

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

Aug 02, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LEONEL C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 4:18-CV-5133-RMP

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

BEFORE THE COURT, without oral argument, are cross-motions for summary judgment from Plaintiff Leonel C.¹, ECF No. 13, and the Commissioner of Social Security (“Commissioner”), ECF No. 20. Plaintiff seeks judicial review, pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3) (applying § 405(g) to SSI decisions), of the Commissioner’s denial of his claim for supplemental security income (“SSI”) under Title XVI of the Social Security Act (the “Act”). ECF No. 13

¹ In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first name and last initial, and, subsequently, Plaintiff’s first name only, throughout this decision.

1 at 1–2. Having reviewed the parties’ motions and the administrative record, the
2 Court is fully informed. The Court denies Plaintiff’s motion, grants the
3 Commissioner’s motion, and determines that the ALJ’s decision should remain
4 intact on the basis that it is supported by substantial evidence and free of harmful
5 legal error.

6 **BACKGROUND**

7 **A. Plaintiff’s Claim for Benefits and Procedural History**

8 Plaintiff Leonel C. was 42 years old when he applied for SSI. Administrative
9 Record (“AR”)² 16, 428. He alleged a disability onset date of June 1, 2009, when he
10 was 38 years old. AR 71. Leonel’s claim for disability was based on the following
11 illnesses, injuries, or conditions: degenerative disc disease or disc protrusion, back
12 injury, back pain, numbness in legs, kidney problems, and Hepatitis C. *Id.* The
13 Commissioner denied Leonel’s application initially and upon reconsideration, and
14 Leonel requested a hearing. AR 99–116.

15 **B. January 4, 2017 Hearing**

16 Leonel was represented by attorney Chad Hatfield at his hearing before
17 Administrative Law Judge (“ALJ”) Eric Basse on January 4, 2017.³ AR 10, 35.
18 Leonel testified in response to the ALJ’s and his attorney’s questions. In addition,

19 _____
20 ² The AR is filed at ECF No. 10.

21 ³ The record is unclear as to whether the hearing occurred in Kennewick or Seattle,
Washington. *Compare* AR 10 (Kennewick) *with* 35 (Seattle).

1 vocational expert Kimberly Mullinax testified in response to questions from the ALJ
2 regarding hypothetical scenarios and follow-up questions from Leonel's attorney.

3 By the date of the hearing, Leonel was 45 years old and claimed an inability to
4 sustain competitive employment on a regular and continuing basis due to a
5 combination of the following impairments: degenerative disc disease, obesity, and
6 kidney disease. *See* ECF No. 13 at 2.

7 Leonel testified that he completed high school as well as some college
8 coursework. AR 37. While attending college in approximately 2005, Leonel
9 worked full time during the summer in building maintenance. AR 61. This brief,
10 seasonal employment was the only employment that the ALJ and the vocational
11 expert discussed for purposes of evaluating whether Plaintiff could return to past
12 work. AR 63–66.

13 Plaintiff lives with his grandmother and helps her with home maintenance and
14 running errands when he is able. AR 39, 48. However, at least twice every two
15 weeks, his back pain becomes so debilitating that he cannot get out of bed. AR 49.

16 Plaintiff testified that he is able to drive when the pain does not render him
17 homebound. AR 41. Indeed, Plaintiff was in a car accident the week before the
18 administrative hearing. AR 41–42.⁴ Leonel reported that he experienced

19
20 ⁴ The ALJ gave Plaintiff a three-month window of opportunity to supplement the
21 record with medical records relating to any injuries he sustained in the car
accident, but Plaintiff did not submit additional evidence. AR 10.

1 significant, worsening fatigue over the relevant period, which he attributed to the
2 effects of hepatitis. AR 51. However, Leonel anticipated beginning treatment for
3 hepatitis shortly after the hearing date. AR 52.

4 Throughout the relevant period, Leonel used marijuana to deal with his back
5 pain, rather than using prescription pain medication to which he fears becoming
6 addicted. AR 51. Leonel obtained medical insurance through the State of
7 Washington in 2016. AR 49. The record supports that Leonel had a disruption in
8 medical insurance coverage before 2016 but does not specify for how long. *See* AR
9 23; ECF No. 13 at 5. As of May 16, 2017, according to treatment provider notes
10 following an appointment to address Plaintiff’s lumbar pain, Plaintiff “had not
11 undergone any physical therapy recently or epidural steroid injections . . . [or] any
12 other conservative treatment to help with his pain.” AR 23.

13 **C. ALJ’s Decision**

14 On June 8, 2017, the ALJ issued an unfavorable decision. AR 10–18.

15 Applying the five-step evaluation process, Judge Basse found:

16 **Step one:** Leonel has not engaged in substantially gainful activity since his
17 application date, February 25, 2014.

18 **Step two:** Leonel has the following severe impairments: degenerative disc
19 disease and obesity. The ALJ further found: “While the record also mentions
20 other diagnosis [sic], I do not find that it establishes any further severe
21 impairments as that term is defined by the regulations.” AR 12. With respect

1 to Hepatitis C, the ALJ found that medical records indicated that Plaintiff was
2 asymptomatic as of April 2013 and was again noted as stable in April 2016.
3 “It was not until May 2016, less than 12 months ago, that liver function testing
4 was noted to be elevated.” AR 13. The ALJ noted that Plaintiff had not yet
5 started treatment for hepatitis at the time of the hearing and was anticipating
6 completing a three-month course of treatment. *Id.* With respect to Plaintiff’s
7 description of pain related to kidney stones, the ALJ noted that imaging taken
8 in April 2016 did not confirm any stone present at that time, and the kidney
9 disease diagnosis that Plaintiff received later in 2016 had not lasted the twelve
10 months required by the regulations at the time of the hearing.

11 **Step three:** Leonel’s impairments or combination of impairments do not
12 meet or medically equal the severity of any of the listed impairments in 20
13 C.F.R. Part 404, Subpart P, Appendix 1.

14 **Residual Functional Capacity (“RFC”):** The ALJ found that Plaintiff “has
15 the residual functional capacity to perform light work as defined in 20 CFR
16 416.967(b) except occasionally climb ramps and stairs, but never ladders,
17 ropes, or scaffolds; and occasionally balance, stoop, kneel, crouch, and
18 crawl.” AR 13.

19 **Step four:** Plaintiff has no past relevant work.

20 **Step five:** Considering Plaintiff’s age, education, work experience, and
21 residual functional capacity, there are jobs that exist in significant numbers in

1 the national economy that the claimant can perform, including representative
2 occupations such as “cashier II,” “cleaner housekeeping,” and “assembler,
3 production.” *See* AR 17.

4 Therefore, the ALJ found that Plaintiff was not disabled from February 25,
5 2014 until the date of the ALJ’s decision. AR 17–18. The Appeals Council denied
6 Leonel’s request for review, and Leonel timely appealed the ALJ’s determination to
7 this Court. ECF No. 1.

8 **APPLICABLE LEGAL STANDARDS**

9 **A. Standard of Review**

10 Congress has provided a limited scope of judicial review of a Commissioner’s
11 decision. 42 U.S.C. § 405(g). A court may set aside the Commissioner’s denial of
12 benefits only if the ALJ’s determination was based on legal error or not supported by
13 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985) (citing
14 42 U.S.C. § 405(g)). “The [Commissioner’s] determination that a claimant is not
15 disabled will be upheld if the findings of fact are supported by substantial evidence.”
16 *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)).
17 Substantial evidence is more than a mere scintilla, but less than a preponderance.
18 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); *McCallister v.*
19 *Sullivan*, 888 F.2d 599, 601–02 (9th Cir. 1989). Substantial evidence “means such
20 evidence as a reasonable mind might accept as adequate to support a conclusion.”
21 *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). “[S]uch

1 inferences and conclusions as the [Commissioner] may reasonably draw from the
2 evidence” will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.
3 1965). On review, the court considers the record as a whole, not just the evidence
4 supporting the decisions of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20,
5 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

6 It is the role of the trier of fact, not the reviewing court, to resolve conflicts in
7 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational
8 interpretation, the court may not substitute its judgment for that of the
9 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999); *Allen v.*
10 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by
11 substantial evidence will still be set aside if the proper legal standards were not
12 applied in weighing the evidence and making a decision. *Browner v. Sec’y of Health*
13 *and Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
14 evidence to support the administrative findings, or if there is conflicting evidence
15 that will support a finding of either disability or nondisability, the finding of the
16 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229–30 (9th Cir.
17 1987).

18 **B. Definition of Disability**

19 The Social Security Act defines “disability” as the “inability to engage in any
20 substantial gainful activity by reason of any medically determinable physical or
21 mental impairment which can be expected to result in death or which has lasted or

1 can be expected to last for a continuous period of not less than 12 months.” 42
2 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a claimant shall
3 be determined to be under a disability only if his impairments are of such severity
4 that the claimant is not only unable to do his previous work, but cannot, considering
5 the claimant’s age, education, and work experiences, engage in any other substantial
6 gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
7 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
8 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

9 **C. Sequential Evaluation Process**

10 The Commissioner has established a five-step sequential evaluation process
11 for determining whether a claimant is disabled. 20 C.F.R. § 416.920. Step one
12 determines if he is engaged in substantial gainful activities. If the claimant is
13 engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§
14 404.1520(a)(4)(i), 416.920(a)(4)(i).

15 If the claimant is not engaged in substantial gainful activities, the decision
16 maker proceeds to step two and determines whether the claimant has a medically
17 severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
18 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination
19 of impairments, the disability claim is denied.

20 If the impairment is severe, the evaluation proceeds to the third step, which
21 compares the claimant’s impairment with a number of listed impairments

1 acknowledged by the Commissioner to be so severe as to preclude any gainful
2 activity. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); *see also* 20 C.F.R.
3 § 404, Subpt. P, App. 1. If the impairment meets or equals one of the listed
4 impairments, the claimant is conclusively presumed to be disabled.

5 If the impairment is not one conclusively presumed to be disabling, the
6 evaluation proceeds to the fourth step, which determines whether the impairment
7 prevents the claimant from performing work that he has performed in the past. If the
8 plaintiff is able to perform his previous work, the claimant is not disabled. 20 C.F.R.
9 §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's RFC
10 assessment is considered.

11 If the claimant cannot perform this work, the fifth and final step in the process
12 determines whether the claimant is able to perform other work in the national
13 economy in light of his residual functional capacity and age, education, and past
14 work experience. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v.*
15 *Yuckert*, 482 U.S. 137, 142 (1987).

16 The initial burden of proof rests upon the claimant to establish a prima facie
17 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
18 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
19 is met once the claimant establishes that a physical or mental impairment prevents
20 him from engaging in his previous occupation. *Meanel*, 172 F.3d at 1113. The
21 burden then shifts, at step five, to the Commissioner to show that (1) the claimant

1 can perform other substantial gainful activity, and (2) a “significant number of jobs
2 exist in the national economy” which the claimant can perform. *Kail v. Heckler*, 722
3 F.2d 1496, 1498 (9th Cir. 1984).

4 **DISCUSSION OF ISSUES ON APPEAL**

5 The parties’ motions raise the following issues regarding the ALJ’s decision:

- 6 1. Did the ALJ erroneously find that Plaintiff’s impairments did not equal
7 Listing 1.04(A)?
- 8 2. Did the ALJ improperly reject the opinions of a medical provider and an
9 agency medical consultant?
 1. Did the ALJ erroneously reject Plaintiff’s subjective symptom testimony?
 2. Did the ALJ fail at step five to formulate a hypothetical question to the
10 vocational expert that contained all of Plaintiff’s credible limitations?

11 ***Listing 1.04(A)***

12 Listing 1.04(A) describes the clinical criteria that would make an individual’s
13 spinal disorder presumptively disabling. 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.04.

14 Plaintiff argues that he submitted an MRI showing disc abnormalities that
15 were noted to potentially affect nerve roots. ECF No. 13 at 8 (citing AR 304). He
16 further argues that doctors found that Plaintiff’s straight leg raising on the left
17 caused some discomfort to Plaintiff’s lower back. *Id.* at 9 (citing AR 317, 319).
18 Plaintiff asserts that he later had a positive straight leg raising test and reported
19 muscle weakness and numbness. *Id.* (citing AR 23 and 26).

20 The Commissioner argues that Plaintiff did not meet his burden of presenting
21 evidence to establish that his impairments were equivalent to the impairments in the

1 Listing. The Commissioner continues that the following explanation from the ALJ
2 was sufficient:

3 The record does not establish the criteria of any listing has been met or
4 medically equaled. Specifically, there is no evidence of nerve
impingement with muscle weakness, arachnoiditis, or
pseudoclaudication. Listing 1.04.

5 ECF No. 20 at 5 (citing AR 13).

6 The ALJ found that Plaintiff's degenerative disc impairment was severe. AR
7 12–13. Once an ALJ determines that a claimant suffers a severe impairment, the
8 ALJ must determine whether the impairment meets or is medically equivalent to one
9 of the listed impairments. *See* 20 C.F.R. § 404.1520(c), (d).

10 Listing 1.04 provides the following examples of spinal disorders that may
11 qualify: “herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis,
12 osteoarthritis, degenerative disc disease, facet arthritis, [and] vertebral fracture[.]”

13 *Id.* Regardless of the specific spinal disorder at issue, to meet Listing 1.04, the
14 disorder must result in “compromise of a nerve root (including the cauda equina) or
15 the spinal cord.” *Id.*

16 Listing 1.04 further requires that a claimant satisfy additional criteria in either
17 subsections A, B, or C. Subsection A, at issue in this case, requires a claimant to
18 submit “[e]vidence of nerve root compression characterized by neuro-anatomic
19 distribution of pain, limitation of motion of the spine, motor loss (atrophy with
20 associated muscle weakness or muscle weakness) accompanied by sensory or reflex

1 loss and, if there is involvement of the lower back, positive straight-leg raising test
2 (sitting and supine).” 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.04(A).

3 There are several general principles with respect to the documentation
4 required to demonstrate satisfaction of any of the Listings relating to the
5 musculoskeletal system. Physical findings derived from a physical examination of
6 the claimant “must be determined on the basis of objective observation during the
7 examination and not simply a report of the individual’s allegation, e.g., ‘He says his
8 leg is weak, numb.’” 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.00(D). The physical
9 examination section continues:

10 Alternative testing methods should be used to verify the abnormal
11 findings: e.g., a seated straight-leg raising test in addition to a supine
12 straight-leg raising test. Because abnormal physical findings may be
13 intermittent, their presence over a period of time must be established by
a record of ongoing management and evaluation. Care must be taken
to ascertain that the reported examination findings are consistent with
the individual’s daily activities.

14 *Id.*

15 Documentation of musculoskeletal impairments generally should consist of “a
16 longitudinal clinical record . . . for the assessment of severity and expected duration
17 of an impairment unless the claim can be decided favorably on the basis of the
18 current evidence.” 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.00(H)(1). Section H,
19 addressing documentation, further provides:

20 2. Documentation of medically prescribed treatment and response.
21 Many individuals, especially those who have listing-level impairments,

1 will have received the benefit of medically prescribed treatment.
2 Whenever evidence of such treatment is available it must be considered.

3 3. When there is no record of ongoing treatment. Some individuals will
4 not have received ongoing treatment or have an ongoing relationship
5 with the medical community despite the existence of a severe
6 impairment(s). In such cases, evaluation will be made on the basis of
7 the current objective medical evidence and other available evidence,
8 taking into consideration the individual's medical history, symptoms,
9 and medical source opinions. Even though an individual who does not
10 receive treatment may not be able to show an impairment that meets the
11 criteria of one of the musculoskeletal listings, the individual may have
12 an impairment(s) equivalent in severity to one of the listed impairments
13 or be disabled based on consideration of his or her residual functional
14 capacity (RFC) and age, education and work experience.

15 4. Evaluation when the criteria of a musculoskeletal listing are not met.
16 These listings are only examples of common musculoskeletal disorders
17 that are severe enough to prevent a person from engaging in gainful
18 activity. Therefore, in any case in which an individual has a medically
19 determinable impairment that is not listed, an impairment that does not
20 meet the requirements of a listing, or a combination of impairments no
21 one of which meets the requirements of a listing, we will consider
medical equivalence. (See §§ 404.1526 and 416.926.) Individuals who
have an impairment (s) with a level of severity that does not meet or
equal the criteria of the musculoskeletal listings may or may not have
the RFC that would enable them to engage in substantial gainful
activity. Evaluation of the impairment(s) of these individuals should
proceed through the final steps of the sequential evaluation process in
§§ 404.1520 and 416.920 (or, as appropriate, the steps in the medical
improvement review standard in §§ 404.1594 and 416.994).

20 C.F.R. pt. 404, subpt. P, app. 1, § 1.00(H)(2)–(4).

18 While the Court agrees with Plaintiff that the ALJ's reasoning for finding that
19 Plaintiff did not satisfy Listing 1.04(A) was scant, the evidence to which Plaintiff
20 points on appeal does not change the outcome. The MRI, which Plaintiff cites for
21 the proposition that Plaintiff's disc abnormalities "potentially affect" nerve roots,

1 was performed on May 10, 2012, more than four years before the hearing. *See* AR
2 303–04. However, where documentation of medically-prescribed treatment is
3 unavailable because, as in Plaintiff’s case, there was no ongoing treatment process or
4 relationship with the medical community, an ALJ must evaluate the applicability of
5 the Listing in light of “current objective medical evidence and other available
6 evidence, taking into consideration the individual’s medical history, symptoms, and
7 medical source opinions.” 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.00(H)(3). Even
8 setting aside that the MRI found only “slight” contraction and displacements of the
9 nerve roots and disc deformities that “potentially affect” the nerve root structures,
10 imagery from 2012 was not “current” in 2017. Given that the 2012 MRI was the
11 only evidence of nerve root compression that Plaintiff pointed to in the record, the
12 ALJ did not err in finding that Plaintiff did not meet the requirements of Listing
13 1.04(A).

14 ***Treatment of medical professionals’ opinions***

15 Plaintiff contends that the ALJ erred in rejecting the opinions of nurse
16 practitioner Susan Harp and Brent Packer, MD.

17 Susan Harp, ARNP

18 Ms. Harp filled out a state agency form for Plaintiff on January 4, 2011. AR
19 375–76. Ms. Harp opined that:

- 20 • Plaintiff’s work function was impaired and was expected to remain
21 impaired for twelve months;

- 1 • Plaintiff could stand for fewer than two hours in an eight-hour work
2 day, sit for fewer than two hours in an eight-hour work day, lift fifteen
3 pounds occasionally, and lift five pounds frequently;
- 4 • Plaintiff had no postural nor motor skill restrictions;
- 5 • Plaintiff had an environment restriction in the form of needing to
6 change positions frequently; and
- 7 • Participation in training or employment activities was appropriate for
8 Plaintiff as of January 2011.

9 *Id.* The ALJ did not address Ms. Harp’s evaluation specifically, but instead
10 accorded little weight to that form as well as other “older [State of Washington
11 Department of Social and Health Services] forms that were dated years prior to the
12 date of the claimant’s Title XVI application.” AR 16. Judge Basse found that the
13 forms were not “as persuasive.” *Id.*

14 Plaintiff maintains that the ALJ was wrong to discount Ms. Harp’s opinions
15 on the basis that she made them before Plaintiff’s SSI application because Ms.
16 Harp’s evaluation was made after Plaintiff’s claimed onset date of June 1, 2009. *Id.*
17 Moreover, Plaintiff argues that the ALJ rejected Ms. Harp’s opinion as not
18 “persuasive” rather than providing specific and legitimate reasons based on
19 substantial evidence, as required for an examining source. *Id.*

20 The Commissioner posits that “[p]rovider opinions from years before a
21 claimant alleges he is disabled are of limited relevance.” ECF No. 20 at 13 (citing
Carmickle v. Comm’r of Soc. Sec. Admin., 533 F.3d 1155, 1165 (9th Cir. 2008)).

The Commissioner further urges that an ALJ’s finding may be supported by
substantial evidence even where two inconsistent conclusions may be drawn from
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1 that evidence, and “Plaintiff’s own interpretation of the evidence” does not
2 undermine a residual functional capacity determination that is consistent with the
3 overall evidence. ECF No. 20 at 13–14.

4 The reason given for conferring minimal weight to Ms. Harp’s assessment
5 was specific and legitimate. The ongoing applicability of Ms. Harp’s conclusions to
6 Plaintiff’s capacity to work was unclear given the remoteness in time of Ms. Harp’s
7 assessment. Ms. Harp indicated in the medical record at issue that Plaintiff’s
8 functional impairment could be expected to last twelve months, and the hearing
9 before the ALJ took place six years after Ms. Harp offered that opinion. *See* AR
10 375. Furthermore, there is no indication that Ms. Harp’s interactions with claimant
11 involved significant or ongoing contact beyond the 2011 assessment, and,
12 alternatively, the ALJ could have discounted Ms. Harp’s assessment based on the
13 inconsistency of its conclusions with Plaintiff’s daily activities and his longitudinal
14 treatment record. Therefore, the Court does not find any error with respect to the
15 weight that the ALJ afforded Ms. Harp’s assessment.

16 Packer

17 Dr. Packer, in the capacity of a state agency medical consultant, opined in
18 February 2016 that Plaintiff is limited to sedentary work. AR 406–07.

19 Leonel asserts that the ALJ rejected the sedentary work limitation because Dr.
20 Packer’s review included only “minimal exam findings,” which Plaintiff contends
21 was an invalid reason for rejecting the opinion. ECF No. 13 at 10.

1 The Commissioner argues that an ALJ may reject a physician’s opinion if it is
2 unreasonable in light of other evidence in the record. ECF No. 20 at 12 (citing
3 *Morgan v. Comm’r of the Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999)). The
4 Commissioner continues, “Moreover, the ALJ explained that ‘even if the claimant
5 were limited to sedentary work, the vocational expert identified jobs at this
6 exertional level as well.’” *Id.*

7 An ALJ must accord more weight to a treating physician’s opinion than an
8 examining physician’s, and an examining physician’s opinion carries more weight
9 than a non-examining, reviewing, or consulting physician’s opinion. *Benecke v.*
10 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th
11 Cir. 1995). An ALJ must articulate “specific and legitimate” reasons, supported by
12 substantial evidence in the record, to reject the opinion of either a treating or an
13 examining doctor. *Lester*, 81 F.3d at 830–31.

14 The ALJ assigned the form completed by Dr. Packer “minimal weight”
15 because Dr. Packer indicated he had reviewed only two clinical notes from 2012 and
16 the single December 2015 clinical note before concluding that Plaintiff is limited to
17 sedentary work. AR 16. The ALJ noted that those three clinical notes “include
18 minimal exam findings.” *Id.* The only evidence that Plaintiff offers to support that
19 Dr. Packer’s opinion was based on objective medical evidence is the 2012 MRI that
20 found disc abnormalities that potentially affected nerve roots. ECF No. 13 at 10
21 (citing AR 406). The 2012 clinical note that describes the MRI findings was one of

1 the three clinical notes that the ALJ noted that Dr. Packer reviewed. AR 16.

2 Therefore, Plaintiff does not show that the ALJ's description of the medical record
3 reviewed by Dr. Packer was inaccurate, and Plaintiff does not undermine that the
4 ALJ gave specific and legitimate reasons justifying his decision to discount Dr.
5 Packer's opinion. *See Carmickle v. Comm'r of Social Sec. Admin.*, 533 F.3d 1155,
6 1164 (9th Cir. 2008) ("The ALJ is responsible for resolving conflicts in the medical
7 record.").

8 ***Treatment of Plaintiff's symptoms testimony***

9 Plaintiff argues that Judge Basse did not provide clear and convincing reasons
10 to make a negative credibility finding with respect to Plaintiff's subjective
11 complaints. *See* ECF No. 13 at 12. The Commissioner responds that the ALJ
12 provided specific, clear, and convincing reasons to discount Plaintiff's testimony
13 regarding the intensity, persistence, and limiting effects of his symptoms. ECF No.
14 20 at 5–11.

15 First, Plaintiff asserts that the ALJ was wrong to base his negative credibility
16 finding on the fact that Plaintiff sought little treatment because Plaintiff was
17 uninsured for a large portion of the relevant period. ECF No. 13 at 12. Plaintiff
18 further argues, in a similar vein, that the ALJ should not have discredited him for
19 maintaining only a minimal prescribed pain regimen because "[a]s the claimant
20 testified, he did not want to take pain medications because he was worried that he
21 would become addicted to them." *Id.*

1 Conservative treatment is an acceptable reason for an ALJ to discredit a
2 claimant's testimony regarding the severity of an impairment. *Parra v. Astrue*, 481
3 F.3d 742, 751 (9th Cir. 2007). "[I]n the case of a complaint of pain, such failure
4 may be probative of credibility, because a person's normal reaction is to seek relief
5 from pain, and because modern medicine is often successful in providing some
6 relief." *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007). "But in the case of
7 impairments where the stimulus to seek relief is less pronounced, and where medical
8 treatment is very unlikely to be successful, the approach to credibility makes little
9 sense." *Id.* Obesity is an ailment for which courts have found the second approach
10 proper. *Id.*

11 An ALJ must first consider "any explanations that the individual may
12 provide, or other information in the case records, that may explain infrequent or
13 irregular medical visits or failure to seek medical treatment'" *Orn*, 495 F.3d at
14 638. An ALJ is wrong to discount an applicant's credibility when a financial
15 inability to pay for medical care adequately explains the failure to seek care during
16 the relevant period. *Id.* However, an ALJ may rely on an applicant's ability to seek
17 and receive other medical care during the relevant period to determine that a
18 complaint regarding an ailment is exaggerated or unjustified. *See Flaten v. Sec'y of*
19 *Health & Human Servs.*, 44 F.3d 1453, 1464 (9th Cir. 1995) (affirming ALJ's
20 discounting of applicant's "claim that lack of money prevented her from seeking
21

1 help for ongoing problems” “because she sought appropriate medical care . . . for
2 other medical symptoms . . . during the intervening years.”).

3 Here, Plaintiff does not rebut the ALJ’s finding that after Plaintiff secured
4 health insurance in 2016, the record indicates that Plaintiff “sought even less
5 treatment for his back pain than he had in the past.” AR 15. Based on that timeline,
6 the ALJ could reasonably conclude that lack of health insurance was not a sufficient
7 explanation for Plaintiff’s failure to seek medical treatment throughout the relevant
8 period.

9 The Court likewise finds that Plaintiff’s fear of becoming addicted to
10 painkillers does not sufficiently explain why Plaintiff relied instead on over-the-
11 counter pain medications and inactivity to address his back pain. With symptoms of
12 the severity claimed by Plaintiff during his hearing, including being confined to bed
13 nearly every week, *see* AR 53, it is reasonable to expect to see a record of a more
14 persistent effort to seek relief.

15 Finally, Plaintiff maintains that the activities of daily living cited by the ALJ,
16 including playing poker and throwing darts, are consistent with the alleged
17 limitations and do not show that Plaintiff was able to perform full-time work. ECF
18 No. 13 at 13. While the Court acknowledges that adjudicators cannot expect a
19 claimant to present as “utterly incapacitated” in his activities of daily living, the ALJ
20 in this instance could reasonably have compared Plaintiff’s representation that he
21 was bedridden a significant portion of every month with indications in the record

1 that Plaintiff engaged in activities inconsistent with that level of limitation. *See Fair*
2 *v. Bowen*, 885 F.2d 597 (9th Cir. 1989). The Court accepts Plaintiff's supposition
3 that participating in occasional poker tournaments out of town, shopping, and
4 attending weekly church services do not strongly indicate that Plaintiff could
5 succeed in a work setting. However, the Court does not find that the ALJ erred in
6 considering these inconsistencies between Plaintiff's testimony and others'
7 descriptions of his activity, in addition to Plaintiff's minimal contact with healthcare
8 professionals, in determining that Plaintiff's complaints should not be fully credited.
9 *See Chaudry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012) (recognizing that ALJs
10 may consider a claimant's activities as well as utilize all other ordinary techniques of
11 credibility evaluation in weighing a claimant's credibility).

12 ***Step five other work analysis***

13 Plaintiff argues that the ALJ's finding at step five that Plaintiff could perform
14 other jobs that exist in significant numbers in the national economy was unsupported
15 by substantial evidence. Plaintiff's contention is based on his related argument that
16 the ALJ improperly rejected the opinions of Ms. Harp and Dr. Packer and
17 improperly rejected Plaintiff's testimony regarding the severity of his limitations.
18 ECF No. 13 at 15.

19 In formulating a claimant's capacity to perform past relevant work at step four
20 or other work in the national or regional economy at step five, an ALJ may rely on
21 the testimony of a vocational expert. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1162

1 (9th Cir. 2001). However, the ALJ must include in any hypotheticals posed to a
2 vocational expert only those limitations that are supported by substantial evidence.
3 *Id.* at 1163–65. If the assumptions contained in the hypothetical are not supported
4 by substantial evidence in the record, “the vocational expert’s opinion has no
5 evidentiary value.” *Lewis v. Apfel*, 236 F.3d 503, 518 (9th Cir. 2001).

6 Given that the Court found no error in the ALJ’s treatment of the medical
7 records generated by Ms. Harp and Dr. Packer and no error in the ALJ’s treatment of
8 Plaintiff’s subjective complaints, there is, correspondingly, no basis to find that the
9 ALJ erred in omitting the functional limitations from those sources at step five of the
10 disability analysis. The Court does not find error in the hypotheticals that the ALJ
11 posed to the vocational expert and does not find error in the conclusions that the ALJ
12 drew from the vocational expert’s testimony.

13 CONCLUSION

14 Having found no error in the ALJ’s decision, the Court grants the
15 Commissioner’s motion for summary judgment and denies Plaintiff’s. Accordingly,
16 the Court does not address Plaintiff’s request for remand for immediate award of
17 benefits. *See* ECF No. 21 at 8.

18 IT IS HEREBY ORDERED:

- 19 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.
- 20 2. Defendant’s Motion for Summary Judgment, **ECF No. 20**, is **GRANTED**.

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3. Judgment shall be entered in favor of the Commissioner.

IT IS SO ORDERED. The District Court Clerk is directed to enter this
Order, enter judgment as directed, provide copies to counsel, and **close this case.**

DATED August 2, 2019.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge