

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL J. SHUFF,

Plaintiff,

Case No. C16-5579-JCC

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

**ORDER AFFIRMING THE
COMMISSIONER'S FINAL
DECISION AND DISMISSING THE
CASE WITH PREJUDICE**

Michael J. Shuff seeks review of the denial of his application for Disability Insurance

Benefits (DIB). Dkt. 11. On September 2, 2010, Mr. Shuff filed an application for DIB alleging disability commencing on September 22, 2001. The ALJ determined that Mr. Shuff's date last insured (DLI) was September 30, 2008. Tr. 984. To be entitled to DIB, Mr. Shuff must establish disability existed on or before his DLI. *See* 42 U.S.C. §416(i)(3); *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1995). In a decision issued on December 17, 2015, the ALJ found that, through the DLI: Mr. Shuff's lumbar degenerative disc disease was a severe impairment; this impairment did

¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is substituted for Carolyn W. Colvin as defendant in this suit. The Clerk is directed to update the docket, and all future filings by the parties should reflect this change.

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 not meet the Listings²; he retained the Residual Functional Capacity (“RFC”) to perform
2 sedentary work except he would be unable to stoop, squat, crouch, crawl, kneel and climb, would
3 be absent from work once every 2 months, and was capable of unskilled, repetitive, and routine
4 work due to pain and fatigue from his lumbar spine disorder; he could not perform any past
5 relevant work but was not disabled because he could perform other jobs that existed in
6 significant numbers in the national economy. Tr. 982-997. The Appeals Council denied Mr.
7 Shuff’s exceptions making the ALJ’s decision the Commissioner’s final decision.³ Tr. 972-78.

8 Mr. Shuff contends the ALJ erred by improperly evaluating: (1) the medical evidence;
9 (2) his testimony; (3) the lay testimony; (4) his RFC; and (5) his ability to perform jobs in the
10 national economy at step five. Dkt 11 at 2. As relief, Mr. Shuff asks the Court to remand the
11 case for an award of benefits or alternatively for further administrative proceedings. *Id.* at 19.

12 For the reasons below, the Court **AFFIRMS** the Commissioner’s final decision and
13 **DISMISSES** the matter with prejudice.

14 **DISCUSSION**

15 The Court may reverse an ALJ’s decision only if it is not supported by substantial
16 evidence or if the ALJ applied the wrong legal standard. *See Molina v. Astrue*, 674 F.3d 1104,
17 1110 (9th Cir. 2012). Even then, the Court will reverse the ALJ’s decision only if the claimant
18 demonstrates that the ALJ’s error was harmful. *Id.*

19 **A. Medical Evidence**

20 Mr. Shuff contends the ALJ erroneously assessed the medical opinions of Kenneth J.
21 Brown, NP, Alan G. Greenwald, M.D., Virginia E. Swanson, M.D., Scott Van Linder, M.D., John

22
23 ² 20 C.F.R. Part 404, Subpart P. Appendix 1.

³ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 S. Wendt, M.D., Arnel Brion, M.D., Patrick Bays, D.O., Brian Tallerico, D.C., Jennifer Carl,
2 M.D., Marie Boudreaux, M.D., and Max Selisch, P.T.⁴ The ALJ must provide “clear and
3 convincing reasons” to reject the uncontradicted opinion of a treating or examining doctor. *Lester*
4 *v. Chater*, 81 F.3d 821, 830, 831 (9th Cir. 1996). When contradicted, a treating or examining
5 doctor’s opinion may not be rejected without “specific and legitimate reasons” that are supported
6 by substantial evidence in the record. *Id.* The ALJ may reject the opinion of a non-acceptable
7 medical source, such as a nurse practitioner or a physical therapist, by giving reasons germane to
8 the opinion. *See Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

9 **1. Kenneth J. Brown, ARNP**

10 In August 2009, Mr. Brown evaluated Mr. Shuff and opined that: he could sit for 15
11 minutes continuously before having to alternate postures by standing or walking for 15 minutes;
12 that it was medically necessary for him to elevate his legs to waist level while sitting; he could sit
13 for 2 hours total in an 8 hour workday; could stand or walk about continuously for 30 minutes
14 before needing to lie down and recline for 15 minutes; could stand and walk a total of 1 hour
15 during an 8 hour workday; would require additional breaks to rest during an 8 hour workday;
16 would need to rest, lie down or recline for 1 hour in an 8 hour workday; could occasionally lift up
17 to 20 pounds; could frequently balance and never stoop; could occasionally rotate and flex his

18 ⁴ Mr. Shuff also summarizes various parts of the medical record and concludes “the ALJ errs by failing to
19 acknowledge that this evidence, considered in its entirety, is consistent with Shuff’s testimony about his
20 symptoms and limitations, and shows that Shuff has been unable to perform any type of full-time work
21 activity on a sustained basis.” Dkt. 11 at 6. However, Mr. Shuff provides no explanation as to how or
22 why the ALJ erred in regards to any of this evidence. This conclusory argument fails to identify or
23 establish harmful error in the ALJ’s evaluation and interpretation of the evidence and, as such, Mr. Shuff
fails to carry his burden. *See Avila v. Astrue*, No. C07-1331, 2008 WL 4104300 (E.D. Cal. Sept. 2, 2008)
at * 2 (unpublished opinion) (citing *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918,
923-24 (9th Cir. 1996) (party who presents no explanation in support of claim of error waives issue); *see also* *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (“[T]he burden of showing that an error is harmful
normally falls upon the party attacking the agency’s determination.”)).

ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 neck forward and never flex his neck backward; could frequently reach, handle and finger; his
2 pain would constantly interfere with his attention and concentration; he was severely limited in
3 his ability to deal with work stress; he required a cane for ambulating; and he would be absent
4 from work more than 3 times per month. Tr. 967-71. Mr. Brown indicated Mr. Shuff's
5 "condition existed and persisted with the restrictions outlined ... at least since February 22,
6 2001." Tr. 971. In June 2015, Mr. Brown completed another medical source statement indicating
7 that Mr. Brown's symptoms and restrictions had increased since he assessed him in 2009. Tr.
8 1182-85.

9 The ALJ found Mr. Brown's opinions inconsistent with the medical record from the
10 relevant period. Tr. 994-95. While "medical reports are inevitably rendered retrospectively and
11 should not be disregarded solely on that basis,"⁵ a retrospective opinion may be discredited if it is
12 inconsistent with, or unsubstantiated by, medical evidence from the period of claimed disability.
13 *Johnson v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1995); *Batson v. Comm'r of Soc. Sec. Admin.*,
14 359 F.3d 1190, 1195 (9th Cir. 2004) (an ALJ may properly reject a medical opinion that is
15 inconsistent with the record). This was a germane reason to discount Mr. Brown's opinions and
16 substantial evidence supports the ALJ's finding. As the ALJ notes, Mr. Brown's opinions purport
17 to relate back to 2001 but were rendered after Mr. Shuff's DLI and Mr. Brown only began
18 treating Mr. Shuff shortly before his DLI. Tr. 994-95. The ALJ further notes that, contrary to
19 Mr. Brown's opinion, the record shows Mr. Shuff's condition did not remain at a fixed level of
20 disabling impairment from 2001 to 2009, but, rather substantially improved following surgery in
21

22

⁵ *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988); *see also* Social Security Ruling ("SSR") 83-20
23 ("In some cases, it may be possible, based on the medical evidence to reasonably infer that the onset of a
disabling impairment(s) occurred some time prior to the date of the first recorded medical examination,
e.g., the date the claimant stopped working.").

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 2003 and 2004. Tr. 994-95. As discussed in more detail below, the medical opinions of treating
2 physician Jennifer Carl, M.D. from 2003 to 2006 indicate that, although Mr. Shuff's functional
3 capacity decreased somewhat prior to surgery in 2003, he was never as limited as Dr. Brown
4 opined during this period, and his functional capacity significantly increased following surgery.
5 Tr. 353-56, 389, 583, 645-35, 991-992. In fact, in February 2006, Dr. Carl opined Mr. Shuff was
6 capable of performing the occupations of meat wrapper and fuel station attendant, the physical
7 requirements of which appear to be in excess of those for sedentary work in most areas.⁶ Tr. 583.
8 Moreover, the medical opinions of Dr. Tallerico in 2006, Dr. Boudreax in 2006, Mr. Selisch, in
9 2002 and 2005, and Guthrie Turner, M.D., in 2011, all indicate Mr. Shuff is capable of
10 substantially more than opined by Mr. Brown. Accordingly, the ALJ reasonably discounted Mr.
11 Brown's retrospective opinion as inconsistent with, or unsubstantiated by, medical evidence from
12 the relevant period.

13 The ALJ also found Mr. Brown did not provide any discussion to support his assessment
14 that Mr. Shuff was limited to the extent provided in his opinion from 2001 through 2009 (or to
15 2015). Tr. 994. While Mr. Brown did note some clinical findings with respect to Mr. Shuff's
16 lumbar spine on examination in 2009, as the ALJ notes, he did not begin treating Mr. Shuff until
17 just prior to his DLI in 2008 and did not identify what records, if any, he reviewed from the
18 relevant period prior to treating him. Tr. 994-95. An ALJ may give less weight to a medical
19 opinion that is "brief, conclusory, and unsupported by the record as a whole, or by objective
20 medical findings." *Batson*, 359 F.3d at 1195. The ALJ also reasonably discounted Mr. Brown's
21

22 ⁶ Fuel center clerk job analysis requires the ability to stand 3 hours without a break for up to 8 hours per day, sit up
23 to 2 hours without a break up to 3 hours per day, and rarely lift and carry 15 pounds a distance of 2 feet. Tr. 450-56.
The meat wrapper job analysis requires lifting 35 pounds occasionally, the ability to stand 8 hours per day, walk two
hours without a break, carry 35 pounds for 30 feet and push 50 pounds. Tr. 450.

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 opinion that Mr. Shuff had significant disabling limitations from 2001 through 2009 (or 2015) on
2 this basis.⁷

3 In sum, the ALJ did not err in discounting Mr. Brown's opinion.

4 **2. Alan Greenwald, M.D.**

5 In July 2009, Dr. Greenwald examined Mr. Shuff and opined that he has "chronic back
6 and L5 sensory and motor deficits which are disabling him from his ability to carry out gainful
7 employment." Tr. 870. The ALJ discounted Dr. Greenwald's opinion because it was rendered 8
months after Mr. Shuff's DLI and was inconsistent with the relevant medical evidence, including
9 MRI studies, independent medical examinations, and the opinions of treatment providers. Tr.
10 993. "Post-DLI opinions may be properly discounted where ... the opinion does not have
11 retrospective applicability." *Denison v. Berryhill*, 2017 WL 3592454 at *3 (W.D. Wash. Aug
12 21, 2017). Moreover, even where an opinion is retrospective it may nonetheless be discounted if
13 it is inconsistent with medical evidence from the relevant period. *Johnson*, 60 F.3d at 1433;
14 *Batson*, 359 F.3d at 1195.

15 Substantial evidence supports the ALJ's findings. Dr. Greenwald's opinion was rendered
16 many months after Mr. Shuff's DLI and nothing in the opinion indicates it is intended to relate
17 back to the relevant period.⁸ Moreover, here, as with Mr. Brown, the opinions of Dr. Carl from
18

19 ⁷ The ALJ also gave other reasons for discounting Mr. Brown's opinion. However, the Court need not
20 address these other reasons in detail because, even if erroneous their inclusion is harmless as they do not
21 negate the ALJ's other valid reason for discounting the opinion. *Carmickle v. Comm'r. Soc. Sec.*
22 *Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008) (including an erroneous reason among other reasons is
23 at most harmless error if the other reasons are supported by substantial evidence and the erroneous reason
does not negate the validity of the overall determination).

⁸ Mr. Shuff contends Dr. Greenwald's opinion "arguably relates back to at least March 2007" but fails to
explain or cite to any evidence supporting this contention. Dkt. 11 at 8. Accordingly, the Court rejects
this conclusory argument.

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 2003 to 2006, Dr. Tallerico in 2006, Dr. Boudreax in 2006, Mr. Selisch in 2002 and 2005, and
2 Dr. Turner in 2011, all indicate Mr. Shuff was functionally capable of substantially more than
3 opined by Dr. Greenwald, and was capable of working during the relevant period. *See Macri v.*
4 *Chater*, 93 F.3d 540, 545 (9th Cir. 1996) (The opinion of a doctor who examines the claimant
5 after the expiration of his disability insured status is entitled to less weight than the opinion of a
6 doctor who completed a contemporaneous exam).

7 In sum, the ALJ did not err in discounting Dr. Greenwald's opinion.

8 **3. *Virginia Swanson, M.D.***

9 In January 2011, Dr. Swanson examined Mr. Shuff and opined that "at this point, he does
10 appear to be quite disabled because of a combination of limited activity intolerance, pain, and
11 emotional stress." Tr. 957-58. The ALJ reasonably discounted Dr. Swanson's opinion because
12 it was provided well after Mr. Shuff's DLI and had little probative value for assessing his
13 abilities during the period at issue. Tr. 994. As noted above, post-DLI opinions may be properly
14 discounted where they do not have retrospective applicability. *See Denison*, 2017 WL 3592454
15 at *3; *Morgan v. Colvin*, 2013 WL 6074119, at *10 (D. Or. Nov. 13, 2013) ("[I]t is well-
16 established that an ALJ may reject a medical opinion, even that of a treating doctor, where 'it
17 was completed ... years after the claimant's date last insured and was not offered as retrospective
18 analysis.' " (quoting *Senter v. Astrue*, 2011 WL 3420426, at *3 (C.D. Cal. Aug. 4, 2011)));
19 *Johnson*, 60 F.3d at 1432 (An ALJ may reject a medical opinion that includes "no specific
20 assessment of [the claimant's] functional capacity" during the relevant time period.). Here, Dr.
21 Swanson's opinion was rendered several years after the DLI and does not relate back to the
22 relevant period.

23 Mr. Shuff argues the ALJ erred in discounting Dr. Swanson's opinion on this basis
ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 because it “is consistent with the other evidence, and shows that Shuff’s medical conditions
2 continued to be disabling through the ALJ’s decision.” Dkt. 11 at 8. However, Mr. Shuff
3 presents nothing to support this argument and at very best it constitutes an alternative
4 interpretation of the record but fails to establish the ALJ’s interpretation was unreasonable.
5 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (When the evidence is susceptible to
6 more than one rational interpretation, the court must affirm the ALJ’s findings if they are
7 supported by inferences reasonably drawn from the record.). Thus, the ALJ did not err in
8 evaluating Dr. Swanson’s opinion.

9 **4. *Scott Van Linder, M.D., and John S. Wendt, M.D.***

10 In September 2003, Dr. Van Linder and Dr. Wendt performed an independent medical
11 examination (IME) of Mr. Shuff and opined that he was limited to “a sedentary or less level of
12 activity” but also stated they would consider him to be at a “disabled status.” Tr. 332. The ALJ
13 gave some weight to Dr. Van Linder and Dr. Wendt’s opinion. Tr. 993-94. The ALJ noted that
14 the restriction to sedentary activity and disabled status appeared inconsistent. *Id.* The ALJ
15 further noted that the purpose of the assessment was to determine whether Mr. Shuff met the
16 criteria for workers compensation, namely whether he should have surgery or whether he was
17 fixed and stable, not to determine a specific residual functional capacity for Social Security
18 claims. *Id.* The ALJ also noted that the term “sedentary” is not defined and it may be that the
19 workers compensation system would consider Mr. Shuff disabled with a sedentary rating and the
20 inability to return to his profession. *Id.* However, “presuming” the definition of “sedentary” was
21 the same as the Social Security requirements, the ALJ found the opinion was not inconsistent
22 with the RFC. *Id.*

23 Mr. Shuff argues that Dr. Van Linder and Dr. Wendt opined he was “currently disabled,
ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 unable to perform even sedentary work.” Dkt. 11 at 9. However, this is not what Dr. Van Linder
2 and Dr. Wendt stated in their opinion. The ALJ also argues that the doctors described many
3 objective findings but fails to explain how these findings undermine the ALJ’s interpretation of
4 the opinion. *Id.* Mr. Shuff’s arguments fail to meet his burden of establish harmful error. *See*
5 *Avila*, 2008 WL 4104300 at * 2 (citing *Northwest Acceptance Corp.*, 841 F.2d at 923-24 (party
6 who presents no explanation in support of claim of error waives issue); *see also* *Shinseki*, 556
7 U.S. at 409 (2009)(“[T]he burden of showing that an error is harmful normally falls upon the
8 party attacking the agency’s determination.”)).

9 Even if the ALJ’s interpretation of the opinion as described above was not reasonable, the
10 ALJ also finds this opinion, rendered just a few months before Mr. Shuff’s first surgery,
11 inconsistent with the record as a whole which shows significant improvement after his surgeries.
12 Tr. 994. Specifically, the ALJ notes that the opinion indicates Mr. Shuff was not fixed and stable
13 at the time, and that the doctors expected surgery would lead to medical improvement. *Id.* The
14 ALJ further notes that Dr. Van Linder and Dr. Wendt did not reassess Mr. Shuff after his 2003
15 and 2004 surgeries and the evidence shows significant improvement. *Id.* Under the
16 circumstances, the ALJ reasonably concluded that these opinions, rendered shortly before
17 surgery, were not indicative of Mr. Shuff’s long-term functioning and were inconsistent with the
18 record as a whole regarding Mr. Shuff’s functional capacity. *See Batson*, 359 F.3d at 1195 (an
19 ALJ may properly reject a medical opinion that is inconsistent with the record); *see, e.g., Lawson*
20 *v. Colvin*, 2013 WL 6095518 (W.D. Wash. Nov. 20, 2013) (ALJ properly discounted physician’s
21 opinion as inconsistent with the record as a whole, which indicates the claimant improved and
22 stabilized with treatment); *Nance v. Colvin*, 2014 WL 3347027 (C.D. Cal. July 8, 2014)
23 (discounting opinion in part because it predated knee surgery which resulted in “overall

ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 improvement"); *Carmickle*, 533 F.3d at 1165 (affirming ALJ's finding that treating physicians'
2 short term excuse from work was not indicative of "claimant's long term functioning."). Mr.
3 Shuff does not challenge this aspect of the ALJ's decision and this rationale is supported by
4 substantial evidence. Specifically, the opinions of Dr. Carl from 2003 to 2006, Dr. Tallerico,
5 D.C. in 2006, Dr. Boudreux, M.D. in 2006, Mr. Selisch, in 2002 and 2005, and Dr. Turner,
6 M.D. in 2011, all support the ALJ's findings that Mr. Shuff was capable of working and that his
7 condition improved after surgery.

8 **5. *Arnel Brion, M.D.***

9 In May 2005, Dr. Brion examined Mr. Shuff and opined he was "not ready to return to
10 work as a meat wrapper or a fuel center clerk." Tr. 450. The ALJ reasonably discounted Dr.
11 Brion's opinion as inconsistent with the opinions of other treatment providers or independent
12 medical examiners as well as based on evidence that Mr. Shuff's condition improved shortly
13 after Dr. Brion's opinion. Tr. 993. An ALJ may discount an opinion as inconsistent with the
14 record as a whole including evidence the claimant's condition improved and stabilized with
15 treatment. *See Batson*, 359 F.3d at 1195; 20 C.F.R. § 404.1527(c)(4) ("Generally, the more
16 consistent an opinion is with the record as a whole, the more weight we will give that opinion.");
17 *and see, e.g.*, *Lawson*, 2013 WL 6095518; *Cox v. Astrue*, 2012 WL 3862135 (D. Or. Sept. 5,
18 2012) (the ALJ's reliance on a doctor's notes showing that a claimant improved after the doctor
19 gave his opinion, was a specific and legitimate reason to reject the doctor's opinion). Here, the
20 record shows that a few months after Dr. Brion's opinion, Mr. Shuff showed improvement on
21 physical examination and a few months later his treating physician, Dr. Carl opined that Mr.
22 Shuff could perform the requirements of meat wrapper and fuel station attendant. Tr. 583. In
23 February 2006, Mr. Shuff's pain management physician, Dr. Boudreux, also opined he could
ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 perform the position of fuel center clerk as did Dr. Tallerico in April 2006. Tr. 582, 702.
2 Moreover, less than a year after Dr. Brion's opinion, as the ALJ notes, Mr. Shuff was able to
3 return to work for a period of time. Tr. 993. In light of this evidence, the ALJ reasonably
4 discounted Dr. Brion's opinion as inconsistent with the record as a whole.

5 The ALJ also notes that Dr. Brion did not address other potential positions that Mr. Shuff
6 would be able or unable to perform beyond his past work or as a fuel center clerk. Tr. 993. As
7 such, even if the ALJ had not given sufficient reasons to discount Dr. Brion's opinion, any error
8 would be harmless as Dr. Brion's opinion did not assess any limitations inconsistent with the
9 RFC or the jobs identified at step five. Mr. Shuff points to other treatment records which he
10 contends support Dr. Brion's opinion. However, this argument again at best constitutes an
11 alternative interpretation of the record but fails to establish the ALJ's interpretation was
12 unreasonable. *See Tommasetti*, 533 F.3d at 1038.

13 In sum, the ALJ did not harmfully err in evaluating Dr. Brion's opinion.

14 **6. *Patrick Bays, D.O., Brian Tallerico, D.O., Jennifer Carl, M.D., Marie Boudreaux,***
15 ***M.D., and Max Selisch, P.T.***

16 Mr. Shuff contends the ALJ erred by "engaging in a selective evaluation of the medical
17 evidence and failing to accurately discuss or properly weigh[] the evidence." Dkt. 11 at 10.
18 Specifically, Mr. Shuff argues the ALJ erred in giving significant weight to the treating opinions
19 of Dr. Carl and Dr. Boudreax, the examining opinions of Dr. Bays and Dr. Tallerico, and to the
20 opinions of physical therapist Mr. Selisch.

21 Mr. Shuff contends the ALJ misrepresented Dr. Bay's August 2005 opinion as indicating
22 Mr. Shuff "was ready to return to work" when in fact Dr. Bay indicated he "hope[d] Mr. Shuff
23 will be able to return to full duty on a full-time basis" after completing a work conditioning/work
ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 hardening program. Tr. 642. However, in evaluating Dr. Bays' opinion the ALJ specifically
2 noted that "Dr. Bays opined that the claimant was ready for a work conditioning or work
3 hardening program with the expectation that the claimant could return to work upon its
4 conclusion." Tr. 991. Mr. Shuff fails to establish the ALJ harmfully erred by misrepresenting or
5 otherwise misevaluating Dr. Bay's opinion.

6 Mr. Shuff argues the ALJ erred in giving significant weight to Dr. Tallerico's opinion
7 that he could perform his job as fuel cell attendant while failing to discuss Dr. Tallerico's
8 findings that he had "significant weakness in the extensor hallucis longus, sensory abnormalities
9 in the left foot and right knee, and the presence of discectomy and subsequent lumbar fusion ...
10 with expected residua that warrant a Category 4 impairment rating." Dkt. 11 at 10; Tr. 698-700.
11 However, Mr. Shuff's conclusory statement fails to explain how these findings undermine Dr.
12 Tallerico's opinion or why the ALJ harmfully erred in failing to address them. *See Ludwig v.*
13 *Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) (the burden is on the party claiming error to
14 demonstrate the error and that the error was harmful); *see Independ. Towers of Wash. v. Wash.*, 350
15 F.3d 925, 930 (9th Cir. 2003) (the court "will not consider any claims that were not actually
16 argued in appellant's opening brief"); *Vincent on Behalf of Vincent v. Heckler*, 739 F.3d 1393,
17 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in original) (the ALJ "need not discuss *all*
18 evidence presented" to him or her, rather, the ALJ must only explain why "significant probative
19 evidence has been rejected.").

20 Mr. Shuff also contends that "contrary to the ALJ's assertion, Dr. Tallerico never opined
21 that Shuff could perform the job of fuel cell attendant on a full-time basis." Dkt. 11 at 10.
22 However, this argument is not supported by the record. The record shows that Dr. Tallerico
23 completed a job analysis form on April 11, 2006, the same date of his examination and report, in
ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 which he indicated Mr. Shuff “[c]an perform his job [QFC – Fuel Cell Attendant] on a full time
2 basis.” Tr. 702. Mr. Shuff fails to establish the ALJ harmfully erred in evaluating Dr.
3 Tallerico’s opinion.

4 Mr. Shuff contends the ALJ erred in giving “significant weight” to Dr. Carl’s treating
5 opinions because overall her opinions do not show that he could perform full-time work on a
6 sustained basis. Dkt. 11 at 10; Tr. 991. However, Mr. Shuff again fails to support this
7 conclusory statement with any specific argument or explanation. Moreover, contrary to Mr.
8 Shuff’s argument, in May 2002, Dr. Carl found Mr. Shuff could work as a meat cutter while
9 lifting no more than 50 pounds, using good body mechanics and substituting squatting for
10 bending. Tr. 389. In May 2003, prior to Mr. Shuff’s surgeries, Dr. Carl found him temporarily
11 more limited but capable of “very light level” work on a full time basis and that he could sustain
12 sedentary work, could sit for 1 hour at a time, stand for 30 minutes at a time and walk for one
13 hour at a time, and lift and carry up to 10 pounds. Tr. 353-56. Following Mr. Shuff’s surgery in
14 November 2003, Dr. Carl opined he was expected to recover and be released to lifting up to 35
15 pounds and possibly 50 pounds. Tr. 323. In November 2005, she opined Mr. Shuff was capable
16 of vocational reactivation on a full-time basis as well as performing the occupation of meat
17 wrapper if he was limited to lifting to loads of 50 pounds or less and fuel center clerk if he could
18 change positions every hour. Tr. 629, 634-35, 704. Finally, in February 2006 she opined Mr.
19 Shuff could perform the occupations of meat wrapper and fuel station attendant. Tr. 583. The
20 ALJ reasonably interpreted these opinions to indicate that, although there were periods where
21 Mr. Shuff was more limited, such as leading up to his surgeries, this greater level of limitation
22 was temporary (i.e. did not meet the duration requirement) and, overall Mr. Shuff was capable of
23 performing full time sedentary work, with additional limitations, on a sustained basis.

ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 Mr. Shuff contends the ALJ erred in giving significant weight to Dr. Boudreax's opinion
2 that he could work as a fuel center clerk because "he was unable to sustain any of the jobs he
3 attempted after that [opinion]." Dkt. 11 at 10. However, the ALJ reasonably relied on Dr.
4 Boudreax's opinion as evidence of Mr. Shuff's limitations at the time and Mr. Shuff's own
5 testimony that he was more limited is not sufficient to undermine a medical opinion. To the
6 contrary, the ALJ can reject testimony given by a claimant when it is inconsistent with the
7 medical evidence. *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (The ALJ may
8 consider inconsistencies between claimant's testimony and testimony from physicians
9 concerning the nature, severity, and effect of the symptoms of which claimant complains.).
10 Furthermore, Dr. Boudreax opined that Mr. Shuff could lift up to 48 pounds frequently, sit for up
11 to three hours at a time, stand for up to three hours at a time, walk for up to three hours at a time,
12 and could work as a fuel center clerk. Tr. 578-599. Mr. Shuff's claimed inability to continue
13 working as a meat cutter is not necessarily inconsistent with Dr. Boudreax's opinion.
14 Accordingly, Mr. Shuff fails to establish error.

15 Mr. Shuff contends the ALJ erred in giving significant weight to Mr. Selisch's opinions
16 on the grounds that they have "little overall relevance. Dkt. 11 at 10-11. Specifically, Mr. Shuff
17 notes that the 2002 opinions predate his two back surgeries and the late 2005 opinion is not
18 relevant to how he was doing in early 2007 and beyond. *Id.* However, as the Commissioner
19 points out, the ALJ does not suggest he is relying on Mr. Selisch's opinion specifically as
20 evidence of his condition in 2007 or later. Dkt. 12 at 11. Rather Mr. Shuff is required to
21 establish disability between the alleged onset date of September 22, 2001, and his DLI of
22 September 30, 2008. As such, the ALJ properly considered Mr. Selisch's opinions from 2002
23 and 2005 as they are relevant evidence of his condition during the period in question.

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 Accordingly, Mr. Shuff's arguments fail to establish error.

2 **B. Mr. Shuff's Testimony**

3 Mr. Shuff argues the ALJ erred in rejecting his symptom testimony. Dkt. 11 at 11-16.

4 The ALJ found the medical evidence of Mr. Shuff's underlying impairments might reasonably

5 produce the symptoms alleged and did not find that Mr. Shuff was malingering. Tr. 988.

6 Consequently, the ALJ was required to provide specific, clear and convincing reasons for

7 rejecting Mr. Shuff's testimony. *Brown-Hunter v. Colvin*, 806 F.3d 487 (9th Cir. 2015). If the

8 ALJ's credibility finding is supported by substantial evidence in the record, the Court may not

9 engage in second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002). Factors that

10 an ALJ may consider in weighing a claimant's testimony include inconsistencies in testimony or

11 between testimony and conduct, daily activities, and unexplained or inadequately explained

12 failure to seek treatment or follow a prescribed course of treatment. *Orn v. Astrue*, 495 F.3d 625,

13 636 (9th Cir. 2007); SSR 96-7p (superseded by SSR 16-3p on March 16, 2016).

14 The ALJ discounted Mr. Shuff's testimony in part as inconsistent with his treatment

15 notes. Tr. 988-89. Although "subjective pain testimony cannot be rejected on the sole ground

16 that it is not fully corroborated by objective medical evidence, the medical evidence is still a

17 relevant factor in determining the severity of a claimant's pain and its disabling effects." *Rollins*

18 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). Moreover, an ALJ may discount a claimant's

19 testimony when it contradicts evidence in the medical record. *See Johnson*, 60 F.3d at 1434.

20 Here, the ALJ reasonably discounted Mr. Shuff's testimony on the grounds that "[t]he treatment

21 record showed his back symptoms were not disabling to the extent h[e] alleged prior to his date

22 last insured, and the record showed improvement with treatment." Tr. 988. Specifically, the ALJ

23 notes that a neurological examination in August 2001 (after his February 2001 work accident and

ORDER AFFIRMING THE

COMMISSIONER'S FINAL DECISION AND

DISMISSING THE CASE WITH PREJUDICE

1 just prior to his alleged onset date) was unremarkable with the exception of mildly positive left
2 straight leg raise; in June 2003 straight leg test in was mildly positive on the left side, his manual
3 motor testing, reflexes and sensation were intact and examination revealed no objective
4 neurological findings; in January 2004, straight leg test again was only mildly positive on the left
5 and negative on the right, motor and neurological exam was stable; steroid injections in May 2004
6 improved his pain symptoms and he was noted to be significantly improved. Tr. 989.
7 Furthermore, in January 2005, a few months after undergoing surgery in November 2004, Mr.
8 Shuff's surgeon concluded he was doing well enough that he could likely return to work after two
9 weeks of conditioning; in May 2005 he was able to walk up to 2 miles and climb stairs to the third
10 floor, his mobility was improving, straight leg raising tests were negative and in June 2005 his
11 strength was within normal limits and he walked with normal gait; in October 2005 he was doing
12 well and rated his pain as 3 or 4 out of 10; in November 2005, he had a normal gait, rose easily
13 from a seated position and ambulated without difficulty; and in May 2008 he reported steroid
14 injections improved his symptoms and he had no posterior leg or buttocks pain. *Id.* The ALJ
15 reasonably concluded based on this record that the treatment records were not consistent with the
16 level of disability Mr. Shuff alleged prior to his DLI.

17 Mr. Shuff contends the ALJ cited selective treatment notes which show some
18 improvement and failed to acknowledge that he required spinal surgeries which, "fully supports
19 [his] testimony about his inability to work since September 2001." Dkt. 11 at 11. However,
20 contrary to Mr. Shuff's argument, the ALJ does, in fact, discuss Mr. Shuff's spinal surgeries
21 extensively and concludes that, although he underwent surgery, his condition was not disabling
22 and, in fact, that he showed significant improved with surgery. Tr. 985-95. Mr. Shuff's argument
23 at best amounts to an alternative interpretation of the record but fails to establish the ALJ's

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 interpretation was unreasonable. *Tommasetti*, 533 F.3d at 1038.

2 The ALJ also notes that the objective imaging studies and lab tests did not support the
3 degree of limitation and disability Mr. Shuff claimed. Tr. 989. Specifically, the ALJ notes that a
4 2001 MRI (the year of his alleged onset) showed only mild degenerative changes and that
5 electrodiagnostic testing in November 2002 showed no evidence of left lumbosacral
6 radiculopathy. *Id.* Moreover, one month after his second back surgery, in January 2005, xrays
7 showed the hardware was in good position and he was doing well and MRIs from April 2005,
8 March 2008, and April 2009, showed by and large mild degenerative findings and did not show
9 significant change from other post-surgical studies. *Id.* Mr. Shuff argues that this objective
10 testing cannot be relied upon to disprove his level of pain. Dkt. 11 at 12. However, even though
11 the ALJ cannot discount a claimant's subjective pain testimony solely because it is not fully
12 corroborated by objective medical evidence, it is still a relevant factor in evaluating the severity
13 and disabling effect of that pain. *See Rollins*, 261 F.3d 853. Here, the ALJ properly considered
14 the objective imaging studies and lab tests and reasonably concluded they have not revealed
15 findings one would reasonably expect in the presence of a disabling back injury and the severity
16 of the problems Mr. Shuff portrayed. Tr. 989. Although this was not a sufficient reason on its
17 own to discount Mr. Shuff's testimony, the ALJ also gave other valid reasons for doing so.

18 The ALJ found Mr. Shuff's daily activities to be inconsistent with his claim that he is
19 disabled. Tr. 990. Specifically, the ALJ noted that in June 2001, Mr. Shuff reported bike riding,
20 going on 2-mile hikes, swimming, doing isometric exercises, and in July 2001 reported rowing a
21 boat, lifting weights, swimming, and doing tai chi. *Id.*; 253, 257. In June 2003, he reported
22 spray-washing his vehicle, in April 2005, he reported he could walk 1 mile, sit or stand for up to
23 30 minutes at a time and exercise in his home gym. Tr. 344, 447. In October 2005 he was able

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 to walk 1.6 miles on a treadmill in 29 minutes and in December 2005 he reported exercising
2 daily, doing Pilates on a medicine ball and using a Gazelle machine. Tr. 538, 614. In January
3 and February 2006, he reported his intent to resume boating and walking his dogs on the beach
4 and reported following an exercise program of walking, swimming and stretching. Tr. 571, 593.
5 He also indicated he was able to bike five miles and play with his dogs and the only medication
6 he used was the occasional ibuprofen. Tr. 585. He reported cleaning his pellet stove in April
7 2008 and in June 2009 reported he could lift 40 pounds from floor level. Tr. 811, 894.

8 Mr. Shuff argues the ALJ erred in rejecting his testimony as inconsistent with his
9 activities of daily living. Dkt. 11 at 13-14. He contends his activities do not show that he could
10 perform any type of full-time competitive work activity. *Id.* However, Mr. Shuff presents
11 nothing demonstrating the ALJ's findings lack support in the record. Rather, he argues his
12 activities do not capture the true nature of his limitations and that, as he testified, he struggles
13 with performing many daily activities. However, even if Mr. Shuff's view of his ability to
14 perform daily activities suggests some difficulty functioning, the ALJ may rely upon a claimant's
15 activities as grounds for discrediting the claimant's testimony to the extent that they contradict
16 claims of a totally debilitating impairment. *See Molina*, 674 F.3d at 1113. This is what the ALJ
17 did here. The ALJ considered and rejected Mr. Shuff's testimony that he is disabled on the
18 grounds that the activities discussed above show he is more functional than he claims.

19 Specifically, Mr. Shuff testified that his impairments prevented him from working. Tr. 988. He
20 testified he had great difficulty standing up straight, sitting up straight and walking long
21 distances. Tr. 1020. He stated that he had difficulty sitting, even for a few minutes. Tr. 1021.
22 However, the ALJ noted that the evidence during the relevant period showed Mr. Shuff was an
23 active person who could sit for substantial periods (e.g. sit and ride his bike five miles), could

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 walk for substantial periods (e.g., hiking and walking significant distance), and could perform
2 multiple different activities that involved all of his extremities (e.g. lifting, cleaning a stove,
3 spray washing). The ALJ further noted that Mr. Shuff's activities showed improvement over
4 time, i.e., after his surgeries, through his DLI. Tr. 991. The ALJ reasonably found Mr. Shuff's
5 activities inconsistent with his testimony regarding the severity and limiting effect of his
6 symptoms during the relevant period.

7 Finally, the ALJ noted that Mr. Shuff was able to return to past work as a meat cutter
8 from April 2006 through July 2006 and managed a meat market from October 2006 through
9 February 2007. Tr. 990. The ability to maintain employment "with a fair amount of success"
10 during an alleged period of disability is a valid reason to discredit plaintiff's claim of disability.
11 *Drouin v. Sullivan*, 966 F.2d 1255, 1258 (9th Cir.1992). Even if these jobs were, as Mr. Shuff
12 claims, ultimately too strenuous for him, the ALJ reasonably found Mr. Shuff's ability to engage
13 in them inconsistent with his claims of totally disabling impairment since September 2001. See
14 *id.* (The ALJ reasonably considered that the claimant "was able to hold two previous jobs with a
15 fair amount of success, and even if those particular jobs are, as she claims, too taxing for her, the
16 vocational counselor testified that she is qualified for thousands of less strenuous jobs.").

17 Even if Mr. Shuff's alternative interpretation of his activities is also reasonable, the Court
18 cannot say the ALJ's findings lack support in the record, and cannot say the ALJ's finding that
19 Mr. Shuff's activities show he is more functional than he claims is unreasonable. Under these
20 circumstances, the Court is required to affirm the ALJ's determination. See *Tommasetti*, 533
21 F.3d at 1038.

22 C. **Lay Evidence**

23 Lay testimony as to a claimant's symptoms or how an impairment affects the claimant's
ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 ability to work is competent evidence that the ALJ must take into account. *Nguyen v. Chater*, 100
2 F.3d 1462, 1467 (9th Cir.1996). In order to discount competent lay witness testimony, the ALJ
3 “must give reasons that are germane to each witness,” *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
4 Cir.1993). Here, the ALJ considered the lay testimony of Laura Shuff, Mr. Shuff’s wife. Tr. 180-
5 87, 995.

6 In October 2010, Ms. Shuff submitted a statement indicating that Mr. Shuff: has a hard
7 time standing without changing position or sitting or lying down; uses a device to grab anything
8 out of arm’s length; needs a cane for walking; can’t sit in one position for more than 10 to 15
9 minutes; can walk for only about 15 minutes before stopping and resting for 10 to 15 minutes; is
10 easily distracted, impairing his ability to read and follow instructions; can’t kneel due to pain in
11 his knees and difficulty getting back up; and his memory and concentration and understanding
12 were getting worse, and his hands were numb and occasionally turned white and had no feeling.
13 Tr. 185-87.

14 The ALJ properly discounted Ms. Shuff’s statements as inconsistent with “the claimant’s
15 demonstrated abilities and the opinions of the claimant’s treating physicians and independent
16 medical examiners.” Tr. 995. Inconsistency with the medical evidence is a germane reason to
17 discount a lay witness’ statements. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).
18 Here, the opinions of Dr. Carl from 2003 to 2006, Dr. Tallerico, D.C. in 2006, Dr. Boudreux in
19 2006, Mr. Selisch in 2002 and 2005, and Dr. Turner in 2011, all indicate Mr. Shuff was capable
20 of substantially more functionally than indicated by Ms. Shuff. The ALJ further notes that Ms.
21 Shuff’s statements are similar to those of Mr. Shuff and the same reasons he did not fully accept
22 Mr. Shuff’s statements apply to Ms. Shuff’s statements as well. This was also a valid reason to
23 discount Ms. Shuff’s statements. *See Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 694

ORDER AFFIRMING THE
COMMISSIONER’S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE

1 (9th Cir. 2009) (Where an ALJ has provided clear and convincing reasons for finding a claimant
2 not fully credible, those reasons are germane reasons for rejecting similar lay witness testimony.).

3 In sum, the ALJ did not err in discounting Ms. Shuff's statements.

4 **D. RFC and Step Five**

5 Mr. Shuff contends the ALJ's errors in evaluating the evidence resulted in a defective
6 RFC and step five finding. Dkt. 11 at 18-19. However, as discussed above, the ALJ did not err
7 in evaluating the evidence and, as such, Mr. Shuff fails to establish error with respect to the RFC
8 and step five.

9 **CONCLUSION**

10 For the foregoing reasons, the Commissioner's final decision is **AFFIRMED** and this
11 case is **DISMISSED** with prejudice.

12
13 DATED this 20th day of September, 2017.

14
15
16 
17 JOHN C. COUGHENOUR
18 United States District Judge
19
20
21
22
23

ORDER AFFIRMING THE
COMMISSIONER'S FINAL DECISION AND
DISMISSING THE CASE WITH PREJUDICE