

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

Feb 04, 2019

SEAN F. McAVOY, CLERK

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

VICKI M. O/B/O MONTE H.,
Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:17-cv-00437-MKD

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

ECF Nos. 13, 20

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 13, 20. The parties consented to proceed before a magistrate judge. ECF No. 4. 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. 13, and grants Defendant's Motion, ECF No. 20.

ORDER - 1

1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

3 **STANDARD OF REVIEW**

4 A district court’s review of a final decision of the Commissioner of Social
5 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
6 limited; the Commissioner’s decision will be disturbed “only if it is not supported
7 by substantial evidence or is based on legal error.” Hill v. Astrue, 698 F.3d 1153,
8 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
9 reasonable mind might accept as adequate to support a conclusion.” Id. at 1159
10 (quotation and citation omitted). Stated differently, substantial evidence equates to
11 “more than a mere scintilla[,] but less than a preponderance.” Id. (quotation and
12 citation omitted). In determining whether the standard has been satisfied, a
13 reviewing court must consider the entire record as a whole rather than searching
14 for supporting evidence in isolation. Id.

15 In reviewing a denial of benefits, a district court may not substitute its
16 judgment for that of the Commissioner. Edlund v. Massanari, 253 F.3d 1152,
17 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
18 rational interpretation, [the court] must uphold the ALJ’s findings if they are
19 supported by inferences reasonably drawn from the record.” Molina v. Astrue, 674
20 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ's decision on account of an error that is harmless." Id. An error is harmless
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
3 Id. at 1115 (quotation and citation omitted). The party appealing the ALJ's
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. § 423(d)(1)(A). Second, the claimant's impairment must be
13 "of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy." 42 U.S.C. §
16 423(d)(2)(A).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §
19 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
20 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in

1 “substantial gainful activity,” the Commissioner must find that the claimant is not
2 disabled. 20 C.F.R. § 404.1520(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). If the claimant suffers
6 from “any impairment or combination of impairments which significantly limits
7 [his or her] physical or mental ability to do basic work activities,” the analysis
8 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment
9 does not satisfy this severity threshold, however, the Commissioner must find that
10 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

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

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must pause to assess
19 the claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
2 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

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

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

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is

1 capable of performing other work; and (2) such work “exists in significant
2 numbers in the national economy.” 20 C.F.R. § 404.1560(c)(2); Beltran v. Astrue,
3 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 On May 1, 2014, Plaintiff¹ filed an application for Title II disability
6 insurance benefits, alleging an amended onset date of January 1, 2010. Tr. 68,
7 154-57. The application was denied initially, Tr. 100-02, and on reconsideration,
8 Tr. 104-05. Plaintiff appeared at a hearing before an administrative law judge
9 (ALJ) on September 2, 2016. Tr. 48-76. On November 9, 2016, the ALJ denied
10 Plaintiff’s claim. Tr. 29-47.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
12 activity during the period from his alleged onset date of January 1, 2010, through
13 his date last insured of December 31, 2014. Tr. 34. At step two, the ALJ found
14 Plaintiff had the following severe impairments: status post above the left knee
15 amputation and obesity. Tr. 35. At step three, the ALJ found Plaintiff did not have
16 an impairment or combination of impairments that meets or medically equals the

17
18
19 ¹ The claimant died on November 28, 2016. ECF No. 13 at 2. This opinion will
20 refer to the claimant as Plaintiff.

1 severity of a listed impairment. Tr. 35. The ALJ then concluded that Plaintiff had
2 the RFC to perform sedentary work with the following limitations:

3 [Plaintiff] is able to lift and/or carry fifteen pounds occasionally and ten
4 pounds frequently. He is able to sit for up to six hours in an eight-hour
5 workday with normal breaks. He is able to stand and/or walk for two hours
6 each in an eight-hour workday with normal breaks. He requires the
7 opportunity to change positions every thirty minutes. He is able to walk no
8 more than one block without resting. He is never able to crawl, crouch,
9 kneel, stoop, or climb ladders, ropes, or scaffolds. He is able to perform
10 work limited to occasional climbing of ramps or stairs. He is able to
11 perform work that does not include exposure to uneven surfaces or
12 unprotected heights. He is able to perform work that does not require
13 functional use of the left leg.

9 Tr. 36.

10 At step four, the ALJ found Plaintiff was unable to perform any past relevant
11 work. Tr. 41. At step five, the ALJ found that, considering Plaintiff's age,
12 education, work experience, RFC, and testimony from a vocational expert, there
13 were other jobs that existed in significant numbers in the national economy that
14 Plaintiff could perform, such as order clerk, telephone solicitor, or final assembler.
15 Tr. 41-42. The ALJ concluded Plaintiff was not under a disability, as defined in
16 the Social Security Act, from January 1, 2010, through December 31, 2014, the
17 date last insured. Tr. 42.

18 On November 22, 2017, the Appeals Council denied review, Tr. 1-6, making
19 the ALJ's decision the Commissioner's final decision for purposes of judicial
20 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 income benefits under Title II of the Social Security Act. ECF No.
4 13. Plaintiff raises the following issues for this Court’s review:

- 5 1. Whether the ALJ properly weighed Plaintiff’s symptom claims;
- 6 2. Whether the ALJ properly weighed the lay opinion evidence;
- 7 3. Whether the ALJ properly incorporated the evidence into the RFC; and
- 8 4. Whether the ALJ properly evaluated the vocational expert’s testimony at
9 step five.

10 ECF No. 13 at 4-18.

11 **DISCUSSION**

12 **A. Plaintiff’s Symptom Claims**

13 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
14 convincing in discrediting his subjective symptom claims. ECF No. 13 at 7-11.

15 An ALJ engages in a two-step analysis to determine whether to discount a
16 claimant’s testimony regarding subjective symptoms.² SSR 16-3p, 2016 WL

17 _____
18 ² At the time of the ALJ’s decision in November 2016, the regulation that governed
19 the evaluation of symptom claims was SSR 16-3p, which superseded SSR 96-7p
20 effective March 24, 2016. SSR 16-3p; Titles II and XVI: Evaluation of Symptoms

1 1119029, at *2. “First, the ALJ must determine whether there is objective medical
2 evidence of an underlying impairment which could reasonably be expected to
3 produce the pain or other symptoms alleged.” *Molina*, 674 F.3d at 1112 (quotation
4 marks omitted). “The claimant is not required to show that [his] impairment could
5 reasonably be expected to cause the severity of the symptom [h]e has alleged; [h]e
6 need only show that it could reasonably have caused some degree of the
7 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

8 Second, “[i]f the claimant meets the first test and there is no evidence of
9 malingering, the ALJ can only reject the claimant’s testimony about the severity of
10 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
11 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
12 omitted). General findings are insufficient; rather, the ALJ must identify what
13 symptom claims are being discounted and what evidence undermines these claims.
14 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*
15 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently

16 _____
17 in Disability Claims, 81 Fed. Reg. 15776, 15776 (Mar. 24, 2016). The ALJ’s
18 decision did not cite SSR 16-3p, but cited SSR 96-4p, which was rescinded
19 effective June 14, 2018, in favor of the more comprehensive SSR 16-3p. Neither
20 party argued any error in this regard.

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

5 Factors to be considered in evaluating the intensity, persistence, and limiting
6 effects of an individual’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 an individual takes or has taken to alleviate pain or
10 other symptoms; 5) treatment, other than medication, an individual receives or has
11 received for relief of pain or other symptoms; 6) any measures other than treatment
12 an individual uses or has used to relieve pain or other symptoms; and 7) any other
13 factors concerning an individual’s functional limitations and restrictions due to
14 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
15 404.1529(c)(1)-(3). The ALJ is instructed to “consider all of the evidence in an
16 individual’s record,” “to determine how symptoms limit ability to perform work-
17 related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

18 The ALJ found that Plaintiff’s medically determinable impairments could
19 reasonably be expected to cause the alleged symptoms, but that Plaintiff’s
20

1 statements concerning the intensity, persistence, and limiting effects of his
2 symptoms were not entirely consistent with the evidence. Tr. 37.

3 1. Lack of Supporting Medical Evidence

4 The ALJ found the severity of Plaintiff's symptom complaints was not
5 supported by the medical evidence. Tr. 37-38. An ALJ may not discredit a
6 claimant's symptom testimony and deny benefits solely because the degree of the
7 symptoms alleged is not supported by objective medical evidence. *Rollins v.*
8 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,
9 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989).

10 However, the medical evidence is a relevant factor in determining the severity of a
11 claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §
12 404.1529(c)(2). Minimal objective evidence is a factor which may be relied upon
13 to discount a claimant's testimony, although it may not be the only factor. *Burch*
14 *v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

15 The ALJ found Plaintiff's allegations of chronic daily pain were not
16 supported by the objective evidence in the record. Tr. 37-38. The record contains
17 minimal evidence from the relevant period in this case. In a July 2010
18 appointment with his prosthetic fitter, the provider observed that Plaintiff's new
19 socket had a very good seal, that Plaintiff was able to walk in the bars, and that
20 Plaintiff reported that it felt good. Tr. 351. In September 2014, a consultative

1 examiner observed Plaintiff appeared somewhat uncomfortable but seemed to
2 move fairly fluidly between the chair and exam table and found Plaintiff had
3 normal muscle bulk and tone, full motor strength, some difficulty with forward
4 bending, inability to walk forward on toes, backwards on heels, squat, or rise due
5 to amputation/prosthetic left leg, and minimal decreased range of motion in the
6 right knee only. Tr. 353-56. Plaintiff received 10 chiropractic treatments over the
7 course of four years during the period between his onset date and his date last
8 insured. Tr. 358-59. In April 2016,³ Plaintiff complained of severe back pain after
9 lifting weights two days earlier. Tr. 357. Plaintiff's chiropractor noted a positive
10 straight leg test on the left side, performed an adjustment, and recommended
11 follow-up treatment on an as needed basis. Id. The ALJ reasonably concluded that
12 these minimal findings did not corroborate the severe disabling pain symptoms
13 Plaintiff alleged.

14 2. Daily Activities

15 The ALJ found Plaintiff's daily activities were inconsistent with the level of
16 impairment he alleged. Tr. 34-35, 37-38. A claimant's reported daily activities
17 can form the basis for an adverse credibility determination if they consist of

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19 ³ The ALJ incorrectly described this treatment note as being from April 2014, prior
20 to Plaintiff's date last insured. Tr. 37-38.

1 activities that contradict the claimant’s “other testimony” or if those activities are
2 transferable to a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007);
3 see also *Fair*, 885 F.2d at 603 (daily activities may be grounds for an adverse
4 credibility finding “if a claimant is able to spend a substantial part of his day
5 engaged in pursuits involving the performance of physical functions that are
6 transferable to a work setting.”). “While a claimant need not vegetate in a dark
7 room in order to be eligible for benefits, the ALJ may discredit a claimant’s
8 testimony when the claimant reports participation in everyday activities indicating
9 capacities that are transferable to a work setting” or when activities “contradict
10 claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1112-13 (internal
11 quotation marks and citations omitted).

12 Here, the ALJ noted that Plaintiff alleged that he was unable to sit for
13 prolonged periods, that he could not walk for more than two hours total in a day,
14 and that chronic daily pain caused him to lie down four to five times per day for
15 twenty minutes at a time at unpredictable intervals. Tr. 36-37; see Tr. 59-61. The
16 ALJ then summarized Plaintiff’s robust daily activities, including caring for four
17 children, preparing three meals a day for up to an hour at a time without needing to
18 take breaks or sit down, performing light housework, picking up his children from
19 school, grocery shopping for one hour on a regular weekly basis, and attending
20 weekly barbeque dinners with friends. Tr. 35-38; see Tr. 61-63, 206-09. The ALJ

1 also noted that Plaintiff reported purchasing several condominiums and receiving
2 rental income from them, but that Plaintiff's tax documents did not reflect Plaintiff
3 having employees and Plaintiff did not testify that he received help managing the
4 condominiums. Tr. 34; see Tr. 64, 169-93. The ALJ reasonably inferred that
5 Plaintiff managed these condominiums alone, which the ALJ found to be another
6 activity inconsistent with complete disability. Tr. 34-35. The ALJ's finding that
7 the sum of Plaintiff's daily activities was inconsistent with Plaintiff's specific
8 alleged limitations is supported by substantial evidence.

9 3. Inconsistent Symptom Reporting

10 The ALJ found that Plaintiff's symptom testimony was undermined by his
11 inconsistent reporting in the record. Tr. 38-39. In evaluating a claimant's
12 symptom claims, an ALJ may consider the consistency of an individual's own
13 statements made in connection with the disability review process with any other
14 existing statements or conduct made under other circumstances. *Smolen v. Chater*,
15 80 F.3d 1273, 1284 (9th Cir. 1996); *Thomas*, 278 F.3d at 958-59. Additionally,
16 "[t]he failure to report symptoms to treatment providers is a legitimate
17 consideration in determining the credibility of those complaints." *Leshner v.*
18 *Comm'r of Soc. Sec.*, No. 2:15-cv-00237-SMJ, 2018 WL 314819, at *4 (E.D.
19 Wash. Jan. 5, 2018) (citing *Greger v. Barnhart*, 464 F.3d 972, 972 (9th Cir. 2006)).
20 Here, the ALJ noted that Plaintiff's statement in his function report that he wakes

1 up several times per night due to nerve pain was inconsistent with Plaintiff's report
2 to Dr. Currigan that he sleeps for six to eight hours per night without problems. Tr.
3 38; compare Tr. 206 with Tr. 352. The ALJ also noted that despite Plaintiff's
4 hearing testimony that his pain was so severe that it caused him to lay down four to
5 five times per day, the record contains no documentation of Plaintiff ever reporting
6 this limitation to a medical provider, including the consultative examiner. Tr. 38;
7 see Tr. 61. The ALJ reasonably concluded that Plaintiff's inconsistent symptom
8 reporting undermined the credibility of these reports.

9 Plaintiff argues that Plaintiff's statements were not inconsistent, identifying
10 Plaintiff's endorsement of insomnia during the review of symptoms during the
11 consultative examination. ECF No. 13 at 9; see Tr. 353. Plaintiff's endorsement
12 of insomnia occurred during the same examination where Plaintiff reported
13 sleeping six to eight hours per night without issue. Tr. 352. Even where the
14 "evidence is susceptible to more than one rational interpretation, the ALJ's
15 decision should be upheld." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198
16 (9th Cir. 2008) (internal quotation marks omitted). The ALJ reasonably concluded
17 that Plaintiff's symptom reporting was inconsistent. This finding is supported by
18 substantial evidence.

1 4. Minimal Treatment

2 The ALJ found Plaintiff's symptom allegations were inconsistent with the
3 minimal treatment he received. Tr. 37-38. An unexplained, or inadequately
4 explained, failure to seek treatment or follow a prescribed course of treatment may
5 be considered when evaluating the claimant's subjective symptoms. *Orn*, 495 F.3d
6 at 638. Evidence of a claimant's self-limitation and lack of motivation to seek
7 treatment are appropriate considerations in determining the credibility of a
8 claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-
9 66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F. App'x 45, 49 (9th Cir. 2009)
10 (unpublished) (considering why plaintiff was not seeking treatment). Here, the
11 ALJ noted that the record reflected "very little treatment" for Plaintiff's symptoms.
12 Tr. 37. The record from the five-year period between Plaintiff's onset date and
13 date last insured reflects only ten chiropractic appointments, three interactions with
14 Plaintiff's prosthetic fitter, and the consultative examination. Tr. 341-61.

15 Plaintiff argues that he had "good reason" for not seeking further treatment.
16 ECF No. 13 at 8-9; see *Smolen*, 80 F.3d at 1284 (ALJ may discredit a claimant's
17 symptom complaints if the claimant fails to show good reason for failing to follow
18 treatment recommendations). Plaintiff testified that he does not take pain
19 medication because he does not want to become addicted and because it did not
20 "solve [his] issues." Tr. 62-63. Plaintiff further testified that he "[doesn't] go to a

1 doctor” because “they just want to give you pain pills.” Tr. 65. Declining to take
2 prescription narcotics for fear of addiction can be a good reason to fail to follow a
3 treatment recommendation. See *Trevizo v. Berryhill*, 871 F.3d 664, 680 n.8 (9th
4 Cir. 2017). However, this does not provide “good reason” for Plaintiff’s failure to
5 seek medical treatment in general. The record does not contain any medical
6 evidence to support Plaintiff’s assertion that the only medical treatment available
7 to him was prescription painkillers. Additionally, the record does not reflect
8 Plaintiff seeking alternative treatments from medical providers. At most, Plaintiff
9 received occasional chiropractic adjustments. Tr. 358-61. Plaintiff bears the
10 burden of proof at steps one through four of the sequential evaluation. *Tackett*,
11 180 F.3d at 1098. The ALJ reasonably concluded that Plaintiff’s lack of medical
12 treatment during the relevant period was inconsistent with his allegations of totally
13 disabling pain. Tr. 37.

14 In sum, the ALJ provided clear and convincing reasons supported by
15 substantial evidence in the record for discrediting Plaintiff’s symptom complaints.

16 **B. Lay Opinion Evidence**

17 Plaintiff challenges the ALJ’s evaluation of lay opinion evidence from
18 Plaintiff’s friends Alan Herdon, Lloyd Herdon, and Tonya Keller. ECF No. 13 at
19 12-16. An ALJ must consider the statement of lay witnesses in determining
20 whether a claimant is disabled. *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050,

1 1053 (9th Cir. 2006). Lay witness evidence cannot establish the existence of
2 medically determinable impairments, but lay witness evidence is “competent
3 evidence” as to “how an impairment affects [a claimant’s] ability to work.” Id.; 20
4 C.F.R. § 404.1513; see also *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993)
5 (“[F]riends and family members in a position to observe a claimant's symptoms
6 and daily activities are competent to testify as to her condition.”). If a lay witness
7 statement is rejected, the ALJ ““must give reasons that are germane to each
8 witness.”” *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (citing *Dodrill*,
9 12 F.3d at 919).

10 Alan Herdon submitted a statement that he had known Plaintiff for over 17
11 years, that Plaintiff was an active person before the loss of his leg, that Plaintiff
12 was able to work around his property and engage in outdoors activities with his
13 children before the loss of his leg, that since the loss of his leg Plaintiff needed
14 help standing and engaging in activities that require walking or standing, that
15 Plaintiff was often in pain even when sitting, that Plaintiff had fallen in front of
16 Mr. Herdon and needed help on uneven ground, that Plaintiff had open sores and
17 swelling on his leg, that Plaintiff’s energy levels were low, and that Plaintiff
18 seemed depressed and anxious. Tr. 253-54.

19 Lloyd Herdon submitted a statement that he had known Plaintiff for 16-17
20 years, that Plaintiff was a self-sufficient person prior to losing his leg, that since

1 the loss of his leg Plaintiff became “100% dependent” on others, that Plaintiff
2 needed to stop frequently and rest when riding in cars, that Plaintiff could no
3 longer walk to fish and had to fish sitting in a boat or on a dock, that Plaintiff could
4 no longer walk miles in the woods to hunt, that Plaintiff could no longer
5 snowmobile, that Plaintiff could engage in prior activities only by sitting, that
6 Plaintiff had low motivation and seemed depressed, and that Mr. Herdon had
7 observed sores on Plaintiff’s leg. Tr. 256-59.

8 Tonya Keller submitted a statement that she had known Plaintiff since junior
9 high school, that Plaintiff had always been active in sports and outdoor activities,
10 that Plaintiff’s injury has caused him to become a bystander due to his inability to
11 participate in activities, that Plaintiff’s injury caused him to be unable to do many
12 daily chores and outdoor activities, that Plaintiff complained to Ms. Keller on
13 many occasions about his pain, that Plaintiff had to take medications and visit
14 doctors frequently, and that Plaintiff had to depend on the help of others. Tr. 261-
15 62.

16 The ALJ considered all three lay opinions and assigned them little weight.
17 Tr. 41.

18 First, the ALJ gave less weight to the lay opinion evidence because the ALJ
19 identified inconsistencies in the lay evidence. Tr. 41. Inconsistency with other
20 evidence in the record is a germane reason to discredit lay witness evidence. Lewis

1 v. Apfel, 236 F.3d 503, 512 (9th Cir. 2001). The ALJ noted that Mr. A. Herdon’s
2 report that Plaintiff “just wants to sit or lay down just to relieve the pain” was
3 inconsistent with Plaintiff’s testimony that sitting caused him pain.⁴ Tr. 41;
4 compare Tr. 254 with Tr. 59. The ALJ also noted that Mr. L. Herdon’s report that
5 Plaintiff was able to hunt and fish while sitting was inconsistent with Ms. Keller’s
6 report that Plaintiff was unable to engage in outdoor activities. Tr. 41; compare Tr.
7 256-57 with Tr. 261. Finally, the ALJ observed that Ms. Keller’s report that
8 Plaintiff frequently visited doctors was inconsistent with the complete lack of
9 medical records of doctor’s visits during the relevant period. Tr. 41; see Tr. 261.
10 These inconsistencies provide germane reason to discredit the lay witnesses’
11 opinions.

14 ⁴ Plaintiff challenges the ALJ’s finding by identifying another portion of Mr.
15 Herdon’s statement that is consistent with Plaintiff’s testimony but inconsistent
16 with the portion of Mr. Herdon’s statement identified by the ALJ. ECF No. 13 at
17 14. Even where the “evidence is susceptible to more than one rational
18 interpretation, the ALJ’s decision should be upheld.” Ryan, 528 F.3d at 1198
19 (internal quotation marks omitted). The evidence Plaintiff identifies does not
20 undermine the ALJ’s reasonable interpretation of the record.

1 Second, the ALJ gave less weight to the lay opinion evidence because it was
2 not clear how much time each witness spent with the Plaintiff. The opinion of a
3 lay witness who views the claimant on a less-than-daily basis still carries weight.
4 *Dodrill*, 12 F.3d at 919. However, the frequency with which a lay witness
5 observes the claimant is a relevant consideration in how much weigh to assign to a
6 lay opinion. 20 C.F.R. § 404.1527(c)(2), (f)(1). The ALJ noted that although all
7 three of the lay witnesses indicated they had known Plaintiff for a substantial
8 period, none of the lay witness statements indicated how frequently they observed
9 Plaintiff's functioning.⁵ Tr. 40-41. The ALJ reasonably considered this factor in
10 light of the inconsistencies the ALJ observed in their testimony discussed supra.
11 This was a germane reason to discredit the lay opinion evidence. The ALJ's
12 evaluation of the lay opinion evidence is supported by substantial evidence.

13 _____
14 ⁵ Contrary to Plaintiff's argument, ECF No. 13 at 14, the omission of this
15 information did not trigger the ALJ's duty to develop the record. The duty to
16 develop the record is triggered if the evidence is ambiguous or the record is
17 inadequate to make a decision. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th
18 Cir. 2001). A lay witness' failure to indicate how frequently they observe a
19 claimant does not render the record as a whole ambiguous or inadequate to
20 determine disability.

1 **C. RFC Formulation**

2 Plaintiff asserts the ALJ erred in failing to incorporate evidence of Plaintiff's
3 functional limitations into the RFC. ECF No. 13 at 4-7.

4 The RFC reflects the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations. 20 C.F.R. §
6 404.1545(a)(1). "[T]he ALJ is responsible for translating and incorporating
7 clinical findings into a succinct RFC." *Rounds v. Comm'r Soc. Sec. Admin.*, 807
8 F.3d 996, 1006 (9th Cir. 2015). To the extent the evidence could be interpreted
9 differently, it is the role of the ALJ to resolve conflicts and ambiguity in the
10 evidence. See *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599-600 (9th
11 Cir. 1999).

12 First, Plaintiff asserts the ALJ should have incorporated limitations for lack
13 of focus and absenteeism into the RFC based on Dr. Thompson's hearing
14 testimony. ECF No. 13 at 5-7. The ALJ gave Dr. Thompson's opinion great
15 weight. Tr. 39. However, an ALJ does not need to incorporate into the RFC an
16 opinion that does "not show how [a claimant's] symptoms translate into specific
17 functional deficits which preclude work activity." See *Morgan*, 169 F.3d at 601.
18 Here, Plaintiff identifies the following exchange from the hearing as evidence of a
19 functional limitation:
20

1 ALJ: From your experience people who have to wear a prosthetic, is that, is
2 that something that would impact maybe his ability to focus on work or
would he miss days, what, what's your experience with that?

3 Dr. Thompson: Yeah. I think it would. The, the issues of wearing a
4 prosthesis are more complex and more frequent in, in the above the knee
area than they are in the more common below knee amputations which tend
5 to be better well tolerated and can be worn more reliably.

6 Tr. 56.

7 Dr. Thompson did not render a specific opinion as to how Plaintiff's
8 prosthesis would impact Plaintiff's focus or attendance at work. Dr. Thompson did
9 not opine that Plaintiff would miss any particular number of hours or days at work
10 due to the prosthesis, nor did Dr. Thompson give an opinion as to what impact a
11 prosthesis would have on this Plaintiff's focus. To the contrary, Dr. Thompson
12 testified that certain problems with prostheses could be resolved by taking the
13 prosthesis off. Tr. 56. Dr. Thompson further testified that Plaintiff's specific
14 limitations could be resolved by removing the prosthesis. Tr. 58. The ALJ
15 reasonably incorporated Dr. Thompson's opinions into the RFC by developing an
16 RFC that reflects Plaintiff's functioning while his prosthesis was removed. Tr. 36-
17 41. Additionally, Dr. Thompson's opinion that Plaintiff could improve his
18 functioning by removing the prosthesis is consistent with Plaintiff's own testimony
19 that he often removed his prosthesis for comfort. Tr. 55. The ALJ did not err in
20 incorporating Dr. Thompson's opinion into the RFC.

1 Plaintiff also asserts the ALJ should have incorporated the vocational
2 expert's testimony about distraction and absenteeism into the RFC. ECF No. 13 at
3 6-7. Plaintiff quotes the vocational expert's testimony about the vocational
4 impacts of prostheses generally as evidence of limitations that the ALJ should have
5 incorporated into the RFC. *Id.* However, the testimony identified by Plaintiff is a
6 statement of the vocational expert's general observation and experience and does
7 not pertain to Plaintiff's specific functioning. Tr. 71-72. Therefore, it was not
8 required to be incorporated into the RFC. See 20 C.F.R. § 404.1545(a)(4) ("When
9 we assess your residual functional capacity, we will consider your ability to meet
10 the physical, mental, sensory, and other requirements of work") (emphasis added).
11 The ALJ did not err in formulating the RFC.

12 **D. Step Five**

13 Plaintiff challenges the ALJ's evaluation of the vocational expert's
14 testimony at step five. ECF No. 13 at 16-18.

15 First, Plaintiff asserts the ALJ failed to ask the vocational expert if his
16 testimony was consistent with the Dictionary of Occupational Titles (DOT), as
17 required by SSR 00-4p. ECF No. 13 at 16-17; SSR 00-4p, 2000 WL 1898704.
18 However, Plaintiff's reply brief concedes that the ALJ did in fact satisfy this duty
19 by instructing the vocational expert to state whether his testimony deviated from
20 the DOT. ECF No. 21 at 4; see Tr. 70. The ALJ did not err in this regard.

1 Second, Plaintiff asserts the ALJ failed to resolve a conflict between the
2 vocational expert's testimony and the DOT. ECF No. 13 at 16-18. Specifically,
3 Plaintiff claims that Plaintiff's limitation to modified sedentary work is
4 inconsistent with the RFC limitation that Plaintiff "requires the opportunity to
5 change positions every thirty minutes." Id.; Tr. 36.

6 "In some disability claims, the medical facts lead to an assessment of RFC
7 which is compatible with the performance of either sedentary or light work except
8 that the person must alternate between periods of sitting and standing." SSR 83-
9 12, 1983 WL 31253, at *4. "In cases of unusual limitation of ability to sit or stand,
10 a [vocational specialist] should be consulted to clarify the implications for the
11 occupational base." Id. Additionally, "[w]hen there is an apparent unresolved
12 conflict between [vocational expert] or [vocational specialist] evidence and the
13 DOT, the adjudicator must elicit a reasonable explanation for the conflict before
14 relying on the VE or VS evidence." SSR 00-4p, 2000 WL 1898704, at *2.

15 However, where the DOT is "silent on whether the jobs in question allow for a
16 sit/stand option," there is no conflict with a vocational expert's testimony that a
17 claimant can perform a job with a sit/stand option. *Dewey v. Colvin*, 650 F. App'x
18 512, 514 (9th Cir. 2016) (unpublished); see also *Meyer v. Astrue*, No. CV 12-89-
19 M-DLC-JCL, 2013 WL 1615893, at *7-*8 (D. Mont. Feb. 22, 2013) (SSR 00-4p
20

1 satisfied where DOT did not address sit/stand option and ALJ consulted vocational
2 expert about limitation of claimant's ability to sit or stand pursuant to SSR 83-12).

3 Here, the RFC included a limitation that Plaintiff would be required to
4 change positions every thirty minutes. Tr. 36. The ALJ consulted the vocational
5 expert, who testified that an individual with Plaintiff's RFC would be capable of
6 performing the jobs of order clerk, telephone solicitor, or final assembler. Tr. 70-
7 73. The DOT is silent as to whether the three jobs identified by the vocational
8 expert allow for a sit/stand option. DOT 209.567-014, Order Clerk, 1991 WL
9 671794; DOT 299.357-014, Telephone Solicitor, 1991 WL 672624; DOT 713.687-
10 018, Final Assembler, 1991 WL 679271. Therefore, there was no conflict for the
11 ALJ to resolve. The ALJ satisfied SSR 83-12 by seeking the testimony of a
12 vocational expert. 1983 WL 31253, at *4. The ALJ did not err in considering the
13 vocational expert's testimony at step five.

14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, this court concludes the
16 ALJ's decision is supported by substantial evidence and free of harmful legal error.

17 Accordingly, **IT IS HEREBY ORDERED:**

- 18 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is **DENIED**.
- 19 2. Defendant's Motion for Summary Judgment, ECF No. 20, is **GRANTED**.
- 20 3. The Court enter **JUDGMENT** in favor of Defendant.

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

3 DATED February 4, 2019.

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

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