

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DOLYN KEITH BARROW,

Plaintiff,

No. 2:10-cv-00698 KJN

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

ORDER

In his motion for summary judgment, plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying plaintiff’s applications for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”), and Supplemental Security Income (“SSI”) under Title XVI of the Act.¹ (Pl.’s Mot. for Summ. J. (“Pl.’s Motion”), Dkt. No. 21 at 1.)

Plaintiff makes four arguments within his motion for summary judgment. First, plaintiff contends that the administrative law judge (the “ALJ”) failed to sufficiently develop the administrative record, because he failed to “secure” a treating physician’s Residual Functional

¹ This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(15) and 28 U.S.C. § 636(c), and both parties have voluntarily consented to proceed before a United States Magistrate Judge. (Dkt. Nos. 8, 11.)

1 Capacity assessments or order a consultative examination. (Pl.’s Mot. at 20.) As part of this
2 argument, plaintiff asserts that the ALJ’s decision is necessarily erroneous because “the record
3 contained no [Residual Functional Capacity] assessment by a treating or examining physician.”
4 (Id. at 20-21.)

5 Plaintiff’s second argument is that the ALJ failed to include plaintiff’s
6 “uncontrolled hypertension and plantar fibromatosis/plantar fasciitis” as “severe” impairments at
7 step two of the analysis. (Pl.’s Mot. at 22.)

8 Plaintiff’s third argument is that the ALJ failed to “utilize the proper legal
9 standard in evaluating” plaintiff’s obesity. (Id. at 22.) As part of this argument, plaintiff
10 contends that the ALJ improperly concluded that plaintiff’s obesity did not exacerbate any
11 functional limitations arising from his severe impairments. (Id. at 23.)

12 Plaintiff’s fourth argument is that the ALJ “failed to properly credit” plaintiff’s
13 testimony regarding the nature and extent of his functional limitations insofar as that testimony
14 conflicted with the ALJ’s RFC finding. (Pl.’s Mot. at 26-27.) As part of this argument, plaintiff
15 challenges the ALJ’s conclusion that plaintiff’s sleep apnea was “alleviated” with CPAP
16 treatment. (Id. at 27.)

17 The Commissioner filed an opposition to plaintiff’s motion and a cross-motion for
18 summary judgment. (Def.’s Mot. for Summ. J. (“Def.’s Motion”), Dkt. No. 25.) Plaintiff did not
19 file a reply in support of his motion.

20 For the reasons stated below, the court denies plaintiff’s motion for summary
21 judgment and grants the Commissioner’s cross-motion for summary judgment.

22 ///

23 ///

24 ///

25 ///

26

1 I. BACKGROUND²

2 A. Procedural Background

3 Plaintiff applied for benefits on July 26, 2006, alleging a disability onset date of
4 November 1, 2005. (Administrative Record (“AR”) 40, 127-28, 132-39.) The Social Security
5 Administration denied plaintiff’s applications both initially and upon reconsideration. (AR 11.)

6 On September 11, 2008, the ALJ conducted a hearing regarding plaintiff’s claims.
7 (AR 11-22.) Plaintiff, who was represented by an attorney, testified at the hearing. (AR 23-74.)
8 A vocational expert (the “VE”) also testified at the hearing. (Id.) During the hearing, plaintiff
9 confirmed that his previous employment included work as a juvenile “at risk” counselor, a
10 security officer, and a ship builder. (AR 37-43.)

11 In a decision dated January 9, 2009, the ALJ determined that plaintiff was not
12 disabled.³ (AR 11-22.) The ALJ found that while plaintiff could not perform his past relevant
13

14 ² Because the parties are familiar with the factual background of this case, including
15 plaintiff’s medical history, the undersigned does not exhaustively relate those facts here. The
16 facts related to plaintiff’s impairments and medical history will be addressed only insofar as they
17 are relevant the issues presented by the parties’ respective motions.

18 Additionally, to the extent the undersigned uses the present tense in referring to or
19 describing plaintiff’s alleged conditions or functional abilities, or the ALJ’s or Appeals Council’s
20 characterizations of the same, the undersigned clarifies that such references are to plaintiff’s
21 conditions or functional abilities at the time of the ALJ’s or Appeals Council’s decision, unless
22 otherwise indicated.

23 ³ Disability Insurance Benefits are paid to disabled persons who have contributed to the
24 Social Security program, 42 U.S.C. §§ 401 et seq. Supplemental Security Income (“SSI”) is paid
25 to disabled persons with low income. 42 U.S.C. §§ 1382 et seq. Under both provisions,
26 disability is defined, in part, as an “inability to engage in any substantial gainful activity” due to
“a medically determinable physical or mental impairment.” 42 U.S.C. §§ 423(d)(1)(a) &
1382c(a)(3)(A). A five-step sequential evaluation governs eligibility for benefits. 20 C.F.R. §§
423(d)(1)(a), 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987). The
following summarizes the sequential evaluation:

Step one: Is the claimant engaging in substantial gainful activity?
If so, the claimant is found not disabled. If not, proceed to step
two.

Step two: Does the claimant have a “severe” impairment? If so,

1 work, plaintiff could nonetheless perform other work in the national economy. (AR 17-22.) The
2 ALJ's decision became the final decision of the Commissioner when the Appeals Council denied
3 plaintiff's request for review. (AR 4-6.) Plaintiff subsequently filed this action.

4 B. Summary Of The ALJ's Findings

5 The ALJ conducted the required five-step evaluation and concluded that plaintiff
6 was not disabled within the meaning of the Act. (AR 21-22.) At step one, the ALJ concluded
7 that plaintiff had not engaged in substantial gainful activity since November 1, 2005, plaintiff's
8 amended alleged date of onset of disability. (AR 21.) At step two, the ALJ concluded that
9 plaintiff had the following "severe" impairments: "left eye blindness, chronic kidney disease,
10 obesity and sleep apnea." (AR 18, 21.) The ALJ found that plaintiff's "feet impairment is not
11 severe" because it "is only periodic and alleviated with orthotics and injections," and because
12 plaintiff made "no complaints" about feet impairments "from July 2006 to February 2008." (AR
13 18.) The ALJ noted that, in any case, "there is no reason to believe that ongoing [feet] problems,
14 if any, would not be accommodated by alternating between sitting and standing." (AR 18.)

15 At step three, the ALJ determined that none of plaintiff's impairments "either
16 alone or combined meets or medically equals" one of the listed impairments in the applicable

17
18 proceed to step three. If not, then a finding of not disabled is appropriate.

19 Step three: Does the claimant's impairment or combination of
20 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
21 404, Subpt. P, App.1? If so, the claimant is automatically
determined disabled. If not, proceed to step four.

22 Step four: Is the claimant capable of performing his past work? If
23 so, the claimant is not disabled. If not, proceed to step five.

24 Step five: Does the claimant have the residual functional capacity
25 to perform any other work? If so, the claimant is not disabled. If
26 not, the claimant is disabled.

25 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995). The claimant bears the burden of proof in
26 the first four steps of the sequential evaluation process. Bowen, 482 U.S. at 146 n.5. The
Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.

1 regulations. (AR 19, 21.)

2 Between steps three and four, the ALJ assessed plaintiff's residual functional
3 capacity ("RFC"). (AR 19, 22.) The ALJ accorded "substantial weight" to the opinion of the
4 non-examining state agency medical consultant, Dr. A.G. Dipsia. (AR 20.) Dr. Dipsia opined
5 that plaintiff could perform "light work" with vision-related limitations. (AR 20.) In light of Dr.
6 Dipsia's opinion, the "objective clinical findings and the claimant's activities and treatment
7 history" (AR 20 (citing AR 75, 76, 248-52)), and after "careful consideration of the entire
8 record," the ALJ found that plaintiff:

9 has the residual functional capacity to perform essentially
10 the full range of light work as defined in 20 C.F.R.
11 404.1567(b) and 416.967(b), but due to pain, needs to be
12 able to alternate between sitting and standing and avoid
13 work requiring good distant visual acuity, depth
14 perception, and broad field of vision.

15 (AR 22.)

16 In discussing this RFC determination, as well as in discussing the step three
17 analysis, the ALJ explained that plaintiff's "obesity has contributed to his alleged physical
18 limitations such as his sleep apnea and his back pain. However, the medical record and
19 testimony show that the claimant's physical deconditioning is remediable with physical exercise
20 and moderate consumption of food. In short, his symptoms are alleviated with changes in his
21 sedentary lifestyle." (AR 19.) The ALJ explained that plaintiff's other impairments "do not
22 preclude modification of food intake or a routine home exercise program. The claimant must
23 understand that the majority of his alleged impairments (i.e., high blood pressure, back pain, feet
24 pain) are related to his weight." (*Id.*) The ALJ found that plaintiff did indeed suffer from several
25 medically determinable physical impairments, but also found that plaintiff's "statements
26 concerning the intensity, persistence, and limiting effects" of the symptoms of such impairments
"are not credible to the extent they are inconsistent with the residual functional capacity
assessment made herein." (AR 20.) The ALJ concluded that "the claimant's obesity in

1 combination with his other alleged impairments does not increase the severity or functional
2 limitations of those impairments.” (AR 19.) The ALJ also found that “[t]here is simply no
3 compelling evidence that the claimant’s alleged impairments significantly impact his day-to-day
4 functioning.” (AR 20.) The ALJ repeatedly noted that plaintiff “performed a variety of jobs in
5 the past in spite of his obesity,” and that “claimant has held a variety of jobs in spite of his
6 impairments.” (AR 19, 20.)

7 After assessing plaintiff’s RFC, the ALJ proceeded to step four of the analysis and
8 determined that plaintiff was not capable of performing any of his past relevant work. (AR 21.)

9 At step five, the ALJ accepted the VE’s testimony and determined that a
10 hypothetical individual with plaintiff’s RFC could perform several other jobs existing in the
11 national economy, including that as an “Information Clerk,” “Storage Facility Clerk,” and
12 “Office Helper.” (AR 17, 21-22.)

13 II. STANDARDS OF REVIEW

14 The court reviews the Commissioner’s decision to determine whether it is (1) free
15 of legal error, and (2) supported by substantial evidence in the record as a whole. Bruce v.
16 Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009); accord Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th
17 Cir. 2009). This standard of review has been described as “highly deferential.” Valentine v.
18 Comm’r of Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009). “Substantial evidence means
19 more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
20 reasonable mind might accept as adequate to support a conclusion.” Bray v. Comm’r of Soc.
21 Sec. Admin., 554 F.3d 1219, 1222 (9th Cir. 2009) (quoting Andrews v. Shalala, 53 F.3d 1035,
22 1039 (9th Cir. 1995)); accord Valentine, 574 F.3d at 690 (citing Desrosiers v. Sec’y of Health &
23 Human Servs., 846 F.2d 573, 576 (9th Cir. 1988)). “The ALJ is responsible for determining
24 credibility, resolving conflicts in medical testimony, and for resolving ambiguities.” Andrews,
25 53 F.3d at 1039; Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) (“[T]he ALJ is the
26 final arbiter with respect to resolving ambiguities in the medical evidence.”).

1 Findings of fact that are supported by substantial evidence are conclusive.
2 42 U.S.C. § 405(g); see also McCarthy v. Apfel, 221 F.3d 1119, 1125 (9th Cir. 2000). “Where
3 the evidence as a whole can support either a grant or a denial, [the court] may not substitute [its]
4 judgment for the ALJ’s.” Bray, 554 F.3d at 1222; see also Ryan v. Comm’r of Soc. Sec., 528
5 F.3d 1194, 1198 (9th Cir. 2008) (“Where evidence is susceptible to more than one rational
6 interpretation,’ the ALJ’s decision should be upheld.”) (quoting Burch v. Barnhart, 400 F.3d 676,
7 679 (9th Cir. 2005)); Batson v. Comm’r of Soc. Sec., 359 F.3d 1190, 1196 (9th Cir. 2004).
8 However, the court “must consider the entire record as a whole and may not affirm simply by
9 isolating a ‘specific quantum of supporting evidence.’” Ryan, 528 F.3d at 1198 (quoting
10 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006)); accord Lingenfelter v. Astrue,
11 504 F.3d 1028, 1035 (9th Cir. 2007).

12 III. ANALYSIS

13 A. The ALJ Did Not Err By Failing To Recontact Plaintiff’s Treating 14 Physician Or Failing To Further Develop The Record

15 “The ALJ in a social security case has an independent ‘duty to fully and fairly
16 develop the record and to assure that the claimant’s interests are considered.” Tonapetyan v.
17 Halter, 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting Smolen v. Chater, 80 F.3d 1273, 1288 (9th
18 Cir. 1996)); Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005). Ambiguous evidence, or the
19 ALJ’s own finding that the record is inadequate to allow for proper evaluation of the evidence,
20 triggers the ALJ’s duty to conduct an appropriate further inquiry. Smolen, 80 F.3d at 1288;
21 Armstrong v. Comm’r of Soc. Sec. Admin., 160 F.3d 587, 590 (9th Cir.1998). “An ALJ is
22 required to recontact a doctor only if the doctor’s report is ambiguous or insufficient for the ALJ
23 to make a disability determination.” Bayliss v. Barnhart, 427 F.3d 1211, 1217 (9th Cir. 2005);
24 Thomas v. Barnhart, 278 F.3d 947, 958 (9th Cir. 2002) (“the requirement for additional
25 information is triggered only when the evidence from the treating medical source is inadequate to
26 make a determination as to the claimant’s disability.”) Plaintiff bears the burden of proving his

1 disability, and he cannot shift that burden by arguing that the ALJ should have developed the
2 record further. Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001). “The ALJ may discharge
3 this duty in several ways, including: subpoenaing the claimant’s physicians, submitting questions
4 to the claimant’s physicians, continuing the hearing, or keeping the record open after the hearing
5 to allow supplementation of the record.” Tonapetyan, 242 F.3d at 1150 (citing Tidwell v. Apfel,
6 161 F.3d 599, 602 (9th Cir. 1998)).

7 Plaintiff argues that “the record contained no residual functional capacity (RFC)
8 assessment by a treating or examining physician,” and that the “only RFC assessment in the
9 record was a check-off-the-box form completed by a non-examining State Agency physician in
10 November 2006.” (Pl.’s Mot. at 20.) Plaintiff explains that a document in the record suggests
11 that Dr. Will, plaintiff’s treating physician, *may* have completed RFC assessment forms — and
12 that such forms are absent from the record. (Id. (citing AR 324).) As a result, according to
13 plaintiff, the ALJ erred by not re-contacting Dr. Will and inquiring about the potentially “missing
14 RFC assessments.” (Id.) Plaintiff contends that the potentially “missing RFC assessments”
15 created an “ambiguity” in the record that the ALJ was duty-bound to resolve. (Id. at 20-21.)

16 Contrary to plaintiff’s argument, the ALJ fulfilled his duty to develop the record in
17 this case. A duty to recontact a treating physician is triggered only when the evidence is otherwise
18 insufficient to enable the ALJ to determine whether a disability exists, and here, the evidence was
19 sufficient to make such a determination. (AR 20-22.) For instance, in making his findings, the
20 ALJ reviewed the “entire record” (AR 19), which included treatment notes from Dr. Will (AR
21 322-24), as well as an RFC assessment from the non-examining agency physician Dr. Dipsia.
22 (AR 20.)⁴ Plaintiff presumes that a potentially missing RFC assessment necessarily renders the
23

24 ⁴ Plaintiff also argues that Dr. Dipsia’s November 2006 RFC assessment was insufficient
25 because it was dated more than two years before the administrative hearing and because it
26 predated the worsening of plaintiff’s kidney disease. (Pl.’s Mot. at 20.) But the supposedly
“missing” RFC assessment from Dr. Will was dated only three months later, in January 2007,
and therefore would also predate the administrative hearing and the kidney deterioration by

1 record ambiguous. Yet, plaintiff has not cited authorities supporting his argument that, because
2 an RFC assessment *may* have been completed⁵ and is not within the record, this necessarily
3 creates the sort of “ambiguity” that renders the remaining evidence “inadequate” to determine
4 whether a disability exists. (Pl.’s Mot. at 20-21.) Similarly, plaintiff has not cited authorities
5 supporting the argument that, every time a record lacks an RFC assessment from either “a treating
6 or examining physician” (Pl.’s Mot. at 21), that record is necessarily insufficient and therefore
7 requires further development (i.e., by a “consultative examination” or otherwise). Indeed,
8 controlling authority is to the contrary: the reports of non-examining physicians like Dr. Dipsia
9 can constitute substantial evidence. See Magallanes v. Bowen, 881 F.2d 747, 752 (9th Cir. 1989)
10 (“[T]he reports of consultative physicians called in by the Secretary may serve as substantial
11 evidence.”).

12 Plaintiff failed to raise the issue of “missing RFC assessments” during the
13 administrative hearing. (AR 23-74.) Instead, plaintiff now invokes his own failure to introduce a
14 treating physician’s RFC assessment in efforts to raise an ambiguity. See Mayes, 276 F.3d at 459
15 (holding that “[i]t was [plaintiff’s] duty to prove she was disabled” and that plaintiff could not
16 “shift her own burden to the ALJ” by arguing that he improperly developed the record). In any
17 event, even if there were some “ambiguity” caused by Dr. Will’s so-called “missing RFC
18 assessment,” (Pl.’s Mot. at 20), the ALJ satisfied his duty under Tonapetyan by holding the record
19 open after the hearing (AR 28-29, 73, 432-39) and in fact receiving other materials. See
20 Tonapetyan, 242 F.3d at 1150. As a result, plaintiff had the opportunity to supplement the record
21 to clarify any ambiguities he now raises. Plaintiff identifies no reason why he could not have
22 timely supplemented the record to include any potential “missing RFC assessments.” (Pl.’s Mot.

23 _____
24 roughly the same amount of time.

25 ⁵ It is unclear whether any RFC assessments by Dr. Hill ever actually existed. The only
26 evidence of such assessments is Dr. Hill’s notation: “Forms were filled out today, January 29,
2007, for Medical Assessment of Ability to Perform Work-Related Activities, Mental and
Physical.” (AR 324.) Plaintiff never supplemented the record with any such assessments.

1 at 20.) Accordingly, plaintiff has not shown that the ALJ failed to discharge a duty to recontact
2 Dr. Hill or otherwise further develop the record in this case.

3 B. The ALJ Supported His List Of Plaintiff's "Severe" Impairments With
4 Substantial Evidence, And In Any Event, The ALJ's RFC Assessment
5 Accounts For Plaintiff's Foot Impairments And Hypertension

6 Plaintiff's second argument is that the ALJ failed to include plaintiff's
7 "uncontrolled hypertension and plantar fibromatosis/plantar fasciitis" as "severe" impairments at
8 step two of the analysis. (Pl.'s Mot. at 22.)

9 A medical impairment is deemed "severe" when "alone or in combination with
10 other medically determinable physical or mental impairment(s), it significantly limits an
11 individual's physical or mental ability to do basic work activities." Burch v. Barnhart, 400 F.3d
12 676, 682 (9th Cir.2005); 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

13 a. Foot Impairments

14 The ALJ found that plaintiff's foot impairments were not severe. (AR 18.) He
15 found that the impairments were "only periodic and alleviated with orthotics and injections.
16 [Plaintiff] made no complaints from July 2006 to February 2008." (Id.) He also found that
17 "[t]here is no reason to believe that ongoing [foot] problems, if any, would not be accommodated
18 by alternating between sitting and standing." (Id.)

19 Plaintiff argues that his foot impairments were not actually "alleviated" with
20 orthotics and injections, as "the record documented that orthotics and injections helped but that
21 the impairment continued to come back." (Pl.'s Mot. at 24.) Plaintiff lists various portions of the
22 record substantiating his foot impairments. (Id.)

23 While plaintiff is correct that certain parts of the record may well support the
24 existence of "severe" foot impairments, plaintiff fails to compellingly demonstrate how the ALJ's
25 failure to deem the foot impairments "severe" resulted in anything more than harmless error.
26 Indeed, plaintiff does not squarely address the ALJ's finding that "[t]here is no reason to believe
that ongoing problems, if any, would not be accommodated by alternating between sitting and

1 incorrect and controverted by the record.” (Pl.’s Mot. at 25.) Plaintiff cites evidence in the record
2 showing some periods in which plaintiff’s hypertension was controlled and other periods when it
3 was not. (Id. (citing AR 392 (“uncontrolled” on May 21, 2007); 369 (“uncontrolled” on February
4 4, 2008); 351 (“well controlled” on May 5, 2008; 340 (“uncontrolled” on May 20, 2008).) As of
5 the administrative hearing, though, plaintiff himself testified that his hypertension had “stabled
6 out” as of the previous day based on a change in medication. (AR 57.) The ALJ was entitled to
7 rely on plaintiff’s own testimony on this issue. “The ALJ is responsible for determining
8 credibility, resolving conflicts in medical testimony, and for resolving ambiguities,” and here, in
9 resolving record’s ambiguities regarding plaintiff’s hypertension, substantial evidence supported
10 the ALJ’s determinations. See Andrews, 53 F.3d at 1039; Tommasetti, 533 F.3d 1035, 1041 (9th
11 Cir. 2008).

12 In light of the medical evidence and plaintiff’s own hearing testimony, it cannot be
13 said that the ALJ’s findings regarding hypertension were not supported by substantial evidence.
14 Moreover, plaintiff fails to explain how his hypertension, whether or not labeled a “severe”
15 impairment, significantly limited his physical ability to do work, or that such resulting functional
16 limitations were not accommodated by the ALJ’s RFC assessment. Accordingly, plaintiff has not
17 shown the ALJ’s determination regarding plaintiff’s hypertension to be unsupported by substantial
18 evidence, and plaintiff has not shown that omitting hypertension from the list of “severe”
19 impairments resulted in anything other than harmless error.

20 c. In Any Event, The ALJ Accounted For All Of Plaintiff’s Ailments In
21 Assessing Plaintiff’s RFC

22 Plaintiff argues that the ALJ’s failure to deem his foot impairments and
23 hypertension as “severe” means “there is no assurance that they [had] any role whatsoever in the
24 determination of the claimant’s disability.” (Pl.’s Mot. at 25.) Plaintiff’s argument overlooks the
25 fact that, in determining a claimant’s RFC, the ALJ must consider “all” of the claimant’s
26 impairments, including impairments that are not severe. Carmickle v. Comm’r Soc. Sec. Admin.,

1 533 F.3d 1155, 1164 (9th Cir. 2008) (citing Social Security Ruling 96-8p). Contrary to plaintiff's
2 arguments, the ALJ based his RFC assessment upon a careful review of the "entire record." (AR
3 19.) The record contains references to plaintiff's hypertension and foot impairments, and it can be
4 reasonably inferred that the ALJ at least "considered" each of these impairments in rendering his
5 decision. See Carmickle, 533 F.3d at 1164. Given the ALJ's consideration of the "entire record"
6 (AR 19) and the amount of testimony the ALJ elicited on these topics during the hearing, the
7 undersigned infers that the ALJ considered such testimony in assessing plaintiff's RFC. See
8 Batson, 359 F.3d at 1193 ("[T]he Commissioner's findings are upheld if supported by inferences
9 reasonably drawn from the record . . .") (citing Gallant v. Heckler, 753 F.2d 1450, 1452-53 (9th
10 Cir. 1984); e.g., LaFaelle v. Astrue, No. C09-0496-JCC, 2010 WL 1286804, at *14-16 (W.D.
11 Wash. March 25, 2010) (unpublished) (upholding ALJ's RFC assessment even though it did not
12 explicitly discuss all impairments plaintiff alleged, because the ALJ discounted several medical
13 opinions offered by plaintiff's physicians, the ALJ's decision "reflect[ed] [the ALJ's] thorough
14 consideration of the medical evidence," and where the RFC "specifically accounted for many of
15 plaintiff's concerns").

16 C. Even If The ALJ Improperly Evaluated Plaintiff's Obesity, This Evaluation
17 Did Not Render His RFC Assessment Erroneous

18 Plaintiff's third argument is that the ALJ failed to "utilize the proper legal standard
19 in evaluating" plaintiff's obesity. (Pl.'s Mot. at 22.) As part of this argument, plaintiff contends
20 that the ALJ improperly concluded that plaintiff's obesity did not exacerbate functional
21 limitations arising from any of his severe impairments. (Id. at 23.)

22 Plaintiff cites Orn v. Astrue and argues that, by discussing plaintiff's obesity and
23 noting that "his symptoms are alleviated with changes in his sedentary lifestyle" (AR 19), the ALJ
24 "engaged in exactly the type of 'blame the victim' obesity analysis proscribed by Orn. (Pl.'s Mot.
25 at 23 (citing Orn v. Astrue, 495 F.3d 625, 636-37 (9th Cir. 2007).) However, Orn addressed the
26 propriety of an ALJ's using a claimant's failure to exercise in the context of an adverse credibility

1 determination. Orn, 495 F.3d at 636-37. Plaintiff’s contentions regarding the ALJ’s use of the
2 “proper legal standard in evaluating” plaintiff’s obesity does not include an argument that the ALJ
3 used improper, obesity-based grounds for an adverse credibility determination in violation of Orn;
4 instead, plaintiff takes issue with the ALJ’s general “punitive” mentions of obesity and weight.
5 (Pl.’s Mot. at 22-23.) Indeed, plaintiff devotes a separate section of his briefing to the ALJ’s
6 adverse credibility determination (id. at 27-29), and nowhere does plaintiff specifically argue that
7 the ALJ’s *credibility determination* violated Orn. Accordingly, while the ALJ’s discussion of
8 plaintiff’s obesity did include the ALJ’s sentiments that plaintiff’s “symptoms are alleviated with
9 changes in his sedentary lifestyle” and “the majority of his alleged impairments (i.e. high blood
10 pressure, back pain, feet pain) are related to his weight” (AR 19), the ALJ did not improperly
11 invoke these sentiments in analyzing plaintiff’s credibility. Accordingly, plaintiff’s reliance on
12 Orn is misplaced, as the discussion of obesity in that case was limited to the context of using a
13 claimant’s “failure to lose weight” in assessing the claimant’s *credibility*. Orn, 495 F.3d at 636-
14 37.

15 While the ALJ did not specifically invoke plaintiff’s failure to lose weight as part
16 of the decision to discredit some of plaintiff’s testimony, the ALJ did reference plaintiff’s need to
17 lose weight and/or exercise, and did find that plaintiff’s “overall health should benefit with
18 continued weight loss.” (AR 19-20.) At most, as described below, these references amount to
19 harmless error. See Burch, 400 F.3d at 679 (“A decision of the ALJ will not be reversed for errors
20 that are harmless.”) (citing Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir.1990)).

21 a. Applicable Law

22 Social Security Ruling 02-1p (“SSR 02-1p”)⁷ states that “[o]besity is a complex,
23 chronic disease characterized by excessive accumulation of body fat.” It further states that obesity
24 “commonly leads to, and often complicates, chronic diseases of the cardiovascular, respiratory,

25 ⁷ SSR 02-1p is available at Policy Interpretation Ruling Titles II and XVI: Evaluation of
26 Obesity, 67 Fed. Reg. 57,859-02 (Sept. 12, 2002).

1 and musculoskeletal body systems,” and “may also cause or contribute to mental impairments
2 such as depression.” SSR 02-1p also requires an ALJ to consider an individual’s obesity at steps
3 two through five of the sequential evaluation, and requires that obesity be considered in
4 combination with the individual’s other impairments.⁸ It also states that “[an adjudicator] will not
5 make assumptions about the severity or functional effects of obesity combined with other
6 impairments. Obesity in combination with another impairment may or may not increase the
7 severity or functional limitations of the other impairment. [The adjudicator] will evaluate each
8 case based on the information in the case record.” Ninth Circuit case law also requires an ALJ to
9 determine the effect of a claimant’s obesity on his or her other impairments. Celaya v. Halter, 332
10 F.3d 1177 (9th Cir. 2003).

11 In Celaya, the Ninth Circuit held that an ALJ should consider the effect of a
12 claimant’s obesity, in combination with the claimant’s other impairments, on the claimant’s health
13 and ability to work even where the claimant does not raise the issue. Id. at 1182. The Ninth
14 Circuit Court of Appeals reasoned that: (1) the claimant had implicitly raised the issue of obesity
15 in her report of symptoms; (2) the record clearly showed that the claimant’s obesity was at least
16 close to the listing criterion, and was a condition that could exacerbate the claimant’s reported
17 illness; and (3) in light of the claimant’s pro se status, the ALJ’s personal observation of the
18 claimant and the information in the record should have alerted him to the need to develop the
19 record on the claimant’s behalf. Id.

20 More recently, in Burch, the Ninth Circuit distinguished its holding in Celaya, and
21 found no reversible error in an ALJ’s failure to consider the claimant’s obesity at multiple steps of
22

23 ⁸ “The Secretary issues Social Security Rulings to clarify the Secretary’s regulations and
24 policy.” Bunnell v. Sullivan, 947 F.2d 341, 346 n.3 (9th Cir. 1991). Although “SSRs do not
25 carry the ‘force of law,’ . . . they are binding on ALJs nonetheless. Bray, 554 F.3d at 1224
26 (citation omitted). Social Security rulings “constitute Social Security Administration
interpretations of the statute it administers and of its own regulations,” and are given deference
“unless they are plainly erroneous or inconsistent with the Act or regulations.” Han v. Bowen,
882 F.2d 1453, 1457 (9th Cir. 1989).

1 the sequential evaluation process where: (i) the claimant was represented by counsel; (ii) the
2 record did not indicate that the claimant’s obesity exacerbated the claimant’s other impairments
3 (other than possibly her back pain), and (iii) the claimant failed to: (a) specify which listing the
4 claimant believed the claimant met or equaled; (b) set forth any evidence which would support the
5 diagnosis and findings of a listed impairment; and (c) point to any evidence of functional
6 limitations due to obesity which would have impacted the ALJ’s analysis. Burch, 400 F.3d at
7 682–84 (finding that the ALJ adequately considered plaintiff’s obesity in his RFC determination
8 and at various stages of the analysis, given that plaintiff had not pointed to “any evidence of
9 functional limitations due to obesity which would have impacted the ALJ’s analysis”).

10 b. Application

11 Here, the ALJ considered plaintiff’s obesity throughout the sequential analysis.
12 (AR 16-22.) For instance, the ALJ found that plaintiff’s obesity was a “severe” impairment at
13 step two of the sequential analysis. (AT 18.) This finding means that the ALJ must have
14 determined that plaintiff’s obesity had some material impact on plaintiff’s ability to do basic work
15 activities. See Webb, 433 F.3d at 686 (“An impairment or combination of impairments may be
16 found not severe *only* if the evidence establishes a slight abnormality that has no more than a
17 minimal effect on an individual’s ability to work” (citations and quotation marks omitted).).
18 However, while the ALJ concluded plaintiff’s obesity impacted plaintiff’s ability to work insofar
19 as the obesity contributed to the existence of plaintiff’s physical impairments, the ALJ also
20 concluded that plaintiff’s obesity did not “increase the severity or functional limitations” of
21 plaintiff’s impairments. (AR 19.) In other words, the ALJ concluded that plaintiff’s obesity
22 “contributed to” the very existence of plaintiff’s various impairments (i.e., “sleep apnea” and
23 “back pain”) (AR 19), but also that obesity did not exacerbate plaintiff’s *functional limitations*
24 and concluded that “the claimant’s obesity in combination with his other alleged impairments
25 does not increase the severity or functional limitations of those impairments.” (AR 19.)

26 Plaintiff argues that the ALJ erred by finding that plaintiff’s obesity contributed to

1 the very existence of his physical impairments and simultaneously finding that plaintiff's obesity
2 did not increase plaintiff's "functional limitations." (Pl.'s Mot. at 23.) However, just as in Burch,
3 plaintiff has failed to point to any evidence of actual *functional limitations* due to obesity which
4 would have impacted the ALJ's RFC analysis. See Burch, 400 F.3d at 682-84.⁹ While the ALJ's
5 decision could have been more clearly written in this regard, substantial evidence nonetheless
6 supports the ALJ's determination regarding plaintiff's functional limitations and, in any event, any
7 error in the ALJ's RFC determination was harmless as described below.

8 Plaintiff argues that "the record clearly documented" several functional limitations
9 arising from plaintiff's obesity. (Pl.'s Mot. at 23-24.)

10 For example, on March 1, 2006, Mr. Barrow was
11 diagnosed with plantar fasciitis secondary to severe pes
12 planus and obesity. TR 228. On December 19, 2006,
13 Mr. Barrow was encouraged to lose weight and adhere to
14 a low fat/low sodium diet in order to help his CKD Stage
15 III, hypertension, and dyslipidemia. TR 287. In May of
16 2008, Mr. Barrow was assessed with Stage 4 CKD and
17 noted that the progression of his CKD might be
18 'secondary to hyperfiltration or secondary to FSGS with
19 obesity.' TR 350-351.

20 (Pl.'s Mot. at 24.) These excerpted sentences do not support plaintiff's argument that his obesity
21 itself causes functional limitations, or the argument that his obesity exacerbates functional
22 limitations arising from other impairments. Instead, these sentences demonstrate only that
23 plaintiff's obesity is related to the *existence* of his other impairments. The quoted sentences do
24 not address any particular *functional limitations*, let alone functional limitations necessarily
25 arising from (or exacerbated by) plaintiff's obesity. For instance, the fact that plaintiff was
26 diagnosed with plantar fasciitis secondary to severe pes planus and obesity does not render the

24 ⁹ "Even on appeal, Burch has not pointed to any evidence of functional limitations due to
25 obesity which would have impacted the ALJ's analysis. In fact, the only evidence in the record
26 relating to her obesity are notes from doctors who observed weight gain, indicated that Burch is
obese, and recommended that she participate in a medically supervised weight loss program."
Burch, 400 F.3d at 683.

1 ALJ's RFC determination erroneous. The fact that these impairments are related does not address
2 whether or what *functional limitations* arise from plaintiff's obesity. Similarly, the ALJ's RFC
3 determination is not rendered erroneous because plaintiff was encouraged to lose weight and
4 adhere to a low fat/low sodium diet in order to help his CKD Stage III, hypertension, and
5 dyslipidemia, or because plaintiff was assessed with Stage 4 CKD secondary to hyperfiltration or
6 secondary to FSGS with obesity. The fact that plaintiff's physicians were able to link obesity to
7 the existence of plaintiff's other conditions is not evidence of plaintiff's alleged *functional*
8 *limitations*, nor is it evidence that obesity actually exacerbated the *functional limitations* arising
9 from those conditions.

10 Plaintiff identifies no medical evidence indicating that he suffered particular
11 *functional limitations* due to obesity, let alone limitations which would have materially impacted
12 the ALJ's RFC analysis. The medical evidence in the record does not support plaintiff's argument
13 that his obesity exacerbated the functional limitations arising from his various severe and non-
14 severe impairments. See Burch, 400 F.3d at 682-84 (no error where plaintiff failed to point to any
15 evidence of actual functional limitations due to obesity). Although the record reveals that
16 plaintiff's doctors encouraged him to lose weight (AR 287 ("have encouraged [plaintiff] to lose
17 weight, adhere to low fat/low Na diet")), plaintiff has not highlighted portions of the record
18 revealing actual *functional limitations* plaintiff suffered due to his weight. Consistently, Dr. Hill,
19 plaintiff's examining physician, noted plaintiff's obesity (AR 322-24) and conducted a physical
20 exam, including examining plaintiff's "gait and stance" (both of which were "normal for
21 [plaintiff's] weight") and plaintiff's "heel, toe, and tandem walk" (all of which were "adequately
22 performed, considering [plaintiff's weight]), but *did not* suggest any obesity-related functional
23 limitations beyond those noted in the ALJ's RFC assessment. (AR 19). The report of state
24 agency non-examining physician, Dr. Dipsia (AR 248-52), is consistent with the ALJ's RFC
25 assessment and does not suggest that any functional limitations arise from plaintiff's obesity.

26 The continuation of the above-quoted excerpt from plaintiff's brief also fails to

1 amount to evidence that renders the ALJ’s RFC determination erroneous. In arguing that the
2 record “clearly” demonstrates that plaintiff had functional limitations arising from obesity,
3 plaintiff notes:

4 Mr. Barrow also testified that his weight was a barrier to him
5 being able to work on a regular basis. TR 39, 48. He explained
6 that sitting, standing on his feet, and having to get up and move
7 about were all problematic because of his weight. TR 39. He
8 also noted his back and feet problems in relationship to his
9 obesity. Id.

10 (Pl.’s Mot. at 24.) Because plaintiff invokes his own testimony to support his argument that the
11 ALJ improperly found that obesity did not increase the functional limitations of his impairments
12 and thus rendered an erroneous RFC assessment, the undersigned will address whether plaintiff’s
13 cited testimony, if taken as true, would have any impact upon the RFC assessment. On a closer
14 review of the cited pages of the hearing transcript (AR 39, 48), however, plaintiff’s cited
15 testimony does not support his argument that his obesity functionally limits his ability to work.

16 At page 48 of the hearing transcript, plaintiff testified regarding some difficulties
17 arising from his weight. (AR 48.) The ALJ asked, “other than maybe you’re not as agile as you
18 used to be, tell me how that weight bothers you? How does it keep you from working?” (Id.)
19 Plaintiff responded, “Uncomfortable in the back. I see a chiropractor.” (Id.) Plaintiff went on to
20 describe how his “back might go out” about “three or four times a year” for “two to three weeks,”
21 but explained that “pain medication helps it subside for maybe three or four, seven days and then I
22 have to go back again [for more pain medication].” (Id.)

23 At page 39 of the hearing transcript, plaintiff testified that his weight posed a “little
24 problem” in his working, because it resulted in his “not being able just to sit in one setting, stand
25 in one setting too long. Having to get up and move about.” (AR 39.) Plaintiff also explained that
26 “standing on my feet” posed a problem in his working: “I got plantar fasciitis. So between the
combination of standing and sitting.” (Id.) However, the ALJ pressed plaintiff regarding this
functional limitation. The ALJ asked, “Can you – even with the problems, if you’re allowed, if

1 you were in a situation where you could get up and down when you wanted, could you get through
2 the day as long as you could get up and walk around if you needed to and then sit down when you
3 needed to?” (Id.) Plaintiff responded, “Yeah that’s – I can get up – yeah, I can get through a day
4 with being able to – yeah, to get up and sit down when I need to.” (Id.) The ALJ clarified, “Okay.
5 All right. So if you had a job like that . . . and it was something like counseling that you enjoyed
6 and that you were good at apparently, is there any reason why you couldn’t do that today?” (Id.)
7 Plaintiff responded candidly: “I just wouldn’t want to work. I don’t want to work back with kids.”
8 (Id.) Plaintiff continued on to explain that he had “had it up to here” with kids and that the work
9 counseling children did not “pay” as much as he wanted. (Id. at 39-40.)

10 Plaintiff’s cited testimony at pages 39 and 48 of the transcript do not compellingly
11 support plaintiff’s argument that “the record clearly documented” functional limitations arising
12 from plaintiff’s obesity. (Pl.’s Mot. at 23-24.) Even taking plaintiff’s above-quoted testimony as
13 absolutely credible, it does not render the ALJ’s RFC determination erroneous. In a nutshell, the
14 cited testimony shows only that plaintiff’s back was “uncomfortable,” in his assumption, because
15 of his weight (AR 48), and yet such testimony was followed by plaintiff’s concession that pain
16 medication causes the discomfort to subside. (Id.) The remaining cited testimony shows that
17 plaintiff had difficulty “standing and sitting,” again, in his assumption, because of his weight.
18 (AR 39.) Yet such testimony was followed by plaintiff’s concession that he *could* work in a job
19 where he could “get up and sit down when I need to” *and* that even if such a job existed, he still
20 simply “wouldn’t want to work.” (Id.) Even if taken as true, neither of the cited transcript
21 portions demonstrates that plaintiff’s functional limitations (if they can be so labeled) necessarily
22 arose from plaintiff’s obesity. Plaintiff’s “own speculation that [his] obesity impacts [his] ability
23 to work does not constitute evidence and falls short of meeting [his] burden of proof.” See
24 Williams v. Astrue, No. EDCV 10–1827 JC, 2011 WL 3319536, at * 2-4 (C.D. Cal. July 29,
25 2011) (unpublished). Moreover, plaintiff has not convincingly argued that either his weight-
26 related back discomfort or his need to stand and sit at will are not adequately accommodated by

1 the ALJ's RFC assessment.

2 Accordingly, even if the ALJ made improper or needless mention of plaintiff's
3 need to lose weight and/or to exercise (AR 19-20) in rendering his RFC determination, any error
4 arising from these references was harmless. See Burch, 400 F.3d at 682-84; Carmickle, 533 F.3d
5 at 1162. This conclusion is because the record does not, as plaintiff argues, "clearly document"
6 functional limitations arising from plaintiff's obesity. (Pl.'s Mot. at 23-24.) Plaintiff's own cited
7 testimony regarding his so-called limitations – even if taken as credible – does not demonstrate
8 that such limitations necessarily arose from plaintiff's obesity. Moreover, a close reading of that
9 testimony reveals plaintiff's admissions that medication alleviated his weight-related back
10 discomfort *and* that while plaintiff could indeed work in a job that enabled him to sit and stand at
11 will, he would simply rather not work. This testimony actually undercuts plaintiff's argument that
12 he has prohibitive functional limitations. Finally, even if plaintiff's back discomfort and need to
13 sit and stand at will were assumed to be functional limitations and were assumed to arise from
14 plaintiff's obesity, plaintiff has not shown that the ALJ's RFC failed to adequately accommodate
15 these limitations.

16 D. The ALJ's Credibility Determination Was Either Properly Supported, And In Any
17 Event, Any Error In The Credibility Determination Was, At Most, Harmless

18 Plaintiff's fourth argument is that the ALJ "failed to properly credit" plaintiff's
19 testimony regarding the nature and extent of his functional limitations. (Pl.'s Mot. at 26-27.) The
20 ALJ determined that plaintiff's testimony regarding his functional limitations was not credible
21 insofar as it conflicted with the ALJ's RFC assessment. (AR 19-20.) Specifically, the ALJ found
22 that "the claimant's statements concerning the intensity, persistence and limiting effects of [his]
23 symptoms are not credible to the extent that they are inconsistent with the residual functional
24 capacity assessment made herein." (AR 20.) Plaintiff challenges this credibility finding and its
25 implications upon the ALJ's RFC determination. (Pl.'s Mot. at 26-29.)

26 In Lingenfelter v. Astrue, the Ninth Circuit Court of Appeals summarized the

1 ALJ's task with respect to assessing a claimant's credibility:

2 To determine whether a claimant's testimony regarding subjective pain or
3 symptoms is credible, an ALJ must engage in a two-step analysis. First, the
4 ALJ must determine whether the claimant has presented objective medical
5 evidence of an underlying impairment which could reasonably be expected
6 to produce the pain or other symptoms alleged. The claimant, however,
7 need not show that her impairment could reasonably be expected to cause
8 the severity of the symptom she has alleged; she need only show that it
9 could reasonably have caused some degree of the symptom. Thus, the ALJ
10 may not reject subjective symptom testimony . . . simply because there is no
11 showing that the impairment can reasonably produce the degree of
12 symptom alleged.

13 Second, if the claimant meets this first test, and there is no evidence of
14 malingering, the ALJ can reject the claimant's testimony about the severity
15 of her symptoms only by offering specific, clear and convincing reasons for
16 doing so. . . .

17 504 F.3d at 1035-36 (citations and quotation marks omitted). In weighing a claimant's credibility,
18 an ALJ may consider, among other things, the "[claimant's] reputation for truthfulness,
19 inconsistencies either in [claimant's] testimony or between [her] testimony and [her] conduct,
20 [claimant's] daily activities, [her] work record, and testimony from physicians and third parties
21 concerning the nature, severity, and effect of the symptoms of which [claimant] complains."
22 Thomas, 278 F.3d at 958-59 (modification in original) (quoting Light v. Soc. Sec. Admin., 119
23 F.3d 789, 792 (9th Cir. 1997)). If the ALJ's credibility finding is supported by substantial
24 evidence in the record, the court "may not engage in second-guessing." Id. at 959.

25 If an ALJ finds that a claimant's testimony relating to the intensity of his pain is
26 unreliable, the ALJ must make a credibility determination and explain why the testimony is
unpersuasive. Morgan v. Comm'r Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999); accord
Valentine, 574 F.3d at 693. The ALJ must point to "specific evidence in the record" undermining
the claimant's testimony. Valentine, 574 F.3d at 693; Magallanes, 881 F.2d at 755. Questions of
credibility and resolutions of conflicts in the testimony are functions solely of the Secretary.
Valentine, 574 F.3d at 693. To find a claimant not credible, the ALJ may rely on internal
contradictions in the claimant's testimony, or on conflicts between the claimant's testimony and

1 conduct. Light, 119 F.3d at 792; accord Batson, 359 F.3d at 1196-97. When evidence reasonably
2 supports either confirming or reversing the ALJ's decision, the district court may not substitute its
3 judgment for ALJ's. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

4 Here, the ALJ found that plaintiff's medically determinable impairments could
5 reasonably be expected to produce some of the symptoms alleged by plaintiff, but that plaintiff's
6 statements concerning the intensity, persistence, and limiting effects of those symptoms were not
7 entirely credible. (AR 20.) Given the absence of evidence of malingering, the ALJ was required
8 to provide clear and convincing reasons in support of his adverse credibility finding. See
9 Lingenfelter, 504 F.3d at 1035-36. The ALJ provided clear and convincing reasons in support of
10 his credibility finding, and even if he erred in supplying one or more improper grounds to support
11 that finding, plaintiff has not demonstrated that such error(s) were anything more than harmless.

12 a. The ALJ's Credibility Determination Was Properly Supported

13 The ALJ provided clear and convincing reasons for discrediting plaintiff's
14 testimony insofar as it conflicted with the ALJ's RFC assessment. Plaintiff argues that the ALJ's
15 credibility determination was based upon three "specious" reasons: (1) a finding that plaintiff's
16 sleep apnea was "alleviated" with CPAP treatment; (2) a finding that plaintiff's kidney disease
17 was not presently disabling and would benefit with weight loss; and (3) a finding that there was
18 "no compelling evidence that the claimant's alleged impairments significantly impact his day-to-
19 day functioning." (Pl.'s Mot. at 27-28.) Plaintiff has not shown any of these reasons to be
20 "specious" or unsupported; indeed, each of them find support in the record as described below.
21 Further, plaintiff omits to mention other valid bases for the ALJ's credibility determination, such
22 as the fact that plaintiff was able to hold "a variety of jobs in spite of his impairments." (AR 19.)

23 The ALJ gave several reasons for his credibility determination. He noted that
24 plaintiff's sleep apnea was "alleviated with CPAP treatment," that plaintiff's kidney problems did
25 not pose any "present . . . significant[] adverse effects," and that plaintiff was able to hold "a
26 variety of jobs in spite of his impairments." (AR 19.) The ALJ concluded, after "careful

1 consideration of the evidence,” that “[t]here simply is no compelling evidence that the claimant’s
2 alleged impairments significantly impact his day-to-day functioning.” (Id.)¹⁰ Plaintiff’s testimony
3 on these issues conflicts with the medical evidence in the record as well as with other testimony
4 by plaintiff, and the ALJ was entitled to discount plaintiff’s testimony accordingly. See Light,
5 119 F.3d at 792; Batson, 359 F.3d at 1196-97.

6 i. Sleep Apnea

7 The ALJ found plaintiff’s sleep apnea to be a “severe” impairment (AR 18), but
8 specifically rejected plaintiff’s testimony regarding any functional limitations arising from that
9 impairment insofar as it conflicted with his RFC assessment. (AR 20.) The ALJ specifically
10 found that “[t]he claimant’s sleep apnea symptoms are indeed serious (i.e., the possibility of
11 falling asleep while driving) however, they are alleviated with CPAP treatment.” (Id.) Plaintiff
12 argues that the ALJ improperly found that plaintiff’s “sleep apnea was alleviated with CPAP
13 treatment,” because “there is no evidence in the record indicating that [plaintiff’s] sleep apnea was
14 ‘alleviated’ by his use of the CPAP machine.” (Pl.’s Mot. at 27.)

15 Contrary to plaintiff’s contention, the ALJ’s rejection of plaintiff’s testimony
16 regarding sleep apnea does find support in the record. The ALJ rejected such testimony after
17 “careful consideration of the evidence,” which included the medical record as well as plaintiff’s
18 own statements during the hearing. (AR 20.) Plaintiff testified that the CPAP machine “helped
19 tremendously” with his apnea, language the ALJ specifically noted within his decision. (AR 15;
20 53.) During the hearing, the ALJ asked plaintiff, “Do you have any problems nodding off since
21

22 ¹⁰ While the ALJ also appears to have based his credibility determination on the fact that
23 plaintiff “was offered physical and hydro-therapy for weight loss” and declined (AR 19), to the
24 extent that this basis for the credibility determination violated Orn, there are sufficient remaining
25 grounds for the credibility determination. Batson, 359 F.3d at 1197 (“Any error the ALJ may
26 have committed . . . was in our view harmless and does not negate the validity of the ALJ’s
ultimate conclusion that Batson’s testimony was not credible.”); Carmickle, 533 F.3d at 1162 (if
one of the ALJ’s reasons is invalid, the question is whether the ALJ’s decision remains legally
valid, despite such error, based on the ALJ’s “remaining reasoning and ultimate credibility
determination.”)

1 you use the machine?” (Id.) Plaintiff responded, “There’s still general nodding off, but the CPAP
2 machine – I don’t go anywhere without it. I don’t – if I have a girlfriend and she doesn’t want a
3 sleep apnea machine at her house, I go home.” (Id.) After further questioning by the ALJ,
4 plaintiff went on to testify that he still nods off, a “couple of times per day,” when he’s “just
5 sitting and watching TV.” (Id.)

6 While plaintiff is correct that the record contains some evidence of plaintiff’s
7 nodding off in the daytime, the record also contains evidence that plaintiff’s sleep apnea was
8 alleviated with CPAP treatment. “Where evidence is susceptible to more than one rational
9 interpretation,” the Commissioner’s conclusion must be upheld. Burch, 400 F.3d at 679. To find
10 a claimant not credible, the ALJ may rely on internal contradictions in the claimant’s testimony,
11 or on conflicts between the claimant’s testimony and conduct. Light, 119 F.3d at 792; accord
12 Batson, 359 F.3d at 1196-97. Here, the ALJ’s decision describes both sorts of conflicts. Indeed,
13 aside from testifying that his CPAP machine “helped tremendously,” plaintiff also testified that he
14 drove himself to the hearing (AR 14), ostensibly without nodding off — a fact the ALJ noted.
15 (AR 45.) The ALJ specifically found that plaintiff had a driver’s license. (Id.) The ALJ also
16 gave substantial weight to the RFC assessment of Dr. Dipsia (AR 20), who did not see fit to
17 address plaintiff’s nodding off or sleep apnea within the assessment. (AR 248-52.) Finally, the
18 ALJ repeatedly noted that plaintiff “has held a variety of jobs in spite of his impairments,” which
19 supports the finding that plaintiff’s nodding off has not materially impacted his working. (AR 19-
20 20, 37-44 (plaintiff testified that he did not want to work with kids, did not want to work as an
21 unarmed security guard because it did not pay enough, and that he was terminated from his
22 security guard job for a mistake, not inability).) The ALJ’s decision gave specific, clear and
23 convincing reasons for discounting plaintiff’s testimony regarding nodding off insofar as that
24 testimony conflicted with his RFC assessment. (AR 20.)

25 ii. Kidney Problems

26 The ALJ partially based his credibility determination on the fact that plaintiff’s

1 kidney problems were not presently disabling and would benefit with weight loss. (AR 20.)
2 While plaintiff claims that “Stage 4” chronic kidney disease, which plaintiff was “assessed with,”
3 involves various symptoms “from which [plaintiff] suffered” (Pl.’s Mot. at 27), the fact that Stage
4 4 kidney disease typically involves certain symptoms does not prove either that plaintiff had such
5 symptoms or, more importantly, that they caused particular *functional limitations* that impacted
6 plaintiff’s ability to work. Further, the ALJ’s finding regarding plaintiff’s kidney problems is
7 supported by substantial evidence: the ALJ specifically noted plaintiff’s testimony that his kidney
8 disease “does not have a significantly adverse impact on him yet.” (AR 20; 49-50.) If plaintiff
9 did not attribute any functional limitations to kidney disease, plaintiff suggests no reason why the
10 ALJ needed to do so either. To the extent the ALJ made an improper assumption that plaintiff’s
11 kidney disease would “benefit” with weight loss and partially based his credibility determination
12 thereon, the ALJ nonetheless gave other valid reasons for his determination and substantial
13 evidence is in support and any such error was harmless. See Batson, 359 F.3d at 1196-97.

14 iii. Lack Of Evidence Suggesting Limits On Plaintiff’s Functioning, And
15 Evidence Showing Plaintiff Previously Worked Despite His Impairments

16 The ALJ partially based his credibility determination on a lack of evidence
17 suggesting limits on plaintiff’s day-to-day functioning, and on the fact that plaintiff previously
18 held a variety of jobs despite his various impairments. (AR 20.) Plaintiff argues that he testified
19 that

20 his back hurt, his feet hurt, that he nodded off during the day
21 due to his sleep apnea, didn’t sleep through the night, and
22 experienced shortness of breath when he walked even short
23 distances. He reported that during his walks he usually had
24 to take three breaks from five to ten minutes and that when
25 he walked over a quarter of a mile he experienced body
26 aches, tiredness, and breathing problems. TR 56-57. He
reported that he could stand comfortably for approximately
10 to 15 minutes before he needed to sit down or take his
shoes off and that once he sat down there was no getting
back up. TR 59.

(Pl.’s Mot. at 28.) Plaintiff’s summary of his testimony does not render the ALJ’s finding

1 unsupported by substantial evidence. The ALJ noted, and the record confirms, that plaintiff was
2 able to perform a number of jobs, including after his original application date. (AR 19, 20, 37-44
3 (revealing that, for instance, plaintiff worked as a juvenile counselor and security officer despite
4 many impairments).) The ALJ found that plaintiff does floor exercises, read books and
5 magazines, helps his mother and goes shopping for her, cares for his own finances, watches TV,
6 takes care of his own personal hygiene and vacuums, loads laundry, and loads the dishwasher.
7 (AR 14.) The ALJ also noted that plaintiff has a driver's license and can drive. (AR 14, 45.) If a
8 claimant engages in numerous daily activities involving skills that could be transferred to the
9 workplace, the ALJ may discredit the claimant's allegations upon making specific findings
10 relating to those activities. See Burch, 400 F.3d at 680-81 (citing Fair v. Bowen, 885 F.2d 597,
11 603 (9th Cir. 1989); Morgan v. Apfel, 169 F.3d 595, 600 (9th Cir. 1999) (claimant's ability to fix
12 meals, do laundry, work in the yard, and occasionally care for his friend's child was evidence of
13 claimant's ability to work)). The ALJ also gave weight to Dr. Dipsia's RFC assessment, which
14 did not reveal any limitations that would impact plaintiff's day-to-day functionality – least not in a
15 way that conflicts with the ALJ's RFC finding. (AR 20, 248-52.)

16 It cannot be said that the ALJ's credibility determination was not supported by
17 specific, clear and convincing reasons or by reasons that are not supported by substantial
18 evidence. Plaintiff's testimony conflicted with other items of evidence in the record, including
19 evidence of his own behavior (i.e., previous work). See Light, 119 F.3d at 792; Batson, 359 F.3d
20 at 1196-97. Accordingly, in weighing plaintiff's credibility, the ALJ properly considered, among
21 other things, inconsistencies in plaintiff's testimony and between his testimony and his conduct,
22 plaintiff's work record, and evidence from physicians concerning the nature, severity, and effect
23 of the symptoms of which plaintiff complains. See Thomas, 278 F.3d at 958-59. In any event,
24 when evidence reasonably supports either confirming or reversing the ALJ's decision, the district
25 court may not substitute its judgment for ALJ's. See Tackett, 180 F.3d at 1098.

26 ///

1 b. Any Error In The Credibility Determination Was, At Most, Harmless

2 Moreover, plaintiff has not compellingly shown that his discounted testimony,
3 even if accepted, would have materially altered the ALJ's RFC determination, and thus has not
4 shown that any error by the ALJ was more than harmless. In other words, assuming *arguendo* that
5 plaintiff's testimony regarding his functional limitations was indeed fully credible and that the
6 ALJ erroneously discounted it, an examination of the substance of the testimony reveals that any
7 error by the ALJ was harmless. See Batson, 359 F.3d at 1195-97. As the court in Batson held, "in
8 light of all the other reasons given by the ALJ for [plaintiff's] lack of credibility and his residual
9 functional capacity, and in light of the objective medical evidence on which the ALJ relied, there
10 was substantial evidence supporting the ALJ's decision. Any error the ALJ may have committed .
11 . . to the extent that [it] bore on an assessment of ability to work, was in our view harmless and
12 does not negate the validity of the ALJ's ultimate conclusion that Batson's testimony was not
13 credible." Batson, 359 F.3d at 1195-97 (citing Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir.
14 1990) (applying the harmless error standard); Booz v. Sec'y of Health and Human Serv., 734 F.2d
15 1378, 1380 (9th Cir. 1984) (same)). Here, the record confirms that the ALJ's RFC determination
16 accounted for the sorts of functional limitations plaintiff claims he had.

17 As stated above, the ALJ determined that plaintiff has:

18 [T]he residual functional capacity to perform essentially the full
19 range of light work as defined in 20 C.F.R. 404.1567(b) and
20 416.967(b), but due to pain, needs to be able to alternate between
sitting and standing and avoid work requiring good distant visual
acuity, depth perception, and broad field of vision.

21 (AR 22.) As the ALJ's decision further explained,

22 Light work involves lifting no more than 20 pounds at a time with
23 frequent lifting or carrying of objects weighing up to ten pounds.
24 Even though the weight lifted may be very little, a job is in this
25 category when it requires a good deal of walking or standing, or
26 when it involves sitting most of the time with some pushing and
pulling of arm or leg controls. To be considered capable of
performing a full range of light work, an individual must have the
ability to do substantially all of these activities. If someone can do
light work, we determine that he can also do sedentary work, unless

1 there are additional limiting factors such as loss of fine dexterity or
2 inability to sit for long periods.

3 (AR 19.)

4 As already described above, plaintiff argues that the ALJ erred in discounting
5 plaintiff's testimony on the following topics:

6 Mr. Barrow testified that his back hurt, his feet hurt, that he nodded
7 off during the day due to his sleep apnea, didn't sleep through the
8 night, and experienced shortness of breath when he walked even
9 short distances. He reported that during his walks he usually had to
10 take three breaks from five to ten minutes and that when he walked
11 over a quarter of a mile he experienced body aches, tiredness, and
12 breathing problems. TR 56-57. He reported that he could stand
13 comfortably for approximately 10 to 15 minutes before he needed to
14 sit down or take his shoes off and that once he sat down there was
15 no getting back up. TR 59.

16 (Pl.'s Mot. at 28.)¹¹ On plaintiff's framing, the ALJ improperly discounted testimony regarding:
17 (1) plaintiff's back pain; (2) plaintiff's need to sit down after 10 to 15 minutes; (3) plaintiff's foot
18 pain; (4) plaintiff's shortness of breath, tiredness, and body aches when walking over a quarter of
19 a mile; (5) plaintiff's nodding off during the day due to sleep apnea at night. (*Id.*) The
20 undersigned addresses each of these so-called limitations below. As to the first four so-called
21 limitations, plaintiff has not compellingly explained how, even when plaintiff's testimony is taken
22 as true, the ALJ's "light work" RFC assessment fails to accommodate those limitations. As to the
23 last limitation – plaintiff's nodding off during the day – while the ALJ's RFC assessment may not
24 accommodate daytime sleepiness, the ALJ's decision provided sufficient reasons for rejecting
25 plaintiff's testimony regarding functional limitations arising from sleep apnea (as described
26

23 ¹¹ While plaintiff raises the issue of his kidney disease at the beginning of his challenge
24 to the ALJ's credibility finding, plaintiff identifies no specific *testimony* from plaintiff regarding
25 functional limitations arising from his kidney disease. (Pl.'s Mot. at 26-27.) As a result, plaintiff
26 has not compellingly argued that the ALJ improperly discounted particular kidney-related
testimony as a result of his adverse credibility determination. Likewise, plaintiff has not
compellingly argued that any particular kidney-related testimony, if accepted, would have
materially altered the ALJ's RFC finding.

1 above), and the undersigned will not readdress that issue.

2 i. (1) Back Pain And (2) Need To Sit Down After 10 To 15 Minutes

3 Plaintiff argues the ALJ improperly discounted plaintiff's testimony regarding his
4 back pain and his need to sit down after ten to fifteen minutes. (Pl.'s Mot. at 28 (citing AR 59).)
5 Plaintiff's testimony regarding his so-called functional limitations of back pain and the need to sit
6 and stand at will was addressed above in the analysis of the ALJ's RFC determination and obesity.
7 As noted above, plaintiff testified that his obesity caused an "uncomfortable" back. (AR 48
8 (although plaintiff clarified that this discomfort was alleviated by pain medication)). Plaintiff also
9 testified that he had difficulty "standing on my feet." (AR 39 (although plaintiff clarified that this
10 difficulty would be alleviated by a job where he could sit and stand as he wanted, and clarified
11 that if such a job existed, he "just wouldn't want to work.")).

12 For the reasons stated above in Part "C," plaintiff's testimony regarding his back
13 discomfort and need to sit and stand at will, even if taken as true, do not reveal error in the ALJ's
14 RFC analysis. Indeed, the ALJ's RFC assessment specifically permits plaintiff to change his
15 position because he "needs to be able to alternate between sitting and standing." (AR 19.) It also
16 limits plaintiff to "light" work, which limits the weight plaintiff could be required to lift and could
17 keep plaintiff "sitting most of the time," (with, of course, the ability to "alternate between sitting
18 and standing" at will), neither of which plaintiff has shown to be prohibitive despite plaintiff's
19 "uncomfortable" back. (Id.; AR 48.) Thus, even if the ALJ erroneously discounted plaintiff's
20 testimony on these particular alleged limitations, plaintiff has not shown that the ALJ's ultimate
21 RFC finding fails to accommodate either limitation.

22 ii. (3) Foot Pain And (4) Shortness Of Breath, Tiredness, And Body Aches
23 When Walking Over A Quarter Of A Mile

24 Plaintiff argues the ALJ improperly discounted plaintiff's testimony regarding his
25 foot pain. (Pl.'s Mot. at 28 (citing AR 56-57).) Plaintiff also argues the ALJ improperly
26 discounted plaintiff's testimony regarding experiencing shortness of breath and body aches when

1 walking for over a quarter mile. (Id. (citing AR 56-57.))

2 Taking plaintiff's testimony regarding these functional limitations as true, plaintiff
3 has failed to show that the ALJ's RFC assessment would not accommodate the "foot pain" and
4 "shortness of breath"/walking functional limitations such testimony describes. The ALJ's RFC
5 assessment accommodates plaintiff's foot pain/plantar fasciitis by permitting plaintiff to keep off
6 his feet and "sit most of the time," and, as a result, not requiring plaintiff to walk quarter-mile
7 distances or become out of breath. (AR 19.) Accordingly, any error in the ALJ's assessment of
8 plaintiff's credibility on these topics was harmless. See Burch, 400 F.3d at 679; Batson, 359 F.3d
9 at 1197 ("Any error the ALJ may have committed . . . was in our view harmless and does not
10 negate the validity of the ALJ's ultimate conclusion that Batson's testimony was not credible.");
11 Carmickle, 533 F.3d at 1162 (if one of the ALJ's reasons is invalid, the question is whether the
12 ALJ's decision remains legally valid, despite such error, based on the ALJ's "remaining reasoning
13 and ultimate credibility determination.") It cannot be said that the ALJ discounted plaintiff's
14 testimony for no reason or for reasons without support in the record. Likewise, because the
15 undersigned finds that the ALJ did not improperly discount plaintiff's testimony and that any error
16 in the ALJ's credibility determination was harmless, the undersigned also finds no error in the
17 ALJ's failure to include the so-called limitations suggested in such testimony as part of the
18 hypothetical posed to the VE at step five.

19 IV. CONCLUSION

20 Based on the foregoing, IT IS HEREBY ORDERED that:

- 21 1. Plaintiff's motion for summary judgment is denied;
- 22 2. The Commissioner's cross-motion for summary judgment is granted; and

23 ///


24 ///

25 ///

26 ///

1 3. The Clerk is directed to enter a judgment affirming the decision of the
2 Commissioner pursuant to sentence four of 42 U.S.C. § 405(g).

3 DATED: September 26 2011

4
5 
6 KENDALL J. NEWMAN
7 UNITED STATES MAGISTRATE JUDGE
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26