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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

GLEN EARL VIVIAN  
Plaintiff,  
v.  
COMMISSIONER OF SOCIAL  
SECURITY,  
Defendant.

No. 2:16-cv-0227-KJN

ORDER

Plaintiff Glen Earl Vivian seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner”) denying plaintiff’s application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”).<sup>1</sup> In his motion for summary judgment, plaintiff principally contends that the Commissioner erred by finding that plaintiff was not disabled from January 1, 2009, plaintiff’s alleged disability onset date, through December 31, 2011, plaintiff’s date last insured. (ECF No. 15.) The Commissioner opposed plaintiff’s motion and filed a cross-motion for summary judgment. (ECF No. 19.) Thereafter, plaintiff filed a reply brief. (ECF No. 20.)

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<sup>1</sup> This action was referred to the undersigned pursuant to Local Rule 302(c)(15), and both parties voluntarily consented to proceed before a United States Magistrate Judge for all purposes. (ECF Nos. 8, 10, 11.)

1 After carefully considering the record and the parties' briefing, the court DENIES  
2 plaintiff's motion for summary judgment, GRANTS the Commissioner's cross-motion for  
3 summary judgment, and AFFIRMS the Commissioner's final decision.

4 I. BACKGROUND

5 Plaintiff was born on February 22, 1962; attended 12 years of education, but did not  
6 graduate high school or obtain a GED; can communicate in English; and previously worked as a  
7 maintenance worker and a painter. (Administrative Transcript ("AT") 23, 43-44, 71.)<sup>2</sup> On  
8 February 28, 2011, plaintiff applied for DIB, alleging that his disability began on January 1, 2009,  
9 and that he was disabled due to problems with: both knees; a crushed right thumb; arthritis; his  
10 back and neck; his wrist; stress; his hip; his elbows; and his feet. (AT 14, 187, 221.) After  
11 plaintiff's application was denied initially and on reconsideration, an administrative law judge  
12 ("ALJ") conducted three hearings on February 27, 2013; August 28, 2013; and March 12, 2014.  
13 (AT 40-66, 67-78, 79-86.)<sup>3</sup> The ALJ subsequently issued a decision dated March 31, 2014,  
14 determining that plaintiff had not been under a disability, as defined in the Act, from January 1,  
15 2009, plaintiff's alleged disability onset date, through December 31, 2011, plaintiff's date last  
16 insured. (AT 14-26.) The ALJ's decision became the final decision of the Commissioner when  
17 the Appeals Council denied plaintiff's request for review on September 11, 2015. (AT 5-7.)  
18 After receiving an extension of time from the Appeals Council to seek federal court review (AT  
19 1-2), plaintiff then filed this action on February 4, 2016, to obtain judicial review of the  
20 Commissioner's final decision. (ECF No. 1.)

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23 <sup>2</sup> Because the parties are familiar with the factual background of this case, including plaintiff's  
24 medical and mental health history, the court does not exhaustively relate those facts in this order.  
25 The facts related to plaintiff's impairments and treatment will be addressed insofar as they are  
relevant to the issues presented by the parties' respective motions.

26 <sup>3</sup> The initial February 27, 2013 hearing was continued to afford plaintiff an opportunity to obtain  
27 counsel. At the August 28, 2013 hearing, plaintiff was absent due to being hospitalized out of  
28 state, and the ALJ only obtained testimony from a vocational expert in the presence of plaintiff's  
counsel. Thereafter, at the March 12, 2014 hearing, plaintiff, represented by counsel, personally  
appeared and testified.

1 II. ISSUES PRESENTED

2 On appeal, plaintiff raises the following issues: (1) whether the ALJ improperly rejected  
3 the opinion of plaintiff's treating physician, Dr. Uppal; (2) whether the ALJ erred in not finding  
4 plaintiff's right wrist pain and thoracic spine impairment to be severe impairments at step two; (3)  
5 whether the ALJ failed to make a proper step three determination; (4) whether the ALJ  
6 improperly discounted plaintiff's credibility; and (5) whether the ALJ's RFC was without  
7 substantial evidence support.<sup>4</sup>

8 III. LEGAL STANDARD

9 The court reviews the Commissioner's decision to determine whether (1) it is based on  
10 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record  
11 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial  
12 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340  
13 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means "such relevant evidence as a reasonable  
14 mind might accept as adequate to support a conclusion." Orn v. Astrue, 495 F.3d 625, 630 (9th  
15 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). "The ALJ is  
16 responsible for determining credibility, resolving conflicts in medical testimony, and resolving  
17 ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citation omitted). "The  
18 court will uphold the ALJ's conclusion when the evidence is susceptible to more than one rational  
19 interpretation." Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

20 IV. DISCUSSION

21 Summary of the ALJ's Findings

22 The ALJ evaluated plaintiff's entitlement to DIB pursuant to the Commissioner's standard  
23 five-step analytical framework.<sup>5</sup> As an initial matter, the ALJ determined that plaintiff met the

24 \_\_\_\_\_  
25 <sup>4</sup> Plaintiff's opening brief raises the issues in a somewhat different order.

26 <sup>5</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the Social  
27 Security program. 42 U.S.C. §§ 401 et seq. Supplemental Security Income is paid to disabled  
28 persons with low income. 42 U.S.C. §§ 1382 et seq. Both provisions define disability, 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 parallel

1 insured status requirements of the Act for purposes of DIB through December 31, 2011. (AT 16.)  
2 At the first step, the ALJ concluded that plaintiff had not engaged in substantial gainful activity  
3 from January 1, 2009, his alleged disability onset date, through December 31, 2011, his date last  
4 insured. (Id.) At step two, the ALJ found that plaintiff had the following severe impairments  
5 through the date last insured: degenerative disc disease of the lumbar and cervical spine. (Id.)  
6 However, at step three, the ALJ determined that, through the date last insured, plaintiff did not  
7 have an impairment or combination of impairments that met or medically equaled the severity of  
8 an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AT 17.)

9 Before proceeding to step four, the ALJ assessed plaintiff's residual functional capacity  
10 ("RFC"), finding that, through the date last insured, plaintiff could perform light work as defined  
11 in 20 C.F.R. § 404.1567(b) except with brief changes in position. (AT 18.) At step four, the ALJ  
12 determined that plaintiff was unable to perform any past relevant work through the date last

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14 five-step sequential evaluation governs eligibility for benefits under both programs. See 20  
15 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-  
42 (1987). The following summarizes the sequential evaluation:

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

18 Step two: Does the claimant have a "severe" impairment? If so, proceed to step  
19 three. If not, then a finding of not disabled is appropriate.

20 Step three: Does the claimant's impairment or combination of impairments meet or  
21 equal an impairment listed in 20 C.F.R., Pt. 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 her past relevant work? If so, the  
23 claimant is not disabled. If not, proceed to step five.

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

26 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

27 The claimant bears the burden of proof in the first four steps of the sequential evaluation  
28 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 insured. (AT 23.) However, at step five the ALJ found that, in light of plaintiff's age, education,  
2 work experience, and RFC, and based on the VE's testimony, there were jobs that existed in  
3 significant numbers in the national economy that plaintiff could have performed through the date  
4 last insured. (AT 24.)

5 Thus, the ALJ concluded that plaintiff had not been under a disability, as defined in the  
6 Act, from January 1, 2009, plaintiff's alleged disability onset date, through December 31, 2011,  
7 plaintiff's date last insured. (AT 25.)

### 8 Plaintiff's Substantive Challenges to the Commissioner's Determinations

9 *Whether the ALJ improperly rejected the opinion of plaintiff's treating*  
10 *physician, Dr. Uppal*

11 The weight given to medical opinions depends in part on whether they are proffered by  
12 treating, examining, or non-examining professionals. Holohan v. Massanari, 246 F.3d 1195,  
13 1201-02 (9th Cir. 2001); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Generally speaking,  
14 a treating physician's opinion carries more weight than an examining physician's opinion, and an  
15 examining physician's opinion carries more weight than a non-examining physician's opinion.  
16 Holohan, 246 F.3d at 1202.

17 To evaluate whether an ALJ properly rejected a medical opinion, in addition to  
18 considering its source, the court considers whether (1) contradictory opinions are in the record;  
19 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a  
20 treating or examining medical professional only for "clear and convincing" reasons. Lester, 81  
21 F.3d at 830-31. In contrast, a contradicted opinion of a treating or examining professional may be  
22 rejected for "specific and legitimate" reasons. Id. at 830. While a treating professional's opinion  
23 generally is accorded superior weight, if it is contradicted by a supported examining  
24 professional's opinion (supported by different independent clinical findings), the ALJ may  
25 resolve the conflict. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing Magallanes  
26 v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). The regulations require the ALJ to weigh the  
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1 contradicted treating physician opinion, Edlund, 253 F.3d at 1157,<sup>6</sup> except that the ALJ in any  
2 event need not give it any weight if it is conclusory and supported by minimal clinical findings.  
3 Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (treating physician’s conclusory, minimally  
4 supported opinion rejected); see also Magallanes, 881 F.2d at 751. The opinion of a non-  
5 examining professional, by itself, is insufficient to reject the opinion of a treating or examining  
6 professional. Lester, 81 F.3d at 831.

7 On January 6, 2012, just after plaintiff’s date last insured, plaintiff’s treating physician,  
8 Dr. Surinder Uppal, issued a one-page letter noting that plaintiff had degenerative disc disease of  
9 the spine (cervical, thoracic, and lumbosacral) and right thumb, with bilateral knee problems, and  
10 had become “totally disabled.” (AT 490.) Dr. Uppal stated:

11 He is not able to do any lifting, pushing, pulling, can not [sic] lift  
12 more than 20 pounds of weight, can not [sic] do much kneeling,  
13 crouching, over reaching [sic] etc. Can not [sic] do walking at  
14 anymore [sic] than half a block at a time, can not [sic] do any  
15 running, so he has become totally disabled but otherwise, he is  
mentally completely clear and he can take care of himself for his  
personal needs. Directions are good, speech is good, hearing is  
good.

16 (Id.)

17 Because Dr. Uppal’s opinion was contradicted by other medical opinions in the record, the  
18 ALJ was required to provide specific and legitimate reasons for discounting Dr. Uppal’s opinion.

19 As an initial matter, the ALJ reasonably gave Dr. Uppal’s January 6, 2012 opinion little  
20 weight, because it is conclusory, provides little support for the extreme limitations assessed, and  
21 appears to rely significantly on plaintiff’s subjective complaints, which the ALJ properly found  
22 less than credible for the reasons discussed below. (AT 23.) Indeed, even plaintiff himself  
23 admitted that he could walk more than half a block (according to plaintiff, about 5-6 blocks not  
24 using any assistive device) during the relevant period. (AT 427.)

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27 <sup>6</sup> The factors include: (1) length of the treatment relationship; (2) frequency of examination; (3)  
28 nature and extent of the treatment relationship; (4) supportability of diagnosis; (5) consistency;  
and (6) specialization. 20 C.F.R. § 404.1527.

1           The ALJ also substantially relied on the opinion of consultative examiner, Dr. Omar  
2 Colon, who personally examined plaintiff during the relevant period on June 4, 2011. (AT 19, 23,  
3 427-30.) Dr. Colon noted plaintiff’s complaints related to his elbows, wrists, thumbs, lower back,  
4 left hip, knees, and ankles, but also observed that plaintiff walked independently into the  
5 examination room with a normal gait, looking comfortable and not in pain. (AT 427-28.) Upon  
6 examination, a straight leg raising test was negative bilaterally; plaintiff had normal motor  
7 strength/muscle bulk in all extremities; and a sensory examination and reflexes were normal in all  
8 extremities. (AT 429.) Dr. Colon found mild swelling in plaintiff’s left ankle, with no tenderness  
9 on palpation, and found no spasms or tenderness on palpation of plaintiff’s lumbar and cervical  
10 spine. (Id.) Dr. Colon diagnosed plaintiff with chronic pain syndrome and left hip pain, but  
11 opined that plaintiff had no physical functional limitations that could be expected to last for at  
12 least twelve (12) months. (AT 429-30.) Because Dr. Colon personally examined plaintiff and  
13 made independent clinical findings, his opinion constitutes substantial evidence on which the ALJ  
14 was entitled to rely.

15           Furthermore, the ALJ properly relied on the opinion of non-examining state agency  
16 physician Dr. Nguyen, who reviewed plaintiff’s records during the relevant period on July 18,  
17 2011, and opined that plaintiff did not have a severe physical impairment. (AT 22-23, 433.) See  
18 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (“Although the contrary opinion of a  
19 non-examining medical expert does not alone constitute a specific, legitimate reason for rejecting  
20 a treating or examining physician’s opinion, it may constitute substantial evidence when it is  
21 consistent with other independent evidence in the record.”).

22           Finally, the ALJ rationally observed that Dr. Uppal’s very restrictive limitations were also  
23 unsupported by other evidence in the medical record. (AT 23.) For example, as the ALJ pointed  
24 out, plaintiff reported to one of his treating providers that “he was doing a lot of work on  
25 05/28/2012, he was working on baseboards and climbing up and down ladders....” (AT 21, 958.)  
26 Such activities are plainly inconsistent with Dr. Uppal’s severe opinion.

27           Therefore, the court finds that the ALJ provided several specific and legitimate reasons for  
28 discounting Dr. Uppal’s opinion.

1                    *Whether the ALJ erred in not finding plaintiff's right wrist pain and thoracic spine*  
2 *impairment to be severe impairments at step two*

3            Plaintiff correctly notes that the ALJ did not specifically find plaintiff's right wrist pain  
4 and thoracic spine impairment severe for purposes of step two.

5            Under the Commissioner's regulations, an impairment or combination of impairments is  
6 deemed to be severe at step two if it "significantly limits your physical or mental ability to do  
7 basic work activities." 20 C.F.R. §§ 404.1520(c), 404.1521(a). As the Ninth Circuit Court of  
8 Appeals has explained, "the step-two inquiry is a de minimis screening device to dispose of  
9 groundless claims. An impairment or combination of impairments can be found not severe only  
10 if the evidence establishes a slight abnormality that has no more than a minimal effect on an  
11 individual's ability to work." Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996) (internal  
12 citations and quotation marks omitted).

13            Even assuming, without deciding, that the ALJ technically erred by not finding plaintiff's  
14 right wrist pain and thoracic spine impairment severe for purposes of step two, such error was  
15 harmless. See Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) ("we may not reverse an  
16 ALJ's decision on account of an error that is harmless"). As an initial matter, the ALJ here  
17 proceeded to subsequent steps and considered all of the medical evidence in formulating the RFC.  
18 See Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007). Moreover, the ALJ determined, based on  
19 the VE's testimony, that even if plaintiff were limited to sedentary work with the ability to change  
20 positions and perform only occasional manipulation of both hands, there would still have been  
21 jobs that existed in significant numbers in the national economy that plaintiff could have  
22 performed. (AT 25, 72-73.)

23            Thus, any error at step two does not warrant reversal and remand.

24                    *Whether the ALJ failed to make a proper step three determination*

25            The claimant "bears the burden of proving that ... she has an impairment that meets or  
26 equals the criteria of an impairment listed in Appendix 1 of the Commissioner's regulations."  
27 Burch v. Barnhart, 400 F.3d 676, 683 (9th Cir. 2005). "For a claimant to show that his  
28 impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment



1 that manifests only some of those criteria, no matter how severely, does not qualify....For a  
2 claimant to qualify for benefits by showing that his unlisted impairment, or combination of  
3 impairments, is ‘equivalent’ to a listed impairment, he must present medical findings equal in  
4 severity to *all* the criteria for the one most similar listed impairment.” Sullivan v. Zebley, 493  
5 U.S. 521, 530-31 (1990). A determination of medical equivalence must rest on objective medical  
6 evidence. See Lewis v. Apfel, 236 F.3d 503, 514 (9th Cir. 2001) (“A finding of equivalence must  
7 be based on medical evidence only.”); Tackett v. Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999)  
8 (“Medical equivalence must be based on medical findings...A generalized assertion of functional  
9 problems is not enough to establish disability at step three.”). Furthermore, “[t]he mere diagnosis  
10 of an impairment listed in Appendix 1 is not sufficient to sustain a finding of disability.” Key v.  
11 Heckler, 754 F.2d 1545, 1549 (9th Cir. 1985). Instead, all of the specified medical criteria must  
12 be met or equaled. Id. at 1550.

13 On appeal, plaintiff does not outline a plausible theory, by reference to specific criteria  
14 and medical findings, of how he meets or equals any particular Listing. Instead, plaintiff  
15 essentially posits that the ALJ should have further developed the record in that regard through  
16 medical expert testimony. That argument amounts to little more than an attempt by plaintiff to  
17 improperly shift his burden of proof to the Commissioner. Although it is true that the ALJ has a  
18 general duty to appropriately develop the record, there is no indication that the ALJ was required  
19 to further develop the record to make a proper step three determination here. For the reasons  
20 discussed above, the ALJ properly rejected Dr. Uppal’s opinion, and the consultative examiner  
21 and state agency physician did not make any findings of insufficient evidence, but instead issued  
22 definitive opinions finding plaintiff not disabled.

23 Therefore, the court finds no error at step three.

24 *Whether the ALJ improperly discounted plaintiff’s credibility*

25 In Lingenfelter v. Astrue, 504 F.3d 1028 (9th Cir. 2007), the Ninth Circuit Court of  
26 Appeals summarized the ALJ’s task with respect to assessing a claimant’s credibility:

27 To determine whether a claimant’s testimony regarding subjective  
28 pain or symptoms is credible, an ALJ must engage in a two-step  
analysis. First, the ALJ must determine whether the claimant has

1 presented objective medical evidence of an underlying impairment  
2 which could reasonably be expected to produce the pain or other  
3 symptoms alleged. The claimant, however, need not show that her  
4 impairment could reasonably be expected to cause the severity of  
5 the symptom she has alleged; she need only show that it could  
6 reasonably have caused some degree of the symptom. Thus, the  
7 ALJ may not reject subjective symptom testimony . . . simply  
8 because there is no showing that the impairment can reasonably  
9 produce the degree of symptom alleged.

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

14 Lingenfelter, 504 F.3d at 1035-36 (citations and quotation marks omitted). "At the same time, the  
15 ALJ is not required to believe every allegation of disabling pain, or else disability benefits would  
16 be available for the asking..." Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012).

17 "The ALJ must specifically identify what testimony is credible and what testimony  
18 undermines the claimant's complaints." Valentine v. Comm'r of Soc. Sec. Admin., 574 F.3d 685,  
19 693 (9th Cir. 2009) (quoting Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.  
20 1999)). In weighing a claimant's credibility, an ALJ may consider, among other things, the  
21 "[claimant's] reputation for truthfulness, inconsistencies either in [claimant's] testimony or  
22 between [her] testimony and [her] conduct, [claimant's] daily activities, [her] work record, and  
23 testimony from physicians and third parties concerning the nature, severity, and effect of the  
24 symptoms of which [claimant] complains." Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir.  
25 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.  
26 1997)). If the ALJ's credibility finding is supported by substantial evidence in the record, the  
27 court "may not engage in second-guessing." Id. at 959.

28 As an initial matter, the court notes that the ALJ did not entirely discredit plaintiff's  
allegations. Indeed, although both the consultative examiner and state agency physician assessed  
no functional limitations, the ALJ considered plaintiff's testimony, the diagnostic imaging  
studies, and the record as a whole, and ultimately limited plaintiff to light work with the need to  
make brief changes in position. (AT 18-19, 23.) Nevertheless, to the extent that the ALJ  
discounted plaintiff's testimony regarding his symptoms and functional limitations, the ALJ

1 provided several specific, clear, and convincing reasons for doing so.

2 The ALJ reasonably found that plaintiff's subjective allegations were inconsistent with the  
3 medical opinion evidence, when properly weighed. (AT 22.) Although lack of medical evidence  
4 to fully corroborate the alleged severity of symptoms cannot form the sole basis for discounting  
5 plaintiff's subjective symptom testimony, it is nevertheless a relevant factor for the ALJ to  
6 consider. Burch, 400 F.3d at 681.

7 Additionally, the ALJ properly found plaintiff less than credible in light of untruthful  
8 testimony concerning his substance abuse. (AT 22.) At the March 12, 2014 administrative  
9 hearing, plaintiff testified that he had been in AA before, drank alcohol one time about six months  
10 prior, and before that last drank alcohol regularly 14 years ago. (AT 54.) However, on January  
11 15, 2010, plaintiff presented to the emergency room with acute onset of mid-abdominal  
12 discomfort and vomiting. (AT 283.) Treating providers noted that plaintiff was a "heavy alcohol  
13 abuser, drinks approximately a pint a day for a year" and had an ETOH level of 410. (Id.)  
14 Plaintiff was diagnosed with acute alcoholic pancreatitis. (AT 284.) Also, on March 5, 2012,  
15 plaintiff informed his treating provider that he had recently consumed a six-pack of beer. (AT  
16 775.)

17 Furthermore, the ALJ justifiably found some of plaintiff's activities to be inconsistent  
18 with disabling impairments. For example, as discussed above, in May 2012, plaintiff reported  
19 working on baseboards and climbing up and down ladders. (AT 21-22, 958.)

20 Therefore, the court finds that the ALJ provided specific, clear, and convincing reasons  
21 for discounting plaintiff's credibility. As the Ninth Circuit explained:

22 It may well be that a different judge, evaluating the same evidence,  
23 would have found [the claimant's] allegations of disabling pain  
24 credible. But, as we reiterate in nearly every case where we are  
25 called upon to review a denial of benefits, we are not triers of fact.  
26 Credibility determinations are the province of the ALJ...Where, as  
27 here, the ALJ has made specific findings justifying a decision to  
28 disbelieve an allegation of excess pain, and those findings are  
supported by substantial evidence in the record, our role is not to  
second-guess that decision.

27 Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989).

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1                                    *Whether the ALJ's RFC was without substantial evidence support*

2                    For the reasons discussed above, the court finds that the ALJ appropriately evaluated the  
3 medical opinion evidence and plaintiff's credibility. As such, plaintiff's argument that the RFC is  
4 without substantial evidence support is not well taken.

5                    Throughout his briefing, plaintiff also raises several other arguments, which are ultimately  
6 unpersuasive.

7                    Plaintiff argues that the ALJ did not adequately account for the side effects of plaintiff's  
8 medications, such as his alleged inability to think/focus and his lack of energy. However, as the  
9 ALJ discussed, the record in this case contains evidence of significant drug seeking behavior,  
10 with even Dr. Uppal expressing concern regarding the rate at which plaintiff was requesting  
11 opioid medication refills. (AT 21-23.) Additionally, on January 7, 2013, in a worker's  
12 compensation utilization review to determine medical necessity and appropriateness, Dr. Jay  
13 Westphal opined that plaintiff's ongoing opioid use was not supported by the chronic pain  
14 guidelines. (AT 23, 920.) Notably, plaintiff's treating physician Dr. Uppal otherwise opined that  
15 plaintiff was mentally completely clear and could follow directions. (AT 490.) As such, the ALJ  
16 reasonably found that plaintiff's use of medication was excessive and appropriately declined to  
17 assess additional related limitations.

18                    Plaintiff further contends that the ALJ improperly found that plaintiff had a high school  
19 education, when he in fact did not graduate from high school or obtain a GED. However, any  
20 error in that regard was harmless, because the vocational expert identified several light and  
21 sedentary representative occupations with a specific vocational preparation ("SVP") level of 2  
22 (involving simple work) that plaintiff could have performed.

23                    Finally, plaintiff's argument that his due process rights were violated when vocational  
24 expert testimony was taken at the August 28, 2013 hearing in his absence is devoid of merit. The  
25 vocational expert's testimony was taken in the presence of plaintiff's counsel. The ALJ then  
26 conducted a subsequent hearing at which plaintiff himself was given an opportunity to testify,  
27 again represented by the same counsel. Nothing on this record indicates that supplemental  
28 vocational expert testimony was required after the ALJ heard plaintiff's testimony, let alone that

1 any due process violation occurred.

2 Plaintiff's remaining contentions are so insubstantial as to not warrant any further  
3 discussion or analysis.

4 V. CONCLUSION

5 For the foregoing reasons, the court concludes that the ALJ's decision was free from  
6 prejudicial error and supported by substantial evidence in the record as a whole. Accordingly, IT  
7 IS HEREBY ORDERED that:

8 1. Plaintiff's motion for summary judgment (ECF No. 15) is DENIED.


9 2. The Commissioner's cross-motion for summary judgment (ECF No. 19) is  
10 GRANTED.

11 3. The final decision of the Commissioner is AFFIRMED, and judgment is entered  
12 for the Commissioner.

13 4. The Clerk of Court shall close this case.

14 IT IS SO ORDERED.

15 Dated: April 17, 2017

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18 KENDALL J. NEWMAN  
19 UNITED STATES MAGISTRATE JUDGE  
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