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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL R. DIXON,
Plaintiff,
v.
MICHAEL J. ASTRUE,
Defendant.

No. C-09-04869 JCS

**ORDER DENYING PLAINTIFF’S
SUMMARY JUDGMENT MOTION AND
GRANTING DEFENDANT’S SUMMARY
JUDGMENT MOTION [Docket Nos. 23,
26]**

I. INTRODUCTION

Plaintiff, Michael R. Dixon, seeks review of the final decision of the Commissioner of the Social Security Administration (“Commissioner”) denying his Application for disability insurance and Supplemental Security Income (“SSI”) benefits under of the Social Security Act (“SSA”). Plaintiff asks the Court to reverse the Commissioner’s denial of benefits and remand with instructions to award benefits or, in the alternative, to remand for additional administrative proceedings. For the reasons stated below, the Court DENIES Plaintiff’s Motion for Summary Judgment, GRANTS Defendant’s Motion for Summary Judgment and dismisses Plaintiff’s action with prejudice.¹

II. BACKGROUND

A. Procedural Background

Plaintiff filed a claim for disability benefits on September 20, 2004, alleging disability as of May 15, 2003 due to a low back injury. Administrative Record (“AR”) at 18. That claim was

¹The parties have consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c).

1 denied at the initial level on December 27, 2004 and on reconsideration on February 23, 2005. *Id.*
2 Plaintiff did not pursue that claim to the hearing level.

3 On August 18, 2005, Plaintiff filed claims for disability benefits and SSI benefits, again
4 alleging disability as of May 15, 2003 due to a low back injury. *Id.* The claims were denied initially
5 on September 30, 2005 and on reconsideration on January 17, 2006. *Id.* Plaintiff filed a timely
6 request for a hearing, which was conducted on May 3, 2007 in Ukiah, California. *Id.* At the
7 hearing, Plaintiff was represented by attorney Betty Herrera. *Id.* Plaintiff testified at the hearing.
8 *Id.* In addition, vocational expert Malcolm Brodzinsky testified at the hearing. *Id.* Administrative
9 Law Judge (“ALJ”) Charles D. Reite presided over the hearing. *Id.* In a decision dated July
10 23, 2007, the ALJ found that Plaintiff was not disabled and therefore was not entitled to disability
11 insurance benefits or SSI benefits under the SSA. *Id.* at 24. Plaintiff requested administrative
12 review, and the Appeals Council denied the request on August 11, 2009, making the ALJ’s decision
13 the final decision of the Commissioner. *Id.* at 6.

14 Plaintiff filed this action pursuant to 42 U.S.C. § 405(g), which gives the Court jurisdiction
15 to review the final decision of the Commissioner. He has filed a motion for summary judgment
16 asking the Court to reverse the decision of the Commissioner, and the Commissioner has responded
17 with a cross-motion for summary judgment seeking affirmation of the Commissioner’s final
18 decision.

19 **B. Plaintiff’s Background**

20 Plaintiff was born on June 2, 1961 and was 41 years old on his alleged onset date. AR at 89.
21 He graduated from college in 1985 and completed training in carpentry in 1986. *Id.* at 139. Prior to
22 his alleged onset date, he held a series of jobs that included maintenance worker, driver/sanitary
23 worker and carpenter. *Id.* at 152. Plaintiff testified that he stopped working in May 2003 as a result
24 of an injury to his lower back. *Id.* at 606-607.

25 **C. Plaintiff’s Medical History**

26 On May, 16, 2003, Dr. Adalberto Renteria saw Plaintiff for an injury to Plaintiff’s lower
27 back that occurred the previous day. AR at 229 (“Doctor’s First Report of Occupational Injury or
28

1 Illness”). The report stated that Plaintiff was unable to perform his usual work due to the injury. *Id.*
2 On June 17, 2003 a lumbar spine MRI was done to evaluate the impact of the injury. *Id.* at 202. The
3 findings of the MRI were described as follows:

- 4 1. Degenerative disk changes at L2-3 do not produce significant central canal or neural
5 foraminal stenosis. It is stable compared to the prior examination performed on
6 3-21-97;
- 7 2. Degenerative disk and facet changes, L4-5, produce only minimal flattening of the
8 ventral aspect of the thecal sac and mild-to-moderate neural foraminal stenosis.
9 Despite the neural foraminal stenosis, no definite impingement on the L4 nerve roots
10 is demonstrated within the neural foramina. This is also stable.
- 11 3. Foci of altered signal in the L5 and L4 vertebrae are most consistent with foci of fatty
12 infiltration or cavernous hemangioma. There is slight enlargement in the focus of L4.
13 Despite this enlargement, a benign lesion is most likely, particularly given the very
14 minimal growth over six years and signal characteristics.

15 *Id.*

16 On July 22, 2003, Dr. Michael Cohen, of Sutter Health @ Work, completed a Work Status
17 Report listing the following “Modified Duty Restrictions:” no lifting/carrying over 10 pounds, no
18 bend/twist, stand/walk/climb no more than 2 hours a day and no more than 20 minutes at a time, and
19 sit no more than 2 hours a day and no more than 15 minutes at a time. *Id.* at 211.

20 Treatment records from Dr. Allen Gruber from October 29, 2003 through January 27, 2004
21 indicate that Plaintiff continued to experience lower back pain for bilateral L4-5 and L5-S1
22 radiculopathy. *Id.* at 344-62. Plaintiff received lumbar epidural steroid injections on September 18,
23 2003 and January 28, 2004. *Id.* at 337, 371. In addition, Dr. Gruber performed lumbar selective
24 nerve root block procedures on March 31, 2004 and November 3, 2004. *Id.* at 289, 325. In the
25 report from the November 3, 2004 procedure, Dr. Gruber stated:

26 Mr. Dixon reports having had ≈3+ months of excellent major partial relief of his chronic
27 intractable back pain following L4-5 bilateral selective nerve root blocks last March. . . .HE
28 NOTED TODAY THAT MOST OF HIS RESIDUAL PAIN FOLLOWING THE MARCH
PROCEDURE AFFECTED HIS MID AND UPPER LUMBAR AREA AND THAT THE
LOWER PRTION [sic] WAS MOST RELIEVED. He agreed to undergo L3-4 level root
blocks as well today as the L4-5s in order to attempt addressing this contributory element of
his chronic pain.

Id. at 289.

1 In a report to the California Workers' Compensation Division dated April 20, 2004, Dr.
2 Gruber described Plaintiff's pain as follows:

3 Pt. reports decreased, but still present on constant basis, LBP. Slight decrease in "sciatic"
4 pain into both buttocks, and LE's. c/o right calf cramping on constant basis despite walking
and stretching.

5 *Id.* at 320.

6 On October 7, 2004, Dr. Thomas Miles, a Qualified Medical Examiner, examined Plaintiff in
7 connection with a California Worker's Compensation claim. *Id.* at 419 - 431. Dr. Miles also
8 reviewed Plaintiff's medical records and issued a report based on the exam and medical records on
9 October 26, 2004. *Id.* In his report, Dr. Miles diagnosed Plaintiff with "[m]ulti-level degenerative
10 disc disease, lumbar spine, with mild disc bulge L4/5." *Id.* at 427. Dr. Miles stated that Plaintiff
11 "was utilizing no supportive device or brace [at the examination and] was able to ambulate without
12 need of any assistive aids." *Id.* at 423. In describing the neurologic examination, Dr. Miles stated:

13 The patient was noted to have diffuse complaints of tingling to light touch in most of the
14 major dermatomes below his knee. Waddell's tests were inappropriate with tenderness to
15 light touch in the right sacroiliac area. With stimulated axial loading and rotation he would
16 complain of pain. It was felt that there was over-reaction. There was no discrepancy,
however, in the straight leg raising testing, and I could find no regional disturbances that
were abnormal.

17 *Id.* at 424. Under the heading, "Objective Factors," Dr. Miles wrote:

18 The physical examination demonstrated positive findings of inappropriate responses on
19 Waddell's testing x3 with marked loss of range of motion at the lumbar spine in all planes. It
20 was felt that, to some extent at least, the patient's minimal range of motion was [a] self
imposed restriction.

21 *Id.* at 429. He concluded that "Mr. Dixon currently experiences disability with respect to his lumbar
22 spine that should preclude him from heavy lifting, contemplating that he has lost half of his pre-
23 injury capacity for lifting." *Id.*

24 On December 4, 2004, Dr. Nicholas Butowski, a consulting physician with the California
25 Department of Social Services ("DDS") completed a comprehensive orthopedic evaluation. *Id.* at
26 280-284. According to Dr. Butowski, Plaintiff stated "that the pain is always present in his low back
27 radiating down both lower extremities on an intermittent basis, feeling very tingly and electric-like
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1 in sensation [and that] [t]here is patchy sensory loss on both legs, especially at the big toes and
2 between the big toes.” *Id.* at 280. Plaintiff further reported to Dr. Butowski that his “pain is
3 improved by lying supine, heat to the area , or using a cane for support; aggravated by sitting or
4 standing greater than 15 minutes.” *Id.* at 281. Dr. Butowski noted that during the examination,
5 Plaintiff sat “uncomfortably,” frequently changing his position and alternating between sitting and
6 standing. *Id.* at 281. Plaintiff required assistance to get on the examining table. *Id.* Dr. Butowski’s
7 diagnosis was “[b]ack pain, possibly due to disk pathology and/or stenosis, and likely possibly L5
8 radiculopathy.” *Id.* at 284. In his functional assessment, Dr. Butowski stated as follows:

9 Based on the history and physical, I would expect the claimant to stand and/or walk for about
10 two hours in and eight-hour workday and sit about six hours with breaks every 30-60
11 minutes to change position. He does not require an assistive device, but one may be helpful
12 for long distances or uneven terrain. The claimant can lift and/or carry objects of up to 10
13 pounds on an occasional or frequent basis . . . He is posturally limited in that repetitive
bending, stooping, crouching or climbing on an occasional or frequent basis will be difficult
for him. There are no manipulative limitations with regard to gross or fine reaching, feeling,
fingering, or handling, and no environmental limitations.

14 *Id.*

15 Plaintiff sought emergency care on January 12 and 28, 2005 and February 28, 2005 due to
16 flare-ups of his back pain. *Id.* at 469, 480, 494. Plaintiff went to the emergency room again on June
17 9, 2005 and August 15, 2005 for flare-ups in his back pain. *Id.* at 447, 460. During each of these
18 visits he was given injections of Toradol and Norflex. *Id.*

19 On February 9, 2005, Dr. Michael F. Charles, a Qualified Medical Examiner, interviewed
20 and examined Plaintiff in connection with a California Worker’s Compensation claim. *Id.* at 437.
21 In addition, Dr. Charles reviewed some of Plaintiff’s medical records, as well as the report
22 completed by Dr. Miles discussed above. *Id.* at 437-445. In his report, dated April 6, 2005, Dr.
23 Charles noted that Plaintiff arrived at the examination room “utilizing a cane in his right hand and
24 appeared to have a significant antalgic gait favoring the right lower extremity.” *Id.* at 440. Dr.
25 Charles continued,

26 The patient appeared uncomfortable throughout history taking and arose several times during
27 the interview period of this evaluation.

1 The examination of the back and lower extremities noted no scoliosis, normal kyphosis, loss
2 of normal lordotic curve which was flat. . . .Standing for the evaluation, he stood with his
3 right leg forward with knee bent. He was unable to walk on his right heel, performing a
4 quarter squat claiming difficulty.

5 There was palpable tenderness in the low back, right worse than left. On palpation of the
6 right buttocks, there was radicular pain shooting down to the right great toe L5 distribution.

7 The patient had 50 % normal extension, 75 % normal forward flexion, was able to reach
8 within 20 inches of the floor with the knees extended with difficulty. Lateral bending to the
9 right and left was also limited by 50%.

10 Neurologic examination positive in the supine position on the right. Decreased sensation L5
11 distribution on the right. . . .

12 *Id.* Based on his review of the June 2003 MRI, Dr. Charles concluded that Plaintiff had suffered a
13 “significant injury” on May 15, 2003 and that Plaintiff “remain[ed] in pain.” *Id.* at 442. He found
14 that Plaintiff was limited to light work with no heavy lifting. *Id.* at 443.

15 Dr. Charles issued a supplemental report on June 15, 2005 addressing the significance of
16 videotape footage of plaintiff unloading a pick-up truck. *Id.* at 432-434. In it, he stated as follows:

17 Today I was asked to review a videotape sub rosa film, performed on 4/7/05. The patient
18 was observed to be removing several articles from the back of his small pickup truck, two
19 large barrels and some bags that appeared to be either fertilizer or some other type of
20 material. The patient was witnessed as rolling the large wheelbarrows to the side of the truck
21 and then assisting them to the ground. Then there was a female person rolling the barrels
22 away. The patient then took one or two large bags again to the edge of the truck and plopped
23 them onto a dolly, and they were removed by the other person in the video, who was a
24 woman.

25 At no time in the film did the patient lift from ground upward. The activities were brief
26 encounters and did not represent any type of extensive hours of activity. Thus, these videos
27 would not serve to change the undersigned’s opinion. As noted in the Guidelines for Work
28 Capacity, disability resulting in Limitation to Light Work contemplates the individual can do
work in a standing or walking position with a minimum demand of physical effort. In my
opinion, these sub rosa films did show minimal demand of physical effort. Therefore, it
would not contradict the rating noted above for his injury as it pertains to the 5/15/03
incident.

Id. at 433.

Dr. Miles also was asked to offer an opinion as to the sub rose videotape, including his
reaction to Dr. Charles’ opinion of the significance of that tape. *Id.* at 416. Dr. Miles wrote,

In light of the sub rosa videotape, my opinions are definitely changed with regard to the level
of disability, which I precluded him from heavy lifting. Obviously, he seems capable of
heavy lifting, at least on three occasions in rapid sequence as noted while lifting the sacks

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and wine barrels from the back of a truck. Therefore, it is my opinion that I would preclude him more appropriately from heavy work contemplating he had lost approximately one-quarter of his fringing capacity for performing such activities as bending, stooping, lifting, pushing, pulling, climbing and other activities involving comparable physical effort.

It is my opinion that this patient's disability is far less than that of Dr. Charles in that it is obvious that lifting wine barrels from the back of a truck is far more than would be the description of light work. This was indeed heavy work.

...

It should be recalled that on examination this patient demonstrated inappropriate responses on Waddell's testing on 3 out of 5. He was noted to have marked loss of range of motion of his lumbar spine in all planes. It was felt that some of that loss of motion was probably self-imposed restrictions.

At the end of the videotape, he was noted to be bending forward while letting down the wine barrel indicating that his range of motion indeed is probably greater than when I examined him.

Therefore, my revised opinions are as noted above as a consequence of this videotape, which seems quite revealing in my opinion.

Id. at 417.

The record also contains medical notes from Dr. Michael Tran, a pain management specialist, who treated Plaintiff during the period January 2005 through April 2007. *See id.* at 542-67. These reports describe Plaintiff's lower back pain as "constant" and "high level[]." *Id.* at 544, 547. In a Workers' Compensation form dated April 12, 2006, Dr. Tran wrote that Plaintiff had limitations which affected his ability to work but none that affected his ability to participate in education and training. *Id.* At 549. On April 23, 2007, Dr. Tran completed a Residual Functional Capacity Questionnaire in which he stated that Plaintiff had the following limitations:

- sit no more than 15 minutes at one time;
- stand no more than 15 minutes at one time;
- sit no more than 2-3 hours in an 8-hour day;
- stand no more than 2-3 hours in an 8-hour day;
- walk no more than 2 hours in an 8 hour day;
- walk every 30 minutes for 5-10 minutes;
- ability to shift positions at will from sitting, standing or walking;

- 1 • ability to take breaks at random intervals, as frequently as 13-30 minutes for between
- 2 15 and 45 minutes;
- 3 • ability to use assistive device;
- 4 • never lift more than 10 pounds; lift up to 10 pounds rarely
- 5 • rarely twist, stoop, crouch/squat.

6 *Id.* at 570-73.

7 **D. Function Report by Linda Allen**

8 Linda Allen, Plaintiff's roommate, completed a Function Report on September 21, 2005. *Id.*
9 at 168-175. In the report, she states that Plaintiff does not do too much during the day because he
10 "has to lay down & rest back of legs 4 to 5 times a day." *Id.* at 168. She stated that he "can't sleep
11 [because] his feet hurt." *Id.* at 169. She stated that Plaintiff prepares meals for himself three times a
12 day and spends about 20 minutes preparing each meal. *Id.* She noted that since his injury,
13 Plaintiff's meals are "faster and easier [sic] to cook." *Id.* She stated that Plaintiff does his own
14 laundry, which takes him approximately 20 minutes a week. *Id.* She stated that Plaintiff pays to
15 have other housework done. *Id.* at 171. Addressing Plaintiff's ability to get around, Allen stated
16 that Plaintiff walks 6 or 7 blocks every day but that he can't drive due to his pain. *Id.* She stated
17 that Plaintiff does his own shopping, walking once a week to a Safeway that is three blocks from his
18 house and spending 30 to 40 minutes shopping. *Id.* She stated that Plaintiff has no hobbies because
19 he has to lay down 4 to 5 times a day and that he "can't do anything" because his pain is so bad.

20 *Id.* at 172. In her "Remarks," Allen states,

21 I see that it takes him time to fill out forms, he can't sit for more than 15 min., 2 times a day
22 before in great pain & gets worse & has to lay down. He also needs a cane after fall in
November '04 & went to E.R. for fall.

23 *Id.* at 175.

24 **E. The Administrative Hearing**

25 The ALJ held an administrative hearing on Plaintiff's claims on May 3, 2007. At the
26 hearing, Plaintiff testified that he stopped working in 2003 due to a lower back injury. *Id.* at 607.
27 According to Plaintiff, since his injury, he has experienced "[p]ain in the lower back, radiating pain
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1 in the sciatic nerve down both legs . . . all day, every day.” *Id.* at 607. He characterized his pain as a
2 seven on a scale of one to ten and described the pain as feeling like he has “a potato peeler on the
3 back of [his] legs.” *Id.* at 607-608. According to Plaintiff, he has tingling in his legs and feet. *Id.*
4 at 608. He further testified that this pain is exacerbated if he sits for more than 15 minutes at a time
5 or stands more than 15 to 20 minutes at a time. *Id.* He testified that he can walk no more than three
6 blocks, slowly, and that he uses a cane to walk. *Id.* at 608. According to Plaintiff, the cane was
7 prescribed by either Dr. Tran or Dr. Gruber. *Id.* Plaintiff testified that he takes Tradazone and
8 Ambien to sleep, but nonetheless he is unable to sleep more than three hours at a time before he is
9 woken up by sciatic nerve pain. *Id.* He testified that in the morning he is tired and has low energy.
10 *Id.* at 609.

11 When he is awake, Plaintiff said, he has trouble concentrating due to the stabbing pains in his
12 back and legs. *Id.* at 610. Plaintiff testified that he is able to take care of his personal needs, though
13 he uses a bar for support in the shower. *Id.* at 611. Plaintiff stated that he does not perform
14 household tasks, which are instead performed by Plaintiff’s roommate, Linda Allen. *Id.* He stated
15 that he does not drive for more than 15 minutes at a time due to his sciatic nerve pain. *Id.* at 612.
16 When he is in the car, he testified, he must lay down flat. *Id.* at 612. Similarly, Plaintiff testified
17 that during the course of the day, he must lie down four or five times on a heating pad with his feet
18 elevated to alleviate his back and leg pain. *Id.* at 616.

19 Subsequently, the ALJ questioned the vocational expert (“VE”), Malcolm Brodzinsky.
20 According to Brodzinsky, Plaintiff’s past relevant work as a truck driver was semi-skilled and had
21 heavy exertional demands. *Id.* at 621-622. The ALJ posed several hypotheticals to the VE. First,
22 he asked the VE to assume the following limitations:

23 . . . limited to a sedentary level of . . . exertional activity. Require a sit/stand option to
24 maintain comfort. . . . The postural activities all at an occasional level and as far as climbing
25 there’d be no ladders, scaffolds, that sort of thing. In addition to that there’d be some,
26 another non-exertional limitation. I’d say a mild limitation on the concentration, pace and
27 persistence. . . a 10 percent deficit Is there any past work that you identified that could
28 be accomplished?

1 *Id.* at 632. The VE responded that there was no past work that could be performed by an individual
2 with these limitations but that such an individual could work as a final assembler of optical goods in
3 an optical lab, D.O.T. code 713.687-018, classified as unskilled, with sedentary physical demands.

4 *Id.* The VE noted that the D.O.T. does not address the sit/stand limitation but that based on his own
5 expertise, this position could be performed by an individual with such a limitation. *Id.* at 633. The
6 V.E. further testified that there are 1,200 to 1,500 such positions in the San Francisco Bay area and
7 35,000 to 40,000 in the national economy. *Id.* The V.E. testified that an individual with these
8 limitations would also be able to work as an order clerk in food and beverage, an unskilled position
9 with sedentary physical demands. *Id.* He testified that there are 6,000 plus of such positions in the
10 San Francisco Bay area and 180,000 such positions in the national economy. *Id.*

11 Next, the ALJ added to the first hypothetical the need to use a “one-handed assistive device
12 for any kind of lengthy ambulation, say a half block or more.” *Id.* With this limitation, the V.E.
13 testified, the jobs as an order clerk would be cut by 60% because 50 to 60% percent of the jobs as
14 an order clerk require the individual to walk to get the orders and bring them back to the counter. *Id.*
15 at 634. Such an individual would still be able to work as an optical assembler, however, because
16 this job is “for the most part stationary.” *Id.*

17 In his third hypothetical, the ALJ asked the V.E. to assume the same limitations of the
18 second hypothetical and then add to it a 25% impairment in concentration, pace and persistence. *Id.*
19 In response, the V.E. testified that it was “pretty clear that there would be no jobs available in either
20 the national or regional economy” for an individual with these limitations. *Id.*

21 The V.E. also responded to questions posed by Plaintiff’s counsel concerning the impact on
22 an individual’s ability to work as an optical assembler of needing to frequently alternate between
23 sitting and standing. *Id.* at 635. The V.E. stated that up to two minutes of interruption would not be
24 a problem but that “[a]nything over a couple minutes of interruption to sit or stand and adjust focus
25 that would greatly reduce the numbers probably by at least 75 percent.” *Id.* The V.E. further
26 testified that an individual who needed to take unscheduled breaks every 15 to 30 minutes lasting 15
27 to 45 minutes would be unable to perform any job. *Id.*

1 At Step Three, the Commissioner considers whether the claimant’s impairment, or
2 impairments, “meets or equals” one of the Social Security Administration’s compiled listings of
3 impairments that the Commissioner has established as disabling. 20 C.F.R. § 404.1520(a)(4)(iii). If
4 the claimant’s impairment meets one of these listed impairments, the Commissioner will find the
5 claimant disabled. If the impairment does not meet one of the listed impairments, the process
6 continues to Step Four.

7 At Step Four, the Commissioner considers whether the claimant, in light of his residual
8 functional capacity (“RFC”), can continue to perform work he has performed in the past. 20 C.F.R.
9 § 404.1520(a)(4)(iv). Based on the relevant medical evidence and other evidence in the record, the
10 Commissioner will assess the claimant’s RFC to determine whether the claimant can do his past
11 work. 20 C.F.R. § 404.1520(e). If the RFC assessment determines that the claimant can perform his
12 past work, the Commissioner will find him not disabled. 20 C.F.R. § 404.1520(f). If the RFC
13 assessment determines that the claimant cannot perform his past work, then the claimant proceeds to
14 Step Five of the evaluation.

15 At Step Five, the Commissioner considers the claimant’s RFC, age, education, and work
16 experience to determine whether the claimant can “make an adjustment to other work.” 20 C.F.R.
17 § 404.1520(a)(4)(v). If the claimant cannot make an adjustment to other work, the Commissioner
18 will find him disabled. *Id.* At Step Five, the burden shifts to the Commissioner to show that the
19 claimant, in light of his impairments, age, education, and work experience, can adjust to other work
20 in the national economy, and that such a job actually exists. *Distasio v. Shalala*, 47 F.3d 348, 349
21 (9th Cir. 1995).

22 At Step One, the ALJ found that Plaintiff had not engaged in substantial gainful activity
23 since May 15, 2003, the alleged onset date. *Id.* at 20. Therefore, he continued to Step Two.

24 At Step Two, the ALJ found that the Claimant had the following severe impairments:
25 degenerative disc disease of the lumbar spine and chronic low back pain. *Id.*

1 At Step Three, the ALJ found that the Claimant did not have an impairment or combination
2 of impairments that met or equaled a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix
3 1. *Id.* at 21.

4 At Step Four, the ALJ found that Plaintiff had the following residual functional capacity:

5 . . .the claimant has the residual functional capacity (RFC) to perform sedentary work with a
6 sit/stand option; occasional climbing of ramps or stairs, no climbing of ladders ropes or
7 scaffolds; occasional balancing, stooping, kneeling, crouching or crawling; mild limitation in
concentration, persistence and pace; and requires the use of a cane for ambulation.

8 *Id.* In support of this conclusion, the ALJ cited to the conclusions of Qualified Medical Examiners
9 Dr. Miles and Dr. Charles, “both of whom found claimant only precluded from heavy lifting and
10 capable of light/sedentary work and eligible for vocational rehabilitation to lighter work.” *Id.* He
11 also noted that Dr. Miles had found Waddell’s testing to be positive and that Dr. Charles had
12 referred to video observation of Plaintiff doing “light activity, unloading a small pick-up truck.” *Id.*
13 The ALJ further referenced Dr. Butowski’s conclusion that Plaintiff could do sedentary work. *Id.*

14 The ALJ rejected Dr. Tran’s opinion to the extent that Dr. Tran found “much greater”
15 limitations in the April 23, 2007 medical source statement (“MSS”) than Drs. Miles and Charles had
16 found. *Id.* The ALJ offered the following reasons for his conclusion: 1) the MSS did not carry Dr.
17 Tran’s signature but instead, appeared to have been signed by a nurse or physician’s assistant; 2) Dr.
18 Tran was not an orthopedic specialist while both Drs. Miles and Charles are orthopedic specialists;
19 and 3) at no time has any treating doctor recommended any aggressive treatment such as surgery.
20 *Id.* The ALJ also noted that in the April 12, 2006 Workers’ Compensation form, Dr. Tran stated that
21 Plaintiff could participate in education training – an opinion the ALJ found to be “more consistent
22 with the other medical evidence than Dr. Tran’s MSS of April 23, 2007.” *Id.*

23 The ALJ also found that while Plaintiff had presented medical evidence showing limitations
24 in his exertional capacity, the limitations were not so severe as Plaintiff claimed. *Id.* In particular,
25 the ALJ concluded that Plaintiff’s statement that he needed to lie down several times a day was not
26 supported by the reports of Drs. Miles, Charles or Butowski. *Id.* Similarly, he rejected Ms. Allen’s
27 statement in the Function Report that Plaintiff needed to lie down several times a day, finding that it

1 Second, Defendant argues that the ALJ adequately set forth the reasons for his conclusion that
2 Plaintiff did not have a listed impairment, noting that even though he did not offer specific reasons
3 for his conclusion, he did include a summary of the evidence upon which his conclusion was based.
4 As a result, Defendant concludes, the basis for the ALJ’s decision at Step Three is apparent. Third,
5 Defendant argues that the ALJ gave clear and convincing reasons for finding that Plaintiff’s pain
6 testimony was not completely credible, including the positive Waddell’s signs, the videotape of
7 Plaintiff performing light activity, the opinions of Drs. Charles and Miles, the daily activities
8 described in Linda Alen’s report, and the fact that Plaintiff has not undergone any aggressive
9 treatment such as surgery.

10 **III. ANALYSIS**

11 **A. Legal Standard**

12 When reviewing the Commissioner’s decision, the Court takes as conclusive any findings of
13 the Commissioner which are free from legal error and “supported by substantial evidence.” 42
14 U.S.C. § 405(g). Substantial evidence is “such evidence as a reasonable mind accepts as adequate to
15 support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Substantial evidence
16 means “more than a mere scintilla” but “less than a preponderance.” *Id. Desrosiers v. Sec’y of*
17 *Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). Even if the Commissioner’s findings
18 are supported by substantial evidence, they should be set aside if proper legal standards were not
19 applied when using the evidence to reach a decision. *Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir.
20 1978). In reviewing the record, the Court must consider both the evidence that supports and detracts
21 from the Commissioner’s conclusion. *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

22 **B. Whether the ALJ erred in Rejecting the Opinion of Dr. Tran**

23 Plaintiff asserts that the ALJ’s decision should be reversed because he did not offer adequate
24 reasons for rejecting the opinion of Dr. Tran, a treating physician, as to Plaintiff’s limitations.
25 Although the ALJ may consider many sources, the opinion of a treating physician normally is given
26 special weight. *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If the ALJ decides to
27 disregard the treating physician’s opinions, he “must make findings setting forth specific, legitimate
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1 reasons for doing so that are based on substantial evidence in the record.” *Murray v. Heckler*, 722
2 F.2d 499, 502 (9th Cir. 1983). The Court concludes that the ALJ met this requirement.

3 In his decision, the ALJ cited to: 1) the fact that the examining physicians are orthopedists
4 while Dr. Tran is not; 2) the daily activities described by Plaintiff’s roommate, Linda Allen,
5 including doing his own laundry, preparing his own meals three times a day and walking several
6 blocks to the store once a week; and 3) Dr. Tran’s own statement in the April 12, 2006 Workers’
7 Compensation form that suggested less severe limitations than stated in the April 23, 2007 Function
8 Report. The Court finds these reasons to be both specific and legitimate.

9 Plaintiff’s reliance on *Prague v. Bowen*, 812 F.2d 1226 (9th Cir. 1987) is misplaced. In that
10 case, the ALJ adopted the opinion of the examining physician over that of the treating physician as
11 to the severity of the claimant’s impairments where the underlying medical findings of the treating
12 and the examining physicians were similar, namely, that the claimant suffered from degenerative
13 disc disease. 812 F.2d at 1230. The ALJ offered “no specific reasons” for rejecting the opinion of
14 the treating physician as to the claimant’s impairments and only made two oblique references to the
15 treating physician, which the court of appeals found were “totally inadequate as a statement of
16 reasons for disregarding a treating physician’s opinion.” *Id.* at 1230. In contrast to the facts in
17 *Prague v. Bowen*, the ALJ offered specific and legitimate reasons for rejecting the opinion of Dr.
18 Tran as to Plaintiff’s limitations. Accordingly, reversal of the Commissioner’s decision is not
19 warranted on this ground.

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21 **C. Whether the ALJ Erred at Step Three By Failing to Set Forth Reasons for
Finding that Plaintiff’s Impairments Did not Meet a Listing**

22 Plaintiff asserts that the ALJ’s finding that he is not disabled should be reversed because he
23 did not offer specific reasons in support of his conclusion, citing *Marcia v. Sullivan*, 900 F. 172 (9th
24 Cir. 1990). In *Marcia*, the claimant presented medical evidence to establish that his impairments
25 were equivalent to a Listed impairment. 900 F.2d at 176 (citing Social Security Ruling 83-19 for the
26 rule that “equivalency can be established when a listed impairment for which the medical findings
27 are missing from the evidence but for which other medical findings of equal or greater significance
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1 and relating [to] the same impairment are present in the evidence”). The ALJ found that the
2 claimant had failed to establish equivalence but did not offer any reasons in support of that
3 conclusion. *Id.* The court of appeals reversed the ALJ’s decision on the basis that his conclusory
4 finding as to equivalence was “insufficient to show that the ALJ actually considered equivalence.”
5 *Id.*

6 In this case, in contrast to *Marcia*, the ALJ provided a detailed review of the medical
7 evidence in the record, which the court finds to be an “adequate statement of the ‘foundations on
8 which the ultimate factual conclusions are based.’” *Gonzales v. Sullivan*, 914 F.2d 1197, 1201 (9th
9 Cir. 1990). In *Gonzales*, the court of appeals affirmed the Commissioner’s finding that the claimant
10 was not disabled even though the ALJ had not stated what evidence supported his conclusion that
11 the claimant’s impairments did not meet or equal a listing. *Id.* The court reasoned that “[t]he
12 regulations merely require the Secretary to review the symptoms . . . [and] [i]t is unnecessary to
13 require the Secretary, as a matter of law, to state why a claimant failed to satisfy every different
14 section of the listing of impairments.” *Id.* The court concluded that the ALJ’s four-page evaluation
15 of the evidence was sufficient to show the “foundations on which” he based his ultimate factual
16 conclusions. *Id.* Similarly, in this case, the ALJ’s discussion of Plaintiff’s medical history is
17 sufficient to show that he considered whether Plaintiff’s impairments met or equaled a listed
18 impairment.

19 Therefore, the Court rejects Plaintiff’s assertion that the Commissioner’s decision should be
20 reversed on this basis.

21 **D. Whether the ALJ Properly Disregarded Plaintiff’s Pain Testimony**

22 Plaintiff asserts that the Commissioner’s decision should be reversed because the ALJ failed
23 to offer sufficient reasons for finding that Plaintiff’s pain testimony was not completely credible.
24 The Court disagrees.

25 A claimant’s credibility is the degree to which the claimant’s statements can be believed and
26 accepted as true. SSR 96-7p at 4. The ALJ must make credibility findings to determine the truth of
27 a claimant’s description of his symptoms and pain. *See Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir.

1 1996) (holding ALJ responsible for determining credibility and resolving conflicts in medical
2 testimony). When making such findings, the ALJ “must consider the entire case record and give
3 specific reasons for the weight given to the [claimant’s] statements. The reasons for the findings
4 must be grounded in the evidence and articulated in the determination or decision.” *Id.* Testimony
5 cannot be discredited solely because it is not supported by objective medical evidence. *See* SSR 96-
6 7p; *Light v. SSA*, 119 F.3d 789, 792 (9th Cir. 1997). Further, when there is no affirmative evidence
7 of malingering, the ALJ must provide “clear and convincing” reasons for rejecting the claimant’s
8 testimony. *Burch v. Barnhart*, 400 F.3d 676 (9th Cir. 2005) (citation omitted).

9 The Ninth Circuit has articulated several factors that can be considered in determining
10 whether a claimant’s pain or symptom testimony is credible. These include the claimant’s
11 “reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his
12 conduct, his daily activities, his work record, and testimony from physicians and third parties
13 concerning the nature, severity, and effect of the symptoms of which he complains.” *Light*, 119 F.3d
14 at 792-93. If a claimant has proffered medical evidence that indicates the presence of an impairment
15 that could cause some pain, an ALJ may not base his disbelief of a claimant’s testimony on the sole
16 fact that it is unsupported by medical findings. *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989).
17 The Ninth Circuit’s rationale for this rule lies in the fact that “pain is a subjective phenomenon.” *Id.*

18 Here, the ALJ found that “the claimant’s medically determinable impairments could
19 reasonably be expected to produce the alleged symptoms, but that the claimant’s statements
20 concerning the intensity, persistence and limiting effects of these symptoms are not entirely
21 credible.” AR at 22. The ALJ offered several reasons for this, including: 1) a videotape indicating
22 that Plaintiff could perform heavy work, contrary to his assertions; 2) Waddell’s test results that led
23 at least one of the examining physicians to believe Plaintiff was exaggerating his symptoms; 3) the
24 objective medical evidence, including the opinions of Drs. Miles, Charles and Butowski, that
25 Plaintiff could perform light work; 4) the daily activities listed by Plaintiff’s roommate, Linda Allen;
26 and 5) the fact that Plaintiff has not undergone any aggressive treatment, such as surgery, to alleviate
27 his pain. The Court finds that these reasons for discounting Plaintiff’s pain testimony are clear and
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1 convincing.

2 Therefore, the Court rejects Plaintiff's assertion that the Commissioner's decision should be
3 reversed on this basis.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court GRANTS Defendant's motion, DENIES Plaintiff's
6 motion, and dismisses Plaintiff's claims with prejudice.

7 IT IS SO ORDERED.

8 Dated: September 24, 2010

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JOSEPH C. SPERO
United States Magistrate Judge