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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOEL DESPAS,

No. C-14-0681 DMR

Plaintiff(s),

v.

CAROLYN W. COLVIN,

Defendant(s).

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

Pursuant to 42 U.S.C. § 405(g), Plaintiff ("Plaintiff") seeks review of his application for disability insurance benefits. Defendant Social Security Commissioner ("Defendant" or "Commissioner") denied his application after determining that Plaintiff was not disabled under Title II of the Social Security Act, 42 U.S.C. §§ 401 *et seq.* Plaintiff now requests judicial review of the Commissioner's decision pursuant to 42 U.S.C. § 405(g). Both parties filed motions for summary judgment. For the reasons stated below, the court **denies** Plaintiff's motion for summary judgment and **grants** Defendant's motion for summary judgment.

**I. Procedural History**

On August 26, 2008, Plaintiff filed an application for disability insurance benefits under Title II of the Act, alleging disability beginning August 25, 2008. A.R. 224-32. The agency denied Plaintiff's application for benefits and subsequently denied it again upon reconsideration. A.R. 109-13, 114-18. On August 10, 2010, Administrative Law Judge (ALJ) Richard Laverdure held a

1 hearing at which Plaintiff and his attorney representative were present. A.R. 69-84, 183-84. On  
2 October 21, 2010, the ALJ issued a written decision finding that Plaintiff was not disabled. A.R. 90-  
3 98. On April 25, 2012, the Appeals Council vacated the ALJ's decision. A.R. 104-07.

4 A remand hearing was held on August 7, 2012 at which Plaintiff was accompanied by a non-  
5 attorney representative. A.R. 52-68. On September 28, 2012, the ALJ again found that Plaintiff was  
6 capable of performing a reduced range of sedentary work, including his past relevant work as a  
7 Veterans Administration ("VA") claim representative, and that he was not disabled. A.R. 21-31.  
8 The Appeals Council denied Plaintiff's request for review of the ALJ's decision, making the ALJ's  
9 decision the Commissioner's final decision. A.R. 1-6. Plaintiff then filed this action.

## 10 II. Factual Background

11 The record contains the following information. Plaintiff was born in October 1952 and was  
12 55 as of the alleged onset date of his disability. A.R. 226. Plaintiff was born in Haiti and came to  
13 the United States at age 15. A.R. 429. Plaintiff graduated from high school and completed a  
14 bachelor's degree in humanities at the New College in San Francisco. A.R. 445. From February  
15 1987 until August 2008, Plaintiff worked as a claims representative with the VA. A.R. 72-73, 307.

### 16 A. Testimony from First Hearing

17 In August 2008, Plaintiff's employer gave him the option to be terminated or retire early  
18 (because Plaintiff had acquired sufficient experience to qualify for his retirement pension, not  
19 because Plaintiff was claiming a medical need to retire). A.R. 72-73, 80-81, 82. Plaintiff elected to  
20 retire. Prior to his election to retire, Plaintiff felt like he had been "under the microscope" of a  
21 person who had been supervising him for the prior 2-3 years. A.R. 79-81. Plaintiff testified that  
22 before he retired, there had been complaints that Plaintiff had been falling asleep at his computer  
23 three times daily and would also fall asleep at times while dealing with clients on telephone claims.  
24 A.R. 72-73. Plaintiff was also told that his production was falling behind. A.R. 73. When asked  
25 whether Plaintiff had told his employer that Plaintiff had medical reasons for his poor work  
26 performance, Plaintiff stated, "I did tell them that and I . . . did provide medical evidence." A.R. 73.

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1 Plaintiff testified that he had the following medical problems: swelling in both legs,  
2 incontinence, diabetes (with an average blood sugar count of 200, and up to 350 in times of stress),  
3 diabetic retinopathy, and blurry vision in his right eye. A.R. 74.

4 Plaintiff testified that his work required moving files, including up to 20 files at a time, e.g.,  
5 when moving a box of files. A.R. 74-75. Plaintiff testified that he suffered from low back pain and  
6 was unable to lift anything heavier than 30 pounds; had to stand once an hour from sitting; could not  
7 stand more than 10 minutes before having to sit; could only walk two blocks without rest; and had  
8 difficulty bending down. A.R. 75. The ALJ asked, “Are you using a cane?” and Plaintiff  
9 responded, “Yes, I am.” A.R. 76. Plaintiff noted that the cane had been prescribed to him by his  
10 podiatrist. A.R. 76.

11 As to his activities of daily living, Plaintiff stated that he was not very involved in the chores  
12 around the house, as his wife did most of the chores. A.R. 76. However, Plaintiff did water plants,  
13 do a little dishwashing, and some light sweeping. A.R. 76. Plaintiff testified that his wife assisted  
14 him with using the toilet and shower and putting on his socks and shoes. A.R. 76-77.

15 **B. Testimony from Second Hearing**

16 During the second hearing, Plaintiff provided further testimony. Plaintiff testified that the  
17 VA where he worked mostly handled files in paper form rather than electronically. A.R. 60. The  
18 files that Plaintiff handled at his work consisted of at least three volumes of 250 pages each, with  
19 some files having up to 20 volumes. A.R. 60. Plaintiff estimated that the average file weighed  
20 “anywhere from 15 pounds, and well over 15.” A.R. 61. Plaintiff testified that he accessed these  
21 files from filing cabinets, and that he accessed 6-8 files per day on average. A.R. 61.

22 Plaintiff testified that in 2008, his employer wanted to terminate him “because [Plaintiff] was  
23 not meeting the specific production number” for his position. A.R. 62. When asked by his non-  
24 attorney representative why Plaintiff’s production numbers fell in his last few years of employment,  
25 Plaintiff responded, “[T]he complexity of the cases has increased on a yearly basis. I can recall  
26 when I first started to work for the VA it was . . . a lot simpler, but now you have to tell the veterans  
27 a lot more . . . . [T]here is a lot of additional material that is given to us that we have to present on a  
28 yearly basis.” A.R. 62. Plaintiff’s representative also asked whether Plaintiff had “difficulty

1 grabbing [the] files,” but Plaintiff responded “grabbing the case—that’s the first thing we do in the  
2 morning . . . . It’s working the case fully to meet the requirement of management, and . . . setting of  
3 standard was not as easy as it used to be.” A.R. 64.

4 Plaintiff testified that, as of the hearing, he was 5’7” and weighed 300 pounds. A.R. 64.  
5 Plaintiff stated that his weight fluctuated between 300-340 pounds, depending on his blood sugars  
6 and diabetes. A.R. 64. Plaintiff stated that he was trying to lose weight through dieting but not  
7 having much success in doing so. A.R. 65. Plaintiff testified again that his wife help him with using  
8 the bathroom, putting on socks, and picking up things that he dropped. A.R. 66-67.

9 **C. Plaintiff’s Function Report**

10 Plaintiff provided a function report dated December 14, 2008. A.R. 347. In the report,  
11 Plaintiff noted his difficulty with using the toilet, bathing his lower body, bending, sitting or  
12 standing too long, reaching, walking, concentration, and vision. A.R. 347-52. However, Plaintiff  
13 also stated that he was able to prepare meals, wash dishes and do the laundry, drive a car and use  
14 public transportation alone, shop for groceries once a week, and pay bills and count change. A.R.  
15 348-51. Plaintiff stated that he enjoyed reading, watching television, swimming, sitting by the  
16 beach, attending barbecues, and did these activities “once a week in summer time normally” but  
17 “less so [when] it is cold outside.” A.R. 351. Plaintiff stated that he attended church every Saturday  
18 or Sunday “unless feeling tired or depressed.” A.R. 351.

19 **D. Statement of Plaintiff’s Wife**

20 Plaintiff’s wife Gemmalyn Mantuano provided a function report dated December 14, 2008.  
21 A.R. 355. In the report, Plaintiff’s wife stated that she assisted Plaintiff with putting on socks,  
22 shoes, and underwear, bathing (because he had difficulty bending down), using the bathroom, and  
23 giving him insulin. A.R. 356. But Plaintiff’s wife also stated that Plaintiff could perform most  
24 personal care functions by himself, prepare meals for himself, drive a car or use public  
25 transportation to get to his doctor’s appointments, shop for himself in stores, pay bills, go swimming  
26 during the summer, go to barbecues and the beach, walk with companions, go to church every  
27 Saturday or Sunday, and occasionally attend family parties on the weekends. A.R. 356-361.

28 **E. Other Evidence**

1 The court will note other facts from the evidentiary record, including medical evidence of  
2 record, as pertinent to its analysis of Plaintiff's argument.

3 **III. The Five-Step Sequential Evaluation Process**

4 To qualify for disability benefits, a claimant must demonstrate a medically determinable  
5 physical or mental impairment that prevents her from engaging in substantial gainful activity<sup>1</sup> and  
6 that is expected to result in death or to last for a continuous period of at least twelve months.

7 *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The  
8 impairment must render the claimant incapable of performing the work she previously performed  
9 and incapable of performing any other substantial gainful employment that exists in the national  
10 economy. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

11 To decide if a claimant is entitled to benefits, an ALJ conducts a five-step inquiry. 20 C.F.R.  
12 §§ 404.1520, 416.920. The steps are as follows:

- 13 1. At the first step, the ALJ considers the claimant's work activity, if any. If the claimant is doing  
14 substantial gainful activity, the ALJ will find that the claimant is not disabled.
- 15 2. At the second step, the ALJ considers the medical severity of the claimant's impairment(s). If  
16 the claimant does not have a severe medically determinable physical or mental impairment that  
17 meets the duration requirement in [20 C.F.R.] § 416.909, or a combination of impairments that  
18 is severe and meets the duration requirement, the ALJ will find that the claimant is not  
19 disabled
- 20 3. At the third step, the ALJ also considers the medical severity of the claimant's impairment(s).  
21 If the claimant has an impairment(s) that meets or equals one of the listings in 20 C.F.R., Pt.  
22 404, Subpt. P, App. 1 [the "Listings"] and meets the duration requirement, the ALJ will find  
23 that the claimant is disabled.

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27 <sup>1</sup> Substantial gainful activity means work that involves doing significant and productive physical  
28 or mental duties and is done for pay or profit. 20 C.F.R. §§ 404.1510, 416.910.

- 1 4. At the fourth step, the ALJ considers an assessment of the claimant’s residual functional  
2 capacity (“RFC”) and the claimant’s past relevant work. If the claimant can still do his or her  
3 past relevant work, the ALJ will find that the claimant is not disabled.
- 4 5. At the fifth and last step, the ALJ considers the assessment of the claimant’s RFC and age,  
5 education, and work experience to see if the claimant can make an adjustment to other work. If  
6 the claimant can make an adjustment to other work, the ALJ will find that the claimant is not  
7 disabled. If the claimant cannot make an adjustment to other work, the ALJ will find that the  
8 claimant is disabled.
- 9 20 C.F.R. § 416.920(a)(4); 20 C.F.R. §§ 404.1520; *Tackett*, 180 F.3d at 1098-99.

#### 10 **IV. The September 28, 2012 Decision By The ALJ**

11 In the September 28, 2012 decision, the ALJ applied the five-step sequential evaluation to  
12 determine whether Plaintiff was disabled. A.R. 25-36. At Step One, the ALJ found that Plaintiff  
13 had not engaged in substantial gainful activity since his alleged onset date of August 28, 2008. A.R.  
14 23. At Step Two, the ALJ found that the evidence established that Plaintiff had the following severe  
15 impairments: diabetes mellitus, obesity, sleep apnea, chronic venous insufficiency, and mild  
16 degenerative disc disease. A.R. 23. At Step Three, the ALJ found that Plaintiff’s impairments did  
17 not meet or equal a presumptively disabling impairment in the Listings. A.R. 25.

18 The ALJ determined that Plaintiff had the “residual functional capacity to perform sedentary  
19 work . . . with no kneeling or stooping and using a cane for more than 50 feet or on uneven terrain.”  
20 A.R. 25. At Step Five, the ALJ found that Plaintiff was not disabled because he was capable of  
21 performing his past relevant work as a VA claims representative. A.R. 30.

#### 22 **VI. Standard of Review**

23 The ALJ’s underlying determination “will be disturbed only if it is not supported by  
24 substantial evidence or it is based on legal error.” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.  
25 1989) (internal quotation marks omitted). “Substantial evidence” is evidence within the record that  
26 could lead a reasonable mind to accept a conclusion regarding disability status. *See Richardson v.*  
27 *Perales*, 402 U.S. 389, 401 (1971). It is “more than a mere scintilla” but less than a preponderance.  
28 *Id.* If the evidence reasonably could support two conclusions, the court “may not substitute its

1 judgment for that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112 F.3d  
2 1064, 1066 (9th Cir. 1997) (citation omitted). The ALJ is responsible for determining credibility  
3 and resolving conflicts in medical testimony, resolving ambiguities, and drawing inferences  
4 logically flowing from the evidence. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984); *Sample v.*  
5 *Schweiker*, 694 F.2d 639, 642 (9th Cir.1982); *Vincent ex. rel. Vincent v. Heckler*, 739 F.2d 1393,  
6 1394-95 (9th Cir. 1984). “Finally, the court will not reverse an ALJ’s decision for harmless error,  
7 which exists when it is clear from the record that the ALJ’s error was inconsequential to the ultimate  
8 nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (citations  
9 and internal quotation marks omitted).

## 10 VII. Discussion

11 Plaintiff argues that the ALJ erred when he found that Plaintiff was not fully credible in  
12 describing the severity of his subjective testimony. Plaintiff also contends that the ALJ erred by  
13 failing to determine the functional impact of Plaintiff’s obesity.

### 14 A. Credibility of Plaintiff’s Subjective Testimony

15 Plaintiff argues that the ALJ improperly discounted his subjective testimony, and challenges  
16 the ALJ’s finding that Plaintiff’s statements concerning the intensity, persistence, and limiting  
17 effects of his symptoms were not fully credible. A.R. 29. The court will examine this finding to  
18 determine whether it was supported by substantial evidence. *See Thomas v. Barnhart*, 278 F.3d 947,  
19 950 (9th Cir. 2002) (the court may not second-guess the ALJ’s credibility finding if it is supported  
20 by substantial evidence in the record).

21 In deciding whether to admit a claimant’s subjective complaints of pain, the ALJ must engage  
22 in a two-step analysis. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004)  
23 (citing *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)). First, “the claimant must produce  
24 objective medical evidence of underlying ‘impairment,’ and must show that the impairment, or a  
25 combination of impairments, ‘could reasonably be expected to produce pain or other symptoms.’”  
26 *Id.* (quoting *Smolen*, 80 F.3d at 1281-82). The *Smolen* court further elaborated on this requirement:

27 The claimant need not produce objective medical evidence of the pain or fatigue itself, or the  
28 severity thereof. Nor must the claimant produce objective medical evidence of the causal  
relationship between the medically determinable impairment and the symptom. By requiring

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that the medical impairment could reasonably be expected to produce pain or another symptom, [this step] requires only that the causal relationship be a reasonable inference, not a medically proven phenomenon . . . . This approach reflects the highly subjective and idiosyncratic nature of pain and other such symptoms.

*Smolen*, 80 F.3d at 1282 (citations omitted). The ALJ found that Plaintiff had satisfied this first step of the analysis. A.R. 29.

If the first step is satisfied, then the ALJ may consider whether the claimant’s statements about the intensity, persistence, and limiting effects of those symptoms are credible and consistent with objective medical evidence. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007); 20 C.F.R. § 416.929(c). If an ALJ discredits a claimant’s subjective symptom testimony, the ALJ cannot rely on general findings, but “must specifically identify what testimony is credible and what evidence undermines the claimant’s complaints.” *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (quotations omitted). The ALJ must support a finding that the claimant’s subjective testimony is not reliable with specific, clear and convincing evidence from the record. *Thomas*, 278 F.3d at 958-59. The ALJ may consider “ordinary techniques of credibility evaluation,” including the claimant’s reputation for truthfulness and inconsistencies in testimony, and may also consider a claimant’s daily activities, and “unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment.” *Smolen*, 80 F.3d at 1284.

The ALJ stated that he found “the claimant’s medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant’s statements regarding concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment.” A.R. 29. The ALJ gave several reasons for discounting Plaintiff’s subjective pain testimony.

**1. Contradictions in Plaintiff’s Statements**

First, the ALJ found that “claimant’s own statements and actual activities are not fully consistent with his allegations of a complete inability to work.” A.R. 29. The ALJ noted that “[a]lthough [Plaintiff] has alleged that he has constant pain that prevents him from moving around too much, he has also stated that he is able to prepare meals, wash dishes, do laundry, go grocery shopping, use the computer to check email, watch television, read books, perform light housework,



1 take walks, and he enjoys swimming.” A.R. 29 (citing to Plaintiff’s function report dating  
2 December 14, 2008). This was a proper basis for discounting Plaintiff’s testimony because a  
3 claimant’s daily activities may be considered by the ALJ when determining the credibility of the  
4 claimant’s subjective pain testimony. *Smolen*, 80 F.3d at 1284; *Fair v. Bowen*, 885 F.2d 579, 603  
5 (9th Cir. 1989) (if a claimant can perform household chores and other activities that involve similar  
6 physical tasks as a job, an ALJ may conclude that the claimant’s pain does not prevent him from  
7 working).

8 Second, the ALJ noted that Plaintiff had testified at the first hearing that he required a cane to  
9 walk, but that he appeared at his evaluation with examining physician Dr. Dhawan in July 2012  
10 without a cane. A.R. 29; 637-640 (report of Dr. Deepak Dhawan; noting that Plaintiff “came on  
11 time and did not use any assistive devices”); 76 (“ALJ: Are you using a cane? Plaintiff: Yes, I  
12 am.”). In his motion for summary judgment, Plaintiff disputes the ALJ’s interpretation of Plaintiff’s  
13 testimony, because “[t]o state that he uses a cane does not imply that he always uses it or that it is  
14 necessary in order to walk at all. That inference is totally improper.” Pl.’s Motion. However,  
15 Plaintiff’s attempt to reconcile what the ALJ identified as an inconsistency in Plaintiff’s statements  
16 treads on territory left to the ALJ. “The ALJ is responsible for . . . resolving ambiguity.  
17 Determining whether inconsistencies are material (or are in fact inconsistencies at all) . . . falls  
18 within this responsibility.” *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir.  
19 1999). Substantial evidence in the record supports the ALJ’s interpretation of Plaintiff’s statement  
20 that he used a cane is being inconsistent with his appearance at a medical evaluation without the  
21 assistance of a cane.

22 Third, the ALJ found that Plaintiff had “testified at the first hearing that he suffered from  
23 severe sleep apnea and that there were complaints at his job that he was falling asleep during the  
24 day, [but] his testimony at the second hearing differed. He testified that he was not able to keep up  
25 with the production numbers because the cases became more complex and the standards required  
26 were harder than before, and thus he was pressured to retire.” A.R. 30. Thus, in one version of  
27 Plaintiff’s story, his performance suffered because his medical conditions were interfering with his  
28 work; but in the second version, Plaintiff’s performance suffered because the work got more

1 difficult. The ALJ noted the absence of evidence in the record to support Plaintiff’s first version.  
2 For example, while Plaintiff’s medical records indicated that Plaintiff had a history of sleep apnea,  
3 there was no evidence in Plaintiff’s medical treatment records that Plaintiff had mentioned to his  
4 doctors that sleep apnea or daytime fatigue was interfering with his work. A.R. 30. Furthermore,  
5 despite Plaintiff’s testimony that he had told his employer and submitted evidence that his  
6 performance was the result of his medical problems, documents in the record from Plaintiff’s  
7 employer “make no reference to any medical condition.” A.R. 30 (citing “Proposed Removal -  
8 Unacceptable Performance” document from VA Center Manager and attached “Settlement and Last  
9 Chance Agreement,” dated February 13, 2008). Indeed, those documents note that Plaintiff “failed  
10 to sustain and demonstrate an overall acceptable performance level,” but do not mention any  
11 medical reasons for Plaintiff’s poor performance. *See* A.R. 249-255. The ALJ found that Plaintiff  
12 “has produced absolutely no evidence that . . . he ever alleged a medical condition was interfering  
13 with his work. Had he done so at the time, I would expect to see evidence of it.” A.R. 30. The  
14 ALJ’s consideration of this inconsistency in Plaintiff’s testimony is proper when determining the  
15 credibility of Plaintiff’s subjective symptom testimony. *See Smolen*, 80 F.3d at 1284 (ALJ may  
16 consider inconsistencies in testimony when determining plaintiff’s credibility).

17 **2. Medical Records As a Whole**

18 The ALJ also discounted Plaintiff’s subjective testimony because “[t]he medical records  
19 simply do not fully support the claimant’s allegations.” A.R. 31. The ALJ found that “[a]lthough  
20 the records demonstrate the claimant has medical conditions, they also show a greater level of  
21 function than the claimant alleged.” A.R. 26. The ALJ then extensively reviewed the relevant  
22 medical evidence of record and explained how that evidence contradicted Plaintiff’s allegations. *See*  
23 A.R. 26-31.

24 The ALJ’s review of the medical evidence of record was thorough. The ALJ reviewed the  
25 medical records from Alameda County Medical Center from October 2004 until March 2009, and  
26 found evidence of routine or unremarkable treatment for Plaintiff’s diabetes. *See* A.R. 26 (ALJ’s  
27 discussion of medical records). *Accord* A.R. 541 (record dated April 2008 from Alameda County  
28 Medical Center podiatry clinic; Plaintiff noting that his blood sugar was 150 the day before, but he

1 had no other complaints); 531 (record dated July 2008 from podiatry clinic; Plaintiff noting that he  
2 had been in no pain since his visit three months prior); 512 (record from visit with treating physician  
3 Dr. Fitzgerald at Alameda County Medical Center dated July 2008; Plaintiff noting that he was  
4 doing well and his glucose was 136); 511 (record from visit with Dr. Fitzgerald dated October 2008;  
5 Plaintiff noting that he was doing well, though he was having lower back pain, and his glucose was  
6 at 111).

7 The ALJ also reviewed the evaluation of Plaintiff by examining physician Dr. Chen and found  
8 it “generally consistent with the treating records; that is, it demonstrates few objective findings.”  
9 A.R. 26. Dr. Chen’s report noted that Plaintiff reported that he had diabetes, sleep apnea, childhood  
10 asthma, and chronic lower back pain for a few years due to his weight problem. A.R. 442. Dr.  
11 Chen’s physical examination of Plaintiff was unremarkable other than noting 2+ pitting edema of  
12 the legs, and that Plaintiff was markedly obese. A.R. 443. Dr. Chen opined that Plaintiff could  
13 stand/walk for six hours in an eight-hour workday and sit for six hours, and lift/carry 20 pounds  
14 occasionally and 10 pounds frequently.<sup>2</sup> A.R. 444. The ALJ also noted Plaintiff’s medical records  
15 from the Family Medical Group of San Leandro, A.R. 468-491, Plaintiff’s visits to an optometrist  
16 for his eye problems, A.R. 492-493 (Dr. Daza noting signs of diabetic retinopathy, suggesting diet  
17 and exercise as treatment, and not opining on any functional limitations as a result of her findings),  
18 and Plaintiff’s sleep study in December 2009, A.R. 580-596 (diagnosing Plaintiff with sleep apnea  
19 syndrome and “severe sleep-disordered breathing,” and recommending treatment with a CPAP  
20 machine).

21 The ALJ also noted that in November 2009, Plaintiff’s treating physician Dr. Fitzgerald  
22 completed a multiple impairment questionnaire in which he noted that Plaintiff had obesity,  
23 hypertension, diabetes mellitus - insulin dependent, hyperlipidemia, obstructive sleep apnea, chronic  
24 venous insufficiency, venous stasis, diabetic neuropathy, and low back pain. A.R. 566. Dr.

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26 <sup>2</sup> The ALJ gave Dr. Chen’s opinion “some weight,” but declined to give Dr. Chen’s report more  
27 weight because he found that Dr. Chen’s opinion underestimated Plaintiff’s restrictions. *See* A.R. 28  
28 (“I do not accord more weight because the evidence submitted at the hearing level indicates the claimant  
is more limited than determined by [Dr. Chen].”). The court notes that Plaintiff does not challenge the  
ALJ’s decisions regarding how much weight to afford the opinions of the physicians in the record.

1 Fitzgerald opined that Plaintiff could sit for six hours in an eight hour day and stand/walk for two  
2 hours in an eight hour day, but that he would need to get up and move around every two hours for 1-  
3 15 minutes at a time. A.R. 568-69. He also stated that Plaintiff could perform no kneeling or  
4 stooping. A.R. 571-72. Dr. Fitzgerald’s opinion of Plaintiff’s functional limitations was less  
5 restrictive than Plaintiff’s, and the ALJ considered it in arriving at Plaintiff’s RFC. A.R. 27 (noting  
6 that Dr. Fitzgerald’s report is “somewhat consistent with the RFC found herein”).<sup>3</sup>

7 Furthermore, ALJ found that the record lacked objective medical treatment evidence from  
8 November 2010 to the present (i.e., the September 28, 2012 date of the ALJ’s decision), which  
9 “suggested that the diabetes has been under control, as he has not had to seek either emergency or  
10 even routine care for it.” A.R. 29. Plaintiff contends that this finding was error, because after the  
11 ALJ decision but before the Appeals Council had Plaintiff’s request for review of the ALJ’s  
12 decision, Plaintiff submitted additional medical treatment records from Highland Hospital dated  
13 December 2010 to March 2013. A.R. 650-727. However, this additional evidence actually supports  
14 the ALJ’s conclusion, because it suggests that Plaintiff’s diabetes was under control. The treatment  
15 records from this time are routine, and primarily reference Plaintiff’s visits for palliative diabetes  
16 care and toenail and callus treatment. *See, e.g.* A.R. 655-659. They also show that Plaintiff’s blood  
17 sugar levels are generally reduced from the levels found in Plaintiff’s medical records from 2005 to  
18 2009. *See, e.g.* A.R. 658 (February 15, 2012 record stating that Plaintiff “checks his blood glucose  
19 level twice a week and states that averages 160-200); 671 (lab results dated January 21, 2013  
20 showing Plaintiff’s blood sugar level to be 192); 655 (March 6, 2013 record stating that Plaintiff’s  
21 “average sugar level is 140-180”).

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24 <sup>3</sup> The ALJ afforded Dr. Fitzgerald’s impairment questionnaire limited weight, since the ALJ  
25 found that it was based on “a recitation of impairments and on the claimant’s subjective reports, with  
26 apparently no consideration of the objective data (sleep apnea under control; diabetes fairly well-  
27 controlled when the claimant is compliant) or of the claimant’s actual daily activities.” A.R. 27. The  
28 ALJ’s conclusion—that Dr. Fitzgerald’s opinion on Plaintiff’s limitations failed to consider objective  
evidence that Plaintiff’s sleep apnea was under control and that his diabetes was fairly well  
controlled—was supported by substantial evidence, to which the ALJ cited. *See* A.R. 26. In any event,  
Plaintiff does not challenge the ALJ’s decision to afford limited weight to Dr. Fitzgerald, or any of the  
ALJ’s other findings regarding the relative weight of Plaintiff’s physicians’ opinions.

1 As demonstrated in the ALJ’s review of the record, the evidence generally shows  
2 unremarkable treatment, controlled medical conditions, and less restrictive functional limitations  
3 than alleged by Plaintiff. Thus, the ALJ’s decision to discount Plaintiff’s credibility vis-a-vis the  
4 medical evidence in the record is supported by substantial evidence.

5 **3. Other Bases for Discounting Plaintiff’s Subjective Testimony**

6 The ALJ gave another reason he found Plaintiff’s testimony inconsistent with the medical  
7 evidence record: Plaintiff “testified that in his last two years of work his blood sugar was at the 300  
8 level because of stress, [but] his medical records reveal that the sugar levels were much lower than  
9 200, and increased from time to time,” A.R. 29. For this statement, the ALJ cites generally to  
10 Plaintiff’s medical records from Alameda County Medical Center between October 2004 and March  
11 2009. A.R. 29 (citing to A.R. 494-564). Some of these records show that while Plaintiff did report  
12 some instances in 2007 and 2008 when his self-tested blood sugar levels were under 200. *See* A.R.  
13 548 (in February 2007, Plaintiff reported that home glucose testing showed sugar levels of 65-137),  
14 543 (in October 2007, Plaintiff reported his glucose was at 109-131 level); 541 (Plaintiff noting in  
15 April 2008 that his blood sugar was 150 the day before); 512 (Plaintiff noting in July 2008 that his  
16 blood sugar level was 136); 511 (Plaintiff noting in October 2008 that his blood sugar level was  
17 111). However, other evidence in these records show that Plaintiff’s glucose levels were higher than  
18 200 and often over 300 (and in June 2008 reaching 449). *See* A.R. 501-02, 511-12, 524-25, 539,  
19 548, 559, 561.

20 But even if the ALJ’s conclusion that the medical records did not show that Plaintiff’s glucose  
21 levels were as high as he reported during his testimony was not supported by substantial evidence,  
22 this error was harmless, because, as noted above, the ALJ gave several other clear and specific  
23 reasons supported by substantial evidence for discounting Plaintiff’s subjective complaint testimony.

24 **B. Functional Limitations of Plaintiff’s Obesity**

25 The Appeals Council vacated the ALJ’s first written decision in part because the ALJ did not  
26 sufficiently “consider the effect obesity would have on the claimant’s ability to function.” A.R. 105.  
27 The Appeals Council order states, in relevant part:  
28

1 The record indicates that the claimant weighed 330 pounds and was 5'7' tall in October 2008.  
2 That equates to a body mass index (BMI) of 51.7. Social Security Ruling 02-1p states that a  
3 BMI in excess of 40 is classified as Level III or extreme obesity. This describes the extent of  
4 obesity, but it does not correlate with any specific degree of functional loss. The Ruling also  
states that an individualized assessment should be performed on each individual to determine  
the effects of obesity on physical and mental impairments and that the combined effects of  
obesity with other impairments may be greater than might be expected without obesity.

5 The hearing decision states that the claimant's impairments, including obesity, do not meet or  
6 equal the severity criteria of any Listed Impairment contained in App. 1, but do not otherwise  
7 consider the effect obesity would have on the claimant's ability to function. Further evaluation  
of the claimant's obesity is therefore needed . . . .

8 A.R. 105.

9 Plaintiff contends that the ALJ's second written decision still fails to sufficiently consider the  
10 effect of Plaintiff's obesity on his ability to function, specifically because the ALJ did not consider  
11 "the clear nexus between Mr. Despas' massive obesity and his sleep apnea." Pl.'s Motion at 16. In  
12 support of this argument, Plaintiff cites to medical journal articles purporting to explain the nexus  
13 between obesity and sleep apnea. The problem with this argument is that addresses the theoretically  
14 possible effects of obesity, but does not consider whether the medical evidence in the record actually  
15 demonstrates those effects in Plaintiff's case.

16 In contrast, the ALJ explicitly addresses what the medical evidence in the record shows about  
17 the functional limitations stemming from Plaintiff's obesity:

18 The treatment records, supported by the claimant's actual activities, demonstrate that the  
19 claimant is capable of work consistent with the residual functional capacity found herein. The  
20 medical evidence of record demonstrates that the claimant has obesity, symptoms of low back  
21 pain, some neuropathy, and most likely some fatigue, although the record fails to support his  
allegation that he was falling asleep several times a day at work. Thus, the residual functional  
capacity takes into consideration all of the impairments and symptoms reasonably established  
by the record.

22 In reaching this conclusion, I did consider the claimant's obesity, and its possible effects on the  
23 residual functional capacity as provided in SSR 02-1p. My residual functional capacity  
24 assessment fully incorporates any credible limitations stemming from this impairment. The  
25 record does not support additional obesity-related restrictions. The claimant has not come  
forward with evidence of any nexus between obesity and additional limitations, or suggested  
any theory under which I could find aggravation or exacerbation due to this condition.  
Accordingly, I find no limitations beyond those stated previously, due to obesity.

26 A.R. 31. This finding adequately accounts for the functional limitations imposed by Plaintiff's  
27 obesity. Plaintiff has provided no evidence to suggest otherwise. *See Burch v. Barnhart*, 400 F.3d  
28 676, 684 (9th Cir. 2005) ("[T]he ALJ adequately considered Burch's obesity in his RFC

1 determination. Burch has not set forth, and there is no evidence in the record, of any functional  
2 limitations as a result of her obesity that the ALJ failed to consider.”).

3 **VIII. CONCLUSION**

4 For the foregoing reasons, the court finds that substantial evidence supported the ALJ’s  
5 decision to discount Plaintiff’s subjective symptom testimony. Substantial evidence also supports  
6 the ALJ’s determination of the functional limitations resulting from Plaintiff’s obesity. Defendant’s  
7 motion for summary judgment is therefore **granted**, and Plaintiff’s motion for summary judgment is  
8 **denied**.

9  
10  
11 Dated: March 2, 2015

