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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON  
7

8 SIMON RAMIREZ,

9 Plaintiff,

10  
11 v.

12 CAROLYN W. COLVIN,  
13 Commissioner of Social Security,

14 Defendant.  
15

No. 1:15-CV-03035-JTR

ORDER GRANTING, IN PART,  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

16 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF  
17 No. 14, 17. Attorney D. James Tree represents Simon Ramirez (Plaintiff); Special  
18 Assistant United States Attorney Erin F. Highland represents the Commissioner of  
19 Social Security (Defendant). The parties have consented to proceed before a  
20 magistrate judge. ECF No. 7. After reviewing the administrative record and the  
21 briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for  
22 Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and  
23 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to  
24 42 U.S.C. § 405(g).

25 **JURISDICTION**

26 Plaintiff filed applications for Supplemental Security Income (SSI) and  
27 Disability Insurance Benefits (DIB) on July 12, 2011, alleging disability since July  
28 1, 2008, due to bilateral knee pain, knee injury, arthritis, bursitis in the right elbow,

1 bleeding ulcers, and gastroesophageal reflux disease (GERD). Tr. 217-230, 263,  
2 267. The applications were denied initially and upon reconsideration. Tr. 126-  
3 134, 137-150. Administrative Law Judge (ALJ) Virginia M. Robinson held a  
4 hearing on August 14, 2013, at which Plaintiff, represented by counsel, and  
5 vocational expert, Trevor Duncan, testified. Tr. 42-71. The ALJ issued an  
6 unfavorable decision on September 13, 2013. Tr. 23-36. The Appeals Council  
7 denied review on January 2, 2015. Tr. 1-7. The ALJ's September 13, 2013,  
8 decision became the final decision of the Commissioner, which is appealable to the  
9 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
10 review on February 26, 2015. ECF No. 1, 4.

### 11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the  
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
14 here.

15 Plaintiff was 43 years old at the alleged date of onset. Tr. 217. Plaintiff  
16 completed his GED in 1986. Tr. 268. Plaintiff has past work as a cook, material  
17 handler, salesperson, and fast food manager. Tr. 66, 283-293. Plaintiff reported  
18 that he stopped working on July 1, 2008, because of his condition. Tr. 267.

19 Upon the initial denial and reconsideration denial, Tara McBride, Single  
20 Decisionmaker<sup>1</sup> and Eugene Kester, M.D., found Plaintiff was limited to

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21  
22 <sup>1</sup>A Single Decisionmaker Model is a disability determination prototype that  
23 was being tested in the State of Washington at the time of Plaintiff's initial and  
24 reconsideration determinations. *See* POMS DI 12015.100. A Single  
25 Decisionmaker is separate from a medical consultant (MC) or a psychological  
26 consultant (PC) and has the authority to complete all disability determination forms  
27 and make initial disability determinations in many cases without a MC or a PC. *Id.*  
28 In an unpublished decision, the Ninth Circuit has held that it is error for an ALJ to

1 occasionally lifting and carrying twenty pounds, frequently lifting and carrying ten  
2 pounds, sanding/walking a total of two hours, and sitting a total of six hours. Tr.  
3 78, 87, 102, 117. Disability adjudicators, Ms. McBride and Laurie Baltutat  
4 characterized the maximum sustained work capability as sedentary. Tr. 81, 90,  
5 107, 122.

6 On April 11, 2011, Fady Sabry, M.D., opined Plaintiff could stand for two  
7 hours in an eight-hour work day, sit for five hours in an eight-hour work day, lift  
8 twenty pounds occasionally, and lift ten pounds frequently. Tr. 319. On  
9 December 16, 2011, Jesse McClelland, M.D., completed a psychological  
10 consultative examination. Dr. McClelland reviewed medical clinic notes, a copy  
11 of Form SSA 3441, and a copy of the SSA Function Report and completed a  
12 Mental Status Examination. Tr. 448, 450-451. Dr. McClelland diagnosed Plaintiff  
13 with Attention deficit, hyperactive disorder (ADHD), posttraumatic stress disorder  
14 (PTSD), and a rule out diagnosis of major depressive disorder. Tr. 451. Dr.  
15 McClelland opined that Plaintiff should not manage his own funds, he should be  
16 able to perform simple and repetitive tasks, he should be able to perform detailed  
17 and complex tasks, he should be able to accept instructions from supervisors, he  
18 should be able to perform work activities on a consistent bases without special or  
19 additional instruction, he would likely struggle with interacting with coworkers and  
20 the public, he would likely have difficulty maintaining regular attendance in the  
21 workplace, he may have interruptions to the normal workday from panic attacks,  
22 and he may struggle to deal with the usual stress encountered in the workplace. Tr.  
23 451-452. On March 16, 2013, Brent Packer, M.D., a Department of Social and  
24 Health Services (DSHS) evaluator reviewed records form Orthopedics Northwest  
25 and opined that Plaintiff's rating of sedentary work was supported by the records.

26 \_\_\_\_\_  
27 accord substantial weight to the opinion of a non-physician Single Decisionmaker.  
28 *Morgan v. Colvin*, 531 F. App'x 793 (9th Cir. June 21, 2013).

1 Tr. 550.

## 2 STANDARD OF REVIEW

3 The ALJ is responsible for determining credibility, resolving conflicts in  
4 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
5 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
6 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
7 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
8 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
9 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
10 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
11 another way, substantial evidence is such relevant evidence as a reasonable mind  
12 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
13 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
14 interpretation, the court may not substitute its judgment for that of the ALJ.  
15 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial  
16 evidence will be set aside if the proper legal standards were not applied in  
17 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
18 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence  
19 supports the administrative findings, or if conflicting evidence supports a finding  
20 of either disability or non-disability, the ALJ's determination is conclusive.  
21 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

## 22 SEQUENTIAL EVALUATION PROCESS

23 The Commissioner has established a five-step sequential evaluation process  
24 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
25 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one  
26 through four, the burden of proof rests upon the claimant to establish a prima facie  
27 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This  
28 burden is met once a claimant establishes that physical or mental impairments

1 prevent him from engaging in his previous occupations. 20 C.F.R. §§  
2 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the  
3 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
4 (1) the claimant can make an adjustment to other work, and (2) specific jobs exist  
5 in the national economy which the claimant can perform. *Batson v. Comm’r of*  
6 *Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If claimants cannot make an  
7 adjustment to other work in the national economy, a finding of “disabled” is made.  
8 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 9 ADMINISTRATIVE DECISION

10 On September 13, 2013, the ALJ issued a decision finding Plaintiff was not  
11 disabled as defined in the Social Security Act.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
13 activity since July 1, 2008, the alleged date of onset. Tr. 25.

14 At step two, the ALJ determined Plaintiff had the following severe  
15 impairments: reconstructive surgery of a weight-bearing joint, osteoarthritis, and  
16 anxiety disorder. Tr. 25.

17 At step three, the ALJ found Plaintiff did not have an impairment or  
18 combination of impairments that met or medically equaled the severity of one of  
19 the listed impairments. Tr. 26-28.

20 At step four, the ALJ assessed Plaintiff’s residual function capacity (RFC)  
21 and determined he could perform a range of light work:

22 [E]xcept he can occasionally lift twenty pounds and can frequently lift  
23 ten pounds. He can stand and/or walk for two hours in an eight-hour  
24 workday with normal and customary breaks. He can sit for six hours  
25 in an eight-hour workday with normal and customary breaks. He can  
26 occasionally operate foot controls. He can occasionally climb ramps  
27 and stairs. He can never climb ladders, ropes, or scaffolds. He can  
28 frequently balance and stoop. He can occasionally crouch. He can  
never kneel or crawl. He is limited to jobs that can be performed while  
using a hand-held assistive device for uneven terrain or prolonged

1 ambulation. He should avoid concentrated exposure to extreme cold,  
2 excessive vibration, and workplace hazards such as dangerous  
3 machinery and unprotected heights. He is limited to relatively simple  
4 work, and well learned tasks with only superficial contact with the  
public.

5 Tr. 28. The ALJ concluded that Plaintiff was not able to perform his past relevant  
6 work, which included the occupations of cook, material handler, salesperson  
7 (hardware), and fast food manager. Tr. 34.

8 At step five, the ALJ determined that, considering Plaintiff's age, education,  
9 work experience and RFC, and based on the testimony of the vocational expert,  
10 there were other jobs that exist in significant numbers in the national economy  
11 Plaintiff could perform, including the jobs of assembler, cashier II, and ticket taker.  
12 Tr. 35. The ALJ thus concluded Plaintiff was not under a disability within the  
13 meaning of the Social Security Act at any time from July 1, 2008, the alleged date  
14 of onset, through the date of the ALJ's decision, September 13, 2013. *Id.*

## 15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's  
17 decision denying benefits and, if so, whether that decision is based on proper legal  
18 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider  
19 Plaintiff's testimony about the severity of his symptoms; (2) failing to consider  
20 Plaintiff's ability to ambulate effectively under Listings 1.02 and 1.03; (3) failing  
21 to accord proper weight to the opinions of Dr. Sabry, State Agency Reviewers, and  
22 Dr. McClelland; and (4) failing to consider Plaintiff's use of assistance devices in  
23 the residual functional capacity determination.

## 24 DISCUSSION

### 25 A. Credibility

26 Plaintiff contests the ALJ's adverse credibility determination in this case.  
27 ECF No. 14 at 16-21.

28 It is generally the province of the ALJ to make credibility determinations,

1 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific  
2 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
3 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s  
4 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d  
5 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).  
6 “General findings are insufficient: rather the ALJ must identify what testimony is  
7 not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81  
8 F.3d at 834.

9 The ALJ found Plaintiff not fully credible concerning the intensity,  
10 persistence, and limiting effects of his symptoms. Tr. 29. The ALJ reasoned that  
11 Plaintiff was less than fully credible because his symptom reporting was (1)  
12 inconsistent with his activities of daily living; (2) inconsistent with the medical  
13 evidence; (3) inconsistent with the lack of medical treatment; (4) inconsistent with  
14 his work activity; and (5) undermined by his criminal history.

### 15 **1. Activities of Daily Living**

16 The ALJ’s first reason for finding Plaintiff less than credible, that Plaintiff’s  
17 ability to accomplish his daily activities “indicates that he is likely capable of  
18 sustaining some sort of employment within appropriate limitations,” Tr. 29, is not a  
19 specific, clear and convincing reason to undermine Plaintiff’s credibility.

20 A claimant’s daily activities may support an adverse credibility finding if (1)  
21 the claimant’s activities contradict his other testimony, or (2) “the claimant is able  
22 to spend a substantial part of his day engaged in pursuits involving performance of  
23 physical functions that are transferable to a work setting.” *Orn v. Astrue*, 495 F.3d  
24 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).  
25 “The ALJ must make ‘specific findings relating to [the daily] activities’ and their  
26 transferability to conclude that a claimant’s daily activities warrant an adverse  
27 credibility determination.” *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th  
28 Cir. 2005)). A claimant need not be “utterly incapacitated” to be eligible for

1 benefits. *Fair*, 885 F.2d at 603.

2 The ALJ noted Plaintiff reported being able to tend to his personal care and  
3 grooming without reminders, prepare his own meals, wash dishes, vacuum, dust,  
4 water plants, shop for groceries, use public transportation, attend church, read  
5 novels, and play cards. Tr. 29. The ALJ found:

6 In short, the claimant is able to tend to his daily needs without  
7 assistance. He engages in some physically exertional tasks such as  
8 cooking, housework, yard work, and grocery shopping. He is also able  
9 to leave his house regularly. The claimant's ability to accomplish all  
10 of these daily activities without substantial assistance indicates that he  
11 is likely capable of sustaining some sort of employment within  
appropriate limitations.

12 *Id.* Here, the ALJ's determinations that these skills transfer to full time work is not  
13 specific enough under *Orn*. The activities described by the ALJ are typical home  
14 activities. "[M]any home activities are not easily transferable to what may be the  
15 more grueling environment of the workplace, where it might be impossible to  
16 periodically rest or take medication." *Fair*, 885 F.2d at 603. As such, this is not a  
17 specific, clear and convincing reason to find Plaintiff less than fully credible.

## 18 **2. Medical Evidence**

19 The ALJ's second reason for finding Plaintiff less than credible, that  
20 Plaintiff's symptoms are not supported by objective medical evidence, Tr. 30-31, is  
21 not a specific, clear, and convincing reason to undermine Plaintiff's credibility.

22 Although it cannot serve as the sole ground for rejecting a claimant's  
23 credibility, objective medical evidence is a "relevant factor in determining the  
24 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261  
25 F.3d 853, 857 (9th Cir. 2001).

26 First, the ALJ concluded that despite Plaintiff's extensive history of left knee  
27 surgeries and reported pain, he reported to Ismael Vargas, PA-C, that he did not  
28 require an assistance device to get around. Tr. 30. This is not an accurate



1 reflection of the record. PA-C Vargas stated “[h]e does not use a cane.” Tr. 395.  
2 PA-C Vargas then instructs Plaintiff to begin using an assistance device while  
3 ambulating. Tr. 398. There is a difference between Plaintiff stating he does not  
4 need a cane and Plaintiff stating he does not use a cane. As such, this does not  
5 support the unfavorable credibility determination.

6 Second, the ALJ summarized Plaintiff’s testimony, summarized Plaintiff’s  
7 physical medical records and found that “the physical medical records do not  
8 support the degree of limitation that the claimant is alleging. Though the records  
9 show that the claimant does have some problems pertaining to his left knee, he is  
10 still able to accomplish his daily activities, and can get around as needed.” Tr. 31.  
11 This determination does not meet the specificity requirements set forth in *Lester*.  
12 81 F.3d at 834 (“General findings are insufficient: rather the ALJ must identify  
13 what testimony is not credible and what evidence undermines the claimant’s  
14 complaints.”). Considering the majority of the ALJ’s other reasons for finding  
15 Plaintiff less than fully credible are not legally sufficient, even if the physical  
16 records do not support Plaintiff’s alleged severity of symptoms, this reason alone is  
17 not sufficient to support the ALJ’s determination.

### 18 **3. Lack of Treatment**

19 The ALJ finds that Plaintiff’s lack of treatment regarding his knee from mid-  
20 2011 through 2012, and his lack of treatment regarding his mental health  
21 impairments, undermine Plaintiff’s credibility. Tr. 30-31. Noncompliance with  
22 medical care or unexplained or inadequately explained reasons for failing to seek  
23 medical treatment casts doubt on a claimant’s subjective complaints. 20 C.F.R. §§  
24 404.1530, 416.930; *Fair*, 885 F.2d at 603; *Macri v. Chater*, 93 F.3d 540, 544 (9th  
25 Cir. 1996) (finding the ALJ’s decision to reject the claimant’s subjective pain  
26 testimony was supported by the fact that claimant was not taking pain medication).  
27 Social Security Ruling 96-7p states that:

28 [T]he adjudicator must not draw any inferences about an individual’s

1 symptoms and their functional effects from a failure to seek or pursue  
2 regular medical treatment without first considering any explanations  
3 that the individual may provide, or other information in the case  
4 record, that may explain infrequent or irregular medical visits or  
5 failure to seek medical treatment.

6 *See also Orn*, 495 F.3d at 638 (the ALJ erred by failing to discuss the claimant’s  
7 testimony that he could not afford treatment and finding that lack of treatment  
8 supported an unfavorable credibility determination).

9 In her decision, the ALJ fails to address any reason Plaintiff did not seek  
10 medical treatment. Tr. 30-31. The Court recognizes that S.S.R. 96-7p states that  
11 an adjudicator “may need to recontact the individual” to determine whether there  
12 are good reasons the claimant did not seek medical treatment, but does not view  
13 S.S.R. 96-7p as creating an affirmative duty on the ALJ to ask such a question  
14 when the Plaintiff did not provide a reason or the case record did not support a  
15 reason as to why a claimant failed to seek treatment.

16 Here, there is evidence in the record that Plaintiff had limited financial  
17 means. Tr. 449 (Dr. McClelland stated “[t]he claimant currently lives in Yakima,  
18 Washington, with his mother and gets no financial support”); Tr. 319-320, 535-  
19 540, 545-550, (DSHS evaluations showing that Plaintiff was applying for state  
20 assistance). Thus, the ALJ was required to consider this evidence prior to  
21 determining that Plaintiff’s lack of treatment supported an unfavorable credibility  
22 determination. If the ALJ viewed the evidence as inadequate or ambiguous, then  
23 the ALJ’s duty to develop the record under *Mayes v. Massanari* would have been  
24 triggered and the ALJ would then be required to recontact Plaintiff to clarify. *See*  
25 276 F.3d 453, 459-460 (9th Cir. 2001). Since the ALJ failed to address any reason  
26 Plaintiff did not seek medical treatment, this is not a specific, clear and convincing  
27 reason to find Plaintiff less than fully credible.

#### 28 **4. Work Activity**

The ALJ found that Plaintiff’s work from May to June of 2010 showed that

1 he was not as physically limited as alleged. Tr. 32.

2 Plaintiff reported to George S. Liu, M.D., that he had tried to work from  
3 May through June of 2010 performing maintenance on irrigation systems, but he  
4 had to stop work due to his knee. Tr. 431. On Plaintiff's Work History Report, he  
5 reported working from May through June of 2010 performing general maintenance  
6 repair, completing work repair orders, and completing lawn maintenance. Tr. 283,  
7 292. He stated the work required walking for five hours, standing for seven hours,  
8 and lifting fifty pounds frequently. Tr. 292. The ALJ determined that if Plaintiff's  
9 impairments were "as limiting as he is now suggesting, it would stand to reason  
10 that he would not have performed such exertionally challenging work." Tr. 32.  
11 Defendant cites *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir.  
12 2009) as asserting that a claimant's employment and seeking work while allegedly  
13 disabled are proper grounds for discounting the claimant's testimony. ECF No. 17  
14 at 17. In *Bray*, the claimant had been working for two years and continued to look  
15 for work after her job ended. *Id.* This is in contrast to Plaintiff who attempted  
16 working for two months and had to stop due to knee pain. Tr. 431. The two cases  
17 are not analogues, and the ALJ's determination is not supported by established  
18 law. The Ninth Circuit has held that the fact that a claimant "tried to work for a  
19 short period of time and, because of his impairments, failed," should not be used to  
20 discredit the claimant. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-1039 (9th Cir.  
21 2007). In fact, evidence that a claimant tried to work and failed may support the  
22 claimant's allegations of disabling pain. *Id.* at 1038. As such, this reason does not  
23 support the ALJ's unfavorable credibility determination.

## 24 **5. Criminal Activities**

25 The ALJ found that Plaintiff's various criminal activities detract from his  
26 overall credibility. Tr. 32. The ALJ noted that Plaintiff was convicted of a felony  
27 sexual assault charge, admitted to using methamphetamine and marijuana,  
28 admitted to abusing prescription medication, spent time in jail for various minor

1 offenses, and was arrested for shoplifting. *Id.*

2 An ALJ may use “ordinary techniques of credibility evaluation” in assessing  
3 a claimant’s credibility. *Smolen*, 80 F.3d at 1284; see also *Hardisty v. Astrue*, 592  
4 F.3d 1072, 1080 (9th Cir. 2010) (in ruling on an Equal Access to Justice Act  
5 request, the Court determined the ALJ’s credibility determination was substantially  
6 justified when it was based, among other factors, on the claimant’s prior criminal  
7 convictions); see also *Carter v. Astrue*, 472 F. App’x 550, 552 (2012 WL 937988)  
8 (a claimant’s prior conviction for welfare fraud “casts doubt on [his] motivation to  
9 truthfully report”); see also *Albidrez v. Astrue*, 504 F. Supp. 2d 814, 822 (C.D. Cal.  
10 2007) (the ALJ may consider a claimant’s reputation for truthfulness, including  
11 any convictions for crimes involving dishonesty or moral turpitude).

12 Dr. McClelland reported that Plaintiff “has been arrested once for  
13 shoplifting, but also spent time in prison between 2004 and 2009. We did not  
14 discuss what caused him to go to prison.” Tr. 449. At the hearing, Plaintiff  
15 testified that he spent time in prison for “a statutory sexual assault.” Tr. 50. He  
16 further testified that he spent some time in jail for fines, but never had any  
17 incarcerations related to drugs. Tr. 50-51. He further testified that the positive  
18 drug test in the record showing the presences of methamphetamines and marijuana  
19 represented a onetime use where Plaintiff “was in the wrong place at the wrong  
20 time.” Tr. 58-59.

21 As for the sexual assault, Plaintiff argues that the crime of assault is not a  
22 crime of moral turpitude and cites to *Albidrez*, as support. ECF No. 18 at 9. The  
23 Court in *Albidrez*, held that “mere assault convictions are not a proper basis for the  
24 ALJ’s adverse credibility finding.” 504 F. Supp. 2d at 822. Here Plaintiff was not  
25 convicted of a mere assault, he testified that he was convicted of a statutory sexual  
26 assault. Tr. 50. The Ninth Circuit has held that the generic definition of “moral  
27 turpitude” are crimes that involve either fraud or “base, vile, and depraved”  
28 conduct that “shock[s] the public conscience.” *Nunez v. Holder*, 594 F.3d 1124,

1 1131 (9th Cir. 2010); *See also Coats v. Colvin*, No. 1:14-CV-00712-JLT, 2015 WL  
2 5813333, at 17 (E.D. Cal. Sept. 30, 2015) (lewd acts on a minor were held to be a  
3 crime of moral turpitude and acceptable to support an unfavorable credibility  
4 determination). Here, considering the assault was sexual in nature, it falls under  
5 the umbrella of crime of moral turpitude and can be considered a specific, clear  
6 and convincing reason to find Plaintiff less than fully credible.

7 Next, the ALJ's reliance on Plaintiff history of drug use and jail time for  
8 unspecified offences is not sufficient to support an unfavorable credibility  
9 determination. While an ALJ may properly consider evidence of a claimant's  
10 substance use in assessing credibility, the Ninth Circuit has generally held that a  
11 Plaintiff's inconsistent statements regarding drug use supports an unfavorable  
12 decision. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (ALJ's finding  
13 that claimant was not a reliable historian regarding drug and alcohol usage  
14 supports negative credibility determination); *Verduzco v. Apfel*, 188 F.3d 1087,  
15 1090 (9th Cir. 1999) (conflicting or inconsistent testimony concerning alcohol or  
16 drug use can contribute to an adverse credibility finding). Here, the ALJ did not  
17 find Plaintiff's statements regarding his drug use were inconsistent, but simply  
18 found that based on Plaintiff's history of engaging in the criminal activity of using  
19 drugs, he was not credible. As such, this is not sufficient to support an unfavorable  
20 credibility determination.

21 Finally, an arrest without evidence of a conviction is not enough to support  
22 an unfavorable credibility determine. In *Hardisty*, the Ninth Circuit specifically  
23 found it was reasonable to base an adverse credibility finding around criminal  
24 *convictions*, not merely arrests. 592 F.3d at 1080.

25 As such, the ALJ's reliance on Plaintiff's conviction for statutory sexual  
26 assault is a clear and convincing reason to support an adverse credibility  
27 determination, but her reliance on Plaintiff's drug use and arrest for shoplifting is  
28 not.

1           Considering the ALJ’s numerous errors in the credibility determination, this  
2 case must be remanded for a new hearing. At such a hearing, the ALJ will make a  
3 new credibility determination.

4 **B.     The Ability to Ambulate Effectively**

5           Plaintiff asserts that the ALJ failed to properly consider listings 1.02 and  
6 1.03 because the ALJ did not properly address Plaintiff’s ability to ambulate  
7 effectively. ECF No. 14 at 6-8. Conditions contained in the “Listing of  
8 Impairments” are considered so severe that they are irrefutably presumed disabling  
9 without any specific finding as to a claimant’s ability to perform his past relevant  
10 work or any other jobs. 20 C.F.R. §§ 404.1520(d), 416.920(d). A claimant is  
11 conclusively disabled if his condition either meets or equals a listed impairment.  
12 *Id.* A claimant must show more than a mere diagnosis of a listed impairment; he  
13 must show that he has a “medically determinable” impairment or impairments that  
14 satisfy all of the criteria in the applicable listing. 20 C.F.R. §§ 404.1525(d);  
15 416.925(d); *Key v. Heckler*, 754 F.2d 1545, 1549-1550 (9th Cir. 1985).

16           Listing 1.02, titled “Major dysfunction of a joint(s) (due to any cause)” is  
17 met by showing the following:

18           [A] gross anatomical deformity (e.g., subluxation, contracture, bony or  
19 fibrous ankylosis, instability) and chronic joint pain and stiffness with  
20 signs of limitation of motion or other abnormal motion of the affected  
21 joint(s), and findings on appropriate medically acceptable imaging of  
22 joint space narrowing, bony destruction, or ankylosis of the affected  
23 joint(s). With:

24           A. Involvement of one major peripheral weight-bearing joint (i.e., hip,  
25 knee, or ankle), resulting in inability to ambulate effectively, as defined  
26 in 1.00B2b.

26           20 C.F.R. Pt. 404, Subpt. P, App. 1. Similarly, Listing 1.03 is met by showing  
27 claimant underwent “[r]econstructive surgery or surgical arthrodesis of a major  
28 weight-bearing joint, with inability to ambulate effectively, as defined in 1.00B2b,

1 and return to effective ambulation did not occur, or is not expected to occur, within  
2 12 months of onset.” *Id.* The inability to ambulate effectively is defined as:

3 [A]n extreme limitation of the ability to walk; *i.e.*, an impairment(s)  
4 that interferes very seriously with the individual’s ability to  
5 independently initiate, sustain, or complete activities. Ineffective  
6 ambulation is defined generally as having insufficient lower extremity  
7 functioning (see 1.00J) to permit independent ambulation without the  
8 use of a hand-held assistive device(s) that limits the functioning of both  
9 upper extremities.

10 (2) To ambulate effectively, individuals must be capable of sustaining  
11 a reasonable walking pace over a sufficient distance to be able to carry  
12 out activities of daily living. They must have the ability to travel  
13 without companion assistance to and from a place of employment or  
14 school. Therefore, examples of ineffective ambulation include, but are  
15 not limited to, the inability to walk without the use of a walker, two  
16 crutches or two canes, the inability to walk a block at a reasonable pace  
17 on rough or uneven surfaces, the inability to use standard public  
18 transportation, the inability to carry out routine ambulatory activities,  
19 such as shopping and banking, and the inability to climb a few steps at  
20 a reasonable pace with the use of a single hand rail. The ability to walk  
21 independently about one’s home without the use of assistive devices  
22 does not, in and of itself, constitute effective ambulation

23 *Id.*

24 The Ninth Circuit has held that “in determining whether a claimant equals a  
25 listing under step three of the Secretary’s disability evaluation process, the ALJ  
26 must explain adequately his evaluation of alternative tests and the combined effects  
27 of the impairments.” *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir.1990). A mere  
28 statement that a claimant does not equal the listing is insufficient. *See Id.*

29 In *Marcia*, for example, the claimant identified evidence to establish  
30 equivalency of his impairments or a combination of his impairments to a particular  
31 listed impairment. 900 F.2d at 176. The ALJ made the following finding as to  
32 equivalence: “The claimant has failed to provide evidence of medically  
33 determinable impairments that meet or equal the Listings to Subpart P of

1 Regulation 4 or the duration of the requirements Act.” *Id.* at 176. The Ninth  
2 Circuit found this explanation insufficient and remanded the matter to the  
3 Secretary for proper consideration of step three evidence. *Id.*

4 Here, the ALJ set forth the requirements of Listing 1.02 and then concluded  
5 that “the evidence does not demonstrate that the claimant has the degree of  
6 difficulty in ambulating as defined in 1.00B2b.” Tr. 26-27. The ALJ cited no  
7 medical authority to support her conclusion. There was no discussion on how  
8 Plaintiff’s alleged knee impairment failed to meet or equal either of the listed  
9 impairments. Additionally, the ALJ failed to consider Listing 1.03.

10 Defendant contends that the ALJ discussed Plaintiff’s ability to ambulate  
11 effectively at length later in the decision when she discussed Plaintiff’s activities of  
12 daily living. ECF No. 17 at 5. While the ALJ did address Plaintiff’s ability to  
13 clean his home, grocery shop, and use public transportation, she did not address  
14 Plaintiff’s ability to ambulate effectively. Tr. 29. The Code of Federal  
15 Regulations does use the inability to grocery shop and use public transportation as  
16 examples of ineffective ambulation. It also states that this is not an exhaustive list  
17 of examples of ineffective ambulation. 20 C.F.R. Pt. 404, Subpt. P, App. 1. As  
18 such, the ALJ must specifically address the ability to ambulate effectively on  
19 remand.

### 20 **C. Evaluation of Medical Evidence**

21 Plaintiff argues the ALJ failed to properly consider and weigh the medical  
22 opinions expressed by Fady Sabry, M.D., and other state agency opinions  
23 regarding Plaintiff’s physical limitations and the opinion expressed by Jesse  
24 McClelland, M.D., regarding Plaintiff’s mental limitations. ECF No. 14 at 8-16.

25 In weighing medical source opinions, the ALJ should distinguish between  
26 three different types of physicians: (1) treating physicians, who actually treat the  
27 claimant; (2) examining physicians, who examine but do not treat the claimant;  
28 and, (3) nonexamining physicians who neither treat nor examine the claimant.



1 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a  
2 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at  
3 631. The ALJ should give more weight to the opinion of an examining physician  
4 than to the opinion of a nonexamining physician. *Id.*

5 When a treating physician’s opinion is not contradicted by another  
6 physician, the ALJ may reject the opinion only for “clear and convincing” reasons.  
7 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating  
8 physician’s opinion is contradicted by another physician, the ALJ is only required  
9 to provide “specific and legitimate reasons” for rejecting the opinion of the first  
10 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when  
11 an examining physician’s opinion is not contradicted by another physician, the  
12 ALJ may reject the opinion only for “clear and convincing” reasons. *Lester*, 81  
13 F.2d at 830. When an examining physician’s opinion is contradicted by another  
14 physician, the ALJ is only required to provide “specific and legitimate reasons” for  
15 rejecting the opinion of the examining physician. *Id.* at 830-831.

16 **1. Fady Sabry, M.D.**

17 On April 11, 2011, Dr. Sabry opined Plaintiff could stand for two hours in  
18 an eight-hour work day, sit for five hours in an eight-hour work day, lift twenty  
19 pounds occasionally, and lift ten pounds frequently. Tr. 319. Prior to providing  
20 his opinion, Dr. Sabry examined Plaintiff and stated he would review the May 19,  
21 2010, MRI of Plaintiff’s knee. Tr. 399-400, 424. The ALJ gave great weight to  
22 Dr. Sabry’s opinion that Plaintiff could stand for two hours in an eight-hour  
23 workday, lift twenty pounds occasionally, and lift ten pounds frequently, but gave  
24 less weight to his opinion that Plaintiff could sit for only five hours in an eight-  
25 hour workday. Tr. 32. The ALJ found that Dr. Sabry gave no explanation for this  
26 degree of limitation and it appeared inconsistent with Plaintiff’s physical  
27 evaluations and activities of daily living. *Id.*

28 The Ninth Circuit has found that in order to meet the specific and legitimate

1 standard “[t]he ALJ must do more than offer [her] conclusions. [She] must set  
2 forth [her] own interpretations and explain why they, rather than the doctors’, are  
3 correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir. 1988). Here, the ALJ  
4 simply concluded that Dr. Sabry’s opinion was inconsistent with physical  
5 evaluations and activities of daily living. The ALJ did not set forth her own  
6 interpretations and an explanation as to why her opinion, rather than Dr. Sabry’s,  
7 was correct. As such, the ALJ failed to give legally sufficient reasons for the  
8 weight given to Dr. Sabry’s opinion that Plaintiff could sit for only five hours in an  
9 eight-hour workday. The ALJ is to address the weight given to Dr. Sabry’s  
10 opinion on remand.

## 11 **2. State Agency Reviewers**

12 Plaintiff asserts that the ALJ failed erred in limiting Plaintiff to light work  
13 when the other State Agency reviewers limited Plaintiff to sedentary work. ECF  
14 No. 14 at 10-12.

15 On March 16, 2013, Dr. Packer reviewed records from Orthopedics  
16 Northwest and limited Plaintiff to sedentary work. Tr. 550. The ALJ gave some  
17 weight to Dr. Packer’s opinion, finding that he had already made an  
18 accommodation for Plaintiff’s knees in the residual functional capacity  
19 determination. Tr. 33. Considering the ALJ is to readdress Plaintiff’s credibility on  
20 remand and a new credibility determination may result in a new residual functional  
21 capacity determination, the ALJ is instructed to readdress the weight given to Dr.  
22 Packer’s if a new residual functional capacity determination is necessary.

23 Plaintiff also asserts that residual functional capacity determinations  
24 performed upon Plaintiff’s initial application and reconsideration limited Plaintiff  
25 to sedentary work. ECF No. 14 at 11. But a review of these opinions show that  
26 they match the ALJ’s residual functional capacity determination in lifting,  
27 carrying, standing, walking, and sitting. Tr. 78, 87, 102, 117. Therefore,  
28 Plaintiff’s assertion that the ALJ erred in limiting Plaintiff to light work instead of

1 sedentary work is without merit. The opinions at the initial denial and  
2 reconsideration based the limitation to sedentary work on standing/walking and  
3 sitting limitations in their narrative residual functional capacity determinations,  
4 while the ALJ based the limitation to light work on the lifting/carrying limitations  
5 in her narrative residual functional capacity determination. The narrative residual  
6 functional capacity determinations are the same on these exertional limitations.

7 **3. Jesse McClelland, M.D.**

8 Plaintiff challenges the weight given to Dr. McClelland's December 16,  
9 2011, evaluation. ECF No. 14 at 13-16. The ALJ gave Dr. McClelland's opinion  
10 little weight because the doctor relied on Plaintiff's undiagnosed impairment of  
11 attention deficit hyperactivity disorder (ADHD), the doctor relied on Plaintiff's  
12 self-reports, and the findings are inconsistent with mental status exam. Tr. 33.  
13 Once again, because the ALJ is instructed to readdress credibility upon remand and  
14 the ALJ rejected Dr. McClelland's opinion based on the doctor's reliance on  
15 Plaintiff's testimony, the ALJ is to readdress the weight given to Dr. McClelland's  
16 opinion upon remand if a new residual functional capacity determination is  
17 necessary.

18 **D. Use of Assistance Devices**

19 Plaintiff argues that the ALJ failed to fully account for Plaintiff's use of  
20 assistance devices. ECF No. 14 at 12-13. Because the ALJ is already directed to  
21 readdress the ability to ambulate effectively upon remand, the ALJ is also  
22 instructed to address Plaintiff's use of assistance devices in a new residual  
23 functional capacity determination if a step four determination is necessary.

24 **REMEDY**

25 The decision whether to remand for further proceedings or reverse and  
26 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
27 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
28 where "no useful purpose would be served by further administrative proceedings,

1 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*  
2 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
3 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
4 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)  
5 (noting that a district court may abuse its discretion not to remand for benefits  
6 when all of these conditions are met). This policy is based on the “need to  
7 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are  
8 outstanding issues that must be resolved before a determination can be made, and it  
9 is not clear from the record that the ALJ would be required to find a claimant  
10 disabled if all the evidence were properly evaluated, remand is appropriate. *See*  
11 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211  
12 F.3d 1172, 1179-80 (9th Cir. 2000).

13 In this case, it is not clear from the record that the ALJ would be required to  
14 find Plaintiff disabled if all the evidence were properly evaluated. Further  
15 proceedings are necessary for the ALJ to determine Plaintiff’s credibility regarding  
16 his symptom reporting and his ability to ambulate effectively. If a new step four  
17 determination is necessary, the ALJ is to form a new residual functional capacity  
18 determination addressing the medical source opinions and Plaintiff’s use of  
19 assistance devices. Furthermore, the ALJ is instructed to elicit testimony from  
20 both physical and psychological medical experts and a vocational expert regarding  
21 any new step three, four, and five determinations.

## 22 CONCLUSION

23 Accordingly, **IT IS ORDERED:**

- 24 1. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is  
25 **DENIED**.
- 26 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is  
27 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for  
28 additional proceedings consistent with this Order.

1           3.     Application for attorney fees may be filed by separate motion.

2           The District Court Executive is directed to file this Order and provide a copy  
3 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
4 and the file shall be **CLOSED**.

5           DATED March 1, 2016.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE