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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JOEY DALE WHITMAN,
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13 Plaintiff,
14 vs.
15 NANCY A. BERRYHILL, Acting
16 Commissioner of Social Security,
17 Defendant.¹

Case No.: 3:16-cv-28-MMA-JMA

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**REPORT &
RECOMMENDATION OF
UNITED STATES
MAGISTRATE JUDGE RE
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
DEFENDANT'S CROSS-
MOTION FOR SUMMARY
JUDGMENT [ECF Nos. 22, 23]**

19 Plaintiff Joey Dale Whitman ("Plaintiff") seeks judicial review of Defendant
20 Social Security Commissioner Nancy A. Berryhill's ("Defendant") determination
21 that he is not entitled to disability insurance benefits ("DIB") and supplemental
22 security income ("SSI"). The parties have filed cross-motions for summary
23 judgment. [ECF Nos. 22, 23.] For the reasons set forth below, the Court
24 recommends Plaintiff's motion for summary judgment be **DENIED** and
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26 ¹ Nancy A. Berryhill, the new Acting Commissioner of Social Security, is substituted as the
27 Defendant in this suit pursuant to Federal Rule of Civil Procedure 25(d).

1 Defendant's cross-motion for summary judgment be **GRANTED**.

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3 **I. BACKGROUND**

4 Plaintiff was born on December 23, 1968 and is a high school graduate.
5 (Admin R. at 30-31.) Plaintiff worked as a warehouse manager and delivery
6 driver for a party rentals company from 1998 to 2010. Id. at 31, 152. Plaintiff
7 stopped working in August 2010 due to swelling and pain in both Achilles
8 tendons. Id. at 31.

9 On August 16, 2011, Plaintiff filed an application for a period of disability
10 and disability insurance benefits. Id. at 16. On October 31, 2011, Plaintiff
11 protectively filed an application for supplemental security income. Id. at 16, 141,
12 157. In both applications, the Plaintiff alleged a disability onset date of August
13 8, 2010. Id. at 16, 141, 157. The Social Security Administration denied the
14 claim initially on October 26, 2011 and again upon reconsideration on March 14,
15 2012. Id. at 75-84. On April 27, 2012, Plaintiff filed a written request for an
16 administrative hearing. Id. at 99-104. On December 9, 2013, a hearing was
17 conducted by Administrative Law Judge ("ALJ") Leland H. Spencer, who
18 determined on February 28, 2014 that Plaintiff was not disabled within the
19 meaning of the Social Security Act. Id. at 16-23. On April 27, 2014, Plaintiff
20 requested a review of the ALJ's decision. Id. at 12. The Appeals Council for the
21 Social Security Administration ("SSA") denied Plaintiff's request for review on
22 November 6, 2015. Id. at 1-4. Plaintiff then commenced this action pursuant to
23 42 U.S.C. § 405(g).

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1 **II. MEDICAL EVIDENCE**

2 **A. Scripps Clinic, Treating Physicians (August 2010 – October 2011)**

3 On August 8, 2010, Plaintiff presented to the urgent care at Scripps Clinic
4 and was examined by Scott Krishel, M.D. Id. at 189. Plaintiff complained of
5 pain and swelling in the bilateral Achilles heel tendons over the past several
6 months, with the right tendon becoming particularly worse, making it difficult to
7 walk. Id. Plaintiff had a history of gout. Id. Dr. Krishel reported slight
8 tenderness on the right side at the base of the heel and no tenderness or
9 swelling in the left Achilles tendon. Id. Dr. Krishel reported 5/5 for dorsiflexion
10 and plantar flexion of the ankle against resistance. Id. at 190. Dr. Krishel
11 completed x-rays of the ankle and foot bilaterally and indicated no definite acute
12 changes, pending the radiologist's reading. Id. Plaintiff's right leg was splinted
13 and he was given crutches. Id. Dr. Krishel advised Plaintiff to continue non-
14 steroidal pain medication and prescribed a small dose of Vicodin. Id.

15 On August 9, 2010, Plaintiff presented to Dr. Clifford Feaver, a podiatrist.
16 Id. at 191. Plaintiff reported the Vicodin prescribed to him in Urgent Care had
17 not helped much. Id. Dr. Feaver noted Plaintiff was a very pleasant man, in no
18 acute distress. Id. at 192. Dr. Feaver reported the radiographs of the right
19 ankle were negative and (1) there was quite substantial inflammation and
20 swelling around the Achilles tendon bilaterally, (2) there was thickening in the
21 middle third, (3) it was much more tender on the right than on the left, (4) the
22 Thompson test was negative, (5) Homans' sign was negative, (6) there was no
23 particular pain with compression of the calves on either side, (7) mild cavus foot
24 structure, (8) dorsiflexion at the ankle was limited bilaterally, and
25 (9) neurovascular status was grossly intact bilaterally. Id. Dr. Feaver
26 immobilized the right side in a Controlled Ankle Motion ("CAM") Walker boot for
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1 added comfort and protection and advised Plaintiff to increase his medication
2 dosage for gout. Id. Dr. Feaver also ordered an MRI for the more symptomatic
3 right Achilles tendon and advised Plaintiff to follow up when the study became
4 available. Id.

5 On August 10, 2010, Plaintiff presented to Edward V.H. Skol, M.D., a
6 rheumatologist. Id. at 194. Plaintiff reported the increased dosage of his gout
7 medication had not helped. Id. Dr. Skol noted Plaintiff was well appearing, but
8 obviously uncomfortable. Id. at 195. Dr. Skol reported there was a thickening
9 and swelling of both Achilles tendons in the proximal aspect and tenderness to
10 palpation. Id. The doctor opined that although he could not rule it out
11 completely, he did not think this was a gout flare-up because of the duration of
12 the pain and the non-responsiveness to the increased medication. Id. at 196.
13 Dr. Skol advised Plaintiff to continue to wear the CAM Walker boot on the right
14 and to avoid working. Id.

15 On August 16, 2010, Plaintiff returned to Dr. Feaver for the MRI review.
16 Id. at 197. The MRI demonstrated a moderate grade intrasubstance tearing
17 longitudinally of the right Achilles tendon which clinically correlated to the
18 thickening and the area of chief complaint. Id. at 197, 232. Dr. Feaver
19 diagnosed Plaintiff with bilateral Achilles tendinosis, greater on the right than the
20 left. Id. Dr. Feaver directed Plaintiff to continue wearing the CAM Walker for an
21 additional two weeks, at which time physical therapy would be initiated. Id.

22 From August 30, 2010 to June 28, 2011, Plaintiff presented to Dr. Feaver
23 approximately every six weeks for follow-up. Id. at 198-211. By the October 4,
24 2010 appointment, Plaintiff had developed more significant symptoms on the left
25 and a CAM Walker was dispensed for use on that side. Id. at 200. During
26 those follow-up appointments, Dr. Feaver advised Plaintiff to try and wean
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1 himself off the CAM Walker. Id. at 198, 200, 203, 205, 207. At the June 28,
2 2011 appointment, Dr. Feaver noted over the past ten months that Plaintiff
3 consistently had physical therapy and had made relatively good progress, but
4 Plaintiff still experienced significant symptoms with extended activity. Id. at 211.
5 Plaintiff reported he had attended a fair the previous week for much of the day,
6 but had taken “mini rest breaks.” Id. Upon physical examination, Plaintiff was
7 able to do toe raising, but Dr. Feaver noted tenderness to palpation and fusiform
8 thickening in the middle third of the Achilles tendon bilaterally. Id. Dr. Feaver
9 also noted the left was worse than the right, but there were no other significant
10 changes. Id. Dr. Feaver assessed Plaintiff’s pain had improved by 80%-90%,
11 but Plaintiff continued to have significantly restricted activity and was unable to
12 work. Id. Dr. Feaver recommended a consultation with Dr. Rosen to discuss
13 surgical options. Id.

14 On August 10, 2011, Plaintiff presented to Dr. Adam S. Rosen for surgical
15 consultation. Id. at 213. Plaintiff reported the CAM Walkers and physical
16 therapy had helped somewhat, but he essentially had not improved and
17 continued to be out of work due to pain. Id. Dr. Rosen requested an MRI of the
18 left ankle and discussed the possibility of surgery on the left Achilles. Id. at 214.
19 The MRI of the left ankle, performed on August 25, 2011, showed Achilles
20 tendinosis with microscopic intra-substance tearing and mild paratenonitis. Id.
21 at 236.

22 From August 30, 2011 to October 12, 2011, Plaintiff presented to Dr.
23 John Cronin due to persistent loud snoring and struggling to breathe while
24 sleeping. Id. at 216-21, 254-56, 259-61. After completing a sleep study,
25 Plaintiff was diagnosed with mild obstructive sleep apnea. Id. at 220, 306.
26 During follow-up visits, Dr. Cronin noted Plaintiff responded well to CPAP, and
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1 was still responding well as of January 11, 2012. Id. at 243-45.

2 **B. George G. Spellman, Jr. M.D., Non-Examining Physician**
3 **(October 2011)**

4 On October 14, 2011, Dr. George G. Spellman, Jr. completed a physical
5 residual functional capacity assessment regarding Plaintiff. Id. at 238-40. Dr.
6 Spellman reported limitations due to bilateral degenerative joint disease of the
7 feet, Achilles enthesopathy bilaterally, and obesity were evident in the medical
8 evidence of record. Id. at 239. Dr. Spellman found Plaintiff was only partially
9 credible because the alleged persisting severity was not evident in the
10 longitudinal treatment record showing improvement in the Achilles tendon. Id.
11 Dr. Spellman further noted Plaintiff's obstructive sleep apnea was mitigated by
12 the CPAP. Id. Dr. Spellman opined Plaintiff was capable of performing at least
13 light work. Id.

14 **C. Adam Rosen, M.D., Treating Physician**
15 **(October 2011 – January 2012)**

16 On October 20, 2011, Dr. Rosen operated on Plaintiff for chronic left
17 Achilles tendinosis. Id. at 281. At the time of his left Achilles tendon
18 debridement and repair surgery, Plaintiff was found to have thickened fibrotic
19 tissue in the intrasubstance of the tendon. Id. at 282. No calcific pieces were
20 noted and more than 50% of the tendon was intact. Id.

21 Beginning on November 2, 2011, Plaintiff presented to Dr. Rosen for post-
22 operative follow-ups. Id. at 252. Dr. Rosen noted that clinically, Plaintiff was
23 doing well and converted him into a short-leg cast in slight plantar flexion. Id.
24 On November 16, 2011, Dr. Rosen noted there was some slight pulling and
25 tightness when he brought Plaintiff up to neutral, but observed he was doing
26 well clinically. Id. at 250. On December 7, 2011, Dr. Rosen again noted

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1 Plaintiff was doing well and had a well-healed incision. Id. at 248. Plaintiff was
2 converted into a CAM Walker and given a prescription for physical therapy. Id.

3 On January 11, 2012, Dr. Rosen noted Plaintiff had not yet started
4 physical therapy. Id. at 246. Upon examination, Dr. Rosen again noted a well-
5 healed incision, but also mild palpable nodular thickening over the area of his
6 prior surgical debridement. Id. He noted no tenderness on palpation and good
7 dorsiflexion and plantar flexion, although it was somewhat stiff compared to the
8 contralateral side. Id. Plaintiff was converted from his CAM Walker to a shoe
9 with a heel lift and was encouraged to start physical therapy. Id.

10 **D. James Metcalf, M.D., Non-Examining Physician (March 2012)**

11 On March 13, 2012, Dr. James Metcalf analyzed Plaintiff's case and
12 affirmed Dr. Spellman's October 14, 2011 finding of a light residual functional
13 capacity. Id. at 308. Dr. Metcalf noted that since the initial decision, Plaintiff
14 had undergone left Achilles tendon debridement and repair. Id. Dr. Metcalf
15 noted Plaintiff was doing well as of January 11, 2012 and was ready to begin
16 physical therapy. Id. Dr. Metcalf's review of Plaintiff's recent activities of daily
17 living showed that Plaintiff reported no problems with personal care, and could
18 prepare sandwiches, soups, and cereal daily. Id. Plaintiff also reported he was
19 able to fold laundry while sitting, go outside daily, drive short distances, and
20 shop in stores for up to 35-40 minutes. Id. Additionally, Plaintiff reported he
21 could watch movies, play board games, and visit with others, and could lift up to
22 ten pounds and walk up to 100 feet. Id. Plaintiff also reported pain with
23 exertional activities and use of the CAM Walker daily. Id. Dr. Metcalf affirmed
24 Plaintiff's light residual function assessment lasting until October 20, 2012, one
25 year from the date of surgery. Id.

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1 **E. Adam Rosen, M.D., Treating Physician (May 2013)**

2 Plaintiff returned to Dr. Rosen, his surgeon, on May 8, 2013. Id. at 335.
3 Dr. Rosen noted Plaintiff had undergone a repeat debridement with flexor
4 transfer on the left Achilles tendon on October 23, 2012. Id.² Plaintiff reported
5 he had completed physical therapy and was doing well, but there was pain in
6 his right heel. Id. Dr. Rosen noted Plaintiff still had swelling of his left foot and
7 as a result, Plaintiff had to increase his shoe size. Id. Plaintiff reported
8 occasional burning sensations that worsened after days in which he stood for
9 long periods. Id. Plaintiff also noted occasional use of 800 milligrams of
10 ibuprofen, which helped. Id.

11 Dr. Rosen made the following findings: there was a well-healed incision,
12 Plaintiff had mild puffiness to the retrocalcaneal bursa, but no significant edema
13 of the lower extremity; calf was supple and nontender; mild tightness
14 approximately six degrees of dorsiflexion on the left; sensation was grossly
15 intact, and pulses were intact. Id. at 335-36. Dr. Rosen adjusted Plaintiff's shoe
16 by adding heel lifts to use for a number of weeks and noted Plaintiff's
17 ambulation improved with the lifts. Id. at 336. Dr. Rosen advised Plaintiff to
18 wean out of the heel lifts as his symptoms allowed. Id. Dr. Rosen
19 recommended a five-day course of 800 milligrams of Motrin three times a day to
20 help with swelling and pain, and discussed using over-the-counter capsaicin.
21 Id. Dr. Rosen also discussed the continued role of stretching and advised
22 Plaintiff to use his night split. Id. Dr. Rosen spent twenty-five minutes with
23 Plaintiff, noting half the time was spent on patient counseling. Id.

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26 ² Medical records pertaining to Plaintiff's second surgery on October 23, 2012 are missing
27 from the record. (Admin. R. at 49, 59.)

1 **F. Arch Health Partners, Treating Physicians (May 2013 - October 2013)**

2 On May 17, 2013, Plaintiff presented to Dr. Mark Hubbard of Arch Health
3 Partners for a second opinion. Id. at 324-26. Plaintiff reported he was still
4 seeing Dr. Rosen for bilateral Achilles tendon ruptures, and that he also had
5 depression. Id. at 324. Dr. Hubbard referred Plaintiff to Dr. Brad S. Cohen. Id.

6 On May 28, 2013, Plaintiff presented to Dr. Cohen and complained of
7 clicking and pain in his Achilles tendons, rated as 10/10, that woke him up
8 during the night. Id. at 310. Upon examination, Dr. Cohen reported findings
9 consistent with the prior surgical procedures. Id. Dr. Cohen recommended
10 Plaintiff seek another opinion. Id. at 311.

11 On October 25, 2013, Dr. Hubbard reported that Plaintiff saw orthopedic
12 surgeons Dr. Sitler and Dr. Copp, both of whom advised against further
13 surgeries. Id. at 316. Dr. Hubbard recommended a follow-up in six months. Id.
14 at 317.

15 **G. Adam Rosen, M.D., Treating Physician (December 2013)**

16 On December 4, 2013, Plaintiff presented again to Dr. Rosen. Id. at 332.
17 Plaintiff reported that since completing therapy, he had fluctuating pain,
18 sometimes exacerbated without any significant trauma. Id. Dr. Rosen noted
19 Plaintiff came to the office in normal shoes and walked with minimal to
20 nonantalgic gait. Id. Dr. Rosen's physical examination revealed a well-healed
21 incision, intact pulses, and strength at about 4/5 compared to 5/5 on the
22 contralateral side. Id. Dr. Rosen also noted no palpable defects, mild
23 tenderness along the path of the Achilles and mild tenderness with calcaneal
24 squeeze. Id. After a long discussion with Plaintiff wherein Plaintiff reported he
25 still suffered from symptoms, Dr. Rosen recommended a conservative approach
26 of stepping back and placing Plaintiff back into the CAM Walker for
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1 approximately three weeks. Id. at 333. If the CAM Walker did not help to
2 decrease symptoms, then Plaintiff was directed to go back on crutches for a
3 week or two to decrease the stress across the foot. Id. Dr. Rosen provided a
4 sample of diclofenac patches and a prescription for 800 milligrams ibuprofen to
5 be taken three times a day for ten days. Id. Dr. Rosen noted that after
6 Plaintiff's pain decreased, they would discuss a gradual return to strengthening
7 exercises and possibly a revisit to formal physical therapy. Id.

8 9 **III. THE ADMINISTRATIVE HEARING**

10 The ALJ conducted an administrative hearing on December 9, 2013.
11 Id. at 27.

12 **A. Plaintiff's Testimony**

13 Plaintiff testified he was born on December 23, 1968 and graduated
14 from high school. Id. at 30. From 1998 until August 2010, Plaintiff worked
15 at a party rental company. Id. at 31. In August 2010, Plaintiff stopped
16 working because he ruptured both of his Achilles tendons. Id. Plaintiff
17 testified he did not look for other work that allowed him to sit down because
18 he could not concentrate due to "excruciating pain." Id. at 32.

19 Plaintiff underwent two surgeries on his left Achilles tendon, the
20 second of which was in October 2012. Id. at 37. Plaintiff testified Dr.
21 Rosen wanted to get the left tendon under control before performing any
22 work on the right. Id. at 41. Plaintiff worked the left tendon with a stretchy
23 band daily to help strengthen the tendon. Id. at 42. Plaintiff took 800
24 milligrams of ibuprofen three times a day to help with the swelling of the
25 tendons. Id. at 37.

26 Plaintiff also testified driving approximately once per month in case of
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1 emergencies. Id. at 34. Otherwise, Plaintiff stated he stayed home and did
2 not engage in much physical activity. Id. Plaintiff's daily activities
3 consisted of making food and using an iPad. Id. at 34-35. Plaintiff also
4 testified he could stand for approximately ten minutes, could walk with
5 crutches, and that he elevated his feet while sitting. Id. at 34. Plaintiff
6 testified he was prescribed Allopurinol for gout, Zoloft for depression, and
7 Lipitor for cholesterol. Id. at 36. Plaintiff noted his gout was under control
8 from consistent use of his medication. Id. at 41.

9 Plaintiff testified he uses a cane around the house and crutches if he
10 leaves the house. Id. at 38. Since August 2010, Plaintiff has used the
11 crutches approximately 80% of the time. Id. at 39. Plaintiff also noted
12 using a CAM Walker boot since August 2010. Id. Plaintiff told Dr. Rosen
13 he was in severe pain and he would sometimes remove the boot because
14 he was tired of wearing it. Id. at 40. Plaintiff indicated Dr. Rosen told him
15 he cannot take off the boot. Id.

16 **B. Medical Expert Testimony**

17 Medical Expert ("ME") witness Dr. Arthur Brovender testified at the
18 administrative hearing. Id. at 42. The ME's review of Plaintiff's medical
19 records indicated Plaintiff had bilateral Achilles tendonitis in the right and
20 left feet. Id. at 46. The ME found Plaintiff was provided crutches in
21 preparation for the first surgery, but the record did not support a need for a
22 cane or crutches for the years post-surgery. Id. at 51, 53. The ME also
23 indicated the record did not support a limitation in the capacity to walk or
24 stand. Id. at 53. Upon examination by Plaintiff's attorney, the ME testified
25 the record did not show a need for surgery or other intervention with the
26 right Achilles tendon. Id. at 54. The ME also testified the record did not
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1 support a listing under Listing 1.02A, even after taking Plaintiff's obesity
2 into consideration, because the record did not indicate Plaintiff needed two
3 crutches or canes and he was able to get around. Id. at 55-56.

4 Vocational expert Connie Guillory appeared at the hearing, but did
5 not testify. Id. at 16.

6 7 **IV. THE ALJ DECISION**

8 After reviewing the record, ALJ Spencer made the following findings:

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- 10 2. The claimant has not engaged in substantial gainful
11 activity since August 8, 2010, the alleged onset date
12 [citation omitted].
- 13 3. The claimant has the following severe impairments:
14 bilateral Achilles tendonitis, left greater than right, status
15 post left Achilles tendon debridement on October 20,
16 2011 and repeated debridement with flexor tendon
17 transfer on October 23, 2012; and obesity [citation
18 omitted].
- 19 4. The claimant does not have an impairment or
20 combination of impairments that meets or medically
21 equals the severity of one of the listed impairments in [the
22 Social Security Regulations].
- 23 5. After careful consideration of the entire record, the
24 undersigned finds that the claimant has the residual
25 functional capacity to perform the full range of sedentary
26 work standing for no more than two hours in an eight hour
27 workday [citation omitted].
6. The claimant is unable to perform any past relevant work
[citation omitted].

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1 10. Considering the claimant's age, education, work
2 experience, and residual functional capacity, there are
3 jobs that exist in significant numbers in the national
economy that the claimant can perform [citation omitted].

4 11. The claimant has not been under a disability, as defined
5 in the Social Security Act, from August 8, 2010, through
6 the date of this decision [citation omitted].

7 Id. at 18-23.

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9 **V. STANDARD OF REVIEW**

10 To qualify for disability benefits under the Social Security Act, an
11 applicant must show: (1) He or she suffers from a medically determinable
12 impairment that can be expected to result in death or that has lasted or can
13 be expected to last for a continuous period of twelve months or more, and
14 (2) the impairment renders the applicant incapable of performing the work
15 that he or she previously performed or any other substantially gainful
16 employment that exists in the national economy. See 42 U.S.C. §
17 423(d)(1)(A), (2)(A). An applicant must meet both requirements to be
18 "disabled." Id. Further, the applicant bears the burden of proving that he or
19 she was either permanently disabled or subject to a condition which
20 became so severe as to disable the applicant prior to the date upon which
21 his or her disability insured status expired. Johnson v. Shalala, 60 F.3d
22 1428, 1432 (9th Cir. 1995).

23 **A. Sequential Evaluation of Impairments**

24 The Social Security Regulations outline a five-step process to
25 determine whether an applicant is "disabled." The five steps are as follows:
26 (1) Whether the claimant is presently working in any substantial gainful
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1 activity. If so, the claimant is not disabled. If not, the evaluation proceeds
2 to step two. (2) Whether the claimant's impairment is severe. If not, the
3 claimant is not disabled. If so, the evaluation proceeds to step three. (3)
4 Whether the impairment meets or equals a specific impairment listed in the
5 Listing of Impairments. If so, the claimant is disabled. If not, the evaluation
6 proceeds to step four. (4) Whether the claimant is able to do any work he
7 has done in the past. If so, the claimant is not disabled. If not, the
8 evaluation continues to step five. (5) Whether the claimant is able to do
9 any other work. If not, the claimant is disabled. Conversely, if the
10 Commissioner can establish there are a significant number of jobs in the
11 national economy that the claimant can do, the claimant is not disabled. 20
12 C.F.R. § 404.1520; see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th
13 Cir. 1999).

14 **B. Judicial Review**

15 Sections 205(g) and 1631(c)(3) of the Social Security Act allow
16 unsuccessful applicants to seek judicial review of the Commissioner's final
17 agency decision. 42 U.S.C.A. §§ 405(g), 1383(c)(3). The scope of judicial
18 review is limited. The Commissioner's final decision should not be
19 disturbed unless: (1) The ALJ's findings are based on legal error or (2) are
20 not supported by substantial evidence in the record as a whole. Schneider
21 v. Comm'r of Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000).

22 Substantial evidence means "more than a mere scintilla but less than a
23 preponderance; it is such relevant evidence as a reasonable mind might
24 accept as adequate to support a conclusion." Andrews v. Shalala, 53 F.3d
25 1035, 1039 (9th Cir. 1995). The Court must consider the record as a
26 whole, weighing both the evidence that supports and detracts from the
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1 ALJ's conclusion. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir.
2 2001); Desrosiers v. Sec'y of Health & Human Servs., 846 F.2d 573, 576
3 (9th Cir. 1988). "The ALJ is responsible for determining credibility,
4 resolving conflicts in medical testimony, and for resolving ambiguities."
5 Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009) (citing Andrews, 53
6 F.3d at 1039). Where the evidence is susceptible to more than one rational
7 interpretation, the ALJ's decision must be affirmed. Vasquez, 572 F.3d at
8 591 (citation and quotations omitted).

9 Section 405(g) permits this Court to enter a judgment affirming,
10 modifying, or reversing the Commissioner's decision. 42 U.S.C.A. §
11 405(g). The matter may also be remanded to the SSA for further
12 proceedings. Id.

14 **VI. DISCUSSION**

15 Plaintiff contends the ALJ committed error by failing to articulate
16 legally sufficient reasons for discrediting his symptom testimony and finding
17 him not credible. (Pl's Mem. at 3-10.)

18 In determining a claimant's residual functional capacity, the ALJ must
19 consider all relevant evidence in the record, including medical records, lay
20 evidence, and "the effects of symptoms, including pain, that are reasonably
21 attributed to a medically determinable impairment." See Robbins v. Soc.
22 Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006) (citing SSR 96-8p, 1996 WL
23 374184, at *5). "Careful consideration must be given to any available
24 information about symptoms because subjective descriptions may indicate
25 more severe limitations or restrictions than can be shown by objective
26 medical evidence alone." SSR 96-8p, 1996 WL 374184, at *5. An ALJ
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1 must provide specific, clear and convincing reasons for rejecting a
2 claimant's testimony about the severity of his symptoms. Treichler v.
3 Comm'r, 775 F.3d 1090, 1102 (9th Cir. 2014).³

4 Here, the ALJ found Plaintiff's medically determinable impairments
5 could reasonably be expected to cause the alleged symptoms, but
6 Plaintiff's statements concerning the intensity, persistence and limiting
7 effects of these symptoms were not entirely credible for the following
8 reasons:

- 9 (1) The objective medical evidence did not support the
10 Plaintiff's allegations of a disabling physical impairment or
11 combination of impairments and related symptoms;
- 12 (2) Plaintiff experienced improvement with conservative
13 treatment;
- 14 (3) Plaintiff's daily activities were not limited to the extent one
15 would expect, given the complaints of disabling symptoms
16 and limitations; and
- 17 (4) Plaintiff's testimony was inconsistent with the medical
18 evidence.

19 ³ Plaintiff contends Social Security Ruling ("SSR") 16-3p applies to this case. (Pl's Mem. at 4
20 & n.3.) Defendant contends it does not because SSR 16-3p became effective on March 28,
21 2016, well after the ALJ's decision. (Def.'s Mem. at 3 n.2.) SSR 16-3p and SSR 96-7p both
22 relate to the evaluation of symptoms in disability claims. SSR 16-3p superseded SSR 96-7p
23 and removed the term "credibility," clarifying subjective symptom evaluation is not an
24 examination of an individual's character and an ALJ must instead assess whether the
25 claimant's subjective symptom statements are consistent with the record as a whole. See
26 SSR 16-3p, 2016 WL 1119029 (amended at 2016 WL 1237954). Here, the ALJ's decision was
27 issued over two years before SSR 16-3p became effective. Thus, the ALJ could not have
employed the new SSR, and his decision includes reference to Plaintiff's "credibility." In any
case, because the Court finds the ALJ's findings pass muster irrespective of which SSR
governs, the Court need not resolve whether SSR 16-3p retroactively applies. See, e.g.,
Anderson v. Colvin, 2016 WL 7013472, at *10 n.8 (D. Or. Nov. 30, 2016).

1 (Admin. R. at 19-22.) The Court must determine whether the ALJ provided
2 clear and convincing reasons to discount Plaintiff's subjective symptom
3 testimony.

4 **A. Objective Medical Evidence**

5 The ALJ's first reason for finding Plaintiff's pain testimony not
6 credible, that the weight of the objective evidence did not support Plaintiff's
7 claims of disabling limitations to the degree alleged (id. at 20), is a clear
8 and convincing reason. Although an ALJ may not disregard a claimant's
9 testimony "*solely* because it is not substantiated affirmatively by objective
10 medical evidence" (see Robbins, 466 F.3d at 883 [emphasis added]), the
11 ALJ may consider whether the alleged symptoms are consistent with the
12 medical evidence as one factor in his evaluation. See Lingenfelter v.
13 Astrue, 504 F.3d 1028, 1040 (9th Cir. 2007); see also Burch v. Barnhart,
14 400 F.3d 676, 681 (9th Cir. 2005) ("Although lack of medical evidence
15 cannot form the sole basis for discounting pain testimony, it is a factor that
16 the ALJ can consider in his credibility analysis.")

17 Here, the ALJ evaluated the medical record, which showed Plaintiff
18 had bilateral Achilles tendinosis and tears. (Admin. R. at 20, 197, 293,
19 297.) The ALJ reviewed medical examinations and noted Plaintiff
20 participated in physical therapy and used a CAM Walker for added comfort
21 and protection. Id. at 20, 192, 197, 200, 201, 203, 207. The ALJ reviewed
22 early progress notes showing physical therapy and the CAM Walker were
23 relatively effective in providing some pain relief. Id. at 20, 203, 209, 211.
24 Although Plaintiff worked on weaning himself from using the CAM Walker,
25 the record reflects Plaintiff never fully weaned himself off it and appeared at
26 the ALJ hearing in the CAM Walker. Id. at 39, 200, 203, 205, 207, 209,
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1 213, 246, 333. The ALJ acknowledged the record reflected that Plaintiff
2 showed reduced range of motion and some swelling and tenderness, but
3 also that Plaintiff's feet had adequate strength and were neurovascularly
4 intact. Id. at 20, 264. The ALJ reviewed other progress notes showing
5 Plaintiff had a well-healed incision, intact pulses, minimally decreased
6 strength in one foot but full motor strength in his other foot, no palpable
7 defects, and only mild tenderness. Id. at 21, 332.

8 Plaintiff argues the ALJ did not sufficiently consider treatment notes
9 reflecting tenderness on physical examination but fluctuating pain levels, at
10 times exacerbated without significant trauma, as well as Plaintiff's
11 nonanalgesic gait and shortened stride on the left side and early heel off.
12 (Pl's Mem. at 6-7.) However, these same treatment notes also reflect that
13 Plaintiff wore normal shoes, walked with minimal to nonanalgesic gait, and
14 had a well-healed incision, pulses intact, strength of about 4+/5 compared
15 to 5/5 on the contralateral side, no palpable defects, and only mild
16 tenderness. (Admin. R. at 332.) The treatment notes also show mild
17 puffiness to the retrocalcaneal bursa but no significant edema of the lower
18 extremity, mild tightness, and sensation grossly intact. (Id. at 336.) The
19 ALJ reasonably found these clinical findings did not support Plaintiff's
20 claims of disabling limitations to the degree alleged.

21 The Court finds the ALJ's determination that the objective medical
22 evidence in the record does not support Plaintiff's allegations of disability is
23 clear and convincing.

24 **B. Plaintiff's Improvement With Conservative Treatment**

25 The ALJ's second reason for finding Plaintiff's pain testimony not
26 credible, that Plaintiff's condition improved with conservative treatment, is
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1 clear and convincing. Receiving only “minimal” and “conservative”
2 treatment is a valid reason to discredit a claimant’s symptom testimony.
3 Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999). Plaintiff’s treatment
4 primarily consisted of physical therapy and a CAM Walker boot. The ALJ
5 noted Plaintiff primarily took only ibuprofen and had not alleged any side
6 effects from the use of medications. (Admin. R. at 21, 333, 335.) The ALJ
7 also noted the advice to Plaintiff to wean off the use of a CAM Walker. Id.
8 The ALJ found no indication Plaintiff’s physician recommended permanent
9 or long term use of any assistive device and the pattern had been to use a
10 CAM Walker for a short period of time and then wean off it. Id. Although
11 Plaintiff points to his use of crutches, and infers that crutches are not
12 conservative treatment (Pl.’s Mem. at 6), the physician’s suggestion to use
13 crutches was part of the conservative approach to step back and use
14 assistive devices for only a short period of time (a week or two). (Admin R.
15 at 333.) Also, as the ALJ correctly noted, there is no indication Dr. Rosen
16 ever recommended permanent or long-term use of any assistive devices.
17 Id. The CAM Walker was prescribed for approximately three weeks, and if
18 needed, the crutches for one or two weeks only. Id. Although Plaintiff
19 underwent surgery, which is generally not considered conservative
20 treatment, the surgeries were generally successful in improving Plaintiff’s
21 symptoms. Id. at 21. Additionally, treatment notes do not reflect Dr. Rosen
22 recommended any further surgeries and Dr. Sitler and Dr. Copp advised
23 Plaintiff refrain from undergoing any further surgeries. Id. at 316.

24 The ALJ’s finding that Plaintiff’s improvement with conservative
25 treatment does not support his allegations of disability is clear and
26 convincing.

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1 **C. Daily Activities**

2 The ALJ's third reason for discounting Plaintiff's pain testimony is that
3 Plaintiff's daily activities were not limited to the extent one would expect
4 given Plaintiff's complaints of disabling symptoms and limitations. Id. at 21.
5 It is proper for an ALJ to consider the claimant's daily activities in making
6 his credibility determination. See, e.g., Thomas v. Barnhart, 278 F.3d 947,
7 958-59 (9th Cir. 2002); see also 20 C.F.R. §§ 404.1529(c)(3)(i),
8 416.929(c)(3)(i) (claimant's daily activities relevant to evaluating
9 symptoms). "One does not need to be 'utterly incapacitated' in order to be
10 disabled." Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001) (citing
11 Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). "[M]any home activities
12 are not easily transferable to what may be the more grueling environment
13 of the workplace, where it might be impossible to periodically rest or take
14 medication." Fair, 885 F.2d at 603. Only if a claimant's level of activities is
15 inconsistent with his claimed limitations would activities of daily living have
16 any bearing on the claimant's credibility. Reddick v. Chater, 157 F.3d 715,
17 722 (9th Cir. 1998).

18 The ALJ determined Plaintiff's daily activities did not support his
19 allegations of disability because he went to a fair and spent much of the
20 day there with only short rest breaks, prepared meals, drove a car, and
21 shopped in stores for 35 to 40 minutes. (Admin. R. at 21.) Plaintiff testified
22 he drives approximately once a month and although he is able to make
23 himself something to eat, he can only stand for ten minutes. (Id. at 34.)
24 Plaintiff also testified he used crutches when going out to the store and a
25 cane around the house. Id. at 38. Plaintiff also reported going outside
26 once a day, folding laundry while sitting, and spending time with others by
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1 watching movies, playing board games, and conversing. Id. at 171-73.
2 These activities are basic human functions that are not determinative of
3 disability. See Vertigan, 260 F.3d at 1050 (“the mere fact that a plaintiff
4 has carried on certain daily activities...does not in any way detract from
5 [plaintiff’s] credibility as to [plaintiff’s overall disability.”) As for Plaintiff’s trip
6 to the fair, this was a one-time only event, and Plaintiff’s taking small rest
7 breaks during his visit actually supports his testimony rather than detracting
8 from it. In short, Plaintiff’s reported daily activities, mainly staying at home,
9 standing for approximately ten minutes at a time, and using assistive
10 devices when he leaves the house, do not provide a basis for the ALJ to
11 discount Plaintiff’s symptom allegations. Plaintiff’s testimony about his
12 daily activities does not necessarily help him establish disability, either, as it
13 is not inconsistent with an ability to function in a workplace environment.
14 Therefore, this factor weighs neither for nor against the ALJ’s evaluation of
15 Plaintiff’s pain testimony.

16 **D. Inconsistency of Plaintiff’s Testimony With the Medical Evidence**

17 The ALJ’s fourth reason for finding Plaintiff’s pain testimony not
18 credible, that Plaintiff’s testimony is inconsistent with the medical evidence,
19 is clear and convincing.

20 The ALJ found by May 2013, after both surgeries, Plaintiff was doing
21 well overall, had some pain in his right heel and some swelling in his left
22 foot with only occasional burning sensation for which he took ibuprofen,
23 which helped. Id. at 20, 335-36. By December 2013, Plaintiff noted
24 fluctuating pain after completing physical therapy, but presented in normal
25 shoes, walking with a minimal to nonantalgic gait. Id. at 21, 332. The ALJ
26 also noted Dr. Rosen found a well-healed incision, intact pulses, minimally
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1 decreased strength in one foot but full motor strength in the other, no
2 palpable defects, and only mild tenderness. Id. The ALJ found although
3 Plaintiff alleged chronic and disabling bilateral foot pain, progress notes
4 frequently showed he was in no acute distress on physical examination. Id.
5 at 21, 192, 244, 316, 319, 324. The evidence of fluctuating pain, general
6 improvement, and the lack of acute distress is inconsistent with Plaintiff's
7 statements of excruciating and disabling pain. Inconsistent statements and
8 testimony can bear upon a claimant's credibility. See, e.g., Verduzco v.
9 Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999). The ALJ properly considered
10 Plaintiff's inconsistent statements in discrediting Plaintiff's symptom
11 testimony.

12 An ALJ's assessment of pain severity and claimant credibility is
13 entitled to "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir.
14 1989). The Court concludes the ALJ articulated sufficient clear and
15 convincing reasons supported by substantial evidence to discount Plaintiff's
16 subjective pain testimony.

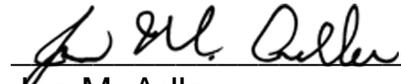
17 **VII. CONCLUSION**

18 For the reasons set forth above, Plaintiff's motion for summary
19 judgment should be **DENIED** and Defendant's cross-motion for summary
20 judgment should be **GRANTED**.

21 This report and recommendation will be submitted to the Honorable
22 Michael M. Anello, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any
23 party may file written objections with the Court and serve a copy on all
24 parties on or before June 8, 2017. The document should be captioned
25 "Objections to Report and Recommendation." Any reply to the Objections
26 shall be served and filed on or before June 22, 2017. The parties are
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1 advised that failure to file objections within the specified time may waive the
2 right to appeal the district court's order. Martinez v. Ylst, 951 F.2d 1153
3 (9th Cir. 1991).

4 DATED: May 18, 2017

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6 Jan M. Adler
7 U.S. Magistrate Judge
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