d at 1114. Dr. Amusa testified that a sitting limitation for two to four
7 hours out of an eight-hour day was not warranted by the record. (AR 1006–07.) More
8 specifically, Dr. Amusa noted Dr. Damania felt an assistive device was not necessary, and the
9 finding of some weakness only supported a limitation of occasional foot control operating. (AR
10 1007.) Dr. Amusa also noted the records from 2013–2014 tended to reference greater complaints
11 of neck pain, rather than back pain. (AR 1003.) This testimony supports the ALJ’s finding that
12 the sitting limitation opined by Dr. Damania was not supported by the record, and it was
13 reasonably cited by the ALJ in her decision. See Magallanes, 881 F.2d at 755; Rice, 384 F.3d at
14 370 n.5. The ALJ also considered Plaintiff’s 2015 testimony that he could sit comfortably (AR
15 977) the lack of changes shown between the December 2013 and September 2014 MRI results
16 (AR 979–80), NP Rico’s recommendation in February 2014 that that Plaintiff should pursue
17 physical therapy and not surgery (AR 979), and the multiple findings of “mild encroachment,”
18 “mild degenerative disc disease,” and normal strength and range of motion in the record (AR
19 978). This evidence is consistent with the ALJ’s finding that Dr. Damania’s opinion was not
20 fully supported by the record.¹⁷ Plaintiff’s contrary argument, at most, constitutes an attempt to
21 present an alternative interpretation of the evidence. However, as previously noted, this Court
22 must defer to the decision of the ALJ where evidence exists to support more than one rational
23 interpretation. Drouin v. Sullivan, 966 F.2d 1255, 1258 (9th Cir. 1992); see also Verduzco v.
24 Apfel, 188 F.3d 1087, 1089 (9th Cir. 1999) (When the evidence presented could support either
25 affirming or reversing the Commissioner’s conclusions, the court cannot substitute its own
26 judgment for that of the Commissioner). Accordingly, the Court finds the ALJ provided

27
28 ¹⁷ Again, although this evidence is discussed earlier in the ALJ’s decision, the ALJ references these portions of her
decision throughout the decision. See Magallanes, 881 F.2d at 755; Rice, 384 F.3d at 370 n.5.

1 sufficient specific and legitimate reasons to discount Dr. Damania’s opinion. See Andrews, 53
2 F.3d at 1041; Batson, 359 F.3d at 1195; Thomas, 278 F.3d at 957.

3 **C. Evaluation of Lay Witness Statements**

4 Plaintiff argues the ALJ failed to provide germane reasons for discounting the lay witness
5 statements of his wife, Lisa McMillen. (ECF No. 15 at 23–24.)

6 1. Legal Standard

7 The Ninth Circuit has held that “[l]ay testimony as to a claimant’s symptoms is competent
8 evidence that an ALJ must take into account, unless he or she expressly determines to disregard
9 such testimony and gives reasons germane to each witness for doing so.” Tobeler v. Colvin, 749
10 F.3d 830, 832 (9th Cir. 2014) (citations omitted); see also Molina, 674 F.3d at 1111. In giving
11 “germane reasons” for disregarding a lay witness’s testimony, the ALJ “generally should explain
12 the weight given to opinions from these sources or otherwise ensure that the discussion of the
13 evidence in the determination or decision allows a claimant or subsequent reviewer to follow the
14 adjudicator’s reasoning, when such opinions may have an effect on the outcome of the case.” 20
15 C.F.R. §§ 404.1527(f)(2), 416.927(f)(2) (standard for evaluating opinion evidence for claims filed
16 before Mar. 27, 2017); see also Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009) (germane
17 reasons must be specific).

18 Nevertheless, even if the ALJ fails to provide germane reasons for rejecting lay witness
19 testimony, such error is harmless “when it is clear from the record that the ALJ’s error was
20 inconsequential to the ultimate nondisability determination.” Tommasetti, 533 F.3d at 1038.
21 More specifically, the Ninth Circuit has held an ALJ’s error in failing to explain his reasons for
22 disregarding lay testimony is harmless where the reasons for rejecting a claimant’s symptom
23 testimony apply equally to third-party lay witness testimony. Molina, 674 F.3d at 1115; see also
24 Valentine, 574 F.3d at 694 (ALJ’s valid reasons for rejecting claimant’s testimony were equally
25 germane to similar lay testimony); Lewis, 236 F.3d at 512 (stating that the ALJ “noted arguably
26 germane reasons for dismissing the [lay] testimony, even if he did not clearly link his
27 determination to those reasons”); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993) (approving
28 ALJ’s dismissal of daughters’ lay testimony on the basis that they were merely repeating the

1 claimant’s statements, where daughters’ statements did not explain sufficiently when and to what
2 extent they had the opportunity to observe their mother); cf. Stout, 454 F.3d at 1055–56
3 (explaining “where the ALJ’s error lies in a failure to properly discuss competent lay testimony
4 favorable to the claimant, a reviewing court cannot consider the error harmless unless it can
5 confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have
6 reached a different disability determination.”) As the Court previously noted, Plaintiff bears the
7 burden of showing that the error is not harmless. Shinseki, 556 U.S. at 409.

8 2. Analysis

9 Plaintiff argues the ALJ’s discounting of Mrs. McMillen’s statement was overly broad,
10 lacked any specific analysis or reference to the record, and lacked germane reasons, and was
11 therefore deficient. (ECF No. 15 at 24.) Further, Plaintiff argues the record evidence, including
12 Plaintiff’s “aggressive” course of treatment, supports Mrs. McMillen’s claim that Plaintiff had a
13 limited ability to sit, stand, and use his hands. Therefore, Plaintiff argues the error was not
14 harmless, as crediting Mrs. McMillen’s statement would have supported a finding that Plaintiff
15 lacked the hand dexterity to frequently handle and finger, as well as the sitting capacity to
16 perform full-time sedentary work. The Court disagrees.

17 The ALJ considered Mrs. McMillen’s statement, noting a decrease in Plaintiff’s activities
18 and pain in his neck, hands, and fingers. The ALJ accorded Mrs. McMillen’s statement only
19 slight weight, “if any,” on the basis that the “evidence of record, taken as a whole, contradicts this
20 statement.” (AR 982.) Inconsistency with the medical evidence is a germane reason for rejecting
21 lay witness testimony. Bayliss, 427 F.3d at 1218.

22 Furthermore, applying the aforementioned authorities, the Court finds any error with
23 respect to the ALJ’s rejection of the lay testimony was harmless. Mrs. McMillen’s statement
24 merely repeated the same statements of pain and limitations as alleged and testified to by
25 Plaintiff. As noted, the Ninth Circuit explains that “[w]here lay witness testimony does not
26 describe any limitations not already described by the claimant, and the ALJ’s well-supported
27 reasons for rejecting the claimant’s testimony apply equally well to the lay witness testimony, it
28 would be inconsistent with our prior harmless error precedent to deem the ALJ’s failure to discuss

1 the lay witness testimony to be prejudicial per se. Molina, 674 F.3d at 1117 (citing Valentine,
2 574 F.3d at 694; Lewis, 236 F.3d at 512). Plaintiff has not identified any portion of the lay
3 testimony that was not already described by himself, nor does Plaintiff present any argument that
4 the ALJ’s reasons for rejecting his testimony are inapplicable to any portion of Mrs. McMillen’s
5 statement. Mrs. McMillen’s reference to “aggressive treatment,” in particular, was previously
6 considered and properly rejected by the ALJ in her determination that Plaintiff’s overall treatment
7 was relatively conservative. As to other allegations raised by Mrs. McMillen, the Court notes the
8 ALJ properly discounted Plaintiff’s subjective testimony; thus, the same valid reasons for
9 rejecting Plaintiff’s testimony are equally applicable as germane reasons for rejecting Mrs.
10 McMillen’s lay testimony. Molina, 674 F.3d at 1115; Valentine, 574 F.3d at 694; Dodrill, 12
11 F.3d at 918. Plaintiff, therefore, has not met his burden to demonstrate any error that was not
12 harmless. Shinseki, 556 U.S. at 409.

13 **D. Whether the ALJ Resolved Apparent Conflicts Between the Vocational**
14 **Expert’s Testimony and the DOT, Pursuant to SSR 00-4p**

15 As previously noted, the ALJ reached an RFC determination that Plaintiff is capable of
16 sedentary work, with additional functional restrictions. (AR 976–77.) The VE testified that
17 Plaintiff was capable of performing jobs such as ticket counter worker, table worker, and lens
18 inserter. (AR 984.)

19 Plaintiff argues apparent inconsistencies exist between the information listed in the DOT
20 and the VE’s testimony that Plaintiff could perform work as a ticket counter worker, table worker,
21 and lens inserter. (ECF No. 15 at 25–27.) Specifically, Plaintiff asserts his RFC limitations to
22 frequent handling and fingering, and occasional overhead reaching but frequent reaching in all
23 other directions (AR 976–77), conflict with the DOT’s description of the “ticket counter” job,
24 which requires “constant reaching, handling, and fingering,” and the “table worker” and “lens
25 inserter” jobs, which require “frequent” reaching, handling, and fingering. (ECF No. 15 at 25.)
26 Plaintiff argues the ALJ did not obtain an explanation for these deviations, nor did the VE offer
27 one. (Id. at 26–27.) Therefore, Plaintiff argues remand for further development of the vocational
28 evidence is necessary to resolve this apparent conflict. (Id. at 27.)

1 1. Legal Standard

2 As previously noted, at step five, the Commissioner must “identify specific jobs existing
3 in substantial numbers in the national economy that [a] claimant can perform despite [his]
4 identified limitations.” Zavalin v. Colvin, 778 F.3d 842, 845 (9th Cir. 2015) (citation and internal
5 quotations omitted). That is, the ALJ must consider potential occupations the claimant may be
6 able to perform, based on the claimant’s RFC, age, education and work experience, and the
7 information provided by the DOT and the VE. See id. at 845, 846; Valentine, 574 F.3d at
8 689; 20 C.F.R. § 416.920(g).

9 “The DOT lists maximum requirements of occupations as generally performed, not the
10 range of requirements of a particular job as it is performed in specific settings.” SSR 00-4p,
11 available at 2000 WL 1898704 (Dec. 4, 2000). “The term ‘occupation,’ as used in the DOT,
12 refers to the collective description of those jobs. Each occupation represents numerous
13 jobs.” Id.; see also Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995) (noting the DOT is not
14 comprehensive, that “[i]ntroduction of evidence of the characteristics of specific jobs available in
15 the local area through the testimony of a vocational expert is appropriate, even though the job
16 traits may vary from the way the job title is classified in the DOT,” and holding “[T]he ALJ was
17 within his rights to rely solely on the vocational expert’s testimony.”) (citations
18 omitted). Information about a particular job’s requirements may be available from a VE’s
19 experience in job placement or career counseling. SSR 00-4p. Thus, a VE may be able to
20 provide more specific information about jobs or occupations than the DOT. Id. see also Johnson,
21 60 F.3d at 1435; Lounsbury, 468 F.3d at 1114. Accordingly, the ALJ may rely on VE testimony
22 regarding “(1) what jobs the claimant, given his or her [RFC], would be able to do; and (2) the
23 availability of such jobs in the national economy.” Tackett v. Apfel, 180 F.3d 1094, 1101 (9th
24 Cir. 1999); Lockwood v. Comm’r of Soc. Sec., 616 F.3d 1068, 1071 (9th Cir. 2010) (the ALJ can
25 meet the agency’s burden of proving that other work exists in significant numbers by the
26 testimony of a VE).

27 Nonetheless, hypothetical questions posed to the VE must set out all the limitations and
28 restrictions of the particular claimant, as supported by the medical record. Embrey v. Bowen, 849

1 F.2d 418, 422 (9th Cir. 1988). Where the testimony of a VE is used, the VE must identify a
2 specific job or jobs in the national economy having requirements that the claimant’s physical and
3 mental abilities and vocational qualifications would satisfy. 20 C.F.R. § 404.1566(b); see
4 Burkhart v. Bowen, 856 F.2d 1335, 1340 n. 3 (9th Cir. 1988).

5 SSR 00-4p provides that where there is an apparent unresolved conflict between VE
6 evidence and the DOT, the ALJ is required to reconcile the inconsistency; that is, the ALJ must
7 elicit a reasonable explanation for the conflict before relying on the VE to support a determination
8 or decision about whether the claimant is disabled. SSR 00-4p, at *2; see also Johnson, 60 F.3d
9 at 1435 (holding that, if the ALJ relies on a VE’s testimony that contradicts the DOT, the record
10 must contain “persuasive evidence to support the deviation.”). “An example of a conflict
11 between the DOT and a VE’s testimony is when the DOT’s description of a job includes activities
12 a claimant is precluded from doing, and the VE nonetheless testifies that the claimant would be
13 able to perform that job.” Martinez v. Colvin, No. 1:14-cv-1070-SMS, 2015 WL 5231973, at *4
14 (E.D. Cal. Sept. 8, 2015) (citations omitted); see also Zavalin, 778 F.3d at 846 (providing
15 example of apparent conflict as “expert testimony that a claimant can perform an occupation
16 involving DOT requirements that appear more than the claimant can handle”). The ALJ must
17 inquire, on the record at the disability hearing, as to whether or not there is such consistency.
18 SSR 00-4p, at *2; Massachi v. Astrue, 486 F.3d 1149, 1153–54 (9th Cir. 2007). Further, the
19 Social Security Administration (“SSA”) notes neither the DOT nor the VE’s evidence
20 “automatically ‘trumps’ when there is a conflict”; rather, the ALJ must resolve the conflict by
21 determining if the explanation given by the VE is reasonable and provides a basis for relying on
22 the VE’s testimony rather than the DOT information. SSR 00-4p, at *2.

23 Where the ALJ fails to resolve an apparent inconsistency, the court is left with “a gap in
24 the record that precludes [it] from determining whether the ALJ’s decision is supported by
25 substantial evidence.” Zavalin, 778 F.3d at 846; Massachi, 486 F.3d at 1154 (“we cannot
26 determine whether the ALJ properly relied on [the VE’s] testimony” due to unresolved
27 occupational evidence). However, a failure to ask the VE whether his or her testimony conflicts
28 with the DOT may amount to harmless error if there is no conflict, or if the VE provides

1 “sufficient support for [his or] her conclusion so as to justify any potential conflicts.” Massachi,
2 486 F.3d at 1154, n.19; see also Hann v. Colvin, No. 12-cv-06234, 2014 WL 1382063, at *15
3 (N.D. Cal. Mar. 28, 2014).

4 2. Analysis

5 The DOT provides the following descriptions for each of the jobs identified by the VE:

6 A ticket counter worker job (alternatively referred to in the DOT as “parimutuel-ticket
7 checker”)

8 [c]ounts and records number of parimutuel tickets cashed at race
9 track to verify records of cashiers. Compares totals with entries on
10 daily balance sheet. Compares each ticket with sample or examines
tickets under fluorescent light to verify validity of tickets. Reports
discrepancies.”

11 Parimutuel-ticket Checker, DOT 219.587-010, available at 1991 WL 671989 (Jan. 1, 2016). The
12 DOT indicates reaching, handling, and fingering exist “constantly” (*i.e.*, 2/3 or more of the time)
13 in this job. Id.

14 A table worker “[e]xamines squares (tiles) of felt-based linoleum material passing along
15 on conveyor and replaces missing and substandard tiles.” Table Worker, DOT 739.687-182,
16 available at 1991 WL 680217 (Jan. 1, 2016). The DOT indicates reaching, handling, and
17 fingering exist “frequently” (*i.e.*, 1/3 to 2/3 of the time) in this job. Id.

18 A lens inserter “[f]its lenses into plastic sunglass frames and places frames on conveyor
19 belt that passes under heat lamps which soften frames preparatory to setting of lenses.” Lens
20 Inserter, DOT 713.687-026, available at 1991 WL 679273 (Jan. 1, 2016). The DOT indicates
21 reaching, handling, and fingering exist “frequently” in this job. Id.

22 **a. Table Worker and Lens Inserter Jobs**

23 (i) Purported Conflict Regarding “Reaching” Limitations

24 As to Plaintiff’s challenge based on the overhead reaching limitation, the Court notes the
25 DOT does not address “overhead reaching,” only “reaching” in general. Plaintiff argues this
26 apparent conflict required ALJ resolution. Yet, the hearing transcript indicates the ALJ did
27 resolve any apparent conflict. Importantly, the VE was aware of the specific limitations in the
28 RFC when she testified that a hypothetical person with Plaintiff’s RFC could perform the

1 identified jobs. At the hearing, the ALJ presented a hypothetical RFC that included limitations to
2 occasional overhead reaching and frequent reaching in all other directions. (AR 1022.) The ALJ
3 asked the VE to provide testimony that was consistent with the DOT and its companion
4 publications, and to let the ALJ know if the VE deviated from the DOT and explain her reason/s
5 for doing so. (AR 1020.) Based on the presented hypothetical, the VE testified that unskilled
6 sedentary jobs that were available to the described hypothetical person included ticket counter
7 worker, table worker, and lens inserter. (AR 1022–23.) The ALJ also asked the VE for the basis
8 of her testimony about the “differences between bilateral and single extremity limitations as well
9 as reaching being overhead[] versus shoulder height [or] some other variation of reaching.” (AR
10 1024.) The VE affirmed her testimony as to these different limitations was based on her years of
11 training, education, and experience, and access to professional resources that are generally relied
12 upon by experts in her field. (AR 1024–25.) On this record, the ALJ reasonably relied upon the
13 VE’s expertise and testimony. See Massachi, 486 F.3d at 1152.

14 Furthermore, the Court is unpersuaded that the purported conflict between “frequent
15 reaching” versus “occasional overhead reaching, but frequent reaching in all other directions” as
16 identified with respect to the table worker and lens inserter jobs constitutes an “apparent or
17 obvious” conflict between the DOT and the VE’s testimony. Gutierrez v. Colvin, 844 F.3d 804,
18 807–08 (9th Cir. 2016). To this point, the Court finds the Ninth Circuit’s decision in Gutierrez v.
19 Colvin particularly instructive. In Gutierrez, the ALJ found that the claimant was unable to lift
20 her right arm above her shoulder, and the VE testified that a hypothetical person with that
21 limitation could work as a cashier, a job requiring “frequent reaching” per the DOT. Id. at 807.
22 The Ninth Circuit found there was no “apparent conflict” between the claimant’s RFC and the
23 DOT’s general statement that cashier occupations require “frequent reaching,” because “overhead
24 reaching is [not] such a common and obvious part of cashiering that the ALJ should have
25 recognized a conflict and questioned the expert more closely before concluding [the claimant]
26 could work as a cashier,” see id. at 807–08:

27 For a difference between an expert’s testimony and
28 the Dictionary’s listings to be fairly characterized as a conflict, it
must be obvious or apparent. This means that the testimony must

1 be at odds with the Dictionary’s listing of job requirements that are
2 essential, integral, or expected. This is not to say that ALJs are free
3 to disregard the Dictionary’s definitions or take them with a grain
4 of salt—they aren’t. But tasks that aren’t essential, integral, or
5 expected parts of a job are less likely to qualify as apparent
6 conflicts that the ALJ must ask about. Likewise, where the job
7 itself is a familiar one—like cashiering—less scrutiny by the ALJ is
8 required.

9 Id. at 808. The Ninth Circuit further explained that, while “reaching” generally connotes
10 extending the hands and arms “in any direction,” SSR 85-15, not every job that involves reaching
11 requires the ability to reach overhead. Gutierrez, 844 F.3d at 808. The ALJ was therefore not
12 obligated to follow up on a potential conflict that was “unlikely and unforeseeable,” given how
13 cashiering was typically performed, and the VE’s testimony that the plaintiff could perform the
14 job despite her limitations. Id. at 808–09. Accordingly, the court concluded the ALJ was entitled
15 to rely on the VE’s expertise to find that Plaintiff could perform other work, including the cashier
16 job. Id. at 809.

17 Following the Ninth Circuit’s reasoning, many district courts within this circuit have
18 similarly recognized that not every job that requires frequent or occasional “reaching” requires
19 the ability to reach “overhead.” See, e.g., Michael v. Comm’r of Soc. Sec., No. 1:21-cv-00395-
20 SAB, 2022 WL 3999819, at *20 (E.D. Cal. Sept. 1, 2022) (finding no apparent or obvious
21 conflict between requiring occasional/frequent reaching per the DOT and RFC limitation for no
22 overhead reaching, where final assembler, bonder operator, and ampoule sealer jobs did not
23 appear to require overhead reaching); Guith v. Berryhill, No. 1:16-cv-00625-GSA, 2017 WL
24 4038105, at *5–6 (E.D. Cal. Sept. 13, 2017) (no obvious conflict between DOT’s description of
25 frequent/constant reaching and claimant’s limitation of occasional overhead reaching where
26 assembler, garment folder, and packager jobs “only require reaching in front of you”); Sanchez v.
27 Colvin, No. EDCV 14-2204-JPR, 2016 WL 370687, at *16 (C.D. Cal. Jan. 29, 2016) (finding that
28 “final assembler” tasks indicated in DOT would require only reaching forward and down, not
overhead); Martinez, 2015 WL 5231973, at *4 (finding no conflict with DOT’s frequent/constant
reaching requirement existed because “[i]t is clear that the reaching required to perform [the
paper patterns folder, nut sorter, and final assembler] occupations is not overhead, and is

1 consistent with Plaintiff's RFC [limiting overhead reaching]"); Moreno v. Berryhill, No. 1:16-cv-
2 00121-GSA, 2017 WL 1881433, at *3-5 (E.D. Cal. May 9, 2017) (same, with respect to ampoule
3 sealer, assembler, and nut sorter jobs).

4 Similarly, here, the Court concludes any "conflict" Plaintiff identifies is not "apparent or
5 obvious" because the jobs identified by the VE do not foreseeably require frequent overhead
6 reaching. Gutierrez, 844 F.3d at 809. Both the table worker and lens inserter jobs are defined as
7 working with a conveyor belt. Common sense dictates that work on a conveyor belt would occur
8 below shoulder height. Similarly, there is no reason to foresee that inserting lenses into glasses
9 and placing them on a conveyor belt would require reaching overhead.

10 Plaintiff argues that "common experience does not suggest that the occupations of ... table
11 worker[] and lens inserter would require no more than occasional overhead reaching" (ECF No.
12 15 at 26), but he provides no further analysis, and he identifies no examples of "essential,
13 integral, or expected" job tasks of a table worker or lens inserter which would include overhead
14 reaching. Gutierrez, 844 F.3d at 807–08. Without more, Plaintiff's conclusory argument is
15 unpersuasive.¹⁸ Accordingly, the Court concludes the ALJ had no further duty to reconcile the
16 purported reaching conflict, and any error was harmless. Gutierrez, 844 F.3d at 807–08.

17 (ii) Purported Conflict Regarding Constant vs. Frequent Handling/Fingering

18 As to the purported conflict between the DOT requirements and the VE's testimony
19 regarding the handling/fingering limitations, the Court finds no conflict exists with respect to the
20 table worker and lens inserter jobs, because these jobs only require "frequent" handling/fingering,
21 which is consistent with Plaintiff's RFC limitation of frequent handling/fingering. Accordingly,
22

23 ¹⁸ The Court additionally notes Plaintiff relies on Lamear v. Berryhill for the general proposition that a restriction to
24 occasional overhead reaching, as here, conflicts with a claimant's ability to perform occupations that the DOT
25 describes as requiring frequent reaching. (ECF No. 15 at 26 (citing Lamear, 865 F.3d 1201, 1203–05 (9th Cir.
26 2017)).) Such a broad and generalized assertion tends to misread Lamear, in which the Ninth Circuit reiterated that
27 "the requirement for an ALJ to ask follow up questions is fact-dependent..." Lamear, 865 F.3d at 1205. Indeed,
28 Lamear appears factually inapposite to the instant case. Notably, the identified jobs in Lamear were office helper,
mail clerk, and parking lot cashier—none of which were identified as viable jobs for Plaintiff by the VE in the instant
social security case, and Plaintiff makes no argument that the DOT duties and descriptions for those jobs are similar
to the DOT descriptions for ticket counter worker, table worker, or lens inserter. Furthermore, the Lamear court's
analysis heavily emphasized the discrepancy between the claimant's handling/fingering limitation, which is less
relevant to this Court's consideration of Plaintiff's purported overhead reaching conflict. Thus, Plaintiff's reliance on
Lamear is unavailing.

1 the Court does not see any conflict between the VE testimony and the DOT and concludes the
2 ALJ reasonably relied on the VE's testimony at step five with respect to the table worker and lens
3 inserter jobs.

4 **b. Ticket Handler Job**

5 As to Plaintiff's argument that a conflict exists between the DOT requirement of
6 "constant" reaching/handling/fingering for the ticket handler job, and Plaintiff's RFC limitation to
7 "frequent" handling/fingering and occasional overhead reaching/frequent other reaching, the
8 Court notes this appears to be an obvious discrepancy which the ALJ was required to address.

9 However, for the reasons previously noted, the Court finds the VE provided sufficient
10 testimony to address any conflict, and the ALJ properly relied upon the VE's testimony with
11 respect to the existence of the identified jobs.

12 Furthermore, having determined that no obvious conflict exists with respect to the other
13 two identified jobs, table worker and lens inserter, the ALJ's ultimate finding of nondisability was
14 supported by substantial evidence, and any error with respect to the ticket handler job is harmless.
15 See Stout, 454 F.3d at 1055–56; Molina, 674 F.3d at 1117; Lewis, 236 F.3d at 503.

16 **c. Waiver of Challenge**

17 Finally, the Court notes that Plaintiff's attorney had an opportunity to cross-examine the
18 VE at the hearing, and did not challenge the VE's credentials or her findings. (See AR 1023–24.)
19 Notably, Plaintiff's attorney asked the VE whether changing the hypothetical to include a
20 restriction in which the person was limited to "less than occasional upper-extremity usage" would
21 affect the jobs; and the VE testified that such a restriction would eliminate all work. (AR 1024.)
22 Thus, the VE distinguished between a person with limitations of occasional overhead reaching,
23 frequent reaching in all other directions, and frequent handling and fingering from a person with
24 less-than-occasional reaching/handling/fingering and confirmed that the identified DOT jobs were
25 available for the former but not the latter. Following this testimony, Plaintiff did not examine the
26 VE as to any apparent conflict with the DOT as to such limitations. Thus, the objection is
27 deemed waived. Meanel, 172 F.3d at 1115 (holding that, "at least when claimants are represented
28 by counsel, they must raise all issues and evidence at their administrative hearings in order to

1 preserve them on appeal” and rejecting brand new challenge based on VE testimony)).

2 In sum, the Court finds the ALJ reasonably relied on the VE’s testimony at step five to
3 find Plaintiff could perform other work.

4 V.

5 **CONCLUSION AND ORDER**

6 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 7 1. Plaintiff’s motion for summary judgment appealing the decision of the
8 Commissioner of Social Security (ECF No. 15) is DENIED;
- 9 2. Defendant’s cross-motion in response to Plaintiff’s brief (ECF No. 18) is
10 GRANTED; and
- 11 3. The Clerk of the Court is DIRECTED to enter judgment in favor of Defendant
12 Commissioner of Social Security and against Plaintiff Fred McMillen and close
13 this case.

14 IT IS SO ORDERED.

15 Dated: May 12, 2023

16 
17 _____
18 UNITED STATES MAGISTRATE JUDGE