UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KELLAN BRYANT MURRAY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

No. 2:13-cv-0866 AC

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying his application for a period of disability and disability insurance benefits ("DIB") under Title II of the Social Security Act ("the Act") The parties' cross-motions for summary judgment are pending. For the reasons discussed below, the court will deny plaintiff's motion for summary judgment and will grant defendant's cross-motion for summary judgment.

PROCEDURAL BACKGROUND

Plaintiff filed an application for DIB on November 3, 2009, alleging disability beginning on April 15, 2009. Administrative Record ("AR") 117-18. Plaintiff's application was denied initially and again upon reconsideration. AR 65-68, 69-73. On July 28, 2011, a hearing was held before administrative law judge ("ALJ") Trevor Skarda. AR 35-59. Plaintiff appeared with

attorney representation at the hearing, at which he and a vocational expert, Stephen Schmidt, testified. See id. In a decision dated August 26, 2011, the ALJ found plaintiff not disabled. AR 17-30. The ALJ made the following findings (citations to 20 C.F.R. omitted):

> 1. The claimant meets the insured status requirements of the Social Security Act through March 31, 2014.
>
> 2. The claimant has not engaged in substantial gainful activity since April 15, 2009, the alleged onset date.
>
> 3. The claimant has the following severe impairments: Morbid obesity, chronic lumbar strain, degenerative disc disease in the left knee, depression and attention deficit disorder.
>
> 4. The claimant does not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments in 20 CFR 404, Subpart P, Appendix 1.
>
> 5. After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform sedentary work as defined in 20 CFR 404.1567(a) except the claimant is able to balance, stoop, kneel, crouch, crawl, and climb ramps and stairs on an occasional basis, while being precluded from climbing ladders, ropes, and scaffolds. The claimant is also precluded from work involving hazards like dangerous machinery and work at unprotected heights. Finally, the claimant is limited to occasional contact with co-workers and the general public.
>
> 6. The claimant has no past relevant work.
>
> 7. The claimant was born on March 4, 1983 and was 26 years old, which is defined as a younger individual age 18-44, on the alleged disability onset date.
>
> 8. The claimant has a limited education and is able to communicate in English.
>
> 9. Transferability of job skills is not an issue because the claimant does not have past relevant work.
>
> 10. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.
>
> 11. The claimant has not been under a disability, as defined in the Social Security Act, from April 15, 2009, through the date of this decision.

AR 17-30.

Plaintiff requested review of the ALJ's decision by the Appeals Council, but the Council denied review on March 7, 2013, leaving the ALJ's decision as the final decision of the

Commissioner of Social Security. AR 1-3.

FACTUAL BACKGROUND

Born on March 4, 1983, plaintiff was 26 years old on the alleged onset date of disability and 28 years old at the time of the administrative hearing. Plaintiff completed the 11th grade of high school after participating in special education classes, and he last worked as a cashier at Taco Bell, in an unspecified role at Target, and as a sign holder / flier distributor for his mother's tax preparation company. AR 44, 229. At the time of the administrative hearing, plaintiff, who stands 5'9" tall, weighed approximately 500 pounds. AR 43.

LEGAL STANDARDS

The Commissioner's decision that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence in the record and the proper legal standards were applied. Schneider v. Comm'r of the Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000); Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).

The findings of the Commissioner as to any fact, if supported by substantial evidence, are conclusive. See Miller v. Heckler, 770 F.2d 845, 847 (9th Cir. 1985). Substantial evidence is more than a mere scintilla, but less than a preponderance. Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996). "It means such evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). "While inferences from the record can constitute substantial evidence, only those 'reasonably drawn from the record' will suffice." Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir.2006) (citation omitted).

Although this Court cannot substitute its discretion for that of the Commissioner, the Court nonetheless must review the record as a whole, "weighing both the evidence that supports and the evidence that detracts from the [Commissioner's] conclusion." Desrosiers v. Sec' y of Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir.1988); see also Jones v. Heckler, 760 F.2d 993, 995 (9th Cir.1985).

"The ALJ is responsible for determining credibility, resolving conflicts in medical

testimony, and resolving ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted). "Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be upheld." Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002). However, the Court may review only the reasons stated by the ALJ in his decision "and may not affirm the ALJ on a ground upon which he did not rely." Orn v. Astrue, 495 F.3d 625, 630 (9th Cir.2007); see also Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003).

The court will not reverse the Commissioner's decision if it is based on harmless error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir.2006) (quoting Stout v. Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

ANALYSIS

Plaintiff seeks summary judgment on the grounds that: (1) the ALJ failed to incorporate or explicitly reject a portion of the opinion of an examining psychologist, and (2) the ALJ improperly rejected the opinion of a physical therapist and instead relied on outdated opinions in determining plaintiff's residual functional capacity ("RFC"). The Commissioner argues that the ALJ's decision is supported by substantial evidence and is free from legal error.

A. Opinion of Examining Psychologist

1. Relevant Background

On November 6, 2009, psychologist Sara Bowerman examined plaintiff on referral from the Department of Social Services Disability Division. AR 229-35. Following review of plaintiff's social, medical and education / employment history, Dr. Bowerman conducted a mental status exam and administered a number of tests. She noted that plaintiff had no difficulty comprehending moderately complex questions, he did not require reminders to stay on task, he had adequate memory, and he was cooperative and responsive. Dr. Bowerman also noted that there was no evidence of exaggeration of symptoms or of malingering.

As to the test results, Dr. Bowerman determined that plaintiff has a Verbal Scale IQ of

107, a Performance Scale IQ of 98, and a Full Scale IQ of 103, all within the average range. She noted that plaintiff's General Memory is in the low-average range, which she found to be somewhat inconsistent with plaintiff's overall intellectual functioning.

Based on the results of the examination, Dr. Bowerman concluded that plaintiff is able to perform work related activities on a consistent basis; he would likely be able to perform simple, concrete and repetitive tasks not requiring complex understanding or communication; and he has mild cognitive impairments that slightly impair his ability to solve problems and to think abstractly. She also noted that plaintiff's ability to concentrate and remember relevant events appeared adequate, as did his abstract thinking, judgment and insight. As for his social skills, Dr. Bowerman found as follows:

> Mr. Murray is likely have mild to moderate difficulty interacting with others in a work related environment. It is believed that some special or additional close supervision would be helpful to assist Mr. Murray in interacting with others and improving his job skills and interpersonal communication.

AR 234.

2. Legal Standards

The weight given to medical opinions depends in part on whether they are proffered by a treating, examining or non-examining doctor. See Lester v. Chater, 81 F.3d 821, 831 (9th Cir. 1995). Those physicians with the most significant clinical relationship with the claimant are generally entitled to more weight than those physicians with lesser relationships. Carmickle v. Comm'r of Soc. Sec. Admin., 533 F.3d 1155, 1164 (9th Cir. 2008). As such, superior weight should be given to the opinion of a treating source, who has a greater opportunity to know and observe the patient as an individual. See Lester, 81 F.3d at 831; Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996). The opinion of an examining physician is, in turn, entitled to greater weight than the opinion of a non-examining physician. See Lester, 81 F.3d at 830; 20 C.F.R. § 416.927(d)(1).

To evaluate whether an ALJ properly rejected a medical opinion, in addition to considering its source, the court considers the presence of contradictory opinions in the record and whether clinical findings support the opinions. See Lester, 81 F.3d at 829-31. An ALJ may

reject the uncontradicted opinion of a treating or examining medical professional only for "clear and convincing" reasons. Id. at 831. In contrast, a contradicted opinion of a treating or examining professional may be rejected for "specific and legitimate" reasons that are supported by substantial evidence. Id. at 830. While a treating professional's opinion generally is accorded superior weight, if it is contradicted by a supported examining professional's opinion (e.g., supported by different independent clinical findings), the ALJ may resolve the conflict. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). The ALJ need not give weight to conclusory opinions supported by minimal clinical findings. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999) (treating physician's conclusory, minimally supported opinion rejected); see also Magallanes, 881 F.2d at 751.

3. Analysis

While the ALJ gave significant weight to Dr. Bowerman's opinion regarding plaintiff's mild to moderate difficulty interacting with others, AR 25, at issue here is the ALJ's failure to explicitly reject or incorporate that portion of the opinion in which Dr. Bowerman stated that some special or additional close supervision would be helpful to assist plaintiff in interacting with others and improving his job skills and interpersonal communication. In addressing plaintiff's social skills, the ALJ determined that plaintiff should be limited to occasional contact with co-workers and the general public. AR 23. The ALJ did not include Dr. Bowerman's suggestion of on-the-job assistance in the RFC, or mention it in discussion of the medical evidence relevant to the RFC.

Plaintiff argues that the limitation of special or additional close supervision would have precluded work entirely based on a response given by the vocational expert during the administrative hearing:

> [Plaintiff's Attorney]: With a follow up to hypothetical two, tell me if this is too general to answer, but, if the person also required additional close supervision during the work day . . .
>
> ALJ: Defined as? A supervisor checking the work a certain number of times a day?
>
> [Plaintiff's Attorney]: Yes, checking the work maybe two or three times as often as another employee, an average employee.

[Vocational Expert]: That would preclude competitive employment.

AR 58. The court notes that this exchange concerns plaintiff's need to have a supervisor check his work performance multiple times a day, whereas the crux of plaintiff's argument here is that additional supervision is needed to address his social functioning difficulties. This argument is therefore unconvincing.

The Commissioner contends that there is no error. Defendant argues first that Dr. Bowerman did not say that additional close supervision was required for plaintiff to work, only that it would be helpful. Defendant is correct. See AR 234 ("It is believed that some special or additional close supervision would be helpful…") Dr. Bowerman's report cannot reasonably be read to opine that plaintiff could only work at all with close supervision. Rather, she stated plainly that such supervision might *improve* his ability to get along with and communicate with others. Id.

Defendant argues second that the suggested accommodation does not constitute a functional assessment, both because it is not a limitation and because it is not attributable to a medical impairment. The court agrees that Dr. Bowerman's suggestion for improved functioning is not itself a functional assessment or a limitation. Dr. Bowerman's functional assessment regarding social skills was that plaintiff is impaired to a mild to moderate degree in his ability to interact with others in a work environment. Id. Based on this opinion, the ALJ appropriately found that plaintiff should be limited to only occasional contact with co-workers and the general public. AR 23. That Dr. Bowerman believed additional assistance might improve plaintiff's social functioning, potentially rendering such limitation unnecessary in the future, does not support incorporation of a further limitation in the RFC.

In sum, Dr. Bowerman's comment about assistance that might be "helpful" for "improvement" in plaintiff's interpersonal functioning does not constitute a medical opinion that the ALJ was obligated to address in formulating the RFC. Cf. Lester, 81 F.3d at 831 (ALJ must provide "clear and convincing" reasons for failing to credit a medical opinion). The comment was a post-script to Dr. Bowerman's opinion about plaintiff's impairments, not an additional finding of impairment or necessary limitation. Accordingly, the court finds no error.

Even if the ALJ erred by not specifically discussing Dr. Bowerman's suggestion and explaining his reasons for rejecting it, remand would not be available because any error is harmless. See Carmickle v. Comm'r, 533 F.3d 1155, 1162-63 (9th Cir. 2008) (where the ALJ errs in not providing any reasons supporting a particular determination, the error is harmless if no reasonable ALJ could have reached a different conclusion had the error not occurred). Dr. Bowerman's substantive opinion was that plaintiff would likely have mild to moderate difficulty interacting with others. The undersigned finds that the ALJ's RFC sufficiently incorporated this assessment by limiting plaintiff to occasional contact with co-workers. The fact that additional accommodations might permit plaintiff to improve his functioning does not support a more restrictive RFC. No other medical opinion supported a more restrictive RFC. Accordingly, no reasonable ALJ could have reached a different result.

B. Opinion of Physical Therapist

Plaintiff next argues that the ALJ erred in rejecting a more recent functional assessment made by a physical therapist in favor of older assessments made by a State agency examiner and a State agency consultant.

1. Relevant Background

On July 21, 2011, physical therapist Mary K. Barry performed a functional evaluation of plaintiff on referral from Dr. Cha Choukao Thao. AR 375-76. Barry conducted tests of plaintiff's strength and mobility and ultimately gave the following assessment:

> Patient demonstrates significant functional limitations including early fatigability with bed mobility, gait and lifting. He demonstrates early diaphoresis, shortness of breath and stress to the cardiovascular system with all mobility. He demonstrates decreased pain-free lumbar spine active range of motion and limited lifting and carrying capacity secondary to poor lumbar spine muscle strength and endurance and possible underlying spinal pathology. Limited left knee joint mobility, range of motion, pain and body habitus contribute to gait deviations and fall risk. Obesity, depression, generalized deconditioning, bilateral lower extremity and low back orthopedic pathologies contribute to overall functional limitations. Presentation is consistent with reported functional capacity / work limitations.

AR 376.

Although a physical therapist is considered a non-acceptable medical source, the ALJ

considered Barry's opinion and gave it reduced weight due to internal inconsistencies and reliance on plaintiff's subjective complaints. AR 28. Per the ALJ, Barry's own findings acknowledge that plaintiff ambulates without the use of an assistive device, and she speculates that plaintiff's lumbar range of motion and limited lifting and carrying capacity is secondary to poor lumbar muscle strength and endurance with a possible underlying spinal pathology.

While giving reduced weight to Barry's assessment, the ALJ gave great weight to the opinion of examining State agency consultant, Dr. Joseph M. Garfinkel, who examined plaintiff on January 25, 2010. AR 26-27, 236-42. At this appointment, plaintiff weighed approximately 490 pounds, had a history of hypertension though he denied taking any medication for it, complained that his feet and ankles hurt, said that he is able to talk for about a quarter of a mile before he has to stop; and admitted that he does not use an assistive device to ambulate. Dr. Garfinkel conducted a complete physical examination of plaintiff, indicating full range of motion in the lower extremities though with pain, grossly normal range of motion in the upper extremities, 5/5 strength in all extremities, and normal neurology. Dr. Garfinkel's impression was that plaintiff suffered from severe, morbid obesity, hypertension, and chronic back pain, possibly chronic lumbosacral strain. He provided the following medical source statement: "The claimant can lift and carry 50 pounds occasionally and 25 pounds frequently. The claimant can stand and walk for 6 hours in an 8-hour day. The claimant can sit for 6 hours in an 8-hour day. There are no postural, manipulative, visual, communicative or environmental limitations."

The ALJ also gave great weight to the assessment provided by State agency consultant, Dr. D. Rose. AR 28. On February 9, 2010, Dr. Rose reviewed plaintiff's medical record and functional information in considering plaintiff's allegations of morbid obesity, dyslexia, chronic back pain, cognitive problems, and swollen lower extremities. AR 264-66. Of the medical records reviewed, one dated January 2010 reflected that plaintiff weighed over 490 pounds. On review, Dr. Rose determined that the objective evidence supports plaintiff's subjective symptoms and that plaintiff was credible. Despite plaintiff's obesity, Dr. Rose noted that the objective evidence suggested a full medium RFC, though he ultimately suggested a sedentary RFC with appropriate environmental limitations. On reconsideration one month later, Dr. Rose reviewed

additional medical records, including bilateral knee x-rays, but concluded that there was no change in his prior decision and sedentary RFC. AR 265.

Also on February 9, 2010, Dr. Rose completed a Physical Residual Functional Capacity Assessment. AR 243-47. Dr. Rose determined that plaintiff could frequently lift and/or carry up to 10 pounds; stand and/or walk at least 2 hours in an 8-hour workday; sit for about 6 hours in an 8-hour workday; and push / pull with no restrictions. Dr. Rose further opined that that plaintiff could occasionally climb ramps and stairs, balance, stoop, kneel, crouch, and crawl, though he could never climb ladders, ropes or scaffolds. Though Dr. Rose found that plaintiff had no manipulative, visual, communicative or environmental limitations, the doctor did note that plaintiff should not work at unprotected heights or around dangerous machinery and should not walk on uneven terrain due to extreme super morbid obesity.

2. Analysis

Plaintiff contends that the ALJ erred in giving great weight to the State agency doctors because their assessments do not take into consideration the increase in plaintiff's weight and the worsening of his knees by July 2011, factors which Barry's assessment considered. Although plaintiff acknowledges that a physical therapist is not considered an acceptable medical source, he argues that the opinion should be considered as an "other source" and therefore given greater weight.

Medical sources are divided into two categories: "acceptable" and "not acceptable." 20 C.F.R. § 404.1502. Acceptable medical sources include licensed physicians and psychologists. 20 C.F.R. § 404.1502. Medical sources classified as "not acceptable" include, but are not limited to, nurse practitioners, therapists, licensed clinical social workers, and chiropractors. SSR 06–03p, at *2.

> With the growth of managed health care in recent years and the emphasis on containing medical costs, medical sources who are not acceptable medical sources, such as nurse practitioners, physician assistants, and licensed clinical social workers, have increasingly assumed a greater percentage of the treatment and evaluation functions previously handled primarily by physicians and psychologists. Opinions from these medical sources, who are not technically deemed acceptable medical sources under our rules, are important and should be evaluated on key issues such as

> impairment severity and functional effects, along with the other relevant evidence in the file.

SSR 06-03p, at * 3.

Factors the ALJ should consider when determining the weight to give an opinion from these "important" sources include: the length of time the source has known the claimant and the number of times and frequency that the source has seen the claimant; the consistency of the source's opinion with other evidence in the record; the relevance of the source's opinion; the quality of the source's explanation of his opinion; and the source's training and expertise. SSR 06-03p, at *4.

> Although there is a distinction between what an adjudicator must consider and what the adjudicator must explain in the disability determination or decision, the adjudicator generally should explain the weight given to opinions from these "other sources," or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinions may have an effect on the outcome of the case.

SSR 06-03p, at *6.

Whether a physical therapist's opinion should be considered an acceptable medical source is unsettled. In a somewhat related context, the Ninth Circuit has held that if a nurse practitioner works closely with a physician, the nurse practitioner's opinion may be considered as part of the team and treated as an acceptable medical source. See Taylor, 659 F.3d at 1234 (citing Gomez v. Chater, 74 F.3d 967, 971 (9th Cir. 1996)). This holding has been limited, and the Ninth Circuit has yet to determine whether it remains good law as it relies on an outdated statute. See Molina v. Astrue, 674 F.3d 1104, 1111 n.3 (9th Cir. 2012). Here, however, plaintiff argues that a physical therapist, who examined plaintiff only one time and with no indication that she was part of a team that treated plaintiff, should be considered an acceptable medical source. Plaintiff cites to no case, nor has the undersigned found any, where the opinion of an "other" medical source, such as a physical therapist, has been deemed an "acceptable" medical source. See 20 C.F.R. §§ 416.902, 416.913. Instead, the holding of these cases has been limited, and other district courts have been conservative in their treatment of nurse practitioners as an acceptable medical source.

See e.g., Cruise v. Astrue, 2012 WL 5037257 (D. Or. Sept. 28, 2012); Davis v. Astrue, 2012 WL 3011223 (N.D. Cal. Jul. 23, 2012); Johnson v. Colvin, 2013 WL 2643305 (E.D. Cal. Jun. 12, 2013). Indeed, as in other cases addressing this issue, there is no evidence in this case that the physical therapist was in fact part of a treatment team. Other than a doctor's referral to the physical therapist, there is no indication that the physical therapist was "working closely with, and under the supervision of [a physician], [for] her opinion . . . to be considered that of an 'acceptable medical source.'" Taylor, 659 F.3d at 1234 (citing Gomez, 74 F.3d at 971). Providing a one-time evaluation of plaintiff is not the type of close working relationship between providers that has been held to meet this limited exception. Therefore, regardless of whether Gomez remains good law, the circumstances here do not qualify, and the ALJ did not err in limiting the physical therapist's evaluation.

The ALJ considered the opinion of the physical therapist as an "other source," which may be rejected if the ALJ "furnishes reasons germane to the particular witness." Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993). Here, the ALJ gave reduced weight to Barry's opinion because, first, her report contained internal inconsistencies. Although plaintiff asserts that the ALJ failed to cite to any inconsistencies, the ALJ specifically referenced Barry's recognition that plaintiff ambulates without an assistive device despite his claim that he could not stand for longer than one minute without pain and is unable to walk at all without pain. Additionally, Barry speculated that the cause of plaintiff's limited lumbar range of motion and ability to lift and carry is secondary to poor lumbar muscle strength and endurance with a possible underlying spinal pathology. See Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (upholding ALJ's rejection of treating doctor's opinion that was internally inconsistent); Johnson v. Shalala, 60 F.3d 1428, 1432-33 (9th Cir. 1995) (affirming rejection of treating doctor's opinion expressed in letter that was inconsistent with doctor's own findings); and Magallanes, 881 F.2d at 751-54 (upholding ALJ's rejection of treating doctor's opinion that was contradicted by evidence in the record). Moreover, the ALJ noted that Barry's opinion was based on plaintiff's discounted subjective testimony, and plaintiff here does not challenge the ALJ's credibility finding. Where credibility is "properly discounted," testimony relying on such credibility may be disregarded. Tonapetyan v. Halter, 242

F.3d 1144, 1149 (9th Cir. 2001); Morgan, 169 F.3d at 602 (9th Cir. 1999) (internal citation omitted).

Insofar as plaintiff argues that the ALJ failed to consider the tests administered by Barry and Barry's opinion regarding plaintiff's worsening condition, the ALJ indicated that Barry's notes and plaintiff's presentation were consistent with reported functional capacity / work limitations. Regardless, the ALJ gave reduced weight to this opinion for the aforementioned reasons, which the court has found adequate. Plaintiff also argues that the ALJ failed to consider Barry's opinion that plaintiff's condition had worsened, as evidenced by plaintiff's weight gain to over 500 pounds and two May 2010 x-rays revealing disc degenerative changes in plaintiff's back and a dislocated patella. See AR 313-14 But SSR 06-03p provides that "Information from . . . 'other sources' cannot establish the existence of a medically determinable impairment. Instead, there must be evidence from an 'acceptable medical source' for this purpose." And "only 'acceptable medical sources' can give us medical opinions." See 20 CFR 404.1527(a)(2) and 416.927(a)(2). In this case, no acceptable medical source has opined that plaintiff's condition worsened from early-2010, when Dr. Garfinkel and Dr. Rose assessed plaintiff's functional limitations, to July 2011, when Barry examined plaintiff. In fact, not once during plaintiff's seven medical appointments following the May 2010 x-rays did a doctor opine that plaintiff's condition had worsened, even though the x-rays were undeniably considered by at least one of plaintiff's three treating physicians[1] and plaintiff's obesity was referenced by all. See AR 301-310. Furthermore, while it is true that neither Dr. Garfinkel nor Dr. Rose considered the May 2010 x-rays or other medical records that were submitted by plaintiff after these two doctors' assessments, the ALJ did consider them when assessing plaintiff's functional limitations, and plaintiff does not argue that the ALJ erred in his consideration of these records. See AR 27. The court therefore finds no error.

CONCLUSION

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that:

[1] Interestingly, at this appointment plaintiff indicated that he was not experiencing any pain. See AR 310.

1. Plaintiff's motion for summary judgment is denied; and

2. The Commissioner's motion for cross-motion for summary judgment is granted.

DATED: May 19, 2014

ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE