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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PAUL V.,

Plaintiff,

v.

KILOLO KIJAKAZI,<sup>1</sup> *Acting  
Commissioner of Social Security,*

Defendant.

Case No.: 21cv0643-MDD

**ORDER RESOLVING JOINT  
MOTION FOR JUDICIAL REVIEW  
AND AFFIRMING THE  
COMMISSIONER'S FINAL  
DECISION**

[ECF No. 24]

Paul V. ("Plaintiff") filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final administrative decision of the Commissioner of the Social Security Administration ("Commissioner") regarding Plaintiff's Title XVI application for Supplemental Security Income. (ECF No. 1). The Administrative Law Judge ("ALJ") found that Plaintiff was not disabled and

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<sup>1</sup> Kilolo Kijakazi became Acting Commissioner of Social Security on July 9, 2021 and is substituted for Andrew M. Saul as the Defendant in this action. *See* 42 U.S.C. § 405(g); Fed. R. Civ. P. 25(d).

1 denied Plaintiff's claim for benefits from September 1, 2011, through the date  
2 of the decision, February 11, 2020. (AR at 44). On August 9, 2022, the  
3 parties filed a Joint Motion for Judicial Review of the ALJ's decision. (ECF  
4 No. 24).

5 For the reasons expressed herein, the Court **AFFIRMS** the  
6 Commissioner's decision.

## 7 **I. BACKGROUND**

### 8 **A. Procedural History**

9 Plaintiff applied for Title II Social Security Disability Insurance  
10 benefits and subsequent Title XVI Supplemental Security Income benefits on  
11 February 4, 2013. (Administrative Record "AR" at 136).<sup>2</sup> His initial  
12 application alleged disability beginning September 1, 2011, when he was 39  
13 years old. (*Id.* at 42, 136). These claims were initially denied on July 31,  
14 2013, and upon reconsideration on March 7, 2014. (AR at 163-82). On June  
15 8, 2014, Plaintiff filed a written request for a hearing. (AR at 251). A  
16 hearing date was set for May 16, 2016, but Plaintiff requested that the  
17 hearing be rescheduled. (AR at 276, 288). Plaintiff's request to reschedule  
18 was denied on April 28, 2016, and Plaintiff subsequently failed to appear at  
19 the hearing, which resulted in an Order of Dismissal on May 26, 2016. (AR  
20 at 205-06). On January 27, 2017, upon written request for review, the  
21 Appeals Council vacated the dismissal and remanded the matter back to the  
22 ALJ to give Plaintiff an opportunity for a hearing. (AR at 209-10).

23 The hearing on remand occurred October 5, 2017, before ALJ Robin  
24 Henrie. (AR at 214-24). On January 31, 2018, ALJ Henrie issued an  
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27 <sup>2</sup> "AR" refers to the Certified Administrative Record filed on November 16, 2021. (ECF Nos. 12-13).

1 unfavorable decision and found that Plaintiff was not disabled under the  
2 Social Security Act. (AR at 223-24). On February 12, 2019, upon written  
3 request for review, the Appeals Council remanded the case for additional  
4 proceedings. (AR at 234). The Appeals Council vacated the 2018 hearing  
5 decision due to errors of law after ALJ Henrie failed to consider supplemental  
6 evidence that Plaintiff provided. (*Id.*).

7 A subsequent hearing on remand was held on January 29, 2020, before  
8 ALJ Kevin Messer. Plaintiff appeared at the hearing and was represented by  
9 his attorney, Laura Krank. (AR at 31). Testimony was taken from Plaintiff  
10 and Vocational Expert (“VE”) Connie Guillory. (AR at 55-96).

11 On February 11, 2020, ALJ Messer issued an unfavorable decision,  
12 concluding that Plaintiff was not disabled based on his capability “of making  
13 a successful adjustment to other work that exists in significant numbers in  
14 the national economy.” (AR at 31-44). Plaintiff requested Appeals Council  
15 review, which was denied by notice on September 15, 2020. (AR at 12).  
16 Therefore, ALJ Messer’s February 11, 2020, decision is the final decision of  
17 the Commissioner. Having exhausted all administrative remedies, Plaintiff  
18 brought this timely civil action, seeking judicial review pursuant to 42 U.S.C.  
19 §§ 405(g) and 1383(c)(3).

## 20 **II. DISCUSSION**

### 21 **A. Legal Standard**

22 Sections 405(g) and 1383(c)(3) of the Social Security Act allow  
23 unsuccessful applicants to seek judicial review of a final agency decision of  
24 the Commissioner. 42 U.S.C. §§ 405(g), 1383(c)(3). The scope of judicial  
25 review is limited in that a denial of benefits will not be disturbed if it is  
26 supported by substantial evidence and contains no legal error. *Id.*; *see also*  
27 *Batson v. Comm’r Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004) (An

1 “ALJ may discount treating physicians’ opinions that are conclusory, brief,  
2 and unsupported by the record as a whole or by objective medical findings.”  
3 (citations omitted).

4 Substantial evidence “is a ‘term of art’ used throughout administrative  
5 law to describe how courts are to review agency factfinding.” *Biestek v.*  
6 *Berryhill*, 139 S. Ct. 1148, 1154 (2019). Courts look “to an existing  
7 administrative record and ask[] whether it contains ‘sufficien[t] evidence’ to  
8 support the agency’s factual determinations.” *Id.* “[T]he threshold for such  
9 evidentiary sufficiency is not high. Substantial evidence, [the Supreme  
10 Court] has said, is ‘more than a mere scintilla.’ It means—and means only—  
11 ‘such relevant evidence as a reasonable mind might accept as adequate to  
12 support a conclusion.’” *Id.* The Ninth Circuit explains that substantial  
13 evidence is “more than a mere scintilla but may be less than a  
14 preponderance.” *Molina v. Astrue*, 674 F.3d 1104, 1110-11 (9th Cir. 2012)  
15 (quotation marks and citations omitted), *superseded by regulation on other*  
16 *grounds*.

17 An ALJ’s decision is reversed only if it “was not supported by  
18 substantial evidence in the record as a whole or if the ALJ applied the wrong  
19 legal standard.” *Id.* “To determine whether substantial evidence supports  
20 the ALJ’s determination, [the Court] must assess the entire record, weighing  
21 the evidence both supporting and detracting from the agency’s conclusion.”  
22 *Ahearn v. Saul*, 988 F.3d 1111, 1115 (9th Cir. 2021) (citing *Mayer v.*  
23 *Massanari*, 276 F.3d 453, 459 (9th Cir. 2001)). The Court “may not reweigh  
24 the evidence or substitute [its] judgment for that of the ALJ.” *Id.* “The ALJ  
25 is responsible for determining credibility, resolving conflicts in medical  
26 testimony, and for resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035,  
27 1039 (9th Cir. 1995).

1 “When the evidence can rationally be interpreted in more than one way,  
2 the court must uphold the [ALJ’s] decision.” *Mayes*, 276 F.3d at 459. Section  
3 405(g) permits a court to enter a judgment affirming, modifying or reversing  
4 the Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing court may  
5 also remand the matter to the Social Security Administration for further  
6 proceedings. *Id.*

### 7 **B. Summary of the ALJ’s Findings**

8 In rendering his decision, the ALJ followed the Commissioner’s five-step  
9 sequential evaluation process. *See* 20 C.F.R. § 404.1520. At step one, ALJ  
10 Messer found that, aside from the period from February 2014 to March 2015,  
11 Plaintiff had not engaged in substantial gainful activity since his alleged  
12 onset date. (AR at 33-34). ALJ Messer found at step two that Plaintiff had  
13 the following severe impairments:

14 morbid obesity; degenerative disc disease of the lumbar and cervical  
15 spine; diabetes mellitus type 1; degenerative joint disease of the left  
16 shoulder; status post left shoulder fracture; lumbar radiculopathy;  
17 cervicalgia; peripheral and central vestibular dysfunction; and  
cerebral concussion.

18 (AR at 34). Next, after considering the entire record, ALJ Messer determined  
19 that Plaintiff had the residual functional capacity (“RFC”) to perform light  
20 work as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b) with the following  
21 limitations:

22 occasionally climb ramps and stairs, but never climb ladders, ropes,  
23 and scaffolds; occasionally balance, stoop, kneel, crouch, or crawl;  
24 and frequently perform overhead reaching with the left upper  
25 extremity. The claimant must avoid concentrated exposure to  
26 extreme heat, and to hazards such as operational control of moving  
27 machinery and unprotected heights.

1 (*Id.* at 35).<sup>3</sup> The ALJ stated that his RFC assessment was based on all the  
2 evidence and the extent to which Plaintiff's symptoms are consistent with the  
3 objective medical evidence and other evidence. (*Id.*). The ALJ also stated  
4 that he considered the opinion evidence and prior administrative medical  
5 findings in accordance with the requirements of 20 C.F.R. §§ 404.1520(c) and  
6 416.920(c). (*Id.* at 34).

7 The ALJ then proceeded to step four of the sequential evaluation  
8 process. He determined Plaintiff was unable to perform any past relevant  
9 work as a chauffeur or sales route delivery driver, and the vocational expert  
10 agreed with that assessment. (AR at 42). Considering Plaintiff's age,  
11 education, work experience, and RFC, ALJ Messer found Plaintiff was  
12 "capable of making a successful adjustment to other work that exists in  
13 significant numbers in the national economy." (AR at 43). The ALJ  
14 explained that transferability of job skills was not material because the  
15 claimant was deemed not disabled. (*Id.*).

16 For purposes of his step five determination, the ALJ accepted the  
17 testimony of the VE. (AR at 43). The VE testified that Plaintiff could  
18 perform the requirements of representative occupations such as Hand  
19 Packager (DOT No. 920.687-018) (light/svp-1), Sub-assembler (DOT No.  
20 729.684-054) (light/svp-2), and Inspector (DOT No. 559.687-074) (light/svp-2).  
21 (*Id.*). The VE testified that those positions existed in significant numbers in  
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24 <sup>3</sup> Light work involves "lifting no more than 20 pounds at a time with frequent  
25 lifting or carrying of objects weighing up to 10 pounds. Even though the  
26 weight lifted may be very little, a job is in this category when it requires a  
27 good deal of walking or standing, or when it involves sitting most of the time  
with some pushing and pulling of arm or leg controls." *See* 20 C.F.R. §§  
404.1567 and 416.967.

1 the national economy. (*Id.*). The ALJ, therefore, found that Plaintiff was not  
2 disabled since his alleged onset date of September 1, 2011, through the date  
3 of the decision on February 11, 2020. (AR at 43-44).

#### 4 **C. Issue in Dispute**

5 The sole issue presented is whether the ALJ properly evaluated the  
6 medical opinion evidence from Plaintiff's treating physician, Dr. Stuart  
7 Kramer, M.D. ("Dr. Kramer"). Plaintiff argues that in formulating the RFC,  
8 the ALJ should have weighed the opinion of Dr. Kramer differently, or more  
9 specifically, that the ALJ should have better explained his reasons for  
10 affording Dr. Kramer's medical opinion little weight. (ECF No. 24 at 5-7).

##### 11 **1. The Law Concerning Medical Opinion Evidence**

12 The Ninth Circuit distinguishes among the opinions of three types of  
13 physicians: (1) those who treat the Plaintiff ("treating physicians"); (2) those  
14 who examine but do not treat the Plaintiff ("examining physicians"); and (3)  
15 those who neither examine nor treat the Plaintiff ("non-examining  
16 physicians"). *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996), *superseded*  
17 *for cases filed on or after March 27, 2017*. As a general rule, more weight is  
18 given to the opinions of a treating source than to that of a non-treating  
19 physician. *Id.* (citing *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)).  
20 Likewise, the opinion of an examining physician is typically entitled to  
21 greater weight than that of a non-examining physician. *Pitzer v. Sullivan*,  
22 908 F.2d 502, 506 (9th Cir. 1990).

23 For claims filed before March 27, 2017, such as the case here, "the  
24 treating source rule" set forth in 20 C.F.R. § 404.1527 applies. *See* 20 C.F.R.  
25 § 404.1527(c). Under those provisions, an ALJ is to weigh medical source  
26 opinions according to the following factors: (1) the examining relationship; (2)  
27 the length, frequency, nature and extent of the treatment relationship; (3)



1 supportability of the opinion; (4) consistency with the record; (5)  
2 specialization of the provider; and (6) other factors a claimant brings to the  
3 ALJ's attention. *Id.* The ALJ does not need "to make an express statement  
4 that [he] considered all the factors outlined in 20 C.F.R. § 404.1527(c)." *See*  
5 *Kelly v. Berryhill*, 732 F. App'x 558, 562 n.4 (9th Cir. 2018).

6 The ALJ must consider all medical opinion evidence. 20 C.F.R. §  
7 404.1527(b). Although the ALJ is not bound by the medical opinion of a  
8 treating doctor on the ultimate question of disability, the treating source rule  
9 "allowed an ALJ to reject a treating or examining physician's uncontradicted  
10 medical opinion only for 'clear and convincing reasons,' and allowed a  
11 contradicted opinion to be rejected only for 'specific and legitimate reasons'  
12 supported by substantial evidence in the record." *Kathy Jean T. v. Saul*, No.  
13 20cv1090-RBB, 2021 WL 2156179, at \*5 (S.D. Cal. May 27, 2021) (citing  
14 *Trevizo v. Berryhill*, 871 F.3d 664, 675 (9th Cir. 2017)).

15 In *Orn v. Astrue*, 495 F.3d 625 (9th Cir. 2007), the Ninth Circuit held:

16 If a treating physician's opinion is not given 'controlling weight'  
17 because it is not 'well-supported' or because it is inconsistent with  
18 other substantial evidence in the record, the Administration  
19 considers specified factors in determining the weight it will be  
20 given. Those factors include the 'length of the treatment  
21 relationship and the frequency of examination' by the treating  
22 physician; and the 'nature and extent of the treatment relationship'  
23 between the patient and the treating physician. Generally, the  
24 opinions of examining physicians are afforded more weight than  
25 those of non-examining physicians, and the opinions of examining  
26 non-treating physicians are afforded less weight than those of  
27 treating physicians.

25 *Id.* at 631 (internal citations omitted).

26 "The ALJ can meet this burden by setting out a detailed and thorough  
27 summary of the facts and conflicting clinical evidence, stating his



1 interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881 F.2d  
2 747, 751 (9th Cir. 1989) (citation omitted) (“We afford greater weight to a  
3 treating physician’s opinion because ‘he is employed to cure and has a greater  
4 opportunity to know and observe the patient as an individual.’”).

## 5 **2. Dr. Kramer’s Medical Opinion**

6 On January 21, 2020, Plaintiff’s treating physician, Dr. Kramer,  
7 completed a medical source statement, and made numerous findings that the  
8 ALJ did not find controlling. (AR at 2725-27). Dr. Kramer concluded that  
9 Plaintiff only had the capacity to sit for 15-20 minutes at one time; stand and  
10 walk 5 minutes at one time; sit 4 hours in an 8-hour day; stand and/or walk 4  
11 hours in an 8-hour day; take an unscheduled break every hour for 5-10  
12 minutes; rarely hold his head up in a static position or twist; never stoop  
13 (bend), crouch/squat, or climb ladders; lift and carry 10-20 pounds  
14 occasionally, and less than 10 pounds frequently; and was limited in the use  
15 of his hands, fingers, and arms from to 25% to 40% of an 8-hour workday.  
16 (*Id.*). Dr. Kramer anticipated that the Plaintiff’s impairments or treatment  
17 would cause him to be absent from work more than 4 days per month. (*Id.*).

18 The ALJ acknowledged Dr. Kramer’s ongoing treatment of Plaintiff,  
19 including the doctor’s role in Plaintiff’s workers’ compensation claims, and  
20 then the ALJ afforded only some weight to those opinions finding them (1)  
21 not supported by Dr. Kramer’s own records, (2) unsupported by the totality of  
22 the evidence, (3) too restrictive in light of the objective medical records, and  
23 (4) overly reliant on Plaintiff’s subjective reports of symptoms and  
24 limitations. (AR at 38-40).

25 Plaintiff argues the ALJ “did not provide any discussion or analysis in  
26 assigning little weight to Dr. Kramer’s opinion.” (ECF No. 24 at 6). Plaintiff  
27 interprets the ALJ’s findings as “conclusions without drawing any

1 distinctions or specific inconsistencies between Dr. Kramer’s opinion and the  
2 medical evidence.” (*Id.*). That, however, simply is not the case.

3 **3. The ALJ Provided Specific and Legitimate Reasons for**  
4 **Affording Dr. Kramer’s Medical Opinion Little Weight**

5 The ALJ’s opinion is replete with “specific and legitimate reasons” for  
6 discounting Dr. Kramer’s opinion. The ALJ took issue with inconsistencies  
7 between Dr. Kramer’s own records and his opinion, the way Dr. Kramer’s  
8 opinions conflicted with other doctors’ medical reports and objective test  
9 results, and several aspects of Plaintiff’s statements when compared to  
10 evidence of his physical abilities and daily activities. The Court considers  
11 each *seriatim*.

12 a. Dr. Kramer’s Medical Records Were Not Consistent with His  
13 Restrictive Limitations

14 The ALJ pointed out incongruity between Dr. Kramer’s own treatment  
15 records and the restrictive limitations he recommended. For example,  
16 despite Plaintiff’s subjective complaints to Dr. Kramer, the doctor’s April 8,  
17 2016, physical examination of Plaintiff, as well as several prior examinations,  
18 revealed numerous normal findings. (*See* AR at 1275, 1285, 1289, 1319,  
19 1331, 1462, 2398-99). Dr. Kramer opined that Plaintiff should be precluded  
20 from “very heavy work” to prevent potentially dangerous hypoglycemic  
21 episodes, with which the ALJ acknowledged and agreed, and thus restricted  
22 Plaintiff’s lifting to 20 pounds. (AR at 40, 1279). Yet, Dr. Kramer’s opinion  
23 limited Plaintiff to lifting and carrying 10 pounds frequently. That  
24 inconsistency was one stated reason for affording only some weight to Dr.  
25 Kramer’s opinion. (AR at 40).

26 As to Dr. Kramer’s medical reports for Plaintiff from 2016 to 2019, the  
27 ALJ noted that Plaintiff had reported conditions of blackouts, dizziness, and

1 severe neck and low-to-mid back pain and headaches. (AR at 40, 2601-76).  
2 ALJ Messer explained, however, that those records did not provide  
3 corresponding findings concerning Plaintiff's range of motion, sensory  
4 abilities, motor strength, or deep tendon reflexes in order to support a  
5 disabling impairment. (*Id.* at 38-39). Other doctors did include such findings  
6 in their reports, but their findings did not support such extreme restrictions.

7 b. Dr. Kramer's Opinion Was Not Consistent with the Totality  
8 of the Medical Record

9 The ALJ pointed to many specific medical reports for Plaintiff that were  
10 inconsistent with Dr. Kramer's restrictive opinion. For example, doctors'  
11 reports from ENT Associates of San Diego, who examined Plaintiff from April  
12 3, 2014, through July 10, 2019, recorded multiple physical examinations of  
13 Plaintiff that demonstrated he had "a normal gait and stance and no edema  
14 or cyanosis of the extremities." (AR at 2261, 2307, 2320-21, 2323-24, 2333,  
15 2337-38, 2341-42, 2346, 2351-52). The ALJ explained that those records were  
16 inconsistent with a finding of significant limitations in walking and standing,  
17 but they aptly supported an RFC of light work. (AR at 38).

18 The ALJ further explained that another physician, neurologist Dr.  
19 Thomas A. Schweller, M.D., issued a neurological consultation report after  
20 examining Plaintiff on December 19, 2018, and monitoring Plaintiff through  
21 July 2019. That 2018 exam revealed unremarkable findings, which also did  
22 not support significant limitations on sitting, standing, and walking as Dr.  
23 Kramer suggested. (AR at 2251-55, 2261). Those medical examinations are  
24 many of the same reports that Dr. Kramer used in formulating his opinion.  
25 (AR at 2399-2419).

26 Dr. Schweller also recorded that Plaintiff's vital signs were normal, and  
27 his mental status revealed an ability to remember two of three objects,

1 confabulating a pear. (*Id.*). Plaintiff also remembered the street address of  
2 the President; his affect was appropriate, and communication skills were  
3 intact. (*Id.*). Plaintiff's station and gait were unremarkable, including heel  
4 walking, toe walking, tandem walking, and Romberg testing. (AR at 2253).  
5 Plaintiff's cranial nerves II through XII were within normal limits (noting  
6 slight discomfort with optic kinetic testing). (*Id.* at 2254). Plaintiff's motor  
7 strength was 5/5 in the upper and lower extremities, and his Jamar grip on  
8 the right (dominant extremity) was 50 pounds and left 40 pounds. (*Id.*).  
9 Sensory findings revealed decreased touch along both palms and the anterior  
10 thighs, and deep tendon reflexes were 1+ and symmetric at both biceps, both  
11 brachioradialis, and both triceps, with both knee jerks and ankle jerks  
12 absent. (*Id.* at 2253-54). The plantar responses were flexor bilaterally. (AR  
13 at 38). Plaintiff's neck range of motion was full, and lumbar range revealed  
14 tenderness in lumbar paraspinal muscles. (AR at 38, 2252-55). Dr.  
15 Schweller continued to assess Plaintiff through July 24, 2019, finding normal  
16 and clear vitals, general alert assessments, clear eyes and lungs, no jugular  
17 venous distention, a regular heart, and no clubbing, cyanosis or significant  
18 edema. (AR at 2282).

19 The ALJ explained that a February 22, 2019, MRI of Plaintiff's brain  
20 was unmarkable, with "No evidence of hemorrhage, mass, or acute infarction.  
21 No other parenchymal abnormality. Ventricles within normal limits." (AR at  
22 2737). ALJ Messer also referenced diagnostic imaging of Plaintiff's spine  
23 that took place on December 12, 2019. (AR at 2736). Those findings showed  
24 that Plaintiff's alignment was "anatomic" with "No abnormal motion. No  
25 fracture. No prevertebral soft tissue swelling." (AR at 38, 2736). The ALJ  
26 cited those studies to conclude that Plaintiff's spine did not show significant  
27 objective findings to support a more restrictive RFC. (AR at 40).

1 The ALJ also cited earlier medical reports concerning Plaintiff's cervical  
2 and lumbar spine impairments and concluded that those records also did not  
3 establish significant functional limitations in walking, standing and other  
4 activities. Dr. John Cleary, M.D., examined Plaintiff three times before he  
5 provided a March 26, 2012, neurosurgical consultation for him; those prior  
6 appointments were in 1998, 2003, and 2010. (AR at 37, 644, 648). Dr.  
7 Cleary's 2012 opinion relied in part upon a diagnosis from an MRI that Dr. J.  
8 Kaiser ordered on October 28, 2010, which found only mild to moderate  
9 multi-level facet arthropathy. (AR at 648). The ALJ noted that Plaintiff's  
10 lumbar spine shoulder flexion was 80 degrees (with 120 being normal). (AR  
11 at 647). Lateral flexion and rotation to either side was full. (AR at 646-47).

12 Concerning Plaintiff's diabetes, in 2012, Plaintiff was receiving  
13 Humalog by pump, and his blood sugars were under control. (*Id.* at 645).  
14 During the same time-period, a medical report for Plaintiff reflected that he  
15 was walking twice a week for an hour. (AR at 706).

16 The ALJ cited six weeks of acupuncture treatment that Plaintiff had  
17 with the Shandong Acupuncture Center in August 2019, where reports  
18 showed that Plaintiff complained of constant neck pain and back pain, with  
19 muscle spasm and constant pain radiation across the low back and into his  
20 buttocks and lower extremities. (AR at 2741). Plaintiff told them his pain  
21 was exacerbated by prolonged sitting, standing, walking and lifting. (*Id.* at  
22 2742). Despite his complaints, Plaintiff reported that he was walking 100  
23 yards, and he denied weakness in the lower extremities. (*Id.*). That 2019  
24 physical exam revealed no edema, clubbing, or cyanosis of the extremities;  
25 Plaintiff had a 5/5 motor strength in the lower extremities, full range of  
26 motion and no tenderness in the thoracic spine, and 20% limited range of  
27 motion on extension of the cervical spine. (AR at 2744).

1 Plaintiff's Licensed Acupuncturist, Ying Jiang, noted moderate  
2 tenderness to palpation along Plaintiff's upper trapezius muscles, moderate  
3 tenderness bilaterally around the thoracic spine region, moderate tenderness  
4 to palpation in the low back, muscle spasms bilaterally, and range of motion  
5 at the lower lumbar region limited 25% forward, and in backward and lateral  
6 bending. (*Id.*). The acupuncturist diagnosed Plaintiff with low back pain,  
7 radiculopathy in the lumbar region and cervicalgia, and ordered acupuncture  
8 twice a week, for 6 weeks. (*Id.* at 2747). After those sessions, the "frequency  
9 and intensity" of Plaintiff's chronic neck and lower back pain improved 15%.  
10 (*Id.*). After an additional month of treatment, Plaintiff's muscle strength in  
11 both lower extremities was 5/5. (*Id.* at 2749).

12 ALJ Messer considered Plaintiff's impairments related to peripheral  
13 and central vestibular dysfunction and cerebral concussion causing dizziness  
14 and blackouts, and a neurological exam from September 2015 that reported a  
15 normal EEG, no cranial nerve abnormalities, normal sensation to pain, no  
16 motor function abnormalities, no gait and stance abnormalities, normal  
17 reflexes of the biceps, brachioradialis, triceps, biceps, and knees, and no  
18 peripheral nerve problems. (AR at 2364-65). The medical recommendations  
19 included vestibular rehabilitation, Xanax, and a return appointment. (*Id.*).

20 The record also cites to appointments with ENT, Dr. Tarek Hassanein,  
21 in May 2017, which affirmed that "Cranial Nerves II-XII" were "grossly intact  
22 and symmetrical," with gait and station normal as well. (AR at 2333). ALJ  
23 Messer further explained that in July 2019, Dr. Jeremiah J. Moles, M.D., an  
24 ENT, similarly concluded that all testing "including cardiology work up,  
25 carotid, and vertebral arteries" were normal, and "MRI of IAC, brain, and C-  
26 spine are normal." (AR at 2346). The ALJ cited and concluded that multiple  
27



1 physical exams “showed normal HEENT<sup>4</sup> (including normal ability to  
2 communicate)” and “no neurological findings to support disabling limitations  
3 due to the peripheral and central vestibular dysfunction and cerebral  
4 concussion.” (AR at 40).

5 The ALJ incorporated findings from December 12, 2014, through  
6 September 11, 2015, reflecting that Plaintiff had an unsteady tandem gait,  
7 sensation loss of vibration, and a positive Romberg’s sign (*i.e.*, loss of balance  
8 test when a claimant stands still). (AR at 2365-66). The ALJ credited Dr.  
9 Kramer’s environmental limitations, secondary to Plaintiff’s hypoglycemic  
10 episodes. (AR at 39-40). He explained that that he had incorporated all such  
11 findings into his RFC. (*Id.* at 40). And, while the state agency medical  
12 consultants opined that Plaintiff could perform medium work with fewer  
13 restrictions, ALJ Messer rejected those opinions because the overall medical  
14 evidence was more consistent with an RFC for light work, and those opinions  
15 were more remote in time. (*Id.*). The ALJ expressly recognized that  
16 Plaintiff’s conditions had worsened since those state examinations. (*Id.*).

17 The ALJ said that Plaintiff’s RFC considered his workers’ compensation  
18 impairments, which concluded that he would be “precluded from the  
19 performance of very heavy work<sup>5</sup> . . . not work at heights or around  
20 dangerous equipment, including moving vehicles [and] to prevent diabetes  
21 aggravation, any employment will need to be in an environment which does  
22 not expose the claimant to undue emotional stress.” (AR at 1279). The  
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24 <sup>4</sup> HEENT stands for the head, ears, eyes, nose, and throat portion of the  
25 doctor’s examination.

26 <sup>5</sup> Heavy work involves “lifting no more than 100 pounds at a time with  
27 frequent lifting or carrying of objects weighing up to 50 pounds.” *See* 20  
C.F.R. §§ 404.1567 and 416.967.



1 workers' compensation whole-person impairment rating was 35%. (AR at  
2 1042, 1088). The ALJ explained, however, that on July 18, 2016, Plaintiff's  
3 treating doctor, Blake Thompson, M.D., concluded that Plaintiff's whole  
4 person impairment was only 4%. (AR at 1042, 1188). The ALJ found Dr.  
5 Thompson's report more credible than the worker's compensation evaluation  
6 because Dr. Thompson made a thorough review of the medical record, which  
7 was included in his report, and it supported the limitation on Plaintiff's  
8 ability to lift at least 20 pounds. (*Id.*).

9 Dr. Thompson's subsequent April 25, 2017, examination showed that  
10 Plaintiff's shoulder surgery was well-healed, and he had regained good  
11 strength, with mild tenderness and a decreased range of motion. (AR at 41,  
12 1188, 1245). The ALJ explained that workers' compensation  
13 recommendations were not dispositive of Plaintiff's capability to work  
14 because they are calculated in a different manner than social security  
15 benefits. (AR at 41). The ALJ accommodated the decreased range of motion  
16 by limiting Plaintiff to frequent overhead reaching with the left upper  
17 extremity. (AR at 35). The ALJ also discussed findings and reports related  
18 to Plaintiff's obesity and his few psychiatric symptoms, noting that the RFC  
19 more than adequately accounted for those issues. (AR at 39-41).

20 In summary, the ALJ has explained and sufficiently established that he  
21 considered all the medical opinion evidence in accordance with the  
22 requirements of §§ 404.1527 and 416.927 (opinion evidence for claims filed  
23 before March 27, 2017). The contradictory opinions of other treating and  
24 examining physicians, as well as the objective medical test results cited, are  
25 well articulated and supported reasons for affording Dr. Kramer's opinion  
26 only some weight. *See Weiss v. Astrue*, No. 12CV0719-CAB WMC, 2013 WL  
27 4517863, at \*11 (S.D. Cal. Aug. 19, 2013) ("Contrary opinions of examining

1 physicians may serve as additional specific and legitimate reasons for  
2 assigning a lower weight to the opinion of a treating physician.”) (citing  
3 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (“Although the  
4 contrary opinion of a non-examining medical expert does not alone constitute  
5 a specific, legitimate reason for rejecting a treating or examining physician’s  
6 opinion, it may constitute substantial evidence when it is consistent with  
7 other independent evidence in the record.”).

8 c. Treatment Gaps and Inconsistent Reports About Plaintiff’s  
9 Physical Abilities

10 The ALJ also took issue with significant gaps in Plaintiff’s history of  
11 treatment. (AR at 37). Notably, in April 2016, Plaintiff reported he had not  
12 seen a pain specialist since 2013. (AR at 1274). The ALJ also described how  
13 Plaintiff’s physical capabilities exceeded his reported limitations. (AR at 37).  
14 Contrary to the limitations Dr. Kramer suggested, Plaintiff testified that in  
15 March 2017, he traveled by plane across the country to see his nephew  
16 perform at Carnegie Hall and that Plaintiff needed no assistance during that  
17 trip, except for help lifting his suitcase. (AR at 113-15). Plaintiff also  
18 described traveling 5.5 hours by car to Mexico without incident in October  
19 2017. (*Id.*).

20 The ALJ specified that evidence of Plaintiff’s physical abilities and  
21 activity level contributed to affording Dr. Kramer’s opinion only some weight.  
22 *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (affirming  
23 ALJ’s crediting of objective evidence, contradictory statements that plaintiff  
24 offered regarding his capabilities, and factual evidence of plaintiff’s  
25 functional abilities in rejecting treating physician’s opinion), *superseded on*  
26 *other grounds by* 20 C.F.R. § 404.1502(a).  
27

1 d. Plaintiff's Activity Level

2 ALJ Messer stated that, throughout the period under adjudication,  
3 Plaintiff reported that he had been able to complete a wide range of daily  
4 living activities that supported light work, such as taking care of his basic  
5 needs, doing household chores, including laundry and cooking, as well as  
6 walking, sitting for long hours, traveling, driving, watching television, and  
7 grocery shopping, while also having gainful activity during one of the years at  
8 issue, February 2014 to March 2015. (AR at 33, 42, 113-14, 706, 932-35, 993).

9 The ALJ pointed out that in a January 31, 2014, adult function report,  
10 Plaintiff self-reported that he could use a computer, do paperwork, watch  
11 television, make telephone calls as needed, pick-up the grandkids from  
12 school, wash dishes, do laundry and some household cleaning, prepare simple  
13 meals, and handle his personal care and hygiene. (AR at 42, 521-28).

14 Although Plaintiff was laid off work in 2011, the ALJ recognized that  
15 was not because of an impairment, and that Plaintiff began looking for and  
16 acquired a more flexible position as a limousine driver. (*Id.* at 37, 108-09).  
17 Plaintiff's ability to perform easier work than he historically did, after his  
18 alleged onset date, was "one factor of many" the ALJ said showed Plaintiff  
19 could perform work at substantial gainful activity levels. (AR at 37).

20 Conflict between a medical opinion and a plaintiff's activity level is a  
21 valid basis for rejecting a medical opinion. 20 C.F.R. § 404.1520c(b)(2);  
22 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (inconsistencies  
23 between the limitations a treating physician assigned and a claimant's daily  
24 activities "may justify rejecting a treating provider's opinion.") (citing *Morgan*  
25 *v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600-02 (9th Cir. 1999)  
26 (considering an inconsistency between a treating physician's opinion and a  
27 claimant's daily activities as a specific and legitimate reason to discount the

1 treating physician’s opinion)); *Rollins v. Massanari*, 261 F.3d 853, 856 (9th  
2 Cir. 2001) (finding a medical source’s proposed restrictions inconsistent with  
3 the level of activity in which plaintiff engaged); *see also* 20 C.F.R. §  
4 404.1529(c)(3)(i) (ALJ may consider daily activities); *Molina*, 674 F.3d at 1112  
5 (ALJ may consider “whether the claimant engages in daily activities  
6 inconsistent with the alleged symptoms”).

7 e. Evidence of Plaintiff’s Exaggerated Statements

8 The ALJ also explained that Plaintiff’s allegations and testimony were  
9 inconsistent with the totality of the record, highly suggesting Plaintiff  
10 exaggerated his allegations of cognitive and physical limitations.<sup>6</sup> (AR at 42).  
11 The ALJ appropriately concluded that Dr. Kramer’s opinion was overly  
12 reliant on Plaintiff’s subjective symptom reports where multiple physical  
13 examinations revealed results and conclusions that were inconsistent with  
14 those subjective reports, as described throughout the ALJ’s decision and  
15 summarized herein. *See Salerno v. Astrue*, 266 F. App’x 570, 573 (9th Cir.  
16 2008) (the ALJ appropriately gave less weight to treating doctor’s assessment  
17 of claimant’s RFC because it was premised on claimant’s “exaggerated” and  
18 “not fully credible” subjective complaints) (citing *Fair v. Bowen*, 885 F.2d 597,  
19 604–05 (9th Cir. 1989) (Where a treating physician’s medical opinion is based  
20 on the subjective complaints of the claimant and the ALJ has found the  
21 claimant’s subjective reports of pain not fully credible, the ALJ is justified in  
22

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23  
24 <sup>6</sup> Plaintiff does not challenge the ALJ’s negative credibility finding; therefore,  
25 any challenge to that finding is waived. *Goodwin v. Colvin*, No. 2:15-CV-  
26 00319-MKD, 2016 WL 7478966, at \*5 (E.D. Wash. Dec. 29, 2016) (citing  
27 *Hughes v. Astrue*, 357 F. App’x 864, 866 (9th Cir. 2009) (holding failure to  
challenge the ALJ’s credibility finding in the district court waives any  
challenge to that finding on appeal).

1 discounting the treating physician’s opinion.)); *see also Britton v. Colvin*, 787  
2 F.3d 1011, 1014 (9th Cir. 2015) (ALJ properly discounted medical expert’s  
3 opinion that was based on claimant’s exaggerated testimony).

4 On this record, the Court concludes the ALJ did not err when he gave  
5 only some weight to Dr. Kramer’s opinion because the ALJ provided specific  
6 and legitimate reasons for doing so based on substantial evidence in the  
7 record as expressly stated herein. *See generally Montoya v. Colvin*, 649 F.  
8 App’x 429, 430 (9th Cir. 2016) (The ALJ gave sufficiently “specific and  
9 legitimate reasons” for giving little weight to the opinion of the plaintiff’s  
10 treating physician).

11 **III. CONCLUSION**

12 Based on the foregoing, the Court **ORDERS** the Joint Motion be  
13 **GRANTED** in favor of Defendant. Accordingly, the final decision of the  
14 Commissioner of Social Security is **AFFIRMED**.

15 **IT IS SO ORDERED.**

16 Dated: September 8, 2022



17  
18 Hon. Mitchell D. Dembin  
United States Magistrate Judge