

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 SOUTHERN DISTRICT OF CALIFORNIA  
7

8 Asa Euregetes Majeed,

9 Plaintiff,

10 v.

11 Carolyn W. Colvin,

12 Defendant.

Case No.: 16-cv-01275-WQH-JLB

**Report and Recommendation**

[ECF Nos. 14, 15]

13  
14 This matter is before the Court on cross-motions for summary judgment. (ECF Nos.  
15 14, 15.) Plaintiff Asa Euregetes Majeed moves under 42 U.S.C. § 405(g)<sup>1</sup> for judicial  
16 review of the Commissioner of Social Security Carolyn Colvin’s (“Commissioner”) final  
17 decision denying his claim for a period of disability and disability insurance benefits.

18 This Report and Recommendation is submitted to United States District Judge  
19 William Q. Hayes pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(c) of the  
20 United States District Court for the Southern District of California. After careful review  
21 of the moving and opposing papers, the administrative record, the facts, and the applicable  
22 law, the Court hereby RECOMMENDS that Plaintiff’s motion for summary judgment  
23 (ECF No. 14) be DENIED. The Court further RECOMMENDS that the Commissioner’s  
24

25  
26 <sup>1</sup> “Any individual, after any final decision of the Commissioner of Social Security made after a hearing to  
27 which he was a party . . . may obtain a review of such decision by a civil action . . . brought in the district  
28 court of the United States . . . . The court shall have the power to enter, upon the pleadings and transcripts  
of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social  
Security, with or without remanding the cause for a rehearing. The findings of the Commissioner . . . as  
to any fact, if supported by substantial evidence, shall be conclusive . . . .” 42 U.S.C. § 405(g) (2015).

1 cross-motion for summary judgment affirming the Administrative Law Judge’s (“ALJ”)
2 decision (ECF No. 15) be GRANTED.

3 **I. BACKGROUND**

4 Plaintiff filed an application for a period of disability and disability insurance
5 benefits on October 26, 2012, alleging disability commencing June 1, 2012.<sup>2</sup> (ECF No.
6 10-5 at 2.) The Commissioner denied the claims by initial determination on February 12,
7 2013. (ECF No. 10-2 at 26.) Plaintiff requested reconsideration of the initial determination
8 on April 8, 2013. (ECF No. 10-4 at 9.) The Commissioner denied reconsideration on
9 September 9, 2013. (Id. at 10–15; ECF No. 10-2 at 2.) Plaintiff requested a de novo
10 hearing before an ALJ on October 27, 2013. (ECF No. 10-4 at 16–17.) The Commissioner
11 granted this request and appointed an ALJ. (Id. at 18–29.) On October 9, 2014, Plaintiff,
12 his attorney, and a vocational expert appeared before the ALJ, Keith Dietterle. (ECF No.
13 10-2 at 26.) In a decision dated December 16, 2014, the ALJ issued an unfavorable
14 decision and found Plaintiff was not disabled through June 30, 2014, the last date insured.
15 (Id. at 35.)

16 Thereafter, the Social Security Administration Appeals Council denied Plaintiff’s
17 request for review of the ALJ’s unfavorable decision, making the ALJ’s decision the final
18 decision of the Commissioner. (Id. at 2.) Plaintiff then commenced this instant action for
19 judicial review pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

20 **II. STANDARD OF REVIEW**

21 The Social Security Act allows for unsuccessful applicants to seek judicial review
22 of the Commissioner’s final agency decision.<sup>3</sup> The scope of judicial review, however, is
23 limited. The Commissioner’s final decision should not be disturbed unless: (1) the ALJ’s
24 findings are based on legal error; or (2) the ALJ’s determinations are not supported by
25

---

26  
27 <sup>2</sup> See 42 U.S.C. § 423 (Disability insurance benefit payments); see also id. at §§ 416(i) (defining “period
28 of disability”), 423(d)(1) (defining “disability” for purposes of entitlement to a period of disability or to
disability insurance benefits).

<sup>3</sup> See 42 U.S.C. §§ 405(g), 1383(c)(3).

1 substantial evidence in the record as a whole.<sup>4</sup> Substantial evidence is “more than a mere  
2 scintilla, but may be less than a preponderance.”<sup>5</sup> Substantial evidence is “relevant  
3 evidence that, considering the entire record, a reasonable person might accept as adequate  
4 to support a conclusion.”<sup>6</sup>

5 In making this determination, the Court must consider the record as a whole,  
6 weighing both the evidence that supports and the evidence that detracts from the ALJ’s  
7 conclusion.<sup>7</sup> Where the evidence can reasonably be construed to support more than one  
8 rational interpretation, the Court must uphold the ALJ’s decision.<sup>8</sup> This includes deferring  
9 to the ALJ’s credibility determinations and resolutions of evidentiary conflicts.<sup>9</sup>

### 10 **III. THE ALJ’S DECISION**

11 Utilizing the five-step disability evaluation process,<sup>10</sup> the ALJ first found that  
12 Plaintiff had not engaged in substantial gainful activity since the alleged disability onset  
13 date of June 1, 2012 through the date he was last insured of June 30, 2014. (ECF No. 10-  
14 2 at 28.) The ALJ then found that during this relevant time period, June 1, 2012 through  
15 June 30, 2014, Plaintiff had the following severe impairments: malignant neoplasm of the  
16 bladder; obesity; degenerative joint disease of the left knee; and osteoarthritic disease of  
17 the left hip.<sup>11</sup> (Id.) In making this determination, the ALJ explained that Plaintiff also had  
18 the following conditions that do not meet the criteria for severe impairments: heel spurs;  
19 mild degenerative changes of the left elbow; and renal stones. (Id.)

20 Next, the ALJ found that Plaintiff does not have an impairment or a combination of  
21 impairments that meet the severity required to stop analysis at step three and award  
22

---

23  
24 <sup>4</sup> See *Schneider v. Comm’r of Soc. Sec. Admin.*, 223 F.3d 968, 973 (9th Cir. 2000).

25 <sup>5</sup> *Lewis v. Apfel*, 236 F.3d 503, 509 (9th Cir. 2001).

26 <sup>6</sup> *Id.*; *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1011 (9th Cir. 2003).

27 <sup>7</sup> See *Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir. 2001); *Desrosiers v. Sec’y of Health & Human*  
28 *Servs.*, 846 F.2d 573, 576 (9th Cir. 1988).

<sup>8</sup> See *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004).

<sup>9</sup> See *Lewis*, 236 F.3d at 509.

<sup>10</sup> 20 C.F.R. § 404.1520.

<sup>11</sup> 20 C.F.R. Part 404, Subpart P. Appendix 1.

1 benefits. (Id. at 28–29.) Before considering step four, the ALJ found that Plaintiff has the  
2 residual functional capacity (“RFC”) to perform medium work:

3 with the following specific limitations he can sit for 6 hours in  
4 an 8-hour day; can stand and walk for 6 hours in an 8-hour day;  
5 can occasionally lift and carry 50 pounds and frequently lift and  
6 carry 25 pounds; can occasionally climb stairs, balance, stoop,  
7 kneel, crouch, and crawl; cannot climb ladders, ropes, and  
8 scaffolds; and cannot work at unprotected heights or around  
9 dangerous or fast moving machinery.

10 (Id. at 29.) In arriving at this RFC, the ALJ explained that he “considered all symptoms  
11 and the extent to which these symptoms can reasonably be accepted as consistent with the  
12 objective medical evidence and other evidence” as well as opinion evidence. (Id.)

13 At step four, the ALJ compared the RFC assessed to the demands of Plaintiff’s past  
14 relevant work as a telephone solicitor and customer service representative. (ECF No. 10-  
15 2 at 33–34.) In doing so, the ALJ relied on the testimony of the vocational expert to  
16 determine that Plaintiff could work as a telephone solicitor or customer service  
17 representative. (Id. at 34.) The ALJ therefore concluded at step four that Plaintiff “was  
18 not under a disability, as defined by the Social Security Act, at any time from June 1, 2012,  
19 the alleged onset date, through June 30, 2014, the date last insured.” (Id.)

#### 20 **IV. DISCUSSION**

21 Plaintiff challenges the ALJ’s finding that Plaintiff’s statements concerning the  
22 intensity, persistence and limiting effects of his symptoms are not entirely credible. (ECF  
23 No. 14 at 4–14.) More specifically, Plaintiff argues that this credibility finding cannot  
24 stand for the following three reasons: (1) the ALJ’s analysis in support of this finding  
25 merely recited the relevant “boilerplate” Social Security Act regulation on subjective  
26 complaints of pain or other symptoms (id. at 6–7); (2) the ALJ’s sole basis for discrediting  
27 Plaintiff’s testimony about the severity of his symptoms was that it lacks support in the  
28 objective medical evidence (id. at 7–9); and (3) the ALJ erroneously believed that Plaintiff  
only had care that was conservative in nature (id. at 9–10). Based on these arguments,  
Plaintiff moves for summary judgment on the ground that the ALJ failed to meet the clear

1 and convincing legal standard for discrediting Plaintiff’s testimony about the severity his  
2 subjective symptoms. (ECF No. 14.)

3 The Commissioner opposes Plaintiff’s motion and cross-moves for summary  
4 judgment, arguing the ALJ properly assessed Plaintiff’s credibility. (ECF Nos. 15, 16.)  
5 For the reasons explained below, the Court concludes that the ALJ articulated clear and  
6 convincing reasons to discredit Plaintiff’s statements concerning the intensity, persistence  
7 and limiting effects of his symptoms.

8 **A. Legal Standard**

9 If an ALJ finds that a claimant’s testimony as to the severity of his pain and  
10 impairments is unreliable, the ALJ is required to make “a credibility determination with  
11 findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily  
12 discredit claimant’s testimony.”<sup>12</sup> As outlined by the Ninth Circuit, there is a two-step  
13 process an ALJ is to employ to assess subjective pain testimony.<sup>13</sup> “First, the ALJ must  
14 determine whether the claimant has presented objective medical evidence of an underlying  
15 impairment ‘which could reasonably be expected to produce the pain or other symptoms  
16 alleged.’”<sup>14</sup> Absent such evidence, subjective pain testimony may be disregarded.<sup>15</sup>  
17 Second, if the ALJ determines that the claimant meets this threshold, “and there is no  
18 evidence of malingering, ‘the ALJ can reject the claimant’s testimony about the severity of  
19 [his] symptoms only by offering specific, clear and convincing reasons for doing so.’”<sup>16</sup>

20 At issue here is the second step in the ALJ’s two-step process of assessing subjective  
21 pain testimony. The Commissioner does not argue that there was evidence of malingering  
22  
23  
24

---

25  
26 <sup>12</sup> Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008) (quoting Thomas v. Barnhart, 278 F.3d 947,  
958 (9th Cir. 2002)).

27 <sup>13</sup> See Lingenfelter v. Astrue, 504 F.3d 1028, 1035–36 (9th Cir. 2007).

28 <sup>14</sup> Id. at 1036 (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir. 1991)).

<sup>15</sup> Tommasetti, 533 F.3d at 1039; see also 42 U.S.C. § 423.

<sup>16</sup> Lingenfelter, 504 F.3d at 1036 (quoting Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996)).

1 and that a lesser standard should consequently apply. As a result, the Court will apply the  
2 “specific, clear and convincing” standard to the ALJ’s adverse credibility determination.<sup>17</sup>

3 To support a finding that the claimant was not credible, the ALJ must “point to  
4 specific facts in the record which demonstrate that [the claimant] is in less pain than [he]  
5 claims.”<sup>18</sup> The ALJ must make specific findings “stat[ing] which pain testimony is not  
6 credible and what evidence suggests the complaints are not credible.”<sup>19</sup> The ALJ can  
7 consider the following when assessing the claimant’s credibility: (1) his reputation for  
8 truthfulness; (2) inconsistencies in either his testimony or between his testimony and his  
9 conduct; (3) his daily activities; (4) his work record; and (5) testimony from physicians and  
10 third parties concerning the nature, severity, and effect of his condition.<sup>20</sup>

11 The reviewing court must bear in mind that it should not “second-guess” an ALJ’s  
12 credibility determination.<sup>21</sup> Accordingly, where an ALJ’s credibility determination is  
13 supported by substantial evidence, it will not be disturbed even where some of the reasons  
14 for discrediting the claimant’s testimony are improper.<sup>22</sup> However, “[t]he clear and  
15 convincing standard is the most demanding required in Social Security cases,”<sup>23</sup> and thus,  
16 the standard “is not an easy requirement to meet.”<sup>24</sup>

17 Courts may only review the ALJ’s articulated rationale, and “[i]f the [ALJ’s]  
18 decision on its face does not adequately explain how a conclusion was reached, that alone  
19 is grounds for remand.”<sup>25</sup> The Ninth Circuit has sympathized with the “large volume of  
20

---

21  
22 <sup>17</sup> See *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014) (applying “clear and convincing” standard  
where the government did not argue that a lesser standard should apply based on evidence of malingering).

23 <sup>18</sup> *Vasquez v. Astrue*, 572 F.3d 586, 592 (9th Cir. 2008) (quoting *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th  
Cir. 1993)).

24 <sup>19</sup> *Dodrill*, 12 F.3d at 918.

25 <sup>20</sup> *Thomas*, 278 F.3d at 958–59.

26 <sup>21</sup> *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (citing *Fair v. Bowen*, 885 F.2d 597, 604 (9th  
Cir. 1989)); see also *Allen v. Heckler*, 749 F.2d 577, 580 (9th Cir. 1984).

27 <sup>22</sup> *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008).

28 <sup>23</sup> *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002).

<sup>24</sup> *Garrison v. Colvin*, 759 F.3d 995, 1105 (9th Cir. 2014).

<sup>25</sup> *Barbato v. Comm’r of Soc. Sec. Admin.*, 923 F. Supp. 1273, 1276 n.2 (C.D. Cal. 1996) (quoting *Williams  
v. Bowen*, 664 F. Supp. 1200, 1207 (N.D. Ill. 1987)).

1 disability cases that the agency must adjudicate,” but “each case represents a citizen’s claim  
2 of serious disability,” and accordingly, courts should not take lightly their responsibility  
3 under 42 U.S.C. § 405(g).<sup>26</sup> Courts, in their reviewing authority, “should not be forced to  
4 speculate” the reasoning behind the ALJ’s findings.<sup>27</sup>

5 Consequently, the Court must assess whether the ALJ provided clear and convincing  
6 reasons for discrediting Plaintiff’s testimony concerning his subjective pain that are  
7 supported by substantial evidence in the record.

### 8 **B. “Boilerplate” Social Security Act Language**

9 First, citing to *Bjornson v. Astrue*, 671 F.3d 640, 645 (7th Cir. 2012), Plaintiff argues  
10 that summary judgment in his favor is warranted because the ALJ merely recited the  
11 relevant “boilerplate” Social Security Act regulation on subjective complaints of pain or  
12 other symptoms language to discredit Plaintiff’s testimony regarding the severity of his  
13 symptoms. (ECF No. 14 at 6–7.) In *Bjornson*, the Seventh Circuit noted that the  
14 “boilerplate language fails to inform us in a meaningful, reviewable way of the specific  
15 evidence the ALJ considered in determining that claimant’s complaints were not  
16 credible.”<sup>28</sup> However, here, the ALJ did not merely provide boilerplate language. As  
17 explained below, the ALJ informed this Court in a meaningful, reviewable way of the  
18 specific evidence that he used to make his credibility determination. Thus, Plaintiff’s first  
19 argument for summary judgment fails.

### 20 **C. Objective Medical Evidence**

21 Second, Plaintiff argues that summary judgment in his favor is warranted because  
22 the ALJ’s sole basis for discrediting Plaintiff’s testimony about the severity of his  
23 symptoms was that it lacks support in the objective medical evidence. (ECF No. 14 at 7–  
24

---

25  
26 <sup>26</sup> *Lewin v. Schweiker*, 654 F.2d 631, 634–35 (9th Cir. 1981) (quoting *Baerga v. Richardson*, 500 F.2d  
309, 312 (3d Cir. 1974)).

27 <sup>27</sup> *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991) (citing *Murray v. Heckler*, 722 F.2d 499, 502  
28 (9th Cir. 1983)); see also *Lewin*, 654 F.2d at 635 (“It is incumbent upon the examiner to make specific  
findings—the court may not speculate as to his findings.” (quoting *Baerga*, 500 F.2d at 312)).

<sup>28</sup> *Bjornson*, 671 F.3d at 644–46.

1 9). Defendant disagrees, arguing that Plaintiff misstates the ALJ’s findings because the  
2 ALJ properly relied on Plaintiff’s overall record and not solely on objective medical  
3 evidence. (ECF No. 15-1 at 6.) Defendant points out that the overall record upon which  
4 the ALJ relied “included objective and clinical findings, conservative treatment,  
5 contradicted statements, and medical opinions that all supported the ALJ’s credibility  
6 finding.” (Id.) The Court agrees with Defendant that the ALJ based his credibility  
7 determination on Plaintiff’s overall record and not solely on objective medical evidence.

8 With respect to the objective medical evidence, the ALJ properly considered it as a  
9 relevant factor when discrediting Plaintiff’s testimony concerning the intensity, persistence  
10 and limiting effects of his symptoms. Plaintiff argues “the assertion of the ALJ that Asa  
11 Majeed’s testimony is not credible because it is inconsistent with the objective medical  
12 evidence is always legally insufficient” under *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th  
13 Cir. 1991). Plaintiff misstates the law. “While subjective pain testimony cannot be rejected  
14 on the sole ground that it is not fully corroborated by objective medical evidence, the  
15 medical evidence is still a relevant factor in determining the severity of the claimant’s pain  
16 and its disabling effects.”<sup>29</sup>

17 Here, the ALJ considered the entire case record and reasonably discounted Plaintiff’s  
18 allegations of disabling pain based on other factors in addition to the contrary objective  
19 medical evidence. (ECF No. 10-2 at 29–33.) Thus, Plaintiff’s second argument for  
20 summary judgment fails.

#### 21 **D. Conservative Treatment**

22 Third, Plaintiff argues that summary judgment in his favor is warranted because the  
23 ALJ’s finding that Plaintiff was not disabled is based on the ALJ’s erroneous belief that  
24 Plaintiff’s “has only had care that was conservative in nature.” (ECF No. 14 at 9.) The  
25 actual language of ALJ’s opinion to which Plaintiff refers states: “The treatment records  
26 reveal the claimant received routine, conservative, and mostly nonemergent treatment  
27

---

28 <sup>29</sup> Rollins, 261 F.3d at 857 (citing 20 C.F.R. § 404.1529(c)(2)).

1 **since the alleged onset date.”** (ECF No. 10-2 at 30 (emphasis added).) Without  
2 acknowledging the ALJ’s focus on the alleged disability onset date of June 1, 2012,  
3 Plaintiff contends that his treatment cannot be described as conservative in light of his knee  
4 surgery (in 1971), history of bladder cancer (in remission) with an internal catheter and  
5 urine bag, and use of narcotic pain medication. (ECF No. 14 at 9.) To support his argument  
6 that his pain was treated with narcotics, Plaintiff cites to discharge instructions from  
7 Scripps dated February 5, 2014 and December 8, 2013, which reference Norco and  
8 Vicodin, respectively. (Id.)

9 In response, Defendant argues that “the record contains evidence of conservative,  
10 effective treatment, supporting a finding that Plaintiff was less than fully credible.” (ECF  
11 No. 15-1 at 7.) Defendant points to evidence in the record showing that many of Plaintiff’s  
12 treatment records consisted of follow-up visits for refills of medication.<sup>30</sup> (Id.) On reply,  
13 Plaintiff acknowledges that it was permissible for the ALJ to consider certain factors,  
14 including type of pain medication and “treatment, other than medication, for relief of pain,”  
15 but that “the ALJ failed to make any nexus between these factors and his discrediting of  
16 Mr. Majeed’s subjective complaints.” (ECF No. 17 at 3-4.) The Court disagrees with  
17 Plaintiff’s characterization of the ALJ’s opinion.

18 The ALJ articulated “specific, clear and convincing reasons” why Plaintiff’s  
19 testimony was undermined by substantial evidence in the record showing Plaintiff’s  
20 treatment during the relevant time period (June 1, 2012 through June 30, 2014) was routine,  
21 conservative, and mostly nonemergent. (See ECF No. 10-2 at 29–33.) A conservative  
22 course of treatment may serve as a basis for discrediting a claimant’s allegations of  
23

---

24  
25  
26 <sup>30</sup> Defendant further argues that, regardless of whether Plaintiff’s use of narcotic medication may be  
27 deemed conservative treatment as a matter of law, Plaintiff’s ability to effectively manage his pain  
28 supports the ALJ’s finding that Plaintiff was less than fully credible. (ECF No. 15-1 at 7.) While this  
may be true, and despite the fact that on reply Plaintiff fails to point to evidence demonstrating otherwise,  
the ALJ does not explicitly state this to be a basis for his opinion. Therefore, the Court declines to address  
this argument.

1 disabling symptoms.<sup>31</sup> Here, the ALJ did not fully credit Plaintiff’s testimony about the  
2 severity of his debilitating pain and physical impairment because the record as a whole,  
3 including Plaintiff’s conservative course of treatment, did not support the degree of  
4 limitations Plaintiff alleged for the period of disability. (ECF No. 10-2 at 29–33.)

5 In analyzing Plaintiff’s symptom testimony, the ALJ criticized the “general nature”  
6 of Plaintiff’s symptom testimony. (ECF No. 10-2 at 30.) Notwithstanding this criticism,  
7 the ALJ identified statements concerning the intensity, persistence and limiting effects of  
8 Plaintiff’s symptoms that the ALJ found to be not entirely credible, including that:  
9 (1) Plaintiff requires a cane for mobility (ECF No. 10-2 at 29, 33); (2) Plaintiff can “sit for  
10 about 35 to 40 minutes at a time and stand for 20 minutes at a time due to pain in his leg  
11 and back” (id. at 29); (3) Plaintiff “cannot walk a block” (id.); (4) Plaintiff “does not lift  
12 with his left hand and he can lift milk or sugar with his right hand” (id. at 30); (5) Plaintiff  
13 “takes naps every day and is lying down about 6 hours a day” (id.); and (6) Plaintiff “cannot  
14 stand for long periods” (id.).

15 The ALJ then went on to analyze whether Plaintiff’s subjective allegations of pain  
16 were undermined by evidence in the record. In doing so, the ALJ credited certain pain  
17 testimony and, as a result, decreased Plaintiff’s residual functional capacity accordingly.  
18 (ECF No. 10-2 at 29–33.) For example, the ALJ “decreased the postural capacities to an  
19 occasional basis to give some greater consideration to the claimant’s subjective pain  
20 complaints.” (Id. at 32.) However, with respect to Plaintiff’s allegations of **debilitating**  
21 pain, the ALJ explained that these allegations appeared to be false and/or undermined by  
22 evidence of a conservative treatment plan throughout the relevant time period. In this  
23 regard, the ALJ provided the following analysis:

24 The claimant testified that he was prescribed a cane about  
25 two months ago by [doctor] Harrison (he is a physician’s  
26 assistant, not a doctor); however, the evidence does not show that  
27 a cane was ever prescribed or that the claimant medically needed

---

28 <sup>31</sup> See, e.g., Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (citing Johnson v. Shalala, 60 F.3d 1428,  
1434 (9th Cir. 1995)).

1 to use a cane. The treatment notes show that the claimant has  
2 normal gait, good mobility, lack of neurological deficits, and  
3 normal muscle strength, which are inconsistent with a need for a  
4 cane (Ex. 9F, pp. 8, 17, 49). Dr. Dao found that an assistive  
5 device for ambulation was not necessary (Ex. 6F, p. 6).  
6 Accordingly, the undersigned has discredited the claimant's  
7 allegation regarding the use of a cane. In addition, the claimant  
8 has received conservative treatment for his musculoskeletal  
9 impairments consisting of pain medications and range of motion  
10 exercises. He has only received treatment from a primary care  
11 provider. His visits to the emergency room are not for emergent  
12 purposes, as he drives himself to the hospital and typically asks  
13 for pain medication. Moreover, he has been advised to control  
14 his diet and walk to lose weight. The lack of more aggressive  
15 treatment, possible surgical intervention, alternative treatment  
16 modalities, or treatment by a specialist at this point suggests the  
17 claimant's symptoms and limitations were not as severe as he  
18 alleged. The claimant testified that his doctor told him he would  
19 need surgery and has referred him to a specialist; however, since  
20 the record does not currently corroborate this information, the  
21 undersigned cannot speculate as to the claimant's future findings  
22 and limitations.

23 (ECF No. 10-2 at 33.)

24 Plaintiff contends that his treatment cannot be described as conservative in light of  
25 his knee surgery, history of bladder cancer with an internal catheter and urine bag, and use  
26 of narcotic pain medication. (ECF No. 14 at 9.) The Court is not persuaded. Plaintiff  
27 underwent knee surgery in 1971 and his bladder cancer was in remission during the  
28 relevant time period (June 1, 2012 through June 30, 2014) – these facts were considered  
by the ALJ and they do not negate the reasonableness of the ALJ's reasoned conclusion  
that Plaintiff's treatment as a whole during the relevant time period was routine,  
conservative, and mostly nonemergent. Further, with respect to Plaintiff's use of narcotics  
for his pain, the ALJ fairly summarized the portions of the record showing that Plaintiff's  
primary care physicians did not regularly prescribe Plaintiff narcotics (e.g. Vicodin and

1 Norco).<sup>32</sup> Thus, substantial evidence supports the ALJ’s reasoned conclusion that  
2 Plaintiff’s treatment plan for pain was conservative and narcotic pain medication was not  
3 part of Plaintiff’s regular treatment plan.<sup>33</sup> Therefore, Plaintiff’s third argument for  
4 summary judgment fails because Plaintiff’s conservative treatment of his pain during the  
5 relevant time period was a specific, clear and convincing reason to find Plaintiff’s  
6 allegations of debilitating pain less than fully credible.

### 7 **E. Daily Activities**

8 Following Plaintiff’s third argument, Plaintiff adds an argument that the ALJ erred  
9 in using Plaintiff’s descriptions of his activity level as a basis to find Plaintiff’s subjective  
10 complaints were less than fully credible.<sup>34</sup> (ECF No. 14 at 11–12.) Plaintiff’s reported  
11 daily activities included that he can drive, use public transportation, shop, climb stairs,  
12 handle personal care tasks and his finances, make sandwiches and heat leftovers, and  
13 accomplish some chores such as sweeping, and washing dishes and doing laundry. (ECF  
14 No. 10-2 at 30.) However, the ALJ did **not** rely on Plaintiff’s descriptions of his activity  
15  
16  
17

---

18 <sup>32</sup> On this issue, the ALJ reviewed Plaintiff’s medications and noted that in June 2012, Plaintiff’s  
19 “medications consisted of only multivitamins and aspirin” (ECF No. 10-2 at 31); in August 2012, Plaintiff  
20 was “prescribed Motrin” (id.); in October 2013, Plaintiff reported taking Motrin and Tramadol (id.); in  
21 December 2013, Plaintiff “requested Vicodin, but the doctor encouraged him to take ibuprofen” (id. at  
22 32); and in February 2014, an emergency room visit for left knee pain resulted in “a prescription for pain  
23 medication” – Norco – “until he could follow up with his primary care physician for his chronic problems”  
24 (id.; ECF No. 10-7 at 128).

25 <sup>33</sup> See *Batson*, 359 F.3d at 1198 (“When the evidence before the ALJ is subject to more than one rational  
26 interpretation, [courts] must defer to the ALJ’s conclusion.”).

27 <sup>34</sup> Plaintiff’s counsel uses the words “First,” “Second,” and “Third” to identify and transition between  
28 Plaintiff’s three arguments in support of his motion for summary judgment. (ECF No. 14.) No such  
transition is used to identify Plaintiff’s argument concerning the ALJ’s reliance on Plaintiff’s daily  
activities. Although Plaintiff perhaps should have been clearer, the Court considers the argument to have  
been sufficiently distinctly made to support addressing it here. See *Indep. Towers of Wash. v. Washington*,  
350 F.3d 925, 929–30 (9th Cir. 2003) (courts “review only issues which are argued specifically and  
distinctly”); *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (declining  
to address whether the ALJ properly rejected claims of memory problems because the plaintiff “failed to  
argue this issue with any specificity in his briefing”).

1 level as a basis to discredit Plaintiff's subjective complaints.<sup>35</sup> Rather, the ALJ found that  
2 "[s]ome of the mental abilities and social interactions required in order to perform these  
3 activities are the same as those necessary for obtaining and maintaining employment and  
4 are consistent with the residual functional capacity herein." (Id.) Thus, Plaintiff's  
5 argument fails. Plaintiff's reported daily activities are part of the substantial evidence in  
6 the record that supports the ALJ's residual functional capacity determination.

7 In sum, the ALJ concluded that Plaintiff's subjective complaints were "less than  
8 fully credible" by relying in detail on the entire record. The ALJ relied on the medical  
9 record and opinions by government doctors, but did not reject Plaintiff's subjective  
10 complaints based solely on a lack of medical evidence to fully corroborate the alleged  
11 severity of pain. The ALJ also relied on the treatment that Plaintiff had undertaken.  
12 Further, the ALJ's residual functional capacity determination was supported by evidence  
13 concerning Plaintiff's daily activities. After thoroughly reviewing the record, this Court is  
14 satisfied that the ALJ's decision is supported by substantial evidence and is free of legal  
15 error. Accordingly, this Court "may not substitute [its] judgment for that of the  
16 Commissioner" and recommends that the ALJ's decision to deny Plaintiff's application for  
17 social security benefits be affirmed.<sup>36</sup>

## 18 **V. CONCLUSION**

19 For the reasons stated above, the Court **RECOMMENDS** the following:

20 (1) Plaintiff's motion for summary judgment (ECF No. 14) be **DENIED**;

21 (2) The Commissioner's cross-motion for summary judgment (ECF No. 15) be  
22 **GRANTED**.

---

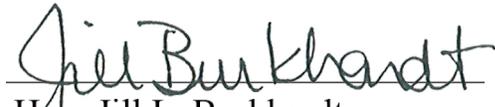
23  
24  
25  
26 <sup>35</sup> Consequently, the Court makes no determination as to whether Plaintiff's reported daily activities  
27 constitute an additional specific, clear and convincing reason to reject Plaintiff's subjective claims of  
28 debilitating symptoms.

<sup>36</sup> *Verduzco v. Apfel*, 188 F.3d 1087, 1089 (9th Cir. 1999) (citing *Reddick v. Chater*, 157 F.3d 715, 721  
(9th Cir. 1998)).

1 IT IS HEREBY ORDERED that any written objections to this Report and  
2 Recommendation must be filed with the Court and served on all parties **no later than July**  
3 **7, 2017**. The document should be captioned “Objections to Report and Recommendation.”

4 IT IS FURTHER ORDERED that any reply to the objections shall be filed with the  
5 Court and served on all parties no later than **July 14, 2017**. The parties are advised that  
6 failure to file objections within the specified time may waive the right to raise those  
7 objections on appeal of the Court’s order.<sup>37</sup>

8 Dated: June 21, 2017

9   
10 Hon. Jill L. Burkhardt  
11 United States Magistrate Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

28 \_\_\_\_\_  
<sup>37</sup> Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).