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7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
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10 Michael Anthony Della,

11 Plaintiff,

12 v.

13 Nancy A. Berryhill,  
14 Acting Commissioner of Social  
15 Security,

16 Defendant.  
17

Case No.: 17cv1374 AJB (PCL)

**REPORT AND  
RECOMMENDATION:**

**DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT (doc. 10) and**

**GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT (doc. 15).**

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19 **I. INTRODUCTION**

20 Plaintiff seeks judicial review of the Acting Commissioner of Social Security's  
21 final decision denying Plaintiff's application for disability insurance benefits. (Doc. 1.)  
22 Plaintiff filed a Motion for Summary Judgment (doc. 10), and Defendant filed a Cross-  
23 Motion for Summary Judgment (doc. 15). The Honorable Anthony Battaglia referred the  
24 matter to the undersigned judge for Report and Recommendation pursuant to 28 U.S.C. §  
25 636(b)(1)(B).  
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1 After a thorough review of all filings and the entire record submitted in this matter,  
2 this Court recommends that Plaintiff's Motion for Summary Judgment be DENIED and  
3 that Defendant's Cross-Motion for Summary Judgment be GRANTED.  
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5 **II. BACKGROUND**

6 Plaintiff Michael Della filed an application for Disability Insurance Benefits and  
7 Supplemental Security Income on July 16, 2015, alleging an inability to work beginning  
8 September 1, 2014. (A.R. 19.) The matter was initially heard by ALJ Robin L. Henrie on  
9 October 21, 2016. (A.R. 19.) Plaintiff, along with Nelly Katsell, an impartial vocational  
10 expert, and Roberta Della, Plaintiff's mother, appeared at the hearing. (Id.) The ALJ  
11 issued an unfavorable decision on December 27, 2016. (A.R. 19-32.)  
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14 In her decision, the ALJ made the following findings:

- 15 1. The claimant has not engaged in substantial gainful activity since September 1,  
16 2014, the alleged onset date.
- 17 2. The claimant has the following severe impairments: adjustment disorder with  
18 anxiety; left knee degenerative joint disease; right shoulder degenerative joint  
19 disease; chronic sprains in the cervical, thoracic, and lumber spine; fibromyalgia;  
20 and somatoform disorders.
- 21 3. The claimant does not have an impairment or combination of impairments that  
22 meet or medically equals one of the listed impairments in 20 CFR Part 404,  
23 Subpart P, Appendix 1. The claimant has the residual functional capacity (RFC)  
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1 to perform the full range of sedentary unskilled work.

2 4. The claimant is unable to perform past relevant work.

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4 5. Considering the claimant's age, education, work experience, and RFC, there are  
5 jobs that exist in significant numbers in the national economy that the claimant  
6 can perform.

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8 6. The claimant has not been under a disability as defined by the Social Security  
9 Act from September 1, 2014 through the date of the decision.

10 Plaintiff appealed, but the Appeal's Council issued an unfavorable decision. Plaintiff  
11 filed this action on July 6, 2017. (Doc. 1.) Defendant answered on September 8, 2017.  
12 (Doc. 7.) Plaintiff filed a motion for summary judgment (doc. 10), and Defendant filed a  
13 cross motion for summary judgment in opposition to Plaintiff's motion for summary  
14 judgment (doc. 15). This report and recommendation addresses both motions pending  
15 before this court.  
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18 **III. ADMINISTRATIVE RECORD**

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20 Plaintiff was born in September 1985. (A.R. 652.) Plaintiff enlisted with the United  
21 States Navy in July 2008 and served as an U.S. Corpsman deployed in Afghanistan from  
22 January to August 2010. (A.R. 883, 884.) Plaintiff was attached to an explosive ordinance  
23 disposal unit (EOD). (Id.) In addition to the regular trauma of dealing with the full range  
24 of combat casualties, Plaintiff was a victim of three events over the span of three months.  
25 (Id.) The first event occurred in May 2010. (Id.) Plaintiff was on foot patrol when an IED  
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1 detonated less than 100 feet away from him. Plaintiff did not sustain any visible physical  
2 injuries, but he did experience a headache for over 24 hours. (Id.) The second event  
3 occurred in June 2010. (Id.) Plaintiff was on foot patrol when another large IED was  
4 detonated less than 100 feet away from him. He sustained a minor groin injury. (Id.) The  
5 third event occurred in July 2010. (Id.) Plaintiff was seated in the rear of the vehicle. The  
6 vehicle drove over and detonated an IED. The IED ripped off the wheel under where  
7 Plaintiff was seated. Plaintiff had difficulty recalling the events from later that day, but he  
8 recalled experiencing a headache for approximately 24 hours and ringing in his ears for  
9 approximately 3 hours after the explosion. (Id.)

13           Following the third event, Plaintiff has been dealing with both mental and physical  
14 issues. Plaintiff has both anxiety and PTSD, as well as cognitive issues such as losing his  
15 memory, staying on task, completing tasks, and feeling irritability and anger towards  
16 others. (Id.) Plaintiff stated that he has intrusive memories when holding his daughter, from  
17 a time when he saw three pregnant women “blown up in a car;” however, even after having  
18 such thoughts, he told his doctor that he still can get a solid five hours of restful sleep after  
19 listening to his daughter’s lullaby. (A.R. 1441.) Plaintiff has physical pain including  
20 debilitating headaches, low back pain, shoulder pain, and loss of mobility. (A.R. 652.) He  
21 has been treated for combat related PTSD, fibromyalgia, chronic pain, insomnia,  
22 flashbacks, nightmares, irritability, low back pain, left/right shoulder pain, left knee pain,  
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1 low testosterone, short term memory loss, decreased concentration/focus, migraine  
2 headaches, acid reflux, hypertension systemic, and major depressive disorder. (A.R. 297.)  
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4 On April 15, 2016, the Department of Veteran Affairs determined that Plaintiff's  
5 mental state disability most closely approximates the criteria for 50 percent disability  
6 evaluation, but found that a higher evaluation of 70 percent was not warranted for post-  
7 traumatic stress disorder as there was not enough evidence of occupational and social  
8 impairments from his symptoms. (A.R. 335.) In April 2014, Plaintiff had complaints of left  
9 knee pain and fatigue. (A.R. 404.) In examinations, Plaintiff had evidence of tenderness  
10 and pain in his left shoulder without any weakness and without any visible abnormality on  
11 imaging studies. (A.R. 496, 500.) Plaintiff also had complaints of headaches, signs of  
12 limitations in range of motion, and a slight decrease in strength on occasion. (A.R. 429,  
13 461.) Plaintiff received physical therapy for his shoulder and for lower back pain, which  
14 he had complained about since 2011. (A.R. 501.) Eventually, Plaintiff's providers  
15 determined his complaints of pain related to his spine were more consistent with spasms  
16 than strictly with degenerative changes. (A.R. 1011.) Eventually, Plaintiff's providers  
17 indicated that Plaintiff's chronic pain and fatigue would be better explained with a  
18 diagnosis of fibromyalgia. (A.R. 1352.)  
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24 In November 2015, Plaintiff had a consultative orthopedic examination with Thomas  
25 Sabourin, M.D. (A.R. 1778, 1786.) At the time, Plaintiff had normal strength, normal  
26 reflexes, normal sensation, and normal range of motion. He had mild tenderness in his  
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1 knee, but overall, his examination was devoid of abnormalities. In general, physical  
2 examinations showed some signs of impairment, such as tenderness and limitations in  
3 range of motion, but not more serious signs such as decreased sensation or abnormal  
4 reflexes. An x-ray of Plaintiff's brain showed no abnormality to explain Plaintiff's  
5 headaches. (A.R. 697, 848.) Plaintiff's shoulder showed signs of worsening slightly, with  
6 Plaintiff exhibiting pain in Brien and Neers testing, but objective scans initially continued  
7 to show no abnormality. (A.R. 936, 937.) This led to a recommendation that Plaintiff try a  
8 cortisone injection, but Plaintiff was not interested in advanced care beyond that level. A  
9 later scan did show mild to moderate changes in the acromioclavicular joint. (A.R. 1979,  
10 80.) When Plaintiff's provider tried ketamine infusions to treat his pain, he reported  
11 dramatic improvement. (A.R. 2003, 2056, 59.)

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16         Around the alleged onset date, Plaintiff had complaints of mild anxiety without panic  
17 symptoms and reported doing well in school, though he did complain of increased sleep  
18 disturbance. (A.R. 373 375.) During the mental status examination, Plaintiff demonstrated  
19 no significant abnormalities and was diagnosed with adjustment disorder with anxiety. He  
20 reported improvement with medication, though he still had anxiety complaints related to  
21 his depression symptoms. (A.R. 652-655.) He had ongoing care for his various diagnosis,  
22 with minimal changes in reported functioning, though the objective observations continued  
23 to show few serious abnormalities. (A.R. 1048.)  
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1 On occasion, Plaintiff reported complaints of irritability associated with thoughts  
2 of harming others. (A.R. 996.) However, other serious symptoms, such as nightmares,  
3 were reported to be decreasing by March 2015. (A.R. 976.) He began reporting  
4 intermittent panic attacks in 2015, stating they started in March, and he identified being  
5 in crowds and in public as stressors. (A.R. 1643.) In October 2015, Plaintiff attended the  
6 archery and golf programs, and he showed motivation and socialized with participants,  
7 staff and volunteers. (A.R. 1832.) While Plaintiff was largely being treated for post-  
8 traumatic stress disorder, another provider in September 2015 felt that somatoform  
9 disorder, NOS, was a better diagnosis, as Plaintiff's symptoms were not coinciding with  
10 service-related stressors. (A.R. 2708.) For example, Plaintiff did not report sleep  
11 problems until April 2014. (Id.) The provider also felt that Plaintiff's headaches were  
12 psychologically medicated. (Id.) In general, Plaintiff consistently presented with normal  
13 concentration, judgment, thought process, and memory. (A.R. 2405-2604.) He continued  
14 to report symptoms, and he did frequently appear with an altered mood, but treatment  
15 notes did not reflect serious symptoms such as suicide attempts, hallucinations, or lack of  
16 proper orientation. In some instances, Plaintiff reported activities inconsistent with his  
17 allegations. For example, in August 2015, Plaintiff reported going to tai chi, sleeping  
18 seven to eight hours, attending a surfing clinic and archery clinic, lifting weights, and  
19 swimming. (A.R. 2847, 373, 425, 1299, 1591-92, 1726, 2205-2402, 2405-2604.) Plaintiff  
20 also reported taking online classes, purchasing a condo, moving, experiencing his wife's  
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1 pregnancy, and bringing a new baby into the household. (A.R. 622.) Plaintiff had a  
2 mental health examination conducted by Michelle Mahone, Ph.D., in May 2015 at the  
3 request of his psychologist Dr. Christian Carter. (A.R. 882.) The results showed signs of  
4 greater mental limitations than previously indicated in the record; however, the  
5 psychologist noted that Plaintiff's responses were atypical and inconsistent, such that the  
6 embedded tests of validity were well outside of normative ranges, and the results were  
7 therefore not valid or reliable. (A.R. 882-894, 888.) The psychologist noted that Plaintiff  
8 endorsed a much greater than average number of symptoms that are rarely described by  
9 individuals with genuine severe psychopathology. (A.R. 888.) He also endorsed an  
10 atypical combination of symptoms that is associated with non-credible reporting of  
11 somatic and/or cognitive symptoms. (A.R. 888.) Bolstering the psychologist's findings,  
12 the record showed that Plaintiff reported in mid-2015 that even when he woke during the  
13 night, he could get back to sleep within minutes and that he was able to travel out of town  
14 to visit family. (A.R. 1619.)

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20       Based on this record, the ALJ found the following: Plaintiff has not been employed  
21 since September 1, 2014. (A.R. 21.) Plaintiff has the following severe impairments:  
22 adjustment disorder with anxiety; left knee degenerative joint disease; right shoulder  
23 degenerative joint disease; chronic sprains in the cervical thoracic and lumbar spine;  
24 fibromyalgia; and somatoform disorders. (A.R. 21.) Despite these limitations, Plaintiff  
25 had the residual functional capacity to perform the full range of sedentary unskilled work,  
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1 with the following limitations: not lifting more than 10 pounds at a time, on more than an  
2 occasional basis; not lifting or carrying articles weighing more than 10 pounds, on more  
3 than an occasional basis; not standing or walking more than 30 minutes at one time, not  
4 totaling more than 2 total hours in an 8-hour workday; not sitting more than 30 minutes at  
5 one time, not totaling more than 6 total hours in an 8-hour work day; not working in a  
6 stressful environment; and not working at more than a low concentration level and no  
7 more than a low memory level. (A.R. 24.)  
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10 The ALJ found that Plaintiff's statements concerning the intensity, persistence, and  
11 limiting effects of his symptoms as he described them to medical providers and to the  
12 Social Security Administration were not entirely consistent with the medical evidence  
13 and other evidence in the record. (A.R. 25.) Although one of Plaintiff's providers, Dr.  
14 Robert Sheu, M.D. opined in May 2016, which was one year after treating Plaintiff, that  
15 Plaintiff has standing limitations, would be off task, and would be absent once per month  
16 but otherwise would be capable of performing low stress work, the ALJ discounted Dr.  
17 Sheu's opinion regarding absences as not being consistent with treatment notes showing  
18 limited abnormalities. (A.R. 28.) With regard to Plaintiff's other provider, Stephanie  
19 Gaines, Psy.D., who opined in January 2016 that Plaintiff had limitations from April  
20 2015 onward, including marked limitations in traveling and performing activities within a  
21 schedule and moderate limitations in working with others and completing a normal  
22 workweek, the ALJ gave her opinion little to no weight because the limitations as  
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1 described were not consistent with treatment notes and the evidence showing that  
2 Plaintiff's condition remained largely unchanged. (A.R. 28.) Finally with regard to  
3 consultative orthopedic physician Dr. Sabourin's opinion that Plaintiff could perform  
4 medium work with postural and manipulative limitations, the ALJ found that Plaintiff  
5 had additional limitations beyond what Dr. Sabourin opined regarding sitting and  
6 standing and that Plaintiff was limited to sedentary unskilled work. Based on this RFC  
7 and the vocational expert's opinion that there were low skill sedentary jobs in the national  
8 economy that Plaintiff could perform, the ALJ found that Plaintiff was capable of making  
9 a successful adjustment to other work such as a document preparer or eye-glass polisher.  
10 (A.R. 31.) Thus, the ALJ concluded that Plaintiff was not disabled from September 1,  
11 2014 to December 27, 2016. (A.R. 31-32.)  
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#### 13 **IV. STANDARD OF REVIEW**

14 To qualify for disability benefits under the Social Security Act, an applicant must  
15 show that: (1) he suffers from a medically determinable impairment that can be expected  
16 to result in death or that has lasted or can be expected to last for a continuous period of  
17 twelve months or more, and (2) the impairment renders the applicant incapable of  
18 performing the work that he previously performed or any other substantially gainful  
19 employment that exists in the national economy. See 42 U.S.C.A. § 423 (d)(1)(A), 2(A)  
20 (West 2004). An applicant must meet both requirements to be "disabled." Id.  
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1           A. Sequential Evaluation of Impairments

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

21           Sections 206(g) and 1631 (c)(3) of the Social Security Act allow unsuccessful  
22 applicants to seek judicial review of the Commissioner’s final agency decision. 42  
23 U.S.C.A. §§ 405(g), 1383(c)(3). The scope of judicial review is limited. The  
24 Commissioner’s final decision should not be disturbed unless: (1) the ALJ’s findings are  
25 based on legal error or (2) are not supported by substantial evidence in the record as a  
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1 whole. Schneider v. Comm’r of Soc. Sec. Admin., 223 F.3d 968, 973 (9<sup>th</sup> Cir. 2000).  
2 Substantial evidence means “more than a mere scintilla but less than a preponderance; it  
3 is such relevant evidence as a reasonable mind might accept as adequate to support a  
4 conclusion.” Andrews v. Shalala, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). The Court must  
5 consider the record as a whole, weighing both the evidence that supports and detracts  
6 from the ALJ’s conclusion. See Mayes v. Massanari, 276 F.3d 453, 459 (9<sup>th</sup> Cir. 2001);  
7 Desrosiers v. Sec’y of Health & Human Servs., 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). “The  
8 ALJ is responsible for determining credibility, resolving conflicts in medical testimony,  
9 and for resolving ambiguities.” Vasquez v. Astrue, 547 F.3d 1101, 1104 (9<sup>th</sup> Cir. 2008)  
10 (quoting Andrews, 53 F.3d at 1039). Where the evidence is susceptible to more than one  
11 rational interpretation, the ALJ’s decision must be affirmed. Id. (citation and quotations  
12 omitted).  
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17 Section 405(g) permits this Court to enter a judgment affirming, modifying, or  
18 reversing the Commissioner’s decision. 42 U.S.C.A. § 405(g). This matter may also be  
19 remanded to the Social Security Administration for further proceedings. Id. Furthermore,  
20 “[a] decision of the ALJ will not be reversed for errors that are harmless.” Burch v.  
21 Barnhart, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005).  
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## 24 **V. DISCUSSION**

25 In his motion, Plaintiff argues that the ALJ’s decision improperly gave little to no  
26 weight to the treating and examining physicians’ opinions and gave too much weight to  
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1 the non-treating physicians and the vocational expert in finding Plaintiff not disabled.  
2 (Doc. 10, at 11.) Ultimately, Plaintiff argues that the ALJ's decision was not supported by  
3 substantial evidence because the ALJ ignored Plaintiff's physical, mental, and emotional  
4 diagnoses and how they affect his day-to-day living. (Doc. 10, at 13-14.) Defendants  
5 argue that the ALJ properly considered the medical opinion evidence, properly  
6 discounted the treating physicians' opinions, and supported her decision with substantial  
7 evidence. (Doc. 15.)  
8

10           Disability under the Social Security Act is defined as the "inability to engage in  
11 any substantial activity by reason of any medically determinable physical or mental  
12 impairment or combination of impairments that can be expected to result in death or that  
13 has lasted or can be expected to last for a continuous period of not less than 12 months."  
14 42 U.S.C. § 432(d)(1)(A). Ordinarily the opinions of a treating physician who is familiar  
15 with the claimant's injuries, treatments, and responses should be accorded considerable  
16 weight in determining disability. In evaluating medical opinions, the regulations  
17 distinguish among three types of physicians: 1) treating physicians; 2) examining  
18 physicians; and 3) non-examining physicians. 20 C.F.R. § 404.1527. "Generally, a  
19 treating physician's opinion carries more weight than an examining physician's, and an  
20 examining physician's opinion carries more weight than a reviewing physician's."  
21 Holohan v. Massanari, 246 F.3d 1195, 1202 (9<sup>th</sup> Cir. 2001). However, the ALJ is not  
22 necessarily bound by the opinion of the treating physician. Smolen v. Chater, 80 F.3d  
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1 1273, 1285 (9<sup>th</sup> Cir. 1996). If a treating physician’s opinion is contradicted by other  
2 opinions, then the ALJ can reject the treating physician’s opinion by providing specific  
3 and legitimate reasons supported by substantial evidence for doing so. Id. Also, “[t]he  
4 ALJ need not accept the opinion of any physician, including a treating physician, if that  
5 opinion is brief, conclusory, and inadequately supported by clinical findings.” Thomas v.  
6 Barnhart, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002). Furthermore, as an ALJ can reject a  
7 claimant’s descriptions claiming disability upon “(1) finding evidence of malingering or  
8 (2) expressing clear and convincing reasons for doing so,” Benton ex rel. Benton v.  
9 Barnhart, 331 F.3d 1030, 1040 (9<sup>th</sup> Cir. 2003), an ALJ can, in turn, discount a treating  
10 physician’s opinion that is based on those less than credible statements made by the  
11 claimant. Bray v. Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1228 (9<sup>th</sup> Cir. 2009).

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13 Here, the ALJ properly developed Plaintiff’s RFC based on the ALJ’s credibility  
14 findings as well as the objective medical evidence, examination findings, and opinion  
15 evidence. The ALJ gave several reasons for discounting two of Plaintiff’s providers, who  
16 found greater limitations for Plaintiff than what the ALJ ultimately found based on the  
17 record as a whole. With regard to Plaintiff’s provider, Dr. Robert Sheu, the ALJ gave  
18 some weight to his opinion that Plaintiff could perform low stress work and that he had  
19 standing limitations but disagreed that Plaintiff would be off task and would be absent  
20 once per month. (A.R. 28.) The ALJ pointed out that Dr. Sheu’s overall diagnosis was  
21 not supported by the treatment notes; in his checklist, Dr. Sheu did not discuss objective  
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1 tests performed or provide records of such tests to support his overall opinion. (A.R.  
2 2915-2919.) Moreover, other limitations opined by Dr. Sheu such as Plaintiff's muscle  
3 weakness, chronic fatigue, and inability to walk more than five minutes at a time was  
4 contradicted by the record showing Plaintiff's participation in tai chi, surfing,  
5 weightlifting, and swimming. (A.R. 27, 2918.)  
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8 With regard to Plaintiff's provider, Stephanie Gaines, Psy.D., the ALJ gave little to  
9 no weight to her opinion that Plaintiff had marked limitations in traveling and performing  
10 activities within a schedule. (A.R. 28.) The ALJ again pointed out that Dr. Gaines'  
11 opinion was inconsistent with the record; importantly, instead of discussing objective  
12 tests performed to support her opinion, she simply provided her opinions in check-box  
13 form. (A.R. 2056-2059.) See Batson v. Comm'r of Soc. Sec., 359 F.3d 1190, 1195 (9<sup>th</sup>  
14 Cir. 2004) (the ALJ properly discounted two treating doctor's opinions because they were  
15 in the form of a checklist, did not have supportive objective evidence, were contradicted  
16 by other statements and assessments of the claimant's medical condition and were based  
17 on the claimant's subjective descriptions of pain.) Similarly, Plaintiff's daily activities of  
18 going to tai chi, attending surfing and archery clinics, weightlifting and swimming  
19 contradicted Dr. Gaines' opinion that Plaintiff had marked limitations in traveling and  
20 performing activities within a schedule.  
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25 Both Dr. Gaines and Dr. Sheu's opinions of Plaintiff's limitations were also in stark  
26 contrast to the opinion of consultative examining physician Dr. Sabourin, who stated that  
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1 Plaintiff had a normal gait and posture and that despite complaints of pain, Plaintiff's range  
2 of motion in his neck and cervical spine were largely normal and his muscle strength was  
3 full (5/5). (A.R. 1780-1783.) Plaintiff's physical examination failed to show more serious  
4 signs of impairment such as decreased sensation or abnormal reflexes. (A.R. 1778, 1786.)  
5 An x-ray of Plaintiff's brain showed no abnormality to explain Plaintiff's headaches. (A.R.  
6 697, 848.) Plaintiff's shoulder showed signs of worsening slightly, with Plaintiff exhibiting  
7 pain in Brien and Neers testing, but objective scans continued to show no abnormality.  
8 (A.R. 936, 937.) This led to a recommendation that Plaintiff try a cortisone injection for  
9 joint pain, but Plaintiff was not interested in advanced care beyond that level. When  
10 Plaintiff's provider tried ketamine infusions to treat his fibromyalgia pain, he reported  
11 dramatic improvement. (A.R. 2003, 2056, 59.)

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16 In October 2015, Plaintiff attended the archery and golf programs, and he showed  
17 motivation and socialized with participants, staff and volunteers. (A.R. 1832.) While  
18 Plaintiff was largely being treated for post-traumatic stress disorder, another provider in  
19 September 2015 felt that somatoform disorder, NOS, was a better diagnosis, as Plaintiff's  
20 symptoms were not coinciding with service-related stressors. (A.R. 2708.) For example,  
21 Plaintiff did not report sleep problems until April 2014. (Id.) The provider also felt that  
22 Plaintiff's headaches were psychologically medicated. (Id.) In general, Plaintiff  
23 consistently presented with normal concentration, judgment, thought process, and  
24 memory. (A.R. 2405-2604.) He continued to report symptoms, and he did frequently  
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1 appear with an altered mood, but treatment notes did not reflect serious symptoms such  
2 as suicide attempts, hallucinations, or lack of proper orientation. Furthermore, in some  
3 instances, Plaintiff reported activities inconsistent with his allegations. For example, in  
4 August 2015, Plaintiff reported going to tai chi, sleeping seven to eight hours, attending a  
5 surfing clinic and archery clinic, lifting weights, and swimming. (A.R. 2847, 373, 425,  
6 1299, 1591-92, 1726, 2205-2402, 2405-2604.) Plaintiff also reported taking online  
7 classes, purchasing a condo, moving, experiencing his wife's pregnancy, and bringing a  
8 new baby into the household. (A.R. 622.)  
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12 Most critically, the ALJ properly discounted Plaintiff's credibility because of  
13 evidence of Plaintiff's malingering in the record. (A.R. 27.) Plaintiff had a mental health  
14 examination conducted by Michelle Mahone, Ph.D., in May 2015 at the request of his  
15 psychologist Dr. Christian Carter. (A.R. 882.) The results showed signs of greater mental  
16 limitations than previously indicated in the record; however, the psychologist noted that  
17 Plaintiff's responses were atypical and inconsistent, such that the embedded tests of  
18 validity were well outside of normative ranges, and the results were therefore not valid or  
19 reliable. (A.R. 882-894, 888.) The psychologist noted that Plaintiff endorsed a much  
20 greater than average number of symptoms that are rarely described by individuals with  
21 genuine severe psychopathology. (A.R. 888.) He also endorsed an atypical combination  
22 of symptoms that is associated with non-credible reporting of somatic and/or cognitive  
23 symptoms. (A.R. 888.) Bolstering the psychologist's findings, the record showed that  
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1 Plaintiff reported in mid-2015 that even when he woke during the night, he could get  
2 back to sleep within minutes and that he was able to travel out of town to visit family.

3 (A.R. 1619.)  
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5 As the ALJ is responsible for determining credibility, resolving conflicts in  
6 medical testimony, and for resolving ambiguities even where the evidence is susceptible  
7 to more than one rational interpretation, the ALJ's decision must be affirmed when there  
8 is substantial evidence supporting her decision and her decision is free from legal error.  
9 In this case, the ALJ properly discounted two of Plaintiff's treating physicians' opinions  
10 because they contradicted the treatment notes and were generally unsubstantiated. The  
11 ALJ also properly undermined Plaintiff's credibility with evidence of Plaintiff's  
12 malingering in the record. In sum, the ALJ's decision finding Plaintiff not disabled was  
13 supported by substantial evidence in the record. Thus, Plaintiff's summary judgment  
14 motion should be denied and Defendant's summary judgment motion should be granted.  
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## 18 **VI. CONCLUSION**

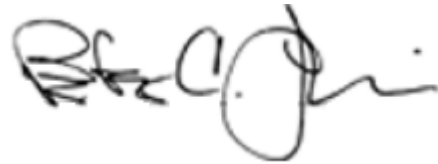
19 For the reasons outlined above, **IT IS HEREBY RECOMMENDED** that the  
20 Court issue an Order: (1) approving and adopting this Report and Recommendation, and  
21 (2) directing that Judgment be entered **GRANTING DEFENDENT'S MOTION AND**  
22 **DENYING PLAINTIFF'S FOR SUMMARY JUDGMENT.**  
23  
24

25 Any party may file written objections with the Court and serve a copy on all parties  
26 on or before **March 22, 2018**. The document should be captioned "Objections to Report  
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28

1 and Recommendation.” Any reply to the Objections shall be served and filed on or  
2 before **March 30, 2018**. The parties are advised that failure to file objections within the  
3  
4 specific time may waive the right to appeal the district court’s order. Martinez v. Ylst,  
5 951 F.2d 1153, 1157 (9th Cir. 1991).

6 **IT IS SO ORDERED.**

7 DATE: March 7, 2018  
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11 Peter C. Lewis  
12 United States Magistrate Judge  
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