

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 17, 2019

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

SHANE B.,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-cv-00389-MKD

ORDER DENYING PLAINTIFF’S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 17, 22

Before the Court are the parties’ cross-motions for summary judgment. ECF Nos. 17, 22. The parties consented to proceed before a magistrate judge. ECF No. 5. The Court, having reviewed the administrative record and the parties’ briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff’s motion, ECF No. 17, and grants Defendant’s motion, ECF No. 22.

JURISDICTION

The Court has jurisdiction pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3).

1 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
2 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
3 *Sanders*, 556 U.S. 396, 409-10 (2009).

4 **FIVE-STEP EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within
6 the meaning of the Social Security Act. First, the claimant must be “unable to
7 engage in any substantial gainful activity by reason of any medically determinable
8 physical or mental impairment which can be expected to result in death or which
9 has lasted or can be expected to last for a continuous period of not less than twelve
10 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
11 impairment must be “of such severity that he is not only unable to do his previous
12 work[,] but cannot, considering his age, education, and work experience, engage in
13 any other kind of substantial gainful work which exists in the national economy.”
14 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

15 The Commissioner has established a five-step sequential analysis to
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
17 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
18 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
19 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
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1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(b), 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
6 claimant suffers from "any impairment or combination of impairments which
7 significantly limits [his] physical or mental ability to do basic work activities," the
8 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
9 claimant's impairment does not satisfy this severity threshold, however, the

10 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
11 404.1520(c), 416.920(c).

12 At step three, the Commissioner compares the claimant's impairment to
13 severe impairments recognized by the Commissioner to be so severe as to preclude
14 a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant's impairment does not meet or exceed the
19 severity of the enumerated impairments, the Commissioner must pause to assess
20 the claimant's "residual functional capacity." Residual functional capacity (RFC),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his limitations, 20 C.F.R. §§ 404.1545(a)(1),
3 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's
5 RFC, the claimant can perform work that he has performed in the past (past
6 relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
7 claimant can perform past relevant work, the Commissioner must find that the
8 claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is
9 incapable of performing such work, the analysis proceeds to step five.

10 At step five, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant can perform other work in the national economy. 20 C.F.R. §§
12 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination, the
13 Commissioner must also consider vocational factors such as the claimant's age,
14 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
15 416.920(a)(4)(v). If the claimant can adjust to other work, the Commissioner must
16 find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).
17 If the claimant is not capable of adjusting to other work, analysis concludes with a
18 finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R.
19 §§ 404.1520(g)(1), 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that 1) the claimant
4 can perform other work; and 2) such work “exists in significant numbers in the
5 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
6 700 F.3d 386, 389 (9th Cir. 2012).

7 **ALJ’S FINDINGS**

8 On November 17, 2014, Plaintiff applied both for Title II disability
9 insurance benefits and Title XVI supplemental security income benefits alleging a
10 disability onset date of July 1, 2014. Tr. 251-62. The applications were denied
11 initially, Tr. 153-65, and on reconsideration, Tr. 174-80. Plaintiff appeared before
12 an administrative law judge (ALJ) on November 14, 2016. Tr. 45-108. On
13 January 13, 2017, the ALJ denied Plaintiff’s claim. Tr. 23-37.

14 At step one of the sequential evaluation process, the ALJ found Plaintiff
15 engaged in substantial gainful activity the fourth quarter of 2014 but otherwise has
16 not engaged in substantial gainful activity since the alleged disability onset date.
17 Tr. 26-27. At step two, the ALJ found that Plaintiff has the following severe
18 impairments: osteoarthritis (multiple joints), degenerative disc disease of the
19 lumbar and cervical spine, sleep apnea, and obesity. Tr. 27.

1 At step three, the ALJ found Plaintiff does not have an impairment or
2 combination of impairments that meets or medically equals the severity of a listed
3 impairment. Tr. 31. The ALJ then concluded that Plaintiff has the RFC to perform
4 light work with the following limitations:

5 [Plaintiff] can lift no more than 20 pounds at a time occasionally
6 and lift or carry 10 pounds at a time frequently; can sit 6 hours and
7 stand and/or walk 6 hours total, in any combination, in an 8-hour
8 workday with normal breaks; can frequently climb ramps/stairs;
can occasionally climb ladders/ropes/scaffolds, stoop, crouch,
kneel, crawl, and or balance; and should avoid concentrated
exposure to heavy industrial-type vibration.

9 Tr. 31-32.

10 At step four, the ALJ found Plaintiff is unable to perform any past relevant
11 work. Tr. 35. At step five, the ALJ found that, considering Plaintiff's age,
12 education, work experience, RFC, and testimony from the vocational expert, there
13 were jobs that existed in significant numbers in the national economy that Plaintiff
14 could perform, such as photo finisher, convenience store cashier, final assembler-
15 optical, and document preparer. Tr. 36. Therefore, the ALJ concluded Plaintiff
16 was not under a disability, as defined in the Social Security Act, from the alleged
17 onset date of July 1, 2014, though the date of the decision. Tr. 37.

18 On October 12, 2017, the Appeals Council denied review of the ALJ's
19 decision, Tr. 1-8, making the ALJ's decision the Commissioner's final decision for
20 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

1 **ISSUES**

2 Plaintiff seeks judicial review of the Commissioner’s final decision denying
3 him disability insurance benefits under Title II and supplemental security income
4 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
5 issues for review:

- 6 1. Whether the ALJ properly identified Plaintiff’s severe impairments at
7 step two;
- 8 2. Whether the ALJ properly evaluated Plaintiff’s symptom claims;
- 9 3. Whether the ALJ properly incorporated the opined limitations into the
10 RFC; and
- 11 4. Whether the ALJ conducted a proper step-five analysis.

12 ECF No. 17 at 10.

13 **DISCUSSION**

14 **A. Step Two: Severe Impairments**

15 Plaintiff contends the ALJ erred at step two by failing to identify his
16 hands/bicep condition and mental-health condition as severe impairments. ECF
17 No. 17 at 14-16.

18 At step two of the sequential process, the ALJ must determine whether the
19 claimant suffers from a “severe” impairment, i.e., one that significantly limits his
20 physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c),

1 416.920(c). To show a severe impairment, the claimant must first prove the
2 existence of a physical or mental impairment by providing medical evidence
3 consisting of signs, symptoms, and laboratory findings. 20 C.F.R. §§ 404.1508,
4 416.908 (2010).¹ The claimant’s own statement of symptoms alone will not
5 suffice. *Id.*

6 An impairment may be found to be not severe when “medical evidence
7 establishes only a slight abnormality or a combination of slight abnormalities
8 which would have no more than a minimal effect on an individual’s ability to
9 work.” Soc. Sec. Rlg. (SSR) 85-28 at *3. Similarly, an impairment is not severe if
10 it does not significantly limit a claimant’s physical or mental ability to do basic
11 work activities, such as walking, standing, sitting, lifting, pushing, pulling,
12 reaching, carrying, handling, seeing, hearing, speaking, understanding, carrying out
13 and remembering simple instructions, dealing with changes in a routine work

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17 ¹ As of March 27, 2017, 20 C.F.R. §§ 416.908 and 404.1508 were removed and
18 reserved and 20 C.F.R. §§ 416.921 and 404.1521 were respectively revised to
19 define what constitutes a medically determinable impairment. The Court applies
20 the statutory versions in effect at the time of the ALJ’s decision.

1 setting, and responding appropriately to supervision, coworkers, and usual work
2 situations. 20 C.F.R. § 416.921(a) (2010);² SSR 85-28.

3 Step two is “a de minimus screening device [used] to dispose of groundless
4 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “Thus, applying
5 our normal standard of review to the requirements of step two, [the Court] must
6 determine whether the ALJ had substantial evidence to find that the medical
7 evidence clearly established that [Plaintiff] did not have a medically severe
8 impairment or combination of impairments.” *Webb v. Barnhart*, 433 F.3d 683, 687
9 (9th Cir. 2005).

10 *1. Hands/Bicep Condition*

11 Plaintiff argues the ALJ erred by not considering his hands/bicep condition as
12 a severe impairment. ECF No. 17 at 16. To succeed, Plaintiff must establish there
13 was medical evidence proving that Plaintiff suffers from a hands/bicep impairment
14 that significantly limited his physical ability to do basic work activities. 20 C.F.R.
15 §§ 404.1520(c), 416.920(c); 20 C.F.R. §§ 404.1508, 416.908 (eff. until March 26,
16 2017). Here, while there were notations in the medical file that Plaintiff
17 complained of pain in his hands and arms and that Plaintiff was occasionally

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19 ² As of March 27, 2017, this statute was amended. The Court applies the version
20 in effect at the time of the ALJ’s decision.

1 observed with diminished bilateral grip and reduced range of movement in the left
2 elbow, the ALJ's finding that Plaintiff's hands/bicep condition was not a severe
3 impairment is supported by the objective medical evidence. For instance, when
4 Dr. Hahn first examined Plaintiff in December 2015, she noted weakened grip in
5 Plaintiff's left hand and some intrinsic atrophy in Plaintiff's right hand. Tr. 484.
6 Dr. Hahn suspected ulnar nerve neuropathy may be causing the hand weakness, but
7 she acknowledged the pinprick sensation test results did not fit that diagnosis. Tr.
8 485. Dr. Hahn ordered electromyogram (EMG)/nerve conduction (NCV) testing
9 of Plaintiff's arms. Tr. 485. The test results were normal—no evidence of right or
10 left cervical radiculopathy of right or left extremities. Tr. 668. A January 2016 x-
11 ray of the left elbow was also normal. Tr. 543. Dr. Hahn then re-evaluated
12 Plaintiff in March 2016. Tr. 669-70. Other than a weak grasp of his right hand
13 and diminished pinprick sensation in his left arm, the examination results of
14 Plaintiff's upper extremities were normal. Tr. 669. Based on the examination and
15 prior testing and x-rays, Dr. Hahn opined that Plaintiff's left biceps weakness and
16 right-hand weakness were orthopedic issues. Tr. 670. She recommended that
17 Plaintiff be evaluated by an orthopedic. Tr. 669-70. Consistent with this
18 recommendation, Dr. Miguel Schmitz evaluated Plaintiff. Tr. 590-95. The exam
19 was normal as to Plaintiff's upper extremities, with full strength and range of
20 movement in the upper extremities. Tr. 593-94. Then, Dr. Randall Espinosa

1 examined Plaintiff. Tr. 637-44. This orthopedic examination was also fairly
2 unremarkable other than guarded Phalen's and Tinel's elbow tests. Tr. 639. X-
3 rays were also normal, except for a remote healed fracture. Tr. 642. Dr. Espinosa
4 opined that Plaintiff seemed to be most bothered by muscular pain in the biceps
5 area and that the objective findings did not indicate sensory disturbances or
6 weakness. Tr. 643. Dr. Espinosa recommended another nerve conduction study
7 and recommended that Plaintiff participate in hand therapy. Tr. 643. Plaintiff
8 engaged in physical therapy from July to September 2016. Tr. 645-63. As therapy
9 progressed, Plaintiff reported soreness from sessions with pain of 3/10, but he
10 tolerated the range of movement activities. Tr. 644-45. Even if the objective
11 medical evidence was interpreted to support a physical impairment in Plaintiff's
12 hands or bicep, the ALJ rationally found that the condition did not significantly
13 limit Plaintiff's ability to perform basic work activities. This finding is consistent
14 with the other objective medical evidence as to Plaintiff's hands/bicep condition.
15 *See* Tr. 388-89, 384-85 (Jan.-Feb.: 2015: range of movement for left elbow is
16 abnormal, but upper extremities motor strength bilaterally was 5/5, and deep
17 tendon reflexes within normal limits); Tr. 463, 524, 535 (Feb., June, and Nov.
18 2015: full range of motion with all extremities and muscle strength is 5/5 with no
19 gross anomalies); Tr. 480 (July 2015: x-rays of right hand show that mineralization
20 and alignment were normal with preserved joint spaces); Tr. 486, 491 (Nov. 2015:

1 while mild tenderness of bilateral medial epicondyles was reported by Plaintiff,
2 there was no pain on flex/extension of wrists and there was full range of movement
3 in all joints); Tr. 823 (Nov. 2016: physical exam revealed normal range of
4 movement and strength); *see also* Tr. 59-60 (Testifying nonexamining physician
5 Dr. Goldstein opined that Plaintiff's hand/biceps condition was not an orthopedic
6 issue, but rather Dr. Goldstein suspected that it was a psychiatric issue or a
7 voluntary reaction.). The ALJ's finding was rational and supported by substantial
8 evidence.

9 Moreover, Plaintiff failed to establish any harmful error resulting from the
10 ALJ's decision to find Plaintiff's hand/biceps condition as a non-severe
11 impairment. First, even if the ALJ should have determined that the hand/biceps
12 condition is a severe impairment, any error would be harmless because the step
13 was resolved in Plaintiff's favor. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454
14 F.3d 1050, 1055 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682 (9th Cir.
15 2005). Plaintiff makes no showing that any of the conditions mentioned creates
16 limitations not already accounted for in the RFC. *See Shinseki*, 556 U.S. at 409-10
17 (the party challenging the ALJ's decision bears the burden of showing harm).

18 Second, the vocational expert testified that Plaintiff could perform the
19 representative occupations of call-out operator and furniture rental associate if
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1 Plaintiff was limited to occasional fingering and handling. Tr. 34, 103, 106. *See*
2 *Molina*, 674 F.3d at 1111. Thus, the ALJ's step two finding is legally sufficient.

3 2. *Mental Conditions*

4 Plaintiff argues the ALJ erred by not considering his mental conditions as a
5 severe impairment. ECF No. 17 at 16. ECF No. 17 at 16. Plaintiff must establish
6 there was objective medical evidence proving that Plaintiff suffers from mental
7 conditions that significantly limited his physical ability to do basic work activities.
8 20 C.F.R. §§ 404.1520(c), 416.920(c); 20 C.F.R. §§ 404.1508, 416.908 (eff. until
9 March 26, 2017). Here, after detailing the objective medical evidence pertaining to
10 Plaintiff's mental conditions, the ALJ found the objective medical evidence did not
11 support a finding that Plaintiff's mental conditions caused more than a minimal
12 limitation on his ability to perform basic work activities and as a result discounted
13 the opinions of Ms. Harris and Harry Hood, M.S. Tr. 30. The ALJ's finding is a
14 rational interpretation of the medical evidence and is supported by substantial
15 evidence.

16 First, the mental examinations of record were unremarkable. For instance,
17 Plaintiff's memory was noted to be normal and he was observed to be orientated,
18 cooperative, and with appropriate mood, affect, judgment, and insight. *See, e.g.*,
19 Tr. 441, 454, 458, 464, 524-25, 528-29, 532, 578, 603-05, 608-09, 638-39, 806,
20 811.

1 Second, Plaintiff did not challenge the ALJ's decision to discount Mr.
2 Hood's mental status examination opinion that Plaintiff's social skills were mildly
3 impaired due to depressed mood and memory was mildly to moderately deficient.
4 Tr. 30, Tr. 374-77. Thus, any challenge to the weight given to Mr. Hood's opinion
5 is waived and the Court may decline to review the weight given to this opinion.
6 *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.
7 2008) (determining the court may decline to address issues not argued with
8 specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998). Despite Plaintiff's
9 waiver, the Court conducted an independent review and finds the ALJ's decision to
10 discount Mr. Hood's vague opinion, which was not consistent with the largely
11 unremarkable exam, supported by substantial evidence. *See Lingenfelter v. Astrue*,
12 504 F.3d 1028, 1042 (9th Cir. 2007) (Relevant factors to evaluating any medical
13 opinion include the amount of relevant evidence that supports the opinion, the
14 quality of the explanation provided in the opinion, and the consistency of the
15 medical opinion with the record).

16 Finally, the ALJ properly discounted Ms. Harris' opinion that Plaintiff had
17 marked anxiety and memory issues.³ Ms. Harris treated Plaintiff monthly from
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19 ³ The Court notes that Plaintiff failed to challenge the ALJ's evaluation of Ms.
20 Harris's opinion, ECF No. 17 at 16, thus any challenge is waived. *See Carmickle*,

1 November 2015 to October 2016. Tr. 562, 665. In March 2016, Ms. Harris
2 diagnosed Plaintiff with post-traumatic stress disorder (chronic) and generalized
3 anxiety disorder with panic. Tr. 562. Ms. Harris opined:

4 [Plaintiff] has voiced vague suicidal ideation and the level of his
5 anxiety make it very unlikely that he will be successful in any
6 employment situation in the next few years. His physical pain
7 issues make it very difficult for [Plaintiff] to respond to others in a
8 tolerant manner and his hypervigilance to physical and tonal
9 stimulation is extreme.

10 Tr. 562. In October 2016, Ms. Harris also diagnosed Plaintiff with traumatic brain
11 injury and opined:

12 [Plaintiff] has evidenced significant short term memory issues in
13 therapy and has difficulty recalling activities or appointments
14 within 2-30 minutes time frames. The level of his anxiety is

15 533 F.3d at 1161 n.2; *Kim*, 154 F.3d at 1000. Despite Plaintiff's waiver, the Court
16 conducted an independent review and finds no error in the weight given to the
17 opinion. Moreover, although Debra Harris' opinion letters indicate that she is a
18 licensed mental health counselor with a M.Ed., the ALJ referred to Ms. Harris as
19 "Dr. Harris." Neither party identified an error in this regard. As a result, the Court
20 utilizes the specific and legitimate standard of review for a physician, rather than
21 the germane reason standard of review that would typically apply to Ms. Harris'
22 opinions. *See Molina*, 674 F.3d at 1104.

1 marked and his comfort in being near others makes it very unlikely
2 that he will be successful in any employment situation in the next
few years.

3 Tr. 665. Ms. Harris also continued to opine that Plaintiff's physical pain issues
4 would present difficulties for Plaintiff. Tr. 665.

5 The ALJ rejected Ms. Harris' opinions. Tr. 30. Because Ms. Harris'
6 opinion was contradicted by the opinion of Philip Comer, Ph.D., Tr. 145-46, the
7 ALJ was required to provide specific and legitimate reasons for rejecting Ms.
8 Harris' opinion. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

9 First, the ALJ found that Ms. Harris did not provide any supporting
10 information for her opinion that Plaintiff would not be successful in an
11 employment situation, other than he had memory issues and marked anxiety. Tr.
12 30. The Social Security regulations "give more weight to opinions that are
13 explained than to those that are not." *Holohan v. Massanari*, 246 F.3d 1195, 1202
14 (9th Cir. 2001). "[T]he ALJ need not accept the opinion of any physician,
15 including a treating physician, if that opinion is brief, conclusory, and inadequately
16 supported by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d
17 1219, 1228 (9th Cir. 2009). Here, Ms. Harris did not support her opinions with an
18 explanation, and her opinions were not supported by any clinical notes of record.
19 This was a specific, legitimate reason, supported by substantial evidence to
20 discount Ms. Harris' opinions.

1 Second, the ALJ found Ms. Harris’ “marked” opinions were not supported
2 by Plaintiff’s unremarkable mental status examinations. A medical opinion may
3 be rejected if it is unsupported by medical findings and the record. *Bray*, 554 F.3d
4 at 1228; *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.
5 2004); *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v.*
6 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). Moreover, an ALJ is not obliged to
7 credit medical opinions that are unsupported by the medical source’s own data
8 and/or contradicted by the opinions of other examining medical sources.
9 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Here, the ALJ
10 rationally found that the mental examinations of record were unremarkable and did
11 not support Ms. Harris’ “marked” anxiety opinion. For instance, Plaintiff’s
12 memory was noted to be normal and he was observed to be orientated, cooperative,
13 and with appropriate mood, affect, judgment, and insight. *See, e.g.*, Tr. 441, 454,
14 458, 464, 524-25, 528-29, 532, 578, 603-05, 608-09, 638-39, 806, 811.

15 Third, based on the objective medical evidence mentioned above, the ALJ’s
16 decision to discount Ms. Harris’ opinions and find that Plaintiff’s mental
17 conditions were not a severe impairment is supported by substantial evidence.

18 The ALJ made no error in the step two findings.
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1 **B. Plaintiff’s Symptom Claims**

2 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
3 convincing in discrediting his symptom claims. ECF No. 17 at 12-14.

4 An ALJ engages in a two-step analysis to determine whether to discount a
5 claimant’s testimony regarding subjective symptoms. SSR 16–3p, 2016 WL
6 1119029, at *2. “First, the ALJ must determine whether there is objective medical
7 evidence of an underlying impairment which could reasonably be expected to
8 produce the pain or other symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation
9 marks omitted). “The claimant is not required to show that [his] impairment could
10 reasonably be expected to cause the severity of the symptom [he] has alleged; [he]
11 need only show that it could reasonably have caused some degree of the
12 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

13 Second, “[i]f the claimant meets the first test and there is no evidence of
14 malingering, the ALJ can only reject the claimant’s testimony about the severity of
15 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
16 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
17 omitted). General findings are insufficient. The ALJ must identify what symptom
18 claims are being discounted and what evidence undermines these claims. *Id.*
19 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas*, 278 F.3d at
20 958 (requiring the ALJ to sufficiently explain why she discounted claimant’s

1 symptom claims)). “The clear and convincing [evidence] standard is the most
2 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
3 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
4 924 (9th Cir. 2002)).

5 Factors to be considered in evaluating the intensity, persistence, and limiting
6 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
7 duration, frequency, and intensity of pain or other symptoms; 3) factors that
8 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
9 side effects of any medication the claimant takes or taken to alleviate pain or other
10 symptoms; 5) treatment, other than medication, the claimant receives or received
11 for relief of pain or other symptoms; 6) any measures other than treatment the
12 claimant uses or used to relieve pain or other symptoms; and 7) any other factors
13 concerning the claimant’s functional limitations and restrictions due to pain or
14 other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. § 416.929(c)(1)-
15 (3). The ALJ is instructed to “consider all of the evidence in an individual’s
16 record,” “to determine how symptoms limit ability to perform work-related
17 activities.” SSR 16-3p, 2016 WL 1119029, at *2.

18 While the ALJ determined that Plaintiff’s medically determinable
19 impairments could reasonably be expected to cause some of the alleged symptoms,
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1 the ALJ discounted Plaintiff's claims concerning the intensity, persistence, and
2 limiting effects of the symptoms. Tr. 33.

3 *1. Inconsistent with the Objective Medical Evidence*

4 The ALJ found the severity of Plaintiff's reported symptoms were
5 unsupported by the objective medical evidence. Tr. 33-34. An ALJ may not
6 discredit a claimant's symptom testimony and deny benefits solely because the
7 degree of the symptoms alleged is not supported by objective medical evidence.
8 *Burch*, 400 F.3d at 680 (Minimal objective evidence is a factor which may be
9 relied upon to discount a claimant's testimony, although it may not be the only
10 factor); *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v.*
11 *Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601
12 (9th Cir. 1989). However, the medical evidence is a relevant factor in determining
13 the severity of a claimant's symptoms and their disabling effects. *Rollins*, 261
14 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Here, the ALJ found the
15 medical providers' observations and findings during physical examinations did not
16 support Plaintiff's disabling claims. Tr. 33. For instance, while some physical
17 examinations indicated tenderness to palpation and supported lumbar conditions,
18 the medical notes reflected Plaintiff had normal sensation in his lower extremities,
19 a normal gait, and no weakness or reflex loss. Tr. 384, 388, 392, 395, 398, 401,
20 408, 410, 412, 414, 416, 418, 420, 422, 441, 457-58, 463-64, 509-510, 738, 593.

1 The ALJ also noted Dr. Hahn's comprehensive evaluation, during which Plaintiff
2 actively resisted range of motion testing and required encouragement to give full
3 effort. *See Tonapetyan*, 242 F.3d at 1148 (recognizing that the tendency to
4 exaggerate symptoms is a reason to discount the claimant's reported symptoms).
5 Dr. Hahn's clinical observations, followed by the subsequent negative nerve
6 studies, Tr. 667-68, and the largely normal orthopedic examinations conducted by
7 Dr. Espinosa, Tr. 637-644, and Dr. Schmitz, Tr. 590-96, support the ALJ's finding
8 that Plaintiff's symptoms were not as disabling as claimed. And as discussed
9 above, the objective medical evidence reflects that Plaintiff's mental abilities were
10 not as restricted as he claimed, as he was regularly noted as having normal mood
11 and affect with normal cognitive functioning. *See, e.g.*, Tr. 441, 454, 458, 464,
12 524-25, 528-29, 532, 578, 603-05, 608-09, 638-39, 806, 811. Moreover, the RFC
13 limited Plaintiff to light work with postural limitations. Tr. 31-32. *See Stubbs-*
14 *Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008).

15 2. *Inconsistent with Daily Living Activities*

16 The ALJ also evaluated Plaintiff's daily living activities against his disabling
17 claims. Tr. 34. It is reasonable for an ALJ to consider a claimant's activities that
18 undermine reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a
19 substantial part of his day engaged in pursuits involving the performance of
20 exertional or non-exertional functions, the ALJ may find these activities

1 inconsistent with the reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*,
2 674 F.3d at 1113. “While a claimant need not vegetate in a dark room in order to
3 be eligible for benefits, the ALJ may discount a claimant’s symptom claims when
4 the claimant reports participation in everyday activities indicating capacities that
5 are transferable to a work setting” or when activities “contradict claims of a totally
6 debilitating impairment.” *Molina*, 674 F.3d at 1112-13. Here, Plaintiff failed to
7 challenge the ALJ’s findings as to his daily living activities. Thus, any challenge
8 is waived. *See Carmickle*, 533 F.3d at 1161 n.2. Regardless, Plaintiff’s
9 unsupported contention fails on the merits because the identified activities of daily
10 living, including watching TV, playing games, talking to his sister on the
11 telephone, taking out the trash, shopping, doing activities with his girlfriend,
12 preparing simple meals, attending church, driving limited distances, and working at
13 a substantial gainful activity level the fourth quarter of 2014 contradict Plaintiff’s
14 disabling claims. Tr. 287-91, 305-10, 86-89, 93, 272, 275; *see Drouin v. Sullivan*,
15 966 F.2d 1255, 1258 (9th Cir. 1992) (recognizing that an individual’s work activity
16 after the alleged disability onset date is a relevant factor). Moreover, about three
17 weeks before the administrative hearing, Plaintiff advised a treating nurse that
18 medication was helping control his symptoms and pain and that he had an
19 improved ability to exercise throughout the day, be more active around the house,
20 and to engage in basic activities of daily living. Tr. 806. This was a clear and

1 convincing reason supported by substantial evidence to discount Plaintiff's
2 symptom claims.

3 C. RFC

4 Plaintiff faults the ALJ for not incorporating his hand, arm,
5 walking/standing, and mental restrictions into the RFC. ECF No. 14 at 16-18. At
6 step four of the sequential evaluation, the ALJ must determine the claimant's RFC.
7 20 C.F.R. § 404.1520(a)(4)(iv), 416.920(a)(4)(iv). "[T]he ALJ is responsible for
8 translating and incorporating clinical findings into a succinct RFC." *Rounds v.*
9 *Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015). "[A]n ALJ's
10 assessment of a claimant adequately captures restrictions . . . where the assessment
11 is consistent with restrictions identified in the medical testimony." *Stubbs-*
12 *Danielson*, 539 F.3d at 1174. An RFC finding need not be identical to a medical
13 opinion; rather, it must be consistent with the medical opinion. *Turner v. Comm'r*
14 *of Soc. Sec. Admin.*, 613 F.3d 1217, 1222-23 (9th Cir. 2010). Therefore, to the
15 extent the evidence could be interpreted differently, it is the role of the ALJ to
16 resolve conflicts and ambiguity in the evidence. *Morgan v. Comm'r of Soc. Sec.*
17 *Admin.*, 169 F.3d 595, 599-600 (9th Cir. 1999). The ALJ was required to include
18 all of Plaintiff's "functional limitations, both physical and mental" in the
19 hypothetical question posed to the vocational expert." *Flores v. Shalala*, 49 F.3d
20 562, 570 (9th Cir. 1995).

1 Here, Plaintiff's contention lacks merit. First, this is a restatement of
2 Plaintiff's argument that the ALJ failed to consider his hand/biceps condition and
3 mental conditions as severe impairments. *See Stubbs-Danielson*, 539 F.3d at 1175-
4 76. The ALJ fully considered the medical evidence and rationally determined that
5 Plaintiff's hands/biceps and mental conditions were not severe impairments.
6 Therefore, the RFC need not include restrictions relating to these non-severe
7 conditions. Moreover, contrary to Plaintiff's assertion otherwise, ECF No. 17 at
8 17, Dr. Goldstein's testimony did not support incorporating a grasping limitation in
9 the RFC. *See* Tr. 59-60 (testifying that based on the objective medical evidence,
10 Plaintiff did not have any fingering or handling difficulties).

11 Second, the ALJ adequately incorporated Plaintiff's functional limitations
12 relating to his standing and walking abilities into the RFC. *See Stubbs-Danielson*,
13 539 F.3d at 1174. For instance, as opined by Dr. Goldstein, Plaintiff was capable
14 of a wide range of light work, even with the partial tear of the left hip. Tr. 54-62.
15 Dr. Goldstein's opinion was consistent with the objective medical evidence
16 relating to Plaintiff's lumbar and neck conditions, including the physical
17 examinations that showed only some tenderness to palpation, some loss of range of
18 motion in the neck and back, some intermittent sensation loss, and some
19 intermittent loss of strength. *See, e.g.*, Tr. 384, 388, 392, 395, 398, 401, 408, 410,
20 412, 414, 416, 418, 420, 422, 441, 457-58, 463-64, 509-510, 738, 593. In addition,

1 the RFC limiting Plaintiff to light work with postural limitations was consistent
2 with the medical opinions of Dr. Trula Thompson, Tr. 613-15, and Dr. Narendra
3 Parikshak, Tr. 137-39, 147-49, who reached their opinions after reviewing the x-
4 rays of Plaintiff's spine, which revealed largely mild to moderate degenerative disc
5 changes. Tr. 473-77. To the extent the medical evidence and opinions conflicted
6 as to Plaintiff's limitations, the ALJ rationally incorporated Plaintiff's evidentiarily
7 supported impairments into the RFC. *See Hill*, 698 F.3d at 1158.

8 **D. Step Five**

9 Plaintiff argues the ALJ erred at step five. ECF No. 17 at 17-18. At step
10 five of the sequential evaluation analysis, the burden shifts to the Commissioner to
11 establish that 1) the claimant can perform other work, and 2) such work "exists in
12 significant numbers in the national economy." 20 C.F.R. §§ 404.1560(c)(2);
13 416.960(c)(2); *Beltran*, 700 F.3d at 389. In assessing whether there is work
14 available, the ALJ must rely on complete hypotheticals posed to a vocational
15 expert. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ's
16 hypothetical must be based on medical assumptions supported by substantial
17 evidence in the record that reflects all of the claimant's limitations. *Osenbrook v.*
18 *Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should be "accurate,
19 detailed, and supported by the medical record." *Tackett*, 180 F.3d at 1101.

1 The hypothetical that ultimately serves as the basis for the ALJ's
2 determination, i.e., the hypothetical that is predicated on the ALJ's final RFC
3 assessment, must account for all the limitations and restrictions of the claimant.
4 *Bray*, 554 F.3d at 1228. As discussed above, the ALJ's RFC need only include
5 those limitations found credible and supported by substantial evidence. *Bayliss*,
6 427 F.3d at 1217 ("The hypothetical that the ALJ posed to the VE contained all of
7 the limitations that the ALJ found credible and supported by substantial evidence
8 in the record."). "If an ALJ's hypothetical does not reflect all of the claimant's
9 limitations, then the expert's testimony has no evidentiary value to support a
10 finding that the claimant can perform jobs in the national economy." *Id.* However,
11 the ALJ "is free to accept or reject restrictions in a hypothetical question that are
12 not supported by substantial evidence." *Greger v. Barnhart*, 464 F.3d 968, 973
13 (9th Cir. 2006). Therefore, the ALJ is not bound to accept as true the restrictions
14 presented in a hypothetical question propounded by a claimant's counsel if they are
15 not supported by substantial evidence. *Magallanes v. Bowen*, 881 F.2d 747, 756-
16 57 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771, 773 (9th Cir. 1986). A
17 claimant fails to establish that a step five determination is flawed by simply
18 restating argument that the ALJ improperly discounted certain evidence, when the
19 record demonstrates the evidence was properly rejected. *Stubbs-Danielson*, 539
20 F.3d at 1175-76.

1 Here, Plaintiff simply restates his argument that the ALJ failed to
2 incorporate his hands/biceps and mental conditions into the RFC and therefore
3 failed to include these conditions in the hypothetical question posed to the
4 vocational expert. For the reasons provided above, the ALJ's hypothetical was
5 accurate, detailed, and supported by the objective medical record. Based on the
6 vocational expert's response to the posed complete hypothetical, the ALJ rationally
7 found Plaintiff capable of performing work that exists in significant numbers in the
8 national economy.

9 **CONCLUSION**

10 Having reviewed the record and the ALJ's findings, the Court concludes the
11 ALJ's decision is supported by substantial evidence and is free of harmful legal
12 error. Accordingly, **IT IS HEREBY ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

14 2. Defendant's Motion for Summary Judgment, **ECF No. 22**, is

15 **GRANTED.**

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1 3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

2 The District Court Executive is directed to file this Order, provide copies to
3 counsel, and **CLOSE THE FILE.**

4 DATED January 17, 2019.

5 *s/Mary K. Dimke*
6 MARY K. DIMKE
7 UNITED STATES MAGISTRATE JUDGE