UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TIMOTHY JAY NEWELL,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

Case No.: 16cv00844-AJB-KSC

REPORT AND RECOMMENDATION RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

[Doc. Nos. 17 and 21]

Pursuant to Title 42, United States Code, Section 405(g), of the Social Security Act ("SSA"), plaintiff filed a Complaint to obtain judicial review of a final decision by the Commissioner of Social Security ("Commissioner") denying his disability insurance benefits. [Doc. No. 1.] Pursuant to Title 28, United States Code, Section 636(b)(1)(B), and Civil Local Rules 72.1(c)(1)(c) and 72.2(a), this matter was assigned to the undersigned Magistrate Judge for a Report and Recommendation.

Presently before the Court are: (1) plaintiff's Motion for Summary Judgment [Doc. No. 17]; (2) defendant's Cross-Motion for Summary Judgment [Doc. No. 21]; (3) the Administrative Record [Doc. No. 13]; and (4) the Supplemental Administrative Record. [Doc. No. 19.]

Plaintiff's Motion for Summary Judgment challenges the denial of disability benefits on the basis that the Administrative Law Judge ("ALJ") improperly relied on evidence not proffered to the plaintiff for consideration and is not supported by substantial evidence. [Doc. No. 17-1, at pp. 10-20.] Plaintiff contends that the ALJ committed the following errors: (1) relied upon evidence not proffered to plaintiff's counsel; (2) improperly examined the vocational expert; and (3) failed to articulate sufficient reasons for rejecting the opinions of plaintiff's treating physicians and plaintiff's testimony regarding his subjective pain symptoms. *Id.* Plaintiff seeks an Order from this Court reversing the decision to deny benefits, or, in the alternative, remanding the decision to deny benefits for further administrative proceedings. [Doc. No. 17, at pp. 8, 17.] Defendant contends that the decision to deny benefits should be upheld, because it is based on substantial evidence and is free of reversible legal error. [Doc. No. 21-1, at pp. 3-13.] After careful consideration of the moving and opposing papers, and the Administrative Record and the applicable law, this Court RECOMMENDS that the District Court DENY plaintiff's Motion for Summary Judgment [Doc. No. 17] and GRANT defendant's Cross-Motion for Summary Judgment [Doc. No. 21].

I. ***Background and Procedural History***

On August 3, 2012, plaintiff filed an application for social security disability benefits. [AR 148-154.] Plaintiff's application stated that he was born on November 15, 1967. [AR 148.] Plaintiff claimed that his disability began on October 22, 2010 and he had been unable to work because of shoulder and left knee injuries. [AR 70; 82; 100; 148; 175.] In plaintiff's application for disability, he characterized his prior work history as follows: (1) criminal justice instructor from August 2009 until October 2010, with a bi-weekly salary of $1,900.00; (2) security officer at a property management company from 2005 until 2009, with a salary of $16.00 per hour; (3) security officer for a school from 2005 until 2007, with a salary of $18.00 per hour; (4) property manager of an apartment complex from 2000 until 2001, with a salary of $14.00 per hour; and (5) police officer from 1997 until 2000, with a salary of $21.00 per hour. [AR 176.]

On January 2, 2013, the Commissioner denied plaintiff's application for disability benefits. [AR 96-99.] Plaintiff requested reconsideration on January 24, 2013 [AR 100], but his request was denied on June 18, 2013. [AR 101-105.] On June 24, 2013, he requested a hearing before an ALJ. [AR 106-107.] The hearing was held on June 25, 2014, and plaintiff appeared and testified. [AR 41-69.] At the hearing, the ALJ ordered an orthopedic examination for the plaintiff and informed plaintiff and his counsel that he would hold the record open until he received the medical report. [AR 68.] On July 22, 2014, the ALJ received a report of plaintiff's orthopedic examination as performed by Frederick Close, M.D, a consultative examiner. [AR 512-16.]

On September 23, 2014, the ALJ issued a written decision concluding that plaintiff did not qualify for disability benefits under the SSA because plaintiff was able to perform his past relevant work as a security guard and teacher of vocational training. [AR 19-40.] On November 25, 2014, plaintiff requested review of the ALJ's decision by the Appeals Council. [AR 15-17.] However, on February 4, 2016, the Appeals Council denied plaintiff's request for review. [AR 1-7.] As a result, the ALJ's decision became the final decision of the Commissioner. [AR 1.] The Complaint in this action was filed on April 8, 2016. [Doc. No. 1.]

II. Standards of Review.

The final decision of the Commissioner must be affirmed if it is supported by substantial evidence and if the Commissioner has applied the correct legal standards. *Batson v. Comm'r of the Social Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). Under the substantial evidence standard, the Commissioner's findings are upheld if supported by inferences reasonably drawn from the record. *Id.* If there is evidence in the record to support more than one rational interpretation, the District Court must defer to the Commissioner's decision. *Id.* "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). "In determining whether the Commissioner's findings are supported by substantial evidence, we must consider the evidence as a whole, weighing

both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

Pursuant to Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment motions, as defined by Fed. R. Civ. P. 56, contemplate the use of evidentiary material in the form of affidavits, depositions, answers to interrogatories, and admissions. In Social Security appeals, however, the Court may 'look no further than the pleadings and the transcript of the record before the agency,' and may not admit additional evidence." *Morton v. Califano*, 481 F.Supp. 908, 914 n. 2 (E.D. Tenn.1978); 42 U.S.C. § 405(g). "[A]lthough summary judgment motions are customarily used [in social security cases], and even requested by the Court or Magistrate, such motions merely serve as vehicles for briefing the parties' positions, and are not a prerequisite to the Court's reaching a decision on the merits." *Kenney v. Heckler*, 577 F.Supp. 214, 216 (N.D. Ohio 1983).

III. Evidence in the Administrative Record.[1]

At the outset of the hearing on June 25, 2014, the ALJ asked plaintiff's counsel, "[T]o your knowledge, do we have a complete record?" [AR 49.] Plaintiff's counsel responded, "Yes, your honor." *Id.* The file was admitted into evidence, including medical Exhibits 1-F through 10-F.

A. Plaintiff's Testimony at the Administrative Hearing.

Plaintiff testified that he is 46 years old and has no children. [AR 45.] After working as a police officer for four and a half years, plaintiff testified that he retired from the San

[1] The instant dispute concerns only whether the ALJ properly evaluated and/or considered the opinions of plaintiff's treating physicians and plaintiff's testimony. [Doc. No. 17-1, at pp. 11, 14.] The medical evidence is not in dispute as "plaintiff stipulate[d] [in his Motion for Summary Judgment] that the ALJ fairly and accurately summarized the medical evidence." [Doc. No. 17-1, at p. 6; Doc. No. 21-1, at p. 5.] Accordingly, the Court refers to specific medical evidence from the record where pertinent to the Court's analysis in the Discussion section of this Order.

Diego Police Department in 2002.[2] *Id.* He currently receives $1,850.00 per month from his retirement account. *Id.* He receives no other source of income. *Id.*

Before becoming a police officer, plaintiff worked "in the field of security as a director for security for private industries." *Id.* When asked why he stopped working, plaintiff stated that he had "injured [his] left knee on duty." *Id.* Subsequently, in 1999 he had surgery to repair a torn ACL and "two meniscus tears in front of [his] knee." *Id.*

The ALJ then asked plaintiff whether 2009 and 2010 were the last two years that he worked. [AR 46-47.] Plaintiff confirmed, and said he was "working security" at that time.[3] [AR 47.] When the ALJ asked plaintiff to be more specific, plaintiff responded he was "a uniformed security officer, like private security, like commercial, patrolling on foot, like, a commercial business." *Id.* From 2008 until 2010, plaintiff also said that he worked as a criminal justice instructor, teaching classes at United Education Institute.[4] [AR 49-50.] He earned twenty-one dollars ($21.00) per hour, a total of $37,000.00 in 2010. [AR 50.] Regarding plaintiff's past work as an apartment manager, plaintiff said that he was a manager for approximately one year. [AR 64.] He stated that he helped collect rent, made bank deposits at the end of the month, and showed potential residents around the property in exchange for reduced rent. [AR 65.]

The ALJ asked plaintiff why he stopped working in 2010. [AR 47.] Plaintiff said he was "laid off [from] UI College." *Id.* Plaintiff believes he was laid off because of his

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[2] Plaintiff's testimony that he retired from the San Diego Police Department in 2002 is not consistent with his representation on his application for disability. [AR 176.] On plaintiff's application for disability, he represented that his employment with the police department was from 1997 through 2000. *Id.*

[3] Plaintiff's testimony that he was "working security" in 2009 and 2010 is not consistent with his representation on his application for disability. [AR 176.] On plaintiff's application for disability, he represented that he worked as a security officer from 2005 until 2009. *Id.*

[4] Plaintiff's testimony that he worked as a criminal justice instructor from 2008 until 2010 is not consistent with his representation on his application for disability. [AR 176.] On plaintiff's application for disability, he represented that he worked as a criminal justice instructor from August 2009 until October 2010. *Id.*

disability. *Id.* First, he explained that he told his director that he could not park at the main campus because it would be too far to walk to the criminal justice building. [AR 47-48.] "Ever since then . . . she was just looking for a reason to get rid of me," plaintiff said. [AR 48.] Next, he said his director "questioned [him]" when he sat during mandatory PowerPoint presentations, instead of stand, due to his knee injury. *Id.* Plaintiff said he was terminated because they were "changing things." *Id.* He explained, "I knew that it was because a lot of people thought I was getting favoritism because of disability." *Id.*

After his termination in October 2010, plaintiff received unemployment payments for "a while." [AR 51.] In 2011, plaintiff said he had an incident with his sciatic nerve that "affected [the] right side of [his] body and [his] right leg." *Id.* Additionally, he said his shoulder tear had "just gotten worse." *Id.* When asked whether he intends to have surgery on his shoulder, plaintiff responded: "I will definitely have to have surgery." [AR 51-52.] However, plaintiff stated that his doctor, Dr. Saben, first gave him injections to try to relieve the pain. *Id.* The ALJ asked plaintiff how long the doctors plan to wait before they operate. [AR 52.] Plaintiff responded: "I talked to him last . . . month. He said, let's try the injections." *Id.* The next day, plaintiff told Dr. Saben that the injections did not provide him with any relief. *Id.* Dr. Saben eventually referred plaintiff to a neurologist for "some nerve issues." *Id.*

When asked again by the ALJ why plaintiff's doctors did not suggest surgery on his shoulder, plaintiff testified that his doctor said "let's try [injections] again." [AR 59-60.] "[I]t's the doctors. I have no control." [AR 60.] Plaintiff said that his doctor was "trying to avoid surgery." *Id.* Plaintiff further explained that he told his doctor that he is in a lot of pain and "can't even sleep at night." *Id.*

The ALJ next discussed plaintiff's issue of sciatica. [AR 53.] Plaintiff testified that Dr. Saben found a pinched nerve on plaintiff's right hip. *Id.* Dr. Saben told plaintiff he was "going to have to have surgery on that too" and then gave plaintiff an epidural. *Id.* Additionally, plaintiff testified that he received an injection of "cortisone or some type of steroid." *Id.* During this time, plaintiff explained that his leg, foot, buttocks, and parts of

his back were numb, causing him urination issues. *Id.* Plaintiff testified that he told Dr. Saben about these issues. *Id.*

Next, the ALJ inquired about the sling on plaintiff's shoulder. [AR 54.] When asked how long he had been wearing it, plaintiff testified that he was instructed to wear it when he has discomfort or engages in "prolonged moving around." *Id.* When he takes it off he said he lays on his back and stretches out his arm and shoulder. *Id.* The ALJ asked plaintiff whether his doctor wants him to move and exercise his shoulder. *Id.* Plaintiff confirmed that he does. *Id.* Plaintiff added that he was instructed to "be careful" and use the sling for support, for example, when he is walking. *Id.*

Plaintiff next explained his daily routine. *Id.* He said he wakes up around 10:30 – 11:00 a.m., takes a shower, takes his medication, walks, and makes oatmeal. *Id.* He then goes back to his room and "just relax[es] for a minute because of the pain." *Id.* During this time he watches TV, lays on his back, and usually takes a nap (and naps throughout the day). [AR 55.] Sometimes he will get up and read, but said it is hard to focus because of the pain. *Id.* "[M]y mind's just not there because of the pain." *Id.* He said it is "depressing." *Id.* Some days, he explained, he does not wake up until 7:30 p.m. because of the pain. *Id.* To help ease the pain, plaintiff testified that he takes ibuprofen, naproxen, and sometimes Vicodin, but usually "just half" a pill. *Id.*

Next, the ALJ asked plaintiff about his exercise routine. When first asked about exercise, plaintiff responded: "I try to. I just do a lot of stretches." [AR 55.] When asked again whether plaintiff works out frequently, plaintiff answered: "No. No . . . just stretch[es] . . . Dr. Saben said you have to move around . . . do some type of exercise. . . ." [AR 57-58.] Plaintiff said that he belongs to 24 Hour Fitness and was going there to use the pool and sauna because "it feels good on my muscles." [AR 58.] When asked whether plaintiff was able to do more physical activity at the time he was terminated in 2010, plaintiff responded: "No. I didn't." [AR 59.]

The ALJ asked plaintiff about Exhibit 2-F because it shows that when plaintiff went to the doctor for right shoulder pain in 2011 (a year after plaintiff was terminated), the

report indicated that "[plaintiff] does do a lot of exercises, including capable extensions, in the gym four or five times a week." *Id.* Plaintiff responded: "No. They got that wrong." *Id.* Plaintiff said he "has rubber bands at home," and that he told them he stretches. *Id.*

In response to questions about his social life, plaintiff testified that he does not engage in any social activities anymore. [AR 61.] He used to have friends in the department, he testified, but he "broke" away from them and does not answer their calls. *Id.* Since then, he has not developed another set of friends. *Id.* Plaintiff explained that his brother lives in the desert and his mom and sister live in San Diego. *Id.* He talks to them "from time to time," but he "just [does not] communicate." *Id.*

In response to questions by his attorney, plaintiff testified that he has headaches every day. [AR 62.] He further testified that he had surgery on his left knee, which was in a brace on the day of the hearing. *Id.* He said he wears the brace because without it his leg hyperextends and "will just go out automatically." *Id.* His attorney asked plaintiff about how long he can sit comfortably. *Id.* He responded: "I can't because of . . . the sciatic nerve . . . Because then my butt feels numb, and it starts to hurt." [AR 63.] Plaintiff said he has difficulty focusing and no longer uses computers or draws because of the pain. *Id.* "The mood is just not there because of the pain." *Id.* When asked about his current capacity to stand, he stated: "If I stand right now, I'll have to sit down within 15 or 20 seconds." [AR 63-64.]

B. Vocational Expert's Testimony at the Administrative Hearing.

At the hearing, the vocational expert identified plaintiff's prior job titles as "police officer,"[5] "security guard,"[6] and "teacher, vocational training."[7] [AR 65-66.] The ALJ

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[5] The exertion for this title is "medium, described as being performed at the heavy exertional level, in 4- E, 5, and the SVP is 6." [AR 66.] "SVP" refers to specific vocational preparation.

[6] The exertion for this title is "light, described as being performed at the heavy exertional level, in 4-E, 3, and 4-E, 4," with a SVP of 3. [AR 66.]

[7] The exertion for this title is "light, described as being performed at the heavy exertional level, in 4-E, 2, and the SVP is 7." [AR 66.]

asked the vocational expert whether an individual of plaintiff's age, education, and work experience could perform any of plaintiff's past work, with certain work restrictions.[8] [AR 66.] With regard to the work of a security guard and teacher of vocational training, the vocational expert responded, "As generally performed, at the light exertional level, yes." [AR 67.] Next, the ALJ asked the vocational expert if the same hypothetical individual could perform either job if that individual was "limited to standing and walking four hours out of an eight-hour day in one-half-hour intervals." [AR 67.] The vocational expert responded, "No." *Id.*

The vocational expert further explained that there would be other options for the hypothetical individual for "light" work including: "a fundraiser,"[9] a "survey worker,"[10] or "an information clerk."[11] [AR 67.] When asked whether an individual with the same restrictions as above, but who would be off-task twenty percent (20%) of the time or more due to pain, would be able to find work, the vocational expert said "No." [AR 67-68.]

*IV. **The ALJ's Five-Step Disability Analysis.***

To qualify for disability benefits under the SSA, an applicant must show that he or she is unable to engage in any substantial gainful activity because of a medically determinable physical or mental impairment that has lasted or can be expected to last at least 12 months. 42 U.S.C. § 423(d). The Social Security regulations establish a five-step

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[8] The work restrictions discussed were as follows: "Assume this person could lift or carry 20 pounds occasionally, 10 pounds frequently; could stand or walk six hours out of an eight-hour day; sit six hours out of an eight-hour day; no pushing or pulling with the non-dominant upper extremity; no work on unprotected heights; no walking on uneven ground; no ladders; no balancing; occasional stairs and ramps; occasional stopping and bending; no lifting above shoulder level with the non-dominant upper extremity." [AR 66.]

[9] The vocational expert testified that there are 167,300 such jobs in the national economy. [AR 67.]

[10] The vocational expert testified that there are 169,500 such jobs in the national economy. [AR 67.]

[11] The vocational expert testified that there are 110,500 such jobs in the national economy. [AR 67.]

sequential evaluation for determining whether an applicant is disabled under this standard. 20 CFR § 404.1520(a); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

At step one, the ALJ must determine whether the applicant is engaged in substantial gainful activity. 20 CFR § 404.1520(a)(4)(I). "Substantial gainful activity is work activity that is both substantial and gainful." 20 CFR § 416.972. Here, the ALJ concluded plaintiff had not engaged in substantial gainful activity since October 22, 2010, the onset date of plaintiff's alleged impairments. [AR 24.]

At step two, the ALJ must determine whether the applicant is suffering from a "severe" impairment within the meaning of Social Security regulations. 20 CFR § 404.1520(a)(4)(ii). "An impairment or combination of impairments is not severe if it does not significantly limit [the applicant's] physical or mental ability to do basic work activities." 20 CFR § 404.1521(a). For example, a slight abnormality or combination of slight abnormalities that only have a minimal effect on the applicant's ability to perform basic work activities will not be considered a "severe" impairment. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005). Examples of basic work activities include walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out and remembering simple instructions, use of judgment, responding appropriately to supervision, co-workers and usual work situations, and dealing with changes in a routine work setting. 20 CFR § 404.1521(b)(1)-(6). "If the ALJ finds that the claimant lacks a medically severe impairment, the ALJ must find the claimant not to be disabled." *Webb v. Barnhart*, 433 F.3d at 686.

At step two, the ALJ concluded that plaintiff had the severe impairments of "degenerative changes of the lumbar spine, chondromalacia patella of the left knee with traumatic synovitis, mild to moderate ankylosis of the left ankle, osteoarthritic changes of the bilateral hips, chronic tendinopathy and adhesive capsulitis of the right shoulder, and a torn rotator cuff of the right shoulder." [AR 25 (internal citations omitted).] Although the ALJ considered plaintiff's other medically determinable conditions and whether or not they

were severe, including mental impairment, the ALJ further concluded that no other medical problems caused any work restrictions.[12] [AR 25-28.]

If there is a severe impairment, the ALJ must then determine at step three whether it meets or equals one of the "Listing of Impairments" in the Social Security regulations. 20 CFR § 404.1520(a)(4)(iii). If the applicant's impairment meets or equals a Listing, he or she must be found disabled. *Id.* In this case, the ALJ concluded at step three that plaintiff's impairments or combination of impairments did not meet or equal a listed impairment. [AR 28-29.] As a result, the ALJ concluded plaintiff was not disabled based on medical considerations alone. *Id.*

If an impairment does not meet or equal a Listing, the ALJ must make a step four determination of the claimant's residual functional capacity based on all impairments, including impairments that are not severe. 20 CFR § 404.1520(e), § 404.1545(a)(2). "Residual functional capacity" is "the most [an applicant] can still do despite [his or her] limitations." 20 CFR § 404.1545(a)(1). The ALJ must determine whether the applicant retains the residual functional capacity to perform his or her past relevant work. 20 CFR § 404.1520(a)(4)(iv).

If the applicant cannot perform past relevant work, the ALJ – at step five – must consider whether the applicant can perform any other work that exists in the national economy. 20 CFR § 404.1520(a)(4)(v). While the applicant carries the burden of proving eligibility at steps one through four, the burden at step five rests on the agency. *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003). The ALJ must consider all of plaintiff's medically determinable impairments, including any pain that could "cause a limitation of function" and any impairments that were not "severe," and then determine plaintiff's residual functional capacity to perform other work in the national economy. 20 CFR

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[12] The ALJ also considered whether plaintiff's obesity was "implicitly raised." [AR 26.] In July 2014, plaintiff was six feet and two inches tall and weighed 235 pounds, placing him within the range of obese. *Id.* However, the ALJ concluded that there was no evidence "showing that the obesity is 'severe' by itself or results in a combination of impairment that is 'severe.'" *Id.*

§§ 404.1520; 404.1545; 416.929. "In determining [the claimant's] residual functional capacity, the ALJ must consider whether the aggregate of [the claimant's] mental and physical impairments may so incapacitate him that he is unable to perform available work." *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997), as *amended on reh'g* (Sept. 17, 1997).

Here, the ALJ acknowledged at step four that plaintiff had the residual functional capacity to perform light work, with some limitations.[13] [AR 29.] In reaching this determination, the ALJ considered the totality of plaintiff's symptoms and "the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence." *Id.* He relied on the 2012 and 2013 opinions of the State Agency medical consultants, giving their opinions "great weight" because of their consistency "with each other and the record as a whole." *Id.* Additionally, the ALJ gave "great weight" to the July 2014 opinion of consultative examiner Frederick Close, who "thoroughly examined" the plaintiff and concluded he could perform medium exertional work, with some limitations.[14] [AR 30.] These findings, the ALJ notes, are consistent with plaintiff's treatment records, and "are all consistent with the claimant performing light exertional work, with the above non-exertional limitations." [AR 30-33.]

Furthermore, in reaching the residual functional capacity determination, the ALJ considered the opinions of plaintiff's treating physicians, Dr. Jamie Saben and Dr. Thomas Harris, both of whom asserted that plaintiff was greatly restricted. [AR 32-33.] Due to these restrictions, Dr. Saben concluded that plaintiff could not "work in public safety or teach criminal justice," [AR 32], and Dr. Harris concluded that plaintiff "was precluded

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[13] "[T]he claimant can stand and walk for six hours in an eight-hour workday and sit for six hours in an eight-hour workday. He cannot push and pull with his non-dominant (right) upper extremity . . . work at unprotected heights . . . walk on uneven ground . . . climb ladders or balance. The claimant can occasionally climb stairs and ramps, stoop, and bend. The claimant also cannot lift above shoulder level with his non-dominant (right) upper extremity." [AR 29.]

[14] The ALJ noted, however, that he finds plaintiff to have "greater exertional limitations than Dr. Close proposes." [AR 30.]

from repetitive[,] above the shoulder activity, with restrictions standing, walking, climbing, and kneeling." [AR 33.] The ALJ acknowledged that the opinions of treating physicians are ordinarily afforded great weight. [AR 32-33.] However, he placed greater weight on the opinions of the State Agency medical consultants and the consultative examiner (Dr. Close) because "the record is more consistent with finding the claimant able to perform a range of light exertional work." [AR 33.]

The ALJ found plaintiff's testimony as to his physical limitations "less than fully credible," concluding that "[t]he objective evidence does not support the claimant's allegations." [AR 34.] The ALJ cited to plaintiff's limited treatment record and "lack of interest in pursuing a surgical treatment option for his right shoulder" to suggest that plaintiff is "not as limited as he alleges." *Id.* Additionally, the ALJ cited to plaintiff's gym membership and multiple treatment reports from February 2011 to March 2014 indicating that plaintiff did "a lot of exercise" both at home and at the gym.[15] [AR34-35.] Accordingly, the ALJ placed "little weight" on the plaintiff's allegations of disabling symptoms. [AR 35.]

The ALJ further concluded that plaintiff has the residual functional capacity to perform his past relevant work as a security guard and teacher of vocational training, based on the testimony of the vocational expert. [AR 35.] As a result, the ALJ concluded plaintiff was not disabled from October 22, 2010, the alleged onset of his disability, through September 23, 2014, when the ALJ issued his decision denying benefits. [AR 35-36.]

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[15] Plaintiff testified that he has a membership to 24 Hour Fitness, as noted by the ALJ. [AR 34.] The ALJ then discussed various treatment notes where plaintiff reported to be exercising frequently. For example, in February 2011, plaintiff reported doing "a lot of exercise." *Id.* As of September 2011, this included "cable extensions in the gym, four to five times per week." *Id.* Plaintiff reported to have last "lifted" in a gym in March 2012. [AR 35.] From July 2013 until March 2014, plaintiff reported that he had been "exercising or working out frequently." *Id.* In April 2014, plaintiff reported that he had been doing "exercises stretching with improvement." *Id.*

V. Discussion.

A. Substantial Evidence Standard.

In his Motion for Summary Judgment, plaintiff argues that the Court should reverse the ALJ's decision and award benefits because the ALJ: (1) relied on evidence not proffered to the plaintiff for consideration; (2) improperly examined the vocational expert, in light of the opinions of Dr. Close; (3) failed to articulate clear and convincing reasons for rejecting the opinions of the treating physicians; and (4) failed to articulate clear and convincing reasons for rejecting plaintiff's testimony. [Doc. No. 17-1, at pp. 10-20.] Defendant argues that the Court should affirm the ALJ's decision because the ALJ: (1) *did* proffer evidence that was obtained subsequent to the administrative hearing for plaintiff's consideration; (2) properly weighed the opinions of Dr. Close; (3) properly addressed the opinions of plaintiff's treating physicians; and (4) properly discounted plaintiff's testimony. [Doc. No. 21-1, at pp. 7-17.]

1. The ALJ Proffered Evidence Obtained After the Administrative Hearing to Plaintiff's Counsel.

First, plaintiff contends that the ALJ improperly considered evidence not proffered to plaintiff's counsel. [Doc. No. 17-1, at p. 10.] Plaintiff contends that the ALJ did not proffer Dr. Close's post-hearing medical report to plaintiff or to plaintiff's counsel, and asks the Court to reverse and remand the decision of the Commissioner "to permit a due process proceeding." [Doc. No. 17-1, at pp. 10-11.] When an ALJ obtains additional evidence after a plaintiff's administrative hearing and proposes to admit the evidence into the record, the Social Security Administration's Hearings, Appeals, and Litigation Law Manual ("HALLEX") advises that the ALJ proffer the evidence to the plaintiff and notify the plaintiff of his or her rights. *See* HALLEX I-2-7-30. HALLEX, however, "does not carry the force of law" and is not binding on this Court. *Roberts v. Comm'r of the Soc. Sec. Admin.*, 644 F.3d 931, 933 (9th Cir. 2011) (internal citations omitted) (a reviewing court will not "review allegations of non-compliance with [HALLEX's] provisions"); *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (where plaintiff relied on HALLEX, the

district court correctly rejected plaintiff's claim because HALLEX is not binding authority, and therefore does not create legally enforceable duties). Accordingly, plaintiff's claim that the ALJ erred by not following the procedures prescribed by HALLEX is without legal basis.[16]

Notwithstanding that HALLEX is not binding law, the Court finds that the ALJ acted pursuant to agency procedures. HALLEX advises that the proffer shall be sent in a letter to the plaintiff and plaintiff's counsel and shall provide:

> A time limit to object to, comment on, or refute the proffered evidence, and to submit a written statement as to the facts and law that the claimant believes apply to the case in light of the evidence submitted; [a] time limit to submit written questions to the author(s) of the proffered evidence; [w]hen applicable . . . an opportunity to request a supplemental hearing, including the opportunity to cross-examine the author(s) of any posthearing evidence; and [t]he opportunity and instructions for requesting a subpoena for the attendance of witnesses or the submission of records.

HALLEX I-2-7-30. The ALJ here sent a proffer letter to plaintiff's counsel notifying him of additional evidence being entered into the record. [Doc. No. 19-2 - Supplemental Record, at p. 2.] In the letter, dated July 28, 2014, the ALJ stated that plaintiff's counsel could submit written comments, additional records, and questions regarding the new evidence. *Id.* Additionally, the ALJ stated that plaintiff could request a supplemental hearing, at which he could "request an opportunity to question . . . the author(s) of the enclosed report(s)." *Id.* The ALJ further provided plaintiff with an opportunity to request a subpoena for the attendance of witnesses or the submission of records. *Id.* at 2-3. The ALJ set a time limit of ten (10) days from the date plaintiff received the letter to submit the

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[16] Plaintiff also contends, in his Reply, that the ALJ erred by not admitting a copy of the proffer letter into the record. [Doc. No. 23, at pp. 4-5 (citing HALLEX I-2-7-35).] Because this is a new argument raised for the first time in plaintiff's Reply, this Court declines to fully consider it. *Longworth v. Colvin*, No. C14-5711 BHS, 2015 WL 1263319, at *6 (W.D. Wash. Mar. 19, 2015). Even if plaintiff raised this claim in his initial briefing, there no legal basis for this argument because, as discussed above, HALLEX is not binding on this Court.

aforementioned statements and requests. As such, the Court finds that the ALJ's letter is consistent with the agency's procedures and sufficiently notified plaintiff of his due process rights.

In his Reply, plaintiff argues that because "the letter does not bear any stamp, mark, or other indication that the ALJ caused the transmittal of that letter," the letter was not sent. [Doc. No. 23, at pp. 2-4.] However, plaintiff provided no legal basis for this requirement. Plaintiff also faults the ALJ for not indicating in his decision that the letter was proffered to plaintiff's representative, but cites no authority that would require the ALJ to include this information in his decision. [Doc. No. 23, at p. 3.] Furthermore, there is no evidence in the record that plaintiff's counsel did not receive the proffer letter. Plaintiff did not allege to the ALJ or to the Appeals Council in his request for review of the hearing decision that the proffer letter was never received. [AR 15-17.]

Even if plaintiff's counsel established that he did not receive the proffer letter, "[t]he burden is on the party claiming error to demonstrate not only the error, but also that it affected his 'substantial rights,' which is to say, not merely his procedural rights." *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012). *See also McLeod v. Astrue,* 640 F.3d 881, 888 (9th Cir. 2010) (plaintiff needs to "show a substantial likelihood of prejudice"). Here, plaintiff stipulated to the fairness and accuracy of the ALJ's summary of the evidence at the hearing [Doc. No. 17-1, at p. 6], which includes Dr. Close's report dated July 22, 2014. [AR 30.] Moreover, plaintiff fails to articulate how an opportunity to question Dr. Close would lead to a different result. [See Doc. No. 17-1, at pp. 10-11.] While the ALJ *did* give great weight to the opinions of Dr. Close, the ALJ did *not* adopt the opinions of Dr. Close without independently reviewing the evidence. [AR 30.] Given that the ALJ's decision was supported by substantial evidence unrelated to Dr. Close's report, simply identifying the issues to be addressed at a supplemental hearing is not enough to prove substantial prejudice.

Accordingly, plaintiff's claim that the ALJ did not proffer post-hearing evidence to plaintiff's counsel is unsubstantiated, and does not constitute grounds for reversal.

2. ***The ALJ Properly Examined the Vocational Expert.***

Next, plaintiff contends that the vocational expert was improperly examined, resulting in an incomplete finding of plaintiff's ability to perform work. [Doc. No. 17-1, at pp. 11-13]. Plaintiff notes that the consultative examiner, Dr. Close, described plaintiff's limitations as "no reaching, handling at or above shoulder level." *Id.* at 12. The ALJ, however, articulated the limitation as "no lifting above shoulder level with the non-dominant upper extremity" when questioning the vocational expert. [AR 66.] "Dr. Close lowered the vertical plane of use of the right upper extremity to *at* shoulder level, *not above* shoulder." [Doc. No. 17-1, at p. 13 (emphasis added).] Plaintiff argues that because Dr. Close's medical evaluation occurred after the administrative hearing, this distinction was not communicated to the vocational expert, resulting in an incomplete finding of plaintiff's ability to perform past work. *Id.*

In *Temple v. Callahan*, 114 F.3d 1195 (9th Cir. 1997), the Ninth Circuit held that the ALJ must present the vocational expert with a "detailed hypothetical" to determine plaintiff's ability to perform past work. *Id.* Notwithstanding the need for detail, courts in this Circuit have found that a hypothetical question that omits additional details "is acceptable so long as it properly identifies the claimant's impairments and provides sufficient detail to permit a vocational expert to understand the claimant's limitations." *Vasquez v. Astrue*, No. 1:09-CV-01894-SMS, 2011 WL 1363777, at *7 (E.D. Cal. Apr. 11, 2011). *See also Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993) (the ALJ's omission of a limitation was irrelevant in determining plaintiff's ability to perform work because other reliable evidence supported the ALJ's finding).

In *Vasquez v. Astrue*, for example, the Court held that the ALJ's failure to distinguish between "lifting at shoulder level and lifting above shoulder level" was harmless. 2011 WL 1363777, at *7. The Court distinguished the case from *Embrey v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988), where the ALJ completely omitted plaintiff's need for "periodic rests,

back and chest pain, and dizziness and blurred vision" when questioning the vocational expert. *Id.*

Here, plaintiff does not dispute whether the ALJ listed all of plaintiff's impairments in his hypothetical question posed to the vocational expert. Plaintiff's only contention is that the *wording* of his shoulder injury was inaccurate. [Doc. No. 17-1, at pp. 12-13.] Plaintiff further claims this error is material because of the "different functions involved." *Id.* at 13. Notably, plaintiff does not provide this Court with any evidence that his prior jobs and the jobs identified by the vocational expert could not be performed with a limitation on lifting at shoulder level (the allegedly faulty limitation depicted by the ALJ). Furthermore, when plaintiff was given the opportunity to request a supplemental hearing and submit questions regarding Dr. Close's medical report, plaintiff failed to act, further evidencing that the alleged discrepancy is immaterial. Accordingly, the Court finds that the ALJ's hypothetical question to the vocational expert was sufficient.

3. The ALJ Gave Proper Weight to the Opinions of Dr. Frederick Close.

The final decision of the Commissioner must be affirmed if it is supported by substantial evidence and if the Commissioner has applied the correct legal standards. *Batson* v. *Comm'r of the Social Security Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). In order to satisfy the substantial evidence standard, all that is required is "relevant evidence" that a "reasonable mind might accept as adequate to support a conclusion." *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999) (internal citations omitted). Furthermore, "the reports of consultative physicians called in by the Secretary may serve as substantial evidence." *Magallanes v. Bowen,* 881 F.2d 747, 752 (9th Cir. 1989) (internal citations omitted).

Here, the ALJ's decision to place "great weight" on Dr. Close's opinion to determine that the plaintiff can perform light exertional work is supported by substantial evidence. The ALJ relied on specific facts included in Dr. Close's medical report to reject the opinions of plaintiff's treating physicians. For example, the ALJ noted that Dr. Close

"thoroughly examined" the plaintiff, listing in detail the medical findings in Dr. Close's report.[17] [AR 30.] Therefore, it was reasonable for the ALJ to rely on Dr. Close's explanation of plaintiff's limitation as "no reaching, handing at or above shoulder level." [AR 516.]

Accordingly, the ALJ's preferential treatment of Dr. Close's opinion was supported by substantial evidence.

4. ***The ALJ Provided Specific, Legitimate Reasons for Rejecting the Opinions of the Treating Physicians.***

Next, plaintiff argues that the "ALJ failed to give good reasons for rejecting the opinions of the treating physician" and asks this Court to "reverse and credit that opinion evidence." [Doc. No. 17-1, at p. 14.] However, plaintiff fails to articulate the relevant legal standard and neglects to provide this Court with specific case law supporting plaintiff's legal conclusion.[18] *Id.* at 14-15.

Generally, the opinion of a treating physician is given great weight because a treating source has a "greater opportunity to know and observe the patient as an individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). "However, the opinion of the treating physician is not necessarily conclusive as to either the physical condition or the ultimate issue of disability." *Morgan*, 169 F.3d at 600. Rather, when a conflict exists between the opinions of a treating physician and an examining physician, the ALJ can

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[17] Dr. Close opined as follows regarding plaintiff's right shoulder:

> [Plaintiff has] significant guarding . . . equivocal impingement tests, a weak O'Brien's test suggesting possible labral or glenhumeral pathology, no detectible glenhumeral instability, a passive range or motion for his right shoulder of 100 degrees for forward flexion, 90 degrees on his right for abduction (180 degrees on his left), 90 degrees for internal rotation (90 degrees on his left), and external rotation of 50 degrees (90 degrees for his left), with minimal tenderness in the AC joint and no crepitance.

[AR 30 (internal citations omitted).]

[18] Rather than identify relevant case law, plaintiff merely lists the findings of his treating physicians, which remain undisputed. [Doc. No. 17-1, at pp. 14-15.]

disregard the opinion of the treating physician if he or she sets forth "specific, legitimate reasons for doing so that are based on substantial evidence in the record."[19] *Sprague*, 812 F.2d at 1230 (merely referencing treating physician's opinions, without providing specific reasons for disregarding them, was insufficient to satisfy the substantial evidence standard). The ALJ can satisfy this burden by providing a "detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Magallanes*, 881 F.2d at 751 (internal citations omitted). In doing so, the ALJ must "set forth his own interpretations and explain why they, rather than the doctors', are correct." *Embrey v. Bowen,* 849 F.2d 418, 421-22 (9th Cir. 1988) (remanded for further consideration where ALJ failed to provide sufficiently specific reasons for disregarding the opinions of three treating physicians and one consulting physician).

Here, the opinions of plaintiff's treating physicians, Dr. Saben and Dr. Harris, are contradicted by the findings of the State Agency medical consultants and the consultative examiner, Dr. Close. Dr. Saben asserted that plaintiff could perform "the equivalent of less than sedentary exertional work." [AR 32, 434-46.] In June 2013, Dr. Saben determined, *inter alia*, that plaintiff could not lift more than ten pounds and could only stand for two hours in an eight hour workday. *Id.* Dr. Harris concluded that plaintiff was "precluded from repetitive above the shoulder activity, with restrictions standing, walking, climbing, and kneeling." [AR 33, 276-77.] Meanwhile, State Agency medical consultants concluded, on more than one occasion, that plaintiff retained the residual functional capacity to perform his past work.[20] [AR 70-94.] The consultative examiner, Dr. Close,

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[19] This is distinguishable from the more stringent standard applied to uncontroverted opinions of a plaintiff's treating physician, which requires the ALJ to provide "clear and convincing reasons" for rejection. *See Montijo v. Secretary of Health and Human Services*, 729 F.2d 599, 601 (9th Cir. 1984) ("The administrative law judge is not bound by the uncontroverted opinions of the claimant's physicians on the ultimate issue of disability, but he cannot reject them without presenting clear and convincing reasons for doing so.").

[20] The Disability Determination Explanation form, dated December 27, 2012 and signed by Dr. G. Taylor Holmes, cited to some limitations in plaintiff's ability to perform work, but concluded that "these

found that plaintiff could sit, stand, and walk for six hours in an eight hour workday and could lift fifty pounds occasionally and twenty-five pounds frequently, contrary to Dr. Saben's medical opinion. [AR 512-516.] Therefore, because of these markedly different opinions, the ALJ must enumerate specific, legitimate reasons, supported by substantial evidence and sufficient analysis, in order to justify rejecting the opinions of the treating physicians.

Consistent with Ninth Circuit precedent, the ALJ here recognized that "special weight" is ordinarily given to a treating physician [AR 32], and provided specific, legitimate reasons supported by substantial evidence and detailed analysis for rejecting the treating physicians' opinions.

First, the ALJ relied on specific medical evidence in the record, stipulated by the plaintiff as "fairly and accurately summarized" [Doc. No. 17-1, at p. 6], to support his finding that plaintiff could perform light exertional work with shoulder limitations. The ALJ referenced at least fifteen separate examination reports of plaintiff with dates ranging from February 2011 to June 2014. [AR 30-31.] For example, the ALJ summarized a July 2012 examination record that revealed plaintiff "had pain on range of motion testing . . . and decreased 5-/5 strength on forward flexion, external rotation, and internal rotation . . . ." [AR 31.] In his analysis, the ALJ included MRI results of "a high grade rotator cuff tear, along with wear and tear fraying to [plaintiff's] rotator cuff tendons." *Id.* However, the ALJ also cited to a March 2013 right shoulder x-ray, which showed "no gross acute osseous radiographic abnormality." *Id.* The ALJ noted that a subsequent examination revealed that plaintiff "had mild tenderness to palpation over his AC joint" but retained the "ability to make a full fist and extend and abduct his digits, and a normal range of motion on forward elevation and external rotation with elbow at the waist." *Id.* After a detailed analysis of plaintiff's medical records, the ALJ concluded that while "the diagnostic findings suggest some limitation in the claimant's right shoulder warranting the above pushing, pulling, and

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limitations do not prevent [plaintiff] from performing work [he] has done in the past." [AR 70-80.] Upon reconsideration, Dr. K. Goedker affirmed the above conclusion on June 18, 2013. [AR 82-94.]

lifting limitations . . . the claimant consistently showed strength in his right shoulder on examination. . . ." [AR 31.]

Next, the ALJ cited to the consultative examiner's finding that there was "minimal tenderness in the AC joint and no crepitance in [plaintiff's] right shoulder." [AR 31.] However, the ALJ did not conclusively accept Dr. Close's opinion that plaintiff could perform medium exertional work, with some limitations. [AR 30.] Rather, the ALJ set forth his *own* interpretation of the record, supported by independent analysis of the medical evidence, to conclude that plaintiff had "greater exertional limitations than Dr. Close proposes." [AR 30.] In his analysis, the ALJ noted that plaintiff did not have surgical intervention to treat his right shoulder. [AR 31.] The ALJ further cited treatment records for plaintiff's back impairment in support of his residual functional capacity. *Id.* The ALJ relied on at least nine reports, with dates ranging from November 2011 to June 2014, to make his independent assessment that "[t]hese findings demonstrate that the claimant's ability to perform light exertional work would not be inhibited by his lumbar spine impairment. . . ." [AR 31-32].

Finally, the ALJ articulated specific reasons to discount the opinions of Dr. Saben and Dr. Harris, plaintiff's treating physicians. Regarding Dr. Saben's opinion, the ALJ noted that "Dr. Saben did not review the records available at the hearing level." [AR 32.] The ALJ found that Dr. Saben's June 2013 opinion[21] "overstates the claimant's limitations given Dr. Saben's treatment records." [AR 32-33.] Furthermore, the ALJ found that Dr. Saben provided "no diagnostic or objective evidence that supports his very restrictive

[21] In June 2013, Dr. Saben completed a Medical Source Statement. [AR 434-36.] Dr. Saben determined that plaintiff: (1) can lift less than 10 pounds, due to right shoulder and back pain; (2) can only stand for 2 hours in an 8 hour workday; (3) can sit with normal breaks for less than 6 hours in an 8 hour workday; (4) needs an alternative to standing and sitting; (5) requires a change in position every 5-20 minutes; and (6) can never climb, stop, kneel, crouch, or crawl but can occasionally balance. *Id.*

assessment," and his May 2013 opinion[22] "lacks specifics as to claimant's functional abilities, aside from ruling out heavy lifting." [AR 33.]

Regarding Dr. Harris, the ALJ concluded that "Dr. Harris failed to provide specific limitations regarding the claimant's ability to sit, stand, walk, lift, and carry." [AR 33.] The ALJ also found that Dr. Harris did not provide sufficient evidence to support his assessment of plaintiff's limitation on standing, walking, climbing, and kneeling. *Id.* Finally, the ALJ noted that Dr. Harris' failed to review the record available at the hearing level. *Id.* As a result, the ALJ placed greater weight on the opinions of the State Agency medical consultants and the consultative examiner (Dr. Close) because "the record is more consistent with finding the claimant able to perform a range of light exertional work." *Id.* This is consistent with the Social Security Administration's Code of Federal Regulations.[23]

Accordingly, the ALJ relied on specific, legitimate reasons to support his conclusion that plaintiff could perform past relevant work. Given the sufficiency of the ALJ's reasoning and analysis, the ALJ was justified in disregarding the opinions of the treating physicians.

5. ***The ALJ Provided Specific, Clear, and Convincing Reasons for Rejecting Plaintiff's Testimony***

Finally, plaintiff contends that the ALJ erred in rejecting plaintiff's testimony and failed to fairly develop the record. [Doc. No. 17-1, at pp. 16-20.] Plaintiff contends that when there is a discrepancy between plaintiff's testimony and the medical record, the ALJ has an "obligation to ask." *Id.* at 20. As evidenced by the testimony during the administrative hearing, the ALJ adequately questioned plaintiff about the alleged

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[22] In May 2013, Dr. Saben wrote two letters outlining plaintiff's condition after a follow-up appointment for plaintiff's shoulder. [AR 381, 382.] In both, Dr. Saben took note of plaintiff's continued back and neck pain and articulated one limitation: "He cannot lift heavy objects." *Id.* Dr. Saben then opined that plaintiff "should not work in the public safety field (body guard/security) or teach criminal justice in an academy setting with self-defense training." *Id.* Both letters indicate that physical activity "will likely exacerbate [plaintiff's] shoulder and/or back conditions." *Id.*

[23] "Generally, the more consistent an opinion is with the record as a whole, the more weight [the ALJ] will give to that opinion." 20 CFR § 404.1527(c)(4).

discrepancy. [AR 56-59.] The ALJ also cited to specific, clear, and convincing reasons to discount plaintiff's testimony, pursuant to agency procedures and Ninth Circuit precedent.

In *Light v. Social Security Administration*, 119 F.3d 789 (9th Cir. 1997), the Ninth Circuit held that an ALJ cannot discredit or reject subjective claims of "excess pain" based solely on a lack of objective medical support in the record. *Id.* at 792-93. "In assessing the credibility of a claimant's testimony regarding subjective pain or the intensity of symptoms, the ALJ engages in a two-step analysis. [Citation omitted.] First, the ALJ must determine whether there is 'objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged.' [Citations omitted.] If the claimant has presented such evidence, and there is no evidence of malingering, then the ALJ must give 'specific, clear and convincing reasons' in order to reject the claimant's testimony about the severity of the symptoms. [Citations omitted.] At the same time, the ALJ is not 'required to believe every allegation of disabling pain, or else disability benefits would be available for the asking, a result plainly contrary to 42 U.S.C. § 423(d)(5)(A).' [Citation omitted.] In evaluating the claimant's testimony, the ALJ may use 'ordinary techniques of credibility evaluation.' [Citation omitted.] For instance, the ALJ may consider inconsistencies either in the claimant's testimony or between the testimony and the claimant's conduct, [such as] . . . 'whether the claimant engages in daily activities inconsistent with the alleged symptoms.' [Citation omitted.] While a claimant need not 'vegetate in a dark room' in order to be eligible for benefits, [citation omitted], the ALJ may discredit a claimant's testimony when the claimant reports participation in everyday activities indicating capacities that are transferable to a work setting. [Citation omitted.] Even where those activities suggest some difficulty functioning, they may be grounds for discrediting the claimant's testimony to the extent that they contradict claims of a totally debilitating impairment. [Citation omitted.]" *Molina v. Astrue*, 674 F.3d 1104, 1112-13 (9th Cir. 2012).

Under Social Security regulations, factors to be considered in evaluating the intensity, persistence, and limiting effects of a claimant's symptoms include: (i) daily

activities; (ii) the location, duration, frequency, and intensity of pain or other symptoms; (iii) precipitating and aggravating factors; (iv) the type, dosage, effectiveness, and side effects of any medication taken to alleviate pain or other symptoms; (v) treatment to relieve pain or symptoms other than medication; (vi) any measures used to relieve pain or other symptoms (*e.g.*, lying flat, standing for 15 to 20 minutes every hour, sleeping on a board, etc.); and (vii) functional limitations and restrictions due to pain or other symptoms. 20 C.F.R. § 404.1529(c)(3); 20 C.F.R. § 416.929(c)(3); Social Security Regulation 16-3p.

"A finding that a claimant's testimony is not credible 'must be sufficiently specific to allow a reviewing court to conclude the adjudicator rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit a claimant's testimony regarding pain.' [Citation omitted.] General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints. [Citation omitted.]" *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015). The Court is "constrained to review the reasons the ALJ asserts." *Brown-Hunter*, 806 F.3d at 492. On the other hand, "there is no rigid requirement that the ALJ specifically refer to every piece of evidence in his decision." *Reid v. Comm'r of Social Sec.*, 769 F.3d 861, 865 (4th Cir. 2014), quoting *Dyer v. Barnhart*, 395 F.3d 1206, 1211 (11th Cir. 2005).

At step one of the analysis, the ALJ found that the plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms, with no affirmative evidence of malingering. [AR 33.] Thus, the ALJ must provide clear and convincing reasons for rejecting plaintiff's testimony, supported by specific findings in the record. The ALJ found that "claimaint's statements concerning the intensity, persistence and limiting effects of [plaintiff's] symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment." [AR 34.] According to the ALJ, a number of factors undermined the credibility of plaintiff's testimony. [AR 34-35.]

First, the ALJ noted that the objective evidence does not support plaintiff's claim of disability. [AR 34.] Regarding plaintiff's allegation that his medication caused drowsiness,

the ALJ stated, "the record contains no evidence that the claimant complained of drowsiness to any of his treating doctors. Moreover, there is no evidence that the claimant's doctors adjusted his medication in response to any such complaint." *Id.* Plaintiff failed to refute this claim in his briefing, and, on the contrary, stipulated to the fairness and accuracy of the ALJ's summary of the medical record. [Doc. No. 17-1, at p. 6.] Accordingly, it was reasonable for the ALJ to discredit plaintiff's testimony regarding his alleged drowsiness for lack of objective evidence in the record. See *Greger v. Barnhart*, 464 F. 3d 968, 973 (9th Cir. 2006) (where plaintiff did not report the side effects of fatigue to his doctor, "the ALJ properly limited the hypothetical to the medical assumptions supported by substantial evidence in the record").

Regarding the degree of impairment alleged, plaintiff argued, *inter alia*, that a "lack of objective evidence is never a stand-alone factor." [Doc. No. 17-1, at p. 17.] Plaintiff argued that the ALJ must provide "clear and convincing reasons" for discounting plaintiff's credibility. *Id.* Here, the ALJ did not exclusively rely on the lack of objective evidence to discredit plaintiff's testimony. Rather, the ALJ cited to specific evidence in the record to discredit plaintiff's testimony of pain, including plaintiff's treatment record indicating that plaintiff was prescribed medication for his impairments, and had received injections to treat his shoulder and back pain. [AR 34.]

The ALJ also noted that plaintiff had a "limited treatment record, including his lack of interest in pursuing a surgical treatment option for his right shoulder." [AR 34.] Under Ninth Circuit precedent, "unexplained, or inadequately explained, failure to seek treatment or follow a prescribed course of treatment" is sufficiently specific to discredit an allegation of pain. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). In response, plaintiff argued that "the offer to perform shoulder surgery had nothing to do with the complaints of difficulty walking, standing, sitting, or balancing." [Doc. No. 17-1, at p. 18.] Plaintiff showed no interest in physical therapy or surgical intervention for *any* of his impairments, which "suggests he is not as limited as he alleged," according to the ALJ. [AR 34.]

Next, the ALJ found that plaintiff's daily living activities "tend to show that claimant

does have the ability to perform work." *Id.* The ALJ may reject a claimant's symptom testimony "if, despite his claims of pain, a claimant is able to perform household chores and other activities that involve many of the same physical tasks as a particular type of job, because it would not be farfetched for an ALJ to conclude that the claimant's pain does not prevent the claimant from working." *Fair*, 885 F.2d at 603 (ALJ was justified in discrediting plaintiff's testimony when plaintiff testified that "he remains capable of caring for all his own personal needs, the performance of his own routine household maintenance and shopping chores, riding public transportation, and driving his own automobile"). Here, plaintiff's ability to "perform activities of personal care, such a showering or preparation of simple meals" suggest that plaintiff was alleging greater physical limitations than necessary. [AR 34.] Thus, it was reasonable for the ALJ to conclude that the "claimant's activities of daily living are ... not consistent with the alleged degree of impairment." *Id.*

Additionally, the ALJ cited to specific evidence in the record indicating that plaintiff was a member of 24 Hour Fitness and remained physically active from 2011 to 2014 [AR 34-35], contrary to plaintiff's testimony that he "[does not] work out frequently."[24] [AR 57.] Based on the extensive documentation of plaintiff's physical activity, the ALJ concluded that "claimant has a better physical capacity than he has stated in the record, which undermined the credibility of his allegations." [AR 35.]

In response to the ALJ's finding that there is an inconsistency between the record

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[24] The ALJ notes:

> Treatment notes also document the claimant's report that he was doing exercises, including cable extensions in the gym, four to give times per week, in September 2011. Later, treatment notes document the claimant's report that he last "lifted" in a gym (24 Hour Fitness) in approximately March 2012. Otherwise, per treatment notes, from July 2013 and March 2014, the claimant reported that he had been exercising or working out frequently. Also, in April 2014, the claimant reported that he had been doing exercises stretching with improvement. Evidently, the claimant remained physically active from 2011 to at least March 2014, if not later.

[AR 34-35 (internal citations omitted).]

and plaintiff's hearing testimony about the extent of his exercise, plaintiff argues that "once the ALJ perceives a discrepancy, the ALJ should explain the significance of the discrepancy." [Doc. No. 17-1, at p. 19.] Plaintiff also cites to the ALJ's duty to "fully and fairly develop the record" and to inquire about any perceived inconsistencies. *Id.* Plaintiff's arguments are without merit. Here, the ALJ here satisfied his burden by questioning the plaintiff about his medical condition, treatments sought, daily physical activities, frequency of exercise, and social interactions at the administrative hearing. [AR 57-58.] The ALJ also clearly articulated that the inconsistency was significant because it "suggest[s] that the claimant has a better physical capacity than he has stated in the record, which undermines the credibility of his allegations." [AR 35.] Under these circumstances, it was reasonable for the ALJ to find not credible plaintiff's allegations "concerning the intensity, persistence and limiting effects of these symptoms," in light of plaintiff's testimony that he did "a lot of exercise" as of February 2011 up until (at least) March 2014. [AR 34-35.]

Finally, the ALJ observed that the plaintiff "did not show any difficulty in focusing on concentrating when providing answers to questions or in volunteering information, at the hearing," further weakening plaintiff's credibility. *Id.* In *Matney v. Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992), the Ninth Circuit held that the ALJ's consideration of a plaintiff's "demeanor and appearance at the hearing" was a sufficiently specific reason to reject plaintiff's testimony of disabling pain. *Id.* Accordingly, the ALJ correctly relied on plaintiff's demeanor at the administrative hearing as a reason to discredit his testimony.

It is not the Court's role to "second-guess [the] decision" of the ALJ, where the ALJ has made specific findings supported by substantial evidence to discredit plaintiff's testimony. *Fair*, 885 F.2d at 603 (affirming the ALJ's conclusion where the ALJ relied on two specific findings to discredit plaintiff's testimony). Here, the ALJ cited to six such findings: (1) lack of objective evidence supporting side-effect of drowsiness; (2) treatment of pain supported by medical records; (3) lack of interest in surgical intervention; (4) ability to perform daily living activities; (5) frequency of physical activity and exercise; and (6) demeanor and appearance at the hearing. Accordingly, the Court finds that the ALJ

sufficiently satisfied his burden by providing clear and convincing reasons, supported by the substantial evidence, for discounting plaintiff's subjective testimony of pain.

It is therefore **RECOMMENDED** that the District Court affirm the ALJ's denial of disability benefits by **DENYING** plaintiff's Motion for Summary Judgment and **GRANTING** defendant's Cross-Motion for Summary Judgment.

VI. Conclusion.

Based on the foregoing, this Court concludes that substantial evidence in the Administrative Record supports the ALJ's June 25, 2014 decision that plaintiff did not qualify for disability benefits because she retained the residual functional capacity to perform past relevant work as a security guard and teacher of vocational training.

IT IS THEREFORE RECOMMENDED THAT THE DISTRICT COURT:

1. **DENY** plaintiff's Motion for Summary Judgment [Doc. No. 17]; and

2. **GRANT** defendant's Cross-Motion for Summary Judgment [Doc. No. 21].

This Report and Recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1) and Civil Local Rule 72.1(d). Within **fourteen (14) days** after being served with a copy of this Report and Recommendation, "any party may serve and file written objections." 28 U.S.C. § 636(b)(1)(B)&(C). The document should be captioned "Objections to Report and Recommendation." The parties are advised that failure to file objections within this specific time may waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1156–57 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 19 2017

Hon. Karen S. Crawford
United States Magistrate Judge