

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4

5
6 ALBERT JACK HELMKE,

7 Plaintiff,

No. C 07-4604 PJH

8
9 v.

**ORDER RE CROSS MOTIONS FOR
SUMMARY JUDGMENT**

10 MICHAEL J. ASTRUE, Commissioner
11 of Social Security,

12 Defendant.
13 _____/

14 Plaintiff Albert Jack Helmke (“Helmke”) seeks judicial review of the decision of the
15 Commissioner of Social Security (“the Commissioner”) denying his claim for disability
16 insurance benefits pursuant to 42 U.S.C. § 405(g). This action is before the court on the
17 parties’ cross-motions for summary judgment and Helmke’s alternative motion to remand.
18 Having read the parties’ papers and administrative record, and having carefully considered
19 their arguments and relevant legal authority, the court GRANTS the Commissioner’s
20 motion, DENIES Helmke’s motion, and AFFIRMS the Commissioner’s final decision.
21

BACKGROUND

22
23 **1. Factual/Procedural Background**

24 Helmke is currently sixty-three years old. Administrative Transcript (“A.T.”) 33. He
25 has completed high school and college, and also has a Masters of Business Administration
26 (M.B.A.). A.T. 20. After ceasing employment as a district sales manager in 1986, Helmke
27 obtained his real estate license through vocational rehabilitation. A.T. 20. However, he
28 has not engaged in substantial gainful activity since 1986. A.T. 20. His back pain began in

1 April 1985, when he coughed while bent over a hotel room sink, resulting in the sudden
2 onset of severe back pain. A.T. 21.

3 Helmke filed an application for social security disability insurance benefits on April
4 25, 2003. A.T. 69-71. He alleged disability beginning August 20, 1986 due to spinal
5 segmental instability; disc herniation at L5-S1¹; bulging disk at L4; and severe low back
6 pain. A.T. 489. The Commissioner denied his application on July 10, 2003, and upon
7 reconsideration on November 6, 2003. A.T. 37-40, 42-45.

8 Administrative Law Judge Charles D. Reite (“the ALJ”) held a hearing on July 15,
9 2004. A.T. 707-55. On November 17, 2004, the ALJ found that Helmke was not disabled
10 within the meaning of the Social Security Act. A.T. 486-96. Helmke requested that the
11 Appeals Council review the ALJ’s decision, A.T. 501, and the Appeals Council remanded
12 the case back to the ALJ on October 20, 2005. A.T. 509-12.

13 On August 15, 2006, Helmke appeared and testified at the administrative hearing on
14 remand. A.T. 652-706. The ALJ rendered an unfavorable decision on November 21, 2006,
15 finding Helmke capable of performing work existing in significant numbers in the national
16 economy. A.T. 16-28. Helmke again requested that the Appeals Council review the ALJ’s
17 decision. A.T. 15. The Appeals Council denied his request on July 12, 2007, and the ALJ’s
18 decision became final. A.T. 9-11. On September 5, 2007, Helmke brought this action
19 seeking judicial review of the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

20 **2. Helmke’s Treatment History**

21 Dr. Cousino, Helmke’s treating physician, reported on August 21, 1986, a little over a
22 year from the time of his injury, that Helmke could not sit for any longer than forty-five
23 minutes to two hours at a time, but was otherwise normal. A.T. 21. Based on a physical
24 examination, Dr. Cousino noted that Helmke appeared in no distress, and his only area of
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27 ¹ L-1 through L-5 are commonly used to refer to the vertebrae located in the lumbar
28 region of the back. Stedman’s Medical Dictionary 2118 (28th ed. 2006). S-1 refers to the first
of the sacroiliac joints, all of which form part of the pelvis and are collectively referred to as the
sacrum.

1 tenderness was his left sacroiliac joint, which was only mildly tender. A.T. 210.

2 Nevertheless, Dr. Cousino wrote to Helmke's employer indicating that he was no longer
3 capable of performing his customary job and, unless lighter duties were available,
4 recommended that Helmke undergo vocational rehabilitation. Dr. Cousino further opined
5 that Helmke's condition was permanent and stationary. A.T. 21.

6 Subsequently, on May 15, 1987, Dr. Cousino opined that Helmke was unable to
7 perform his work as a district manager, but was nevertheless able to perform other work.
8 A.T. 21, 114. Dr. Cousino concluded that Helmke's work restrictions were as follows:
9 inability to lift more than ten pounds frequently and twenty pounds occasionally; capacity to
10 sit for two hours, stand for two hours, and walk for four hours in an eight-hour day; inability
11 to bend, stoop, or crawl; and occasional squatting, kneeling, or reaching above shoulder
12 level was permitted. A.T. 21.

13 A few months later, on September 2, 1987, Dr. Pletz, another one of Helmke's
14 treating physicians, performed a consultative physical examination, but did not find
15 anything abnormal. A.T. 21-22. Dr. Pletz began treating Helmke for low back pain that day
16 and treated him until 1993. A.T. 22, 165. Dr. Pletz noted that Helmke had constant back
17 pain, principally left sacroiliac and no accompanying left extremity pain, with no numbness
18 or weakness. A.T. 22. Dr. Pletz's November 21, 1988 report stated that Peter McCann,
19 Helmke's physical therapist, was conducting an extensive rehabilitation program under Dr.
20 Pletz's direction, and in addition, Helmke was walking 2.5 miles per day, working out at a
21 health club for one-hour intervals each day, and targeting and strengthening his abdominal,
22 paraspinous, and gluteal muscles three times a week with weekends off. A.T. 22, 160.

23 On September 11, 1987, soon after Helmke's first appointment with Dr. Pletz,
24 Helmke underwent an MRI of his lumbosacral spine, which revealed that Helmke suffered
25 from a mild central bulging disc at L4-L5. A.T. 22. A couple of weeks later, on September
26 21, 1987, Dr. Hostetter, Helmke's chiropractor, opined that Helmke suffered low back pain
27 and burning tightness down the back of his leg, rendering him unable to sit and engage in
28 activities that require repeat motion. A.T. 384. Dr. Hostetter reported that Helmke was

1 100% disabled and could not be expected to resume work as a district manager, which at
2 that time consisted of driving and prolonged sitting. A.T. 403.

3 On January 7, 1988, Helmke's therapist, Dr. McCann, informed his treating doctor,
4 Dr. Pletz, that Helmke was not making rapid progress and that Dr. McCann and his staff felt
5 that Helmke's symptoms were not sufficient to justify the slow progress. A.T. 22.

6 Moreover, on February 16, 1988, Sheldon Erkkila, Helmke's other physical therapist,
7 reported to Dr. Pletz that although Helmke had completed twenty-two sessions of a back
8 class, his progress was nevertheless unusually slow. A.T. 22. Dr. Pletz then ordered a CT
9 scan of Helmke's sacroiliac joints, which was taken on February 25, 1988. A.T. 22. The
10 results showed that Helmke's joints appeared normal. A.T. 22, 162, 396.

11 A couple of years later, on June 7, 1990, Marcia A. Luisi, an independent medical
12 examiner requested by Unum Life Insurance Company, Helmke's health insurer, reported
13 that Helmke suffered from chronic pain syndrome with constant lower back and left buttock
14 pain, intermittent left leg radiculitis² and depression. A.T. 22. She noted that the
15 September 1987 MRI report indicated a possible bulging disc or small focal disc fragment
16 at L5-S1 and mild central bulging disc at L4-L5. A.T. 22. Dr. Luisi opined that Helmke was
17 unable to return to work at that time, and recommended a formal chronic pain program as
18 well as a formal functional capacity evaluation by a physical therapist. A.T. 22. On August
19 17, 1990, Dr. Pletz concurred with Dr. Luisi's opinion, and stated that he found Dr. Luisi's
20 recommendation for a functional capacity evaluation reasonable. A.T. 22. He also noted
21 that Helmke continued to have marked sitting intolerance and, in his opinion, was
22 unsuitable for any employment at that time. A.T. 22.

23 On December 17, 1990, Helmke underwent another MRI of his lumbar spine, which
24 showed small posterocentral disc bulges at L5-S1 and L4-L5, "perhaps modestly smaller
25 than the 1987 study." A.T. 23. In a December 21, 1990 report, Dr. Pletz noted that
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28 ² Radiculitis is a disorder of the spinal nerve roots, also known as radiculopathy.
Stedman's Medical Dictionary 1622 (28th ed. 2006).

1 clinically, Helmke's initial sitting tolerance of twenty minutes had not changed since the
2 1987 MRI. A.T. 153. Nevertheless, Dr. Pletz stated in his report that the December 1990
3 MRI demonstrated improvement from Helmke's prior 1987 MRI at the L5-S1 level, because
4 in 1990, there was no evidence of nerve root impingement at L5 or S1. A.T. 23, 153.

5 In a report dated August 8, 1991, consulting rheumatologist Dr. Edward Engel
6 diagnosed Helmke with chronic low back pain syndrome; limited pronation in his forearms;
7 suspect radial dislocation; status post surgery left elbow for cartilage removal; and a kidney
8 stone. Dr. Engel noted that Helmke's major complaint continued to be associated with
9 sitting for long periods of time. Dr. Engel stated that Helmke's pain was more mechanical
10 in origin, and he recommended a physical therapy program. A.T. 23.

11 Also in 1991, Dr. Kenneth Howe³ consulted with Helmke on three occasions and
12 believed that Helmke suffered from a herniated disc at L5-S1 that was documented by the
13 December 1990 MRI. A.T. 24.

14 In a letter dated February 4, 1992, treating psychiatrist Dr. Gary Bunnell stated that
15 he had treated Helmke for anxiety and depression, but that those problems were secondary
16 to Helmke's back injury and the stress he encountered from insurers who were refusing to
17 pay his claims. A.T. 23.

18 The next month, on March 16, 1992, Dr. Pletz examined Helmke again and reported
19 that a bone scan taken the previous month showed only a left-sided kidney stone. A.T. 23,
20 148. Dr. Pletz told Helmke to continue using Motrin, as needed, for pain. A.T. 23. A few
21 months later, x-rays of Helmke's pelvis were taken in order to rule out pelvic tilt. Although
22 scattered vascular calcifications were noted, no evidence of pelvic tilt appeared, and
23 Helmke's hip and S1 joints were intact. A.T. 23.

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26 ³ It is not clear from the record whether Dr. Howe was in fact a treating physician. His
27 March 19, 2004 letter to Disability Representative Melvin Irvin states that "Jack Helmke has
28 been under this physician's care with office records dating from 7/4/86 until present," yet Dr.
Howe continued to add that he did not examine Helmke in regards to his back in 1987. A.T.
378. Apart from this letter, the record only contains evidence pertaining to three examinations
by Dr. Howe in 1991.

1 In a July 1992 report, Unum's independent medical examiner, Dr. Luisi, made no
2 findings of abnormality, other than to note that Helmke suffered from subjective pain upon
3 forward flexion, which she opined was due to restriction of Helmke's hamstring muscles.
4 A.T. 23. She recommended referral to a pain management clinic and to an experienced
5 biofeedback instructor. A.T. 23.

6 Later in July 1992, osteopathic physician, Dr. David Crotty, stated that he had been
7 seeing Helmke since November 1991 and that Helmke had not reported significant change
8 in his symptoms, his sitting tolerance, or his exercise tolerance. A.T. 23-24. However, Dr.
9 Crotty noted that Helmke was more flexible in his lower back. A.T. 24. He recommended a
10 definitive workup at Spine Care Medical Group⁴ that would include discograms and nerve
11 blocks. If the workup was negative, then Dr. Crotty recommended Helmke see a
12 neurosurgeon, Dr. DeLong, who specializes in sclerotherapy.⁵ A.T. 24.

13 On September 21, 1992, Dr. Pletz reported that Helmke had an L5 disc herniation
14 with instability. However, he found that Helmke remained neurologically intact in terms of
15 motor, sensory and reflexes. A.T. 24. A few months later, in December 1992, Dr. Pletz
16 noted that Helmke had been swimming five laps in a swimming pool, doing side stroke and
17 gentle kicking, and that Helmke was feeling improvement since his last visit. Although
18 Helmke reported constant low back pain, the pain did not radiate down into his lower
19 extremities. After an examination, Dr. Pletz found Helmke to be neurologically intact. A.T.
20 24.

21 On January 21, 1993, Dr. John Vallin, yet another one of Helmke's treating
22 physicians, performed a consultation and diagnosed degenerative disc disease with
23 posterior central disc bulging at L4-L5, L5-S1 and bilateral L5-S1 fact joint hypertrophy,
24 chronic low back pain, and history of depression secondary to chronic pain. A.T. 24. Dr.

26 ⁴ Spine Care Medical Group in Daly City, California is the medical group for which Dr.
27 Pletz practices.

28 ⁵ Sclerotherapy is treatment involving the injection of a solution into vessels or tissues.
Stedman's Medical Dictionary 1733-34 (28th ed. 2006).

1 Vallin recommended that Helmke continue his current treatment program with pool therapy
2 rather than going to Spine Care for a workup. A.T. 24. He also suggested
3 electrodiagnostic studies and possible repeat epidurals. A.T. 24.

4 Although the ALJ's analysis omitted medical evidence pertaining to the period of
5 1993 through 2000, the record indicates that Helmke consulted with one of his
6 chiropractors, Dr. Gates, from 1990 through 2001 on a weekly basis. A.T. 171-358. Dr.
7 Gates stated that when he originally saw Helmke in 1990, Helmke was severely limited to
8 sitting for fifteen minutes at a time and was experiencing severe pain in the lumbar spine.
9 A.T. 25. Several of Dr. Gates' weekly reports indicated that Helmke's overall status was
10 slightly improved, with Helmke's primary subjective complaint focusing on his lower and
11 mid-upper back. A.T. 171-358. Dr. Gates opined that Helmke satisfied social security
12 listings and could be presumed disabled. A.T. 25. However, contrary to Dr. Gates, medical
13 expert Dr. Karbelnig testified at Helmke's hearing before the ALJ that based on the
14 September 11, 1987 MRI of Helmke's lumbar spine, which did not discuss nerve root
15 compromise or compression, Helmke would not have satisfied the social security listings.
16 A.T. 25.

17 In addition, Dr. Hostetter, also a chiropractor, performed spinal adjustment treatment
18 on Helmke several times from 1985-1988, with limited success, and continued to see
19 Helmke occasionally to provide "supportive care." A.T. 399. Dr. Hostetter noted that
20 Helmke was unable to sit and produce activities that require repeat motion. A.T. 399.

21 On March 30, 2000, Dr. Bjorn Eck, a treating physician who repeatedly provided
22 Helmke with injections of glucose into his L4-L5 and L5-S1 areas, referred Helmke to
23 surgeon Richard Derby for medial branch blocks⁶ at L4-L5 and L5-S1. A.T. 24. Following
24 the procedure, Helmke sat for one hour, but did not experience any relief of his left-sided
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26 ⁶ Medial branch blocks are injections of local anesthetic and steroid into the space
27 outside a joint in the spine, near the nerve that supplies the medial branch joint. Brigham and
28 Women's Hospital, A teaching Affiliation of Harvard Medical School,
[http://www.brighamandwomens.org/anesthesiology/Pain/Patients/blocks1.aspx?subID=sub
menu3](http://www.brighamandwomens.org/anesthesiology/Pain/Patients/blocks1.aspx?subID=submenu3); see also Stedman's Medical Dictionary 258 (28th ed. 2006).

1 low back pain. A.T. 24. Dr. Derby recommended that Helmke continue Dr. Eck's injection
2 treatment. A.T. 24.

3 STATUTORY AND REGULATORY FRAMEWORK

4 The Social Security Act ("the Act") provides for the payment of disability insurance
5 benefits to people who have contributed to the Social Security system and who suffer from
6 a physical or mental disability. See 42 U.S.C. § 423(a)(1). To evaluate whether a claimant
7 is disabled within the meaning of the Act, the ALJ is required to use a five-step analysis. 20
8 C.F.R. § 404.1520. The ALJ may terminate the analysis at any stage where a decision can
9 be made that a claimant is or is not disabled. See Pitzer v. Sullivan, 908 F.2d 502, 504 (9th
10 Cir. 1990).

11 At step one, the ALJ determines whether the claimant is engaged in any "substantial
12 gainful activity," which would automatically preclude the claimant from receiving disability
13 benefits. See 20 C.F.R. § 404.1520(a)(4)(I). If not, at the second step, the ALJ must
14 consider whether the claimant suffers from a severe impairment which "significantly limits
15 [the claimant's] physical or mental ability to do basic work activities." See 20 C.F.R. §
16 404.1520(a)(4)(ii). At the third step, the ALJ compares the claimant's impairment to a
17 listing of impairments in the regulations. If the claimant's impairment or combination of
18 impairments meets or equals the severity of any medical condition contained in the listing,
19 the claimant is presumed disabled and is awarded benefits. See 20 C.F.R. §
20 404.1520(a)(4)(iii).

21 If the claimant's condition does not meet or equal a listing, the ALJ must proceed to
22 the fourth step to consider whether the claimant has sufficient "residual functional capacity"
23 ("RFC") to perform her past work despite the limitations caused by the impairment. See 20
24 C.F.R. § 404.1520(a)(iv). If the claimant cannot perform her past work, the Commissioner
25 must show, at step five, that the claimant can perform other work that exists in significant
26 numbers in the national economy, taking into consideration the claimant's "residual
27 functional capacity, age, education, and past work experience." See 20 C.F.R. §
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1 404.1520(a)(4)(v).

2 Overall, in steps one through four, the claimant has the burden to demonstrate a
3 severe impairment and an inability to engage in his previous occupation. Andrews v.
4 Shalala, 53 F.3d 1035, 1040 (9th Cir. 1995). If the analysis proceeds to step five, the
5 burden shifts to the Commissioner to demonstrate that the claimant can perform other
6 work. Id.

7 **ALJ'S FINDINGS**

8 The ALJ determined that Helmke was not disabled at step five of the disability
9 evaluation. A.T. 25. The ALJ first concluded that Helmke had not engaged in any
10 substantial gainful activity since his alleged onset date of August 20, 1986. A.T. 20.

11 Before moving on to the remaining steps, the ALJ comprehensively reviewed the
12 medical evidence in the record. After reviewing the evidence, at step two, the ALJ found
13 that Helmke's severe impairments included lumbar degenerative disc disease and
14 depression. A.T. 25. At step three, the ALJ concluded that Helmke did not meet or equal
15 the level of severity in the listings in Appendix 1, Subpart P, Regulations No. 4. A.T. 25.

16 Turning to step four, the ALJ found that Helmke retained the RFC to perform light
17 work activity, which includes walking and/or standing for six hours and sitting for a total of
18 two hours in an eight-hour workday with breaks; and lifting and/or carrying up to twenty
19 pounds occasionally and ten pounds frequently. A.T. 25. In addition, the ALJ determined
20 that Helmke required the option to alternate sitting and standing as needed, as well as the
21 ability to avoid even moderate exposure to cold temperatures. A.T. 25. Finally, the ALJ
22 found that Helmke was precluded from climbing ladders, ropes, and scaffolds, and had mild
23 limitations with concentration, persistence and pace. A.T. 25.

24 In reaching his RFC determination, the ALJ concluded that Helmke's testimony was
25 not fully credible. A.T. 25. The ALJ noted that Dr. Karbelnig, the medical examiner, opined
26 that none of the MRIs revealed any nerve impingement that could account for the level of
27 subjective pain Helmke reported. A.T. 25. Moreover, the ALJ found that Helmke's
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1 aggressive physical therapy from 1986-1992 resulted in improvement as reflected by the
2 subsequent MRI findings. A.T. 25-26. Finally, the ALJ noted that treating physician Dr.
3 Pletz's progress notes also showed that Helmke was able to walk 2.5 miles per day and
4 swim five laps, together with active gym use. A.T. 26. Based on this evidence, the ALJ
5 concluded that the medical evidence did not support a finding that Helmke was precluded
6 from all work. A.T. 25.

7 The ALJ then turned to the vocational expert's testimony that an individual with the
8 same RFC and other vocational factors as Helmke would not be able to perform Helmke's
9 past work as a district manager. A.T. 26. However, the vocational expert opined that a
10 hypothetical individual with the same characteristics and limitations as Helmke would be
11 able to perform five different positions, each of which would accommodate Helmke's level
12 of difficulty with concentration, persistence and pace, including: (1) routing clerk (with
13 250,000 such jobs existing in the national economy and 4,000 in the regional community);
14 (2) distribution clerk (the ALJ did not provide the number of jobs available nationally and
15 regionally); (3) filter assembler (glass products) (with 750,000 jobs nationally and 7,300
16 jobs regionally); (4) laborer (not construction) (with 700,000 jobs nationally and 7,500 jobs
17 regionally); and (5) cleaner and polisher (any industry) (the ALJ did not provide the number
18 of jobs available nationally and regionally). A.T. 26-27.

19 Accordingly, the ALJ concluded that Helmke's ability to perform substantially all of
20 the requirements of light work combined with his age, education, and work experience,
21 warranted a finding of "not disabled" at step five of his analysis.

22 **STANDARD OF REVIEW**

23 This court has jurisdiction to review final decisions of the Commissioner pursuant to
24 42 U.S.C. § 405(g). The ALJ's decision must be affirmed if the ALJ's findings are
25 "supported by substantial evidence and if the [ALJ] applied the correct legal standards."
26 Holohan v. Massanari, 246 F.3d 1195, 1201 (9th Cir. 2001) (citation omitted). "Substantial
27 evidence" means more than a scintilla, but less than a preponderance, or evidence which a
28

1 reasonable person might accept as adequate to support a conclusion. Thomas v. Barnhart,
2 278 F.3d 947, 954 (9th Cir. 2002). The court is required to review the administrative record
3 as a whole, weighing both the evidence that supports and detracts from the ALJ's
4 conclusion. McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). Where the evidence
5 is susceptible to more than one rational interpretation, the court must uphold the ALJ's
6 decision. Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989).

7 Additionally, the harmless error rule applies where substantial evidence otherwise
8 supports the ALJ's decision. Curry v. Sullivan, 925 F.2d 1127, 1129 (9th Cir. 1991) (citing
9 Booz v. Sec'y of Health and Human Servs., 734 F.2d 1378, 1380-81 (9th Cir. 1984).

10 When the Appeals Council denies review after evaluating the entire record, including
11 newly submitted evidence, that new evidence becomes a part of the administrative record
12 to be reviewed by this court on appeal. See Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th
13 Cir. 1993). Thus, this court must consider the evidence before both the ALJ and the
14 Appeals Council in reviewing the ALJ's decision. Id.

15 ISSUES

16 Helmke seeks review of the Commissioner's denial of benefits, arguing that:

- 17 (1) The ALJ erred in assessing the credibility of his allegations;
- 18 (2) the ALJ failed to address and weigh multiple treating physician opinions
19 contained in the record; and
- 20 (3) the ALJ mischaracterized the findings contained in the medical evidence.

21 DISCUSSION

22 1. **The ALJ properly assessed Helmke's credibility.**

23 First, Helmke argues that the ALJ erred in assessing the credibility of his testimony
24 regarding his subjective symptoms. Specifically, Helmke contends that the ALJ failed to
25 offer specific, clear and convincing reasons for rejecting the medical opinions in the record,
26 and instead finding that Helmke's testimony was not entirely credible.
27

28 The ALJ must give careful consideration to any evidence of symptoms because

1 subjective descriptions may better indicate severe limitations or restrictions than medical
2 evidence alone. Robbins v. Social Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006). “When
3 giving such consideration, if the record establishes the existence of a medically
4 determinable impairment that could reasonably give rise to the reported symptoms, an ALJ
5 must make a finding as to the credibility of the claimant’s statements about the symptoms
6 and their functional effect.” Id. at 883.

7 While an ALJ may find testimony partially or wholly not credible, he may not
8 disregard it solely because the objective medical evidence does not affirmatively
9 substantiate the testimony. Id. “Moreover, unless an ALJ makes a finding of malingering
10 based on affirmative evidence thereof, he or she may only find an applicant not credible by
11 making specific findings as to credibility and stating clear and convincing reasons for each.”
12 Id. “To find the claimant not credible, the ALJ must rely either on reasons unrelated to the
13 subjective testimony (e.g., reputation for dishonesty), conflicts between his testimony and
14 his own conduct, or internal contradictions in that testimony.” Id. at 884.

15 In Rollins v. Massanari, the Ninth Circuit found that the ALJ’s specific reasons for not
16 fully crediting the claimant’s testimony were sufficient. 261 F.3d 853, 857 (9th Cir. 2001).
17 First, when the claimant was discharged from a medical center after being treated for
18 addiction to pain killers, the doctors discharging her found that she had “no restrictions on
19 activity” and indicated that she had only mild symptoms and generally quite adequate
20 function. Id. Second, the claimant’s assertion of totally disabling pain was undermined by
21 her own testimony about her daily activities, such as attending to all the needs of her two
22 young children, cooking, housekeeping, laundry, shopping, and attending various meetings
23 each week. Rollins, 261 F.3d at 857. The Ninth Circuit concluded that while the ALJ’s
24 interpretation of the claimant’s testimony may not have been the only reasonable one, it
25 was still a reasonable interpretation supported by substantial evidence. Thus, the court
26 determined it was “not [its] role to second-guess” the ALJ’s determination. Id.

27 Similar to Rollins, the ALJ here did not make an affirmative finding of malingering,
28 and was therefore required to provide specific reasons to support his determination that

1 Helmke’s testimony was not fully credible, which he did. First, the ALJ noted that Helmke’s
2 daily activities undermined his claim that he cannot sit or stand for long periods of time. For
3 example, Helmke was able to walk for 2.5 miles each day and swim for five laps at a time,
4 together with active gym use. According to the ALJ, those activities suggested that Helmke
5 was able to perform certain levels of physical exertion required in a work environment.

6 Second, the ALJ pointed out that Drs. McCann and Erkkila, Helmke’s physical
7 therapists, were both surprised at Helmke’s slow rate of progress. Dr. McCann told Dr.
8 Pletz, Helmke’s treating physician, that Helmke had not been making rapid progress and
9 that Dr. McCann and his staff felt that Helmke’s symptoms were not enough to justify
10 Helmke’s slow progress. Similarly, Dr. Erkkila reported to Dr. Pletz that Helmke had
11 completed twenty-two sessions of a back class, and that his progress was unusually slow.
12 The fact that two independent physical therapists noted abnormally slow progress
13 sufficiently constitutes a specific reason, unrelated to Helmke’s subjective testimony, which
14 supports the ALJ’s credibility finding.

15 Finally, the ALJ noted that Dr. Karbelnig, the medical examiner, opined that none of
16 the MRIs revealed any nerve impingement that could account for the level of subjective
17 pain Helmke has been reporting. This is yet another opinion, independent from Helmke’s
18 own subjective testimony, which supports the ALJ’s credibility finding. See Robbins, 466
19 F.3d at 884. Thus, the ALJ’s credibility finding was reasonable and supported by
20 substantial evidence.

21 **2. The ALJ correctly addressed and weighed the opinions of Helmke’s treating**
22 **physicians.**

23 Next, Helmke contends that the ALJ failed to address and weigh several of the
24 treating physician opinions contained in the record. He first argues that the ALJ failed to
25 rationalize his rejection of or departure from the opinions of Drs. Cousino, Pletz, Luisi,
26 Howe, and Bunnell. Second, Helmke argues that to the extent the ALJ concluded that
27 Helmke’s physicians were trying to advocate for his receipt of long-term disability benefits,
28 the ALJ was required to re-contact each medical source for clarification of any ambiguities.

1 According to Social Security Ruling 96-8p,⁷ the ALJ should give “special
2 significance” to the medical opinions from treating sources about the nature and severity of
3 an individual's impairments. “If a treating source's medical opinion on an issue of the
4 nature and severity of an individual's impairment(s) is well-supported by medically
5 acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the
6 other substantial evidence in the case record, the adjudicator must give it controlling
7 weight.” SSR 96-8p. Nevertheless, “[a] medical source opinion that an individual is
8 ‘disabled’ or ‘unable to work,’ has an impairment(s) that meets or is equivalent in severity to
9 the requirements of a listing, has a particular RFC, or that concerns the application of
10 vocational factors, is an opinion on an issue reserved to the Commissioner.” SSR 96-8p,
11 n.8. While the ALJ must still consider every such opinion in adjudicating a disability claim,
12 the ALJ “will not give any special significance to the opinion because of its source.” *Id.*

13 In addition, the Ninth Circuit has determined that an ALJ should give more weight to
14 a treating doctor’s opinion than to those of doctors who do not treat the claimant. *Reddick*
15 *v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). More specifically,

16 “[w]here the treating doctor’s opinion is not contradicted by another doctor, it
17 may be rejected only for clear and convincing reasons supported by
18 substantial evidence in the record. . . . Even if the treating doctor’s opinion is
19 contradicted by another doctor, the ALJ may not reject this opinion without
20 providing specific and legitimate reasons supported by substantial evidence in
21 the record. . . . This can be done by setting out a detailed and thorough
22 summary of the facts and conflicting clinical evidence, stating his
23 interpretation thereof, and making findings. . . . The ALJ must do more than
24 offer his conclusions. He must set forth his own interpretations and explain
25 why they, rather than the doctors’, are correct.” *Reddick*, 157 F.3d at 725
26 (internal quotations omitted).

27 Here, the ALJ’s interpretation of the record is reasonable, and he has provided
28 adequate support for his decision. Helmke contends that the ALJ “essentially adopted” Dr.
Cousino’s opinion, but then restricted him to walking six hours per day rather than the four
hours recommended by Dr. Cousino without explaining this difference. The ALJ did,

⁷ Social Security Rulings are not binding; rather, they are the agency’s interpretation of the statute and regulations. However, the Ninth Circuit defers to the rulings unless they are “plainly erroneous or inconsistent with the Act or regulations.” *Chavez v. Dept. of Health and Human Servs.*, 103 F.3d 849, 851 (9th Cir. 1996).

1 however, explain his decision to include six rather than four hours of walking in his final
2 RFC determination. The ALJ explained that the medical expert “found [an] even . . . higher
3 RFC than the RFC opined by treating physician Dr. Cousino.” A.T. 26. Moreover, the ALJ
4 noted that sitting was Helmke’s primary complaint during the period in question. Aside from
5 sitting, the ALJ noted that Helmke was able to engage in daily activities, including walking
6 for 2.5 miles per day, swimming five laps in a pool, and continuous gym use. Accordingly,
7 the medical expert’s testimony, in combination with evidence of Helmke’s daily activities,
8 supported the ALJ’s RFC limitation of six hours of walking in an eight-hour workday.

9 Next, Helmke argues that the ALJ failed to explain his rejection of or departure from
10 all the medical doctors who supported Helmke’s claim for disability benefits, including Drs.
11 Cousino, Pletz, Luisi, Howe, and Bunnell. In addressing the opinions of several physicians
12 and medical experts, the ALJ appropriately explained that he would accord the opinions of
13 chiropractors and physical therapists less weight than those of acceptable medical sources.
14 See 20 C.F.R. § 404.1513(a), (d) (acceptable sources are physicians, M.D.s or D.O.s, and
15 psychologists; “other medical sources,” who are in the same category as lay witnesses,
16 include nurse practitioners, chiropractors, social workers, physician assistants, naturopaths,
17 and therapists). Accordingly, the ALJ was permitted to attribute less significance to the
18 opinions of Drs. McCann and Erkkila, both physical therapists; and Drs. Hostetter and
19 Gates, Helmke’s chiropractors.

20 With respect to Helmke’s treating physicians, the ALJ’s final conclusion that Helmke
21 could engage in light work was consistent with several of Helmke’s treating physicians’
22 opinions. For example, Dr. Pletz found no abnormal findings after a full medical
23 examination on September 2, 1987. Moreover, although Dr. Pletz opined in 1990 that
24 Helmke was unsuitable for any employment at that time, the doctor later noted that
25 Helmke’s December 1990 MRI demonstrated improvement as compared to his 1987 MRI.
26 In 1993, Dr. Pletz concluded that Helmke was neurologically intact, that he had been
27 successfully tolerating swimming five laps in a swimming pool, and that he “appear[ed] to
28 be making significant improvement.” A.T. 143.

1 In addition, Dr. Luisi was unable to elicit any abnormal findings other than subjective
2 pain upon forward flexion during a consultation in 1992, and seemed optimistic that Helmke
3 would be able to return to work. A.T. 137-40. While treating physician Dr. Vallin diagnosed
4 Helmke with degenerative disc disease with posterior central disc bulging at L4-5, L5-S1
5 and bilateral L5-S1 facet joint hypertrophy, chronic low back pain, and a history of
6 depression secondary to chronic pain, he merely recommended that Helmke continue with
7 his ongoing pool therapy.

8 Moreover, the ALJ offered in support of his decision to accord certain doctors less
9 weight the fact that “the treating physicians during the relevant period were clearly trying to
10 advocate for the long term disability insurance . . . which claimant was awarded due to
11 inability to do his prior job.” A.T. 26. The Ninth Circuit has suggested that acting as an
12 advocate may diminish the amount of weight an ALJ is required to afford to a particular
13 physician’s opinion. Matney v. Sullivan, 981 F.2d 1016, 1020 (9th Cir. 1992) (doctor’s
14 assessment was entitled to less weight when the doctor acted as an advocate in the
15 claimant’s attempt to obtain Social Security benefits). Thus, the ALJ did not err either in
16 considering the doctors’ attempts to advocate for Helmke, or in eventually according those
17 opinions less weight.

18 Although the ALJ discussed the opinions of Helmke’s treating physicians, Helmke
19 argues that the ALJ did not explain his departure from the opinions of Drs. Howe and
20 Bunnell. With respect to Dr. Howe, as previously noted, it is not clear whether Dr. Howe
21 was in fact a treating physician, as the record only contains evidence of three office visits in
22 1991. However, even if he was, the ALJ afforded his opinion appropriate weight. The ALJ
23 correctly noted that in 2004, Dr. Howe described his findings regarding Helmke’s three
24 1991 office visits. Dr. Howe noted that Helmke could not sit for longer than twenty minutes,
25 four times in a twenty-four hour period and that his prognosis was “guarded.” A.T. 24, 378.
26 Furthermore, the ALJ accurately noted that Dr. Bunnell’s 1992 letter reported that
27 “claimant’s depression and anxiety were secondary to his back injury and the stress of
28 dealing with insurers not paying his claims,” and that Dr. Bunnell proscribed Prozac to

1 Helmke in October and November 1989, and also prescribed Trazodone in 2002 and 2003.
2 A.T. 23, 626.

3 Contrary to Helmke's argument, the opinions of Drs. Howe and Bunnell are not
4 inconsistent with the ALJ's RFC determination and finding of not disabled. Dr. Howe noted,
5 as did the ALJ, that Helmke has difficulty with prolonged periods of sitting, and Dr. Bunnell
6 found that Helmke had a back injury which has caused him depression and anxiety.
7 Neither doctor opined that Helmke was unable to perform the level of work determined by
8 the ALJ: light work with limited sitting.

9 Based on the medical test results, the testimony of the medical examiner, and the
10 fact that the other treating physicians reported findings consistent with the ALJ's decision,
11 the court finds that the ALJ's interpretation of the record was reasonable and supported by
12 substantial evidence.

13 **3. The ALJ properly characterized the findings contained in the medical**
14 **evidence.**

15 Finally, Helmke contends that the ALJ mischaracterized the findings contained in the
16 medical evidence. Specifically, Helmke argues that contrary to the ALJ's statement that Dr.
17 Luisi was unable to elicit any abnormal findings, Dr. Luisi's office actually noted that
18 Helmke's physical examination was remarkable because he was standing and walking
19 throughout the entire interview; because his straight leg raise testing was positive at
20 seventy degrees in the left; because there was painful limited range of motion of the lumbar
21 spine; and because there was pain to palpation over the left upper sacral area and
22 sacroiliac area. Helmke contends that "straight leg raise testing and decreased range of
23 motion are absolutely 'abnormal findings.'" Pl.'s Opp. 20.

24 As the Commissioner notes, though, the court need not determine whether such
25 findings constitute an abnormality because even if that were the case, such findings bore
26 no impact on Dr. Luisi's ultimate conclusion, as she did not find Helmke to be disabled, nor
27 did she recommend any limitations. In fact, at the end of her report, Dr. Luisi stated that
28 "[Helmke] is very motivated to return to work, and I am hoping that the suggestions above

1 will be helpful to that end.” A.T. 140. This statement suggests that, contrary to Helmke’s
2 contention that he is disabled, Dr. Luisi recognized that he had some limitations but that he
3 would ultimately be able to return to work. As Dr. Luisi apparently did not conclude that the
4 examination results were as abnormal as Helmke suggests, the court finds that the ALJ did
5 not mischaracterize Dr. Luisi’s findings.

6 **CONCLUSION**

7 For the foregoing reasons, the court GRANTS the Commissioner’s motion, DENIES
8 Helmke’s motion, and AFFIRMS the decision of the ALJ. Specifically, the court finds that
9 (1) the ALJ properly assessed the credibility of Helmke’s testimony; (2) the ALJ correctly
10 addressed and weighed the opinions of Helmke’s treating physicians; and (3) the ALJ did
11 not mischaracterize the medical evidence.

12 This order fully adjudicates the motions listed at numbers 14 and 17 of the clerk’s
13 docket for this case. The clerk shall close the file.

14
15 IT IS SO ORDERED.

16 Dated: November 20, 2008



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19 PHYLLIS J. HAMILTON
20 United States District Judge
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