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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASEY L.,

Plaintiff,

v.

NANCY A. BERRYHILL, Deputy
Commissioner of Social Security for
Operations,

Defendant.

CASE NO. C17-5942-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff Casey Lee proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda, this matter is AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1975.¹ He completed high school and previously worked as a retail manager, aquarist, pet store sales person, carpet cleaner, sales clerk, and children's

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 wildlife/after school teacher. (AR 30, 246.)

2 Plaintiff protectively filed DIB and SSI applications in January 2015, alleging disability
3 beginning December 31, 2011. (AR 205-12.) He remained insured for DIB through March 31,
4 2012 and was required to establish disability on or prior to that “date last insured” to receive DIB.
5 *See* 20 C.F.R. §§ 404.131, 404.321. On May 4, 2016, ALJ Cynthia D. Rosa held a hearing, taking
6 testimony from plaintiff and a vocational expert (VE). (AR 39-74.) On January 6, 2017, the ALJ
7 issued a decision finding plaintiff not disabled. (AR 19-32.)

8 Plaintiff timely appealed. The Appeals Council denied plaintiff’s request for review on
9 September 15, 2017 (AR 1-5), making the ALJ’s decision the final decision of the Commissioner.
10 Plaintiff appealed this final decision of the Commissioner to this Court.

11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
16 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
17 engaged in substantial gainful activity since the alleged onset date. At step two, it must be
18 determined whether a claimant suffers from a severe impairment. The ALJ found severe plaintiff’s
19 status post surgeries at L4-L5 for a herniated disc, lumbar spondylosis, and degenerative disc of
20 the cervical spine with spondylosis and radiculopathy. Step three asks whether a claimant’s
21 impairments meet or equal a listed impairment. The ALJ found plaintiff’s impairments did not
22 meet or equal the criteria of a listed impairment.

23 If a claimant’s impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has
2 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform
3 less than the full range of sedentary work, defined in 20 C.F.R. §§ 404.1567(a) and 416.967(a) as
4 work involving lifting no more than ten pounds at a time and occasionally lifting or carrying
5 articles like docket files, ledgers, and small tools, with walking and standing required occasionally,
6 i.e., up to two hours in an eight-hour workday. He could occasionally climb stairs and ramps, but
7 never ladders, ropes, or scaffolds; occasionally stoop, kneel, crouch, or crawl; avoid concentrated
8 exposure to extremes of cold and vibrations; work at tasks where he can alternate between sitting
9 and standing every thirty minutes; and occasionally reach overhead. With that assessment, the
10 ALJ found plaintiff unable to perform his past relevant work.

11 If a claimant demonstrates an inability to perform past relevant work, or has no past
12 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
13 retains the capacity to make an adjustment to work that exists in significant levels in the national
14 economy. With the assistance of the VE, the ALJ found plaintiff capable of performing other jobs,
15 such as work as a document preparer, addressor, and callout operator.

16 This Court's review of the ALJ's decision is limited to whether the decision is in
17 accordance with the law and the findings supported by substantial evidence in the record as a
18 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
19 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
20 by substantial evidence in the administrative record or is based on legal error.") Substantial
21 evidence means more than a scintilla, but less than a preponderance; it means such relevant
22 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
23 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of

1 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
2 F.3d 947, 954 (9th Cir. 2002).

3 Plaintiff avers error in a disparity between the hypothetical question proffered to the VE
4 and the RFC in the decision, in the assessment of his testimony and a physician's opinion, and
5 resulting errors at step four and five. He requests remand for an award of benefits or, in the
6 alternative, for further administrative proceedings. The Commissioner argues the ALJ's decision
7 has the support of substantial evidence and should be affirmed.

8 RFC and Hypothetical to VE

9 Both the RFC and hypothetical proffered to a VE must include all of the claimant's
10 functional limitations supported by the record. *See Valentine v. Comm'r SSA*, 574 F.3d 685, 690
11 (9th Cir. 2009), and *Thomas*, 278 F.3d at 956. A VE's testimony based on an incomplete
12 hypothetical lacks evidentiary value to support a finding a claimant can perform jobs in the national
13 economy. *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993). *Accord Lewis v. Apfel*, 236 F.3d
14 503, 517-18 (9th Cir. 2001) ("Hypothetical questions asked of the [VE] must 'set out all of the
15 claimant's impairments.' If the record does not support the assumptions in the hypothetical, the
16 [VE's] opinion has no evidentiary value.") (quoting *Gamer v. Secretary of Health and Human*
17 *Servs.*, 815 F.2d 1275, 1278, 1279 (9th Cir. 1987)).

18 The ALJ assessed an RFC of less than the full range of sedentary work, including a
19 limitation to walking and standing up to two hours in an eight-hour workday, and the ability to
20 "work at tasks where he can alternate between sitting and standing every thirty minutes." (AR
21 22.) In the hypothetical proffered to the VE at hearing, the ALJ asked about an individual who
22 was able to perform sedentary work and "would need to alternate sitting standing at about say 30-
23 minute intervals." (AR 70-71.)

1 Plaintiff construes the RFC limitation to sitting and standing in thirty minute intervals to
2 require a total amount of standing for four hours: “ – sitting for a 30 minute interval, standing for
3 a 30 minute interval, standing for a 30 minute interval, sitting for another interval, standing for
4 another interval, and so on, leaving an equal 4 hours each for standing and sitting at the end of the
5 day.” (Dkt. 9 at 5.) He argues this necessarily contradicts the limitation to standing/ walking up
6 to two hours and suggests the ALJ misunderstood the limitations assigned. He, at the same time,
7 maintains the hypothetical at hearing was less restrictive than the RFC by contemplating four hours
8 of standing in thirty minute intervals, and that the VE identified jobs that required standing up to
9 four hours in thirty minute intervals.

10 Plaintiff’s reading of the RFC and hearing testimony is not reasonable. The ALJ explicitly
11 found plaintiff capable of less than a full range of sedentary work “with walking and standing
12 required occasionally, i.e., up to two hours in an eight-hour workday.” (AR 22.) She proceeded
13 to outline additional limitations, including that plaintiff could “work at tasks where he can alternate
14 between sitting and standing every 30 minutes.” (*Id.*) That is, while plaintiff could stand and walk
15 up to two hours, he required the ability to alternate between sitting and standing every thirty
16 minutes within that two-hour total. The ALJ did not misunderstand or assess conflicting
17 limitations as to the total amount of time plaintiff could stand or walk. She reiterated the limitation
18 to two hours total of standing and walking in noting her agreement with the opinions of the State
19 agency medical consultant. (AR 29-30.)

20 Nor was there error in the hypothetical, reliance on the VE’s testimony, or at step five. At
21 hearing, the ALJ identified an individual able to perform sedentary work, but with additional
22 limitations, including the need to alternate sitting and standing at thirty minute intervals. (AR 70-
23 71.) While the ALJ used the term “sedentary,” rather than “less than sedentary” as stated in the

1 decision, the amount of standing and/or walking remained the same: occasional standing and/or
2 walking, for no more than two hours total in a day. 20 C.F.R. §§ 404.1567(a), 416.967(a) (“Jobs
3 are sedentary if walking and standing are required occasionally and other sedentary criteria are
4 met.”); Social Security Ruling (SSR) 96-9p (“Jobs are sedentary if walking and standing are
5 required occasionally and other sedentary criteria are met. ‘Occasionally’ means occurring from
6 very little up to one- third of the time, and would generally total no more than about 2 hours of an
7 8-hour workday. Sitting would generally total about 6 hours of an 8-hour workday.”) The ALJ, in
8 any event, necessarily proffered a hypothetical to less than sedentary work by including the need
9 to alternate between standing and sitting. SSR 96-9p (“An individual may need to alternate the
10 required sitting of sedentary work by standing (and, possibly, walking) periodically. Where this
11 need cannot be accommodated by scheduled breaks and a lunch period, the occupational base for
12 a full range of unskilled sedentary work will be eroded.”)

13 The VE identified three sedentary jobs plaintiff could perform with the additional
14 limitations assessed, including alternating sitting and standing at thirty minute intervals. (AR 70-
15 71.) These sedentary jobs by definition required no more than a total of two hours standing or
16 walking. *See* Dictionary of Occupational Titles (DOT) 249.587-018 (document preparer); DOT
17 209.587-010 (addressor); DOT 237.367-014 (callout operator). The VE also qualified his
18 testimony by noting the ability to alternate sitting and standing is not addressed in the DOT and
19 was based on his professional experience, education, and past completion of labor market research
20 and development of job analyses. (AR 72-73.) The VE clearly understood both the limitation to
21 sedentary work, with no more than two hours total of standing or walking, and opined the sedentary
22 positions identified could be performed with the need to alternate standing and sitting within that
23 total at thirty-minute intervals. Plaintiff’s assertion of error lacks merit.

1 Symptom Testimony

2 Absent evidence of malingering, an ALJ must provide specific, clear, and convincing
3 reasons to reject a claimant’s testimony.² *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir.
4 2014) (citing *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)). *See also Lingenfelter v.*
5 *Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). “General findings are insufficient; rather, the ALJ
6 must identify what testimony is not credible and what evidence undermines the claimant’s
7 complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). The ALJ may consider a
8 claimant’s “reputation for truthfulness, inconsistencies either in his testimony or between his
9 testimony and his conduct, his daily activities, his work record, and testimony from physicians and
10 third parties concerning the nature, severity, and effect of the symptoms of which he complains.”
11 *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

12 The ALJ found plaintiff’s statements concerning the intensity, persistence, and limiting
13 effects of his symptoms not entirely consistent with the medical and other evidence in the record.
14 (AR 23.) The record did not substantiate plaintiff’s allegations to the degree alleged and his
15 testimony of sitting for thirty minutes at a time with the need to shift positions, standing for one
16 hour at a time, and walking one mile at a time supported an ability to perform sedentary work.
17 The Court finds specific, clear, and convincing reasons provided in support of these conclusions.

18 A. Medical Evidence

19 The ALJ provided a lengthy, detailed discussion of plaintiff’s testimony in conjunction
20 with the medical evidence. (AR 23-28.) She contrasted plaintiff’s testimony he needed to lie
21 down three to five hours a day, with an absence of such reporting prior to February 2016, a

22 _____
23 ² While the Social Security Administration eliminated the term “credibility” from its sub-regulatory
policy addressing symptom evaluation, *see* SSR 16-3p, case law containing that term remains relevant.

1 supportive treating physician opinion, or any observation of body deconditioning; noted the little
2 treatment received between 2011 and early 2015, use of limited medication, and average level of
3 pain; and found the earlier examination notes to support no more than subjective complaints of
4 intermittent lower extremity numbness. (AR 23-24 (citing AR 477-525, 532-78, 608-30).) While
5 testifying to a similar level of debilitating back pain and work restrictions since 2010, plaintiff had
6 continued working after back surgeries and until the end of 2011, and treatment between
7 November 2011 and prior to January 2015 was insignificant. (AR 25 (citing AR 402 (November
8 2011: prescription of marijuana for chronic pain); AR 404 (January 2013: chronic cough and sinus
9 congestion); AR 405 (April 2013: skin rash); AR 539 (May 2014: skin rash; “excellent” range
10 of motion of his lumbar spine).) He reestablished care for his back in early January 2015, while
11 working as a radio advertisement sales person and noting worsened pain the prior six weeks. (AR
12 25-26 (citing AR 364-70, 374).) The ALJ described objective findings and testing associated with
13 plaintiff’s back (AR 372, 375), Dr. Clyde Carpenter’s recommendation of surgical intervention
14 (AR 373), and plaintiff’s later, June 2015 report of doing fairly well with home stretching and a
15 walking program and his desire “to resume normal activities such as scuba diving and skydiving.”
16 (AR 481-82.) In September 2015, Dr. Carpenter noted “back pain which is limiting his ability to
17 get back to work”, but did not specify a degree or type of limitation and recommended a complete
18 discectomy. (AR 26, 483-84 (finding normal gait, forty degrees lumbar flexion, ten degrees
19 extension and lateral bending, four/five motor strength on left and full strength on right, and
20 diminished sensory testing in L5 dermatome).)

21 The ALJ contrasted plaintiff’s testimony of sciatica with a February 2016 treatment note
22 indicating low back pain without sciatica, and his testimony of difficulty driving with the absence
23 of any such reporting prior to February 18, 2016, when he reported worsening symptoms in the

1 preceding five months. (AR 26, 608-11, 623.) “Most importantly, the claimant has had about four
2 doctor visits since October 2015, which suggests that his condition has been stable and has not
3 required aggressive regular medical care. “ (AR 26.) That plaintiff has not had corrective or
4 revision surgery relating to the lumbar spine after 2010 showed his back disorder has not been as
5 debilitating and restrictive as described at hearing.

6 The ALJ identified a number of inconsistencies regarding plaintiff’s alleged neck injury.
7 (AR 26-27.) Plaintiff, for example, alternatively attributed the injury to incidents in April 2015
8 and September 2015, denied cervical or thoracic pain in an April 2015 emergency room visit,
9 reported fourteen years of neck pain to one provider and a year of neck pain to another, and did
10 not receive aggressive treatment even when receiving care for his lumbar spine. (*Id.* (citing AR
11 388-401, 477-92, 514-25, 575).) These inconsistencies put the veracity of plaintiff’s subjective
12 history into question and did not support severe disabling cervical disc disease. (AR 27.)

13 The ALJ also addressed the objective evidence associated with neck pain. (*Id.*) For
14 example, in September 2015, Dr. David Hanscom considered x-ray findings, conducted an
15 examination, found no medical need for lumbar or cervical surgery, and recommended a structured
16 rehabilitation program. (AR 576-78 (intact motor strength and sensory function in extremities,
17 reflexes symmetric and equal bilaterally, limited range of motion in lumbar spine, normal gait,
18 intact tandem gait).) These findings and observations did not support debilitating cervical or
19 lumbar radiculopathy at least through the end of September 2015. (AR 27.) Despite significant
20 findings in an October 2015 cervical spine MRI and the recommendation of surgery, a subsequent
21 postural evaluation was normal except for a reduced range of motion in the cervical and lumbar
22 spines, some cervical tenderness, and other mild findings (AR 519-22), and December 2015 EMG
23 and nerve conduction studies were essentially normal and showed no finding of cervical

1 radiculopathy (AR 524-27, 582-84). Finally, while Dr. Hanscom diagnosed cervical radiculopathy
2 in March 2016, he advised the issue would likely resolve on its own and did not find surgery
3 necessary. (AR 621-25.) The evidence suggested a mild cervical impairment that would resolve
4 with conservative care, but the ALJ considered the condition in formulating sedentary exertional,
5 postural, and manipulative limitations. (AR 28.)

6 Plaintiff asserts that examining physician Dr. Thomas Gritzka, who found plaintiff's need
7 to lie down four to six hours a day medically reasonable, reviewed and analyzed the records with
8 greater professional competence than the ALJ. (AR 604-07.) He suggests providers may not have
9 written down all of his statements and that the absence of such notation does not mean he was not
10 lying down. Plaintiff also asserts he did not always have medical insurance to seek the visits he
11 needed and that his inability to afford some treatment should not be held against him.

12 The Court finds no reversible error established. "While subjective pain testimony cannot
13 be rejected on the sole ground that it is not fully corroborated by objective medical evidence, the
14 medical evidence is still a relevant factor in determining the severity of the claimant's pain and its
15 disabling effects." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); SSR 16-3p. An ALJ
16 therefore properly considers whether the medical evidence supports or is consistent with a
17 claimant's allegations. *Id.*; 20 C.F.R. §§ 404.1529(c)(4), 416.1529(c)(4) (symptoms are
18 determined to diminish capacity for basic work activities only to the extent the alleged functional
19 limitations and restrictions "can reasonably be accepted as consistent with the objective medical
20 evidence and other evidence.") An ALJ may reject subjective testimony upon finding it
21 contradicted by or inconsistent with the medical record. *Carmickle v. Comm'r of SSA*, 533 F.3d
22 1155, 1161 (9th Cir. 2008); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). An ALJ
23 also properly considers inconsistencies in a claimant's reporting, *Greger v. Barnhart*, 464 F.3d

1 968, 972 (9th Cir. 2006), and evidence associated with treatment, §§ 404.1529(c)(3),
2 416.929(c)(3), SSR 16-3p, including unexplained or inadequately explained failure to seek or
3 follow through with treatment, *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008).

4 The existence of a medical opinion supporting plaintiff's testimony does not suffice to
5 demonstrate error. "[T]he ALJ is responsible for determining credibility, resolving conflicts in
6 medical testimony, and for resolving ambiguities." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
7 1998). *Accord Carmickle*, 533 F.3d at 1164; *Thomas*, 278 F.3d at 956-57. When evidence
8 reasonably supports either confirming or reversing the ALJ's decision, the Court may not
9 substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).
10 The Commissioner's decision to deny benefits is disturbed "only if it is not supported by
11 substantial evidence or is based on legal error." *Brown-Hunter v. Colvin*, 806 F.3d 487, 491 (9th
12 Cir. 2015) (quoted sources and internal quotation marks omitted). "Where the evidence is
13 susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld."
14 *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999). Plaintiff offers a contrary
15 interpretation of the medical evidence as it relates to one of his alleged symptoms. Because the
16 ALJ's interpretation is at least equally rational and is supported by substantial evidence, it will not
17 be disturbed.

18 Plaintiff's argument regarding insurance has some substance. At hearing, plaintiff could
19 not recall whether he had medical insurance "the entire time since 2011," testified he had "state
20 medical insurance for part of the time[,]" but did not have it when he "worked for Olympia Cross."
21 (AR 61.) He added:

22 All those years I didn't have any medical insurance, so -- . . . A lot
23 of the reason for that when I'm not going back to the doctor and
whatnot was because I didn't have medical insurance and I couldn't

1 pay for it back then. And then when I did go back to the doctor, they
2 just said that they wanted me to go back in for surgery and I just did
not want to go through what I've been going through again.

3 (AR 61-62.) This testimony suggests plaintiff did not have medical insurance for at least part of
4 the relevant time period. (*See, e.g.*, AR 224, 232 (indicating work for Olympia Cross in 2011).)

5 The ALJ must consider reasons for a claimant's failure to seek or follow through with
6 treatment. SSR 16-3p ("We will not find an individual's symptoms inconsistent with the evidence
7 in the record on this basis without considering possible reasons he or she may not comply with
8 treatment or seek treatment consistent with the degree of his or her complaints.") *But see Trevizo*
9 *v. Berryhill*, 871 F.3d 664, 679 (9th Cir. 2017) (a failure to assert a reason or a finding a reason
10 "is not believable, can cast doubt on the sincerity of the claimant's pain testimony.") (quoting
11 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)). In this case, there is no indication the ALJ
12 considered whether the absence of treatment resulted from a lack of insurance. The ALJ did,
13 however, consider that plaintiff received treatment between 2011 and early 2015, but that his
14 medical visits were sporadic, involved insignificant treatment addressing other, non-severe
15 conditions, and did not include reports of back pain. (AR 24-25.) As plaintiff observes, the fact a
16 person sought some treatment does not mean the person could afford all treatment. *See Trevizo*,
17 871 F.3d at 681 (that a claimant could afford doctor visits, did not mean "she could also afford
18 doctors' visits coupled with expensive pharmaceuticals"; finding nothing to contradict claim
19 claimant "was at times noncompliant with medication because she could not afford it.") (citing
20 *Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995) ("Disability benefits may not be denied
21 because of the claimant's failure to obtain treatment he cannot obtain for lack of funds."))
22 However, in this case, it was notable that, even when he did seek treatment, plaintiff did not report
23 back pain. The Court, considering the ALJ's reasoning and decision as a whole, finds the ALJ's

1 failure to consider reasons for the failure to seek treatment harmless error. *Molina*, 674 F.3d at
2 1115 (ALJ’s error may be deemed harmless where it is “‘inconsequential to the ultimate
3 nondisability determination.’”; the court looks to “the record as a whole to determine whether the
4 error alters the outcome of the case.”); *Carmickle*, 533 F.3d at 1162-63 (where the ALJ provides
5 specific reasons supporting an assessment and substantial evidence supports the conclusion, an
6 error in the assessment may be deemed harmless; the relevant inquiry “is not whether the ALJ
7 would have made a different decision absent any error, . . . [but] whether the ALJ’s decision
8 remains legally valid, despite such error.”)

9 B. Activities

10 The ALJ found plaintiff had been socially active and engaged in a “wide array of daily and
11 social activities, all of which are inconsistent with his subjective allegations of the need to lie down
12 for three to five hours a day. (AR 24.) Plaintiff has partial custody of his son, sees him every
13 weekend, and testified to “doing as much as he can when he is with his son, taking him on nature
14 walks and camping, which he felt was painful last summer.” (*Id.*) He lives in a two-story
15 apartment and had to climb stairs frequently; drives two to three times a week to grocery stores, a
16 gas station, or to pick up his girlfriend; met his girlfriend at a New Year’s Eve party two years ago;
17 is a member of a professional skydivers association and attends their meetings regularly; gets
18 together with family and friends for barbecues regularly; is an avid outdoor person, enjoys going
19 fishing, camping, and hiking with his son, went camping last summer, and continues to fish with
20 his son; drives a half hour to the ocean to fish; and often goes out to dinner.

21 In a function report, plaintiff reported taking care of his son and his pets, preparing daily
22 meals for thirty minutes at a time, going outside at least once a day, and shopping in stores once a
23 week. (AR 259-62.) He spent time with others and performs activities daily, such as walking,

1 hiking, fishing, and going out for dinner. His reports of finishing what he starts and following
2 spoken and written instructions very well suggest an absence of debilitating pain that would affect
3 focus and concentration. He does not use a medically prescribed assistive device for ambulation,
4 despite his testimony of poor balance and the need to lie down most of the day. The ALJ found
5 no rationale as to why plaintiff would not be able to perform at least sedentary work. She found
6 the inconsistencies to show a tendency to magnify symptoms and the alleged need to lie down for
7 a few hours a day inconsistent with the totality of the evidence, but accommodated his alleged
8 need to shift positions every thirty minutes. (AR 24-25.)

9 Plaintiff argues his daily activities could be performed on his own schedule and without
10 any minimal performance standard. He denies that even his seemingly robust activities, such as
11 camping, fishing, driving, and taking care of his son, were not possible given his subjective claims,
12 such as his need to lie down periodically. Plaintiff notes Dr. Gritzka was aware of his activities
13 and nonetheless gave credence to his subjective claims by relying on findings on examination, as
14 well as the most recent lumbar MRI scan and prior imaging studies.

15 An ALJ may weigh inconsistencies between a claimant's testimony and activities in
16 assessing symptom testimony. *Bray v. Comm'r of SSA*, 554 F.3d 1219 (9th Cir. 2009). Activities
17 may undermine testimony where they (1) contradict the claimant's testimony or (2) "meet the
18 threshold for transferable work skills[.]" *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

19 The ALJ here properly found plaintiff's activities inconsistent with his testimony as to the
20 degree of his impairment. The activities extend considerably beyond what might reasonably be
21 construed as typical activities of daily living. *Cf. Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
22 Cir. 2001) ("This court has repeatedly asserted that the mere fact that a plaintiff has carried on
23 certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise,

1 does not in any way detract from her credibility as to her overall disability. One does not need to
2 be ‘utterly incapacitated’ in order to be disabled.”) (quoting *Fair*, 885 F.2d at 603). They are
3 rationally construed as inconsistent with a purported need to lie down three to five hours a day.
4 (AR 57-58.) Again, the mere fact Dr. Gritzka interpreted the record and his findings to support a
5 greater degree of impairment does not suffice to undermine the interpretation of the ALJ. The
6 ALJ’s interpretation was at least equally rational and his conclusion in relation to plaintiff’s
7 activities has the support of substantial evidence.

8 C. Work Activities

9 The ALJ considered plaintiff’s work activities during the time period in which he claims
10 disability, stating: “Working or looking for work while filing for disability benefits is also
11 inconsistent with allegations of total disability.” (AR 25.) Plaintiff tried two jobs during the
12 adjudicative period, but had not been able to perform them on a consistent basis due to his physical
13 conditions. He performed a photography job for a friend for a couple of months, three or four days
14 a week, two hours a day, which he could not perform consistently, and a sales job for a radio station
15 for about three months in 2014, which he left because it required sitting for prolonged periods and
16 significant driving. He earned close to \$2,600.00 in the fourth quarter of 2014 and first quarter of
17 2015. The ALJ found such recent work activities, although not at substantial gainful activity
18 levels, to be indicative of some ability to work. The ALJ, in so doing, provided an additional
19 specific, clear, and convincing reason for not accepting plaintiff’s testimony as to the degree of his
20 limitation. *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (ALJ may consider a
21 claimant’s work history in assessing symptom testimony); *Drouin v. Sullivan*, 966 F.2d 1255, 1258
22 (9th Cir. 1992) (“She was able to hold two previous jobs with a fair amount of success, and even
23 if those particular jobs are, as she claims, too taxing for her, the vocational counselor testified that

1 she is qualified for thousands of less strenuous jobs.”)

2 Medical Opinion

3 Plaintiff avers error in the assessment of the medical opinion of Dr. Gritzka. Dr. Gritzka
4 reviewed records, conducted an examination, and rendered opinions dated April 19, 2016. (AR
5 593-07.)³ He assessed plaintiff as able to perform less than sedentary work, for less than eight
6 hours a day, with the need for three unscheduled absences and other limitations. (AR 604-07.)
7 Plaintiff could, for example, stand and walk for two hours, sit for two hours and up to thirty minutes
8 at a time, walk for twenty minutes at a time, and lift less than five pounds, and would be off task
9 fifteen percent of more of a workday. These limitations were present since December 31, 2011.
10 Dr. Gritzka also found plaintiff’s current need for “four to six hours of recumbency” medically
11 reasonable. (AR 604, 607.)

12 In general, more weight should be given to the opinion of a treating physician than to a
13 non-treating physician, and more weight to the opinion of an examining physician than to a non-
14 examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another physician, a
15 treating or examining physician’s opinion may be rejected only for “clear and convincing”
16 reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted,
17 a treating or examining physician’s opinion may not be rejected without “specific and legitimate
18 reasons’ supported by substantial evidence in the record for so doing.” *Id.* at 830-31 (quoting
19 *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

20 Plaintiff describes the opinion of Dr. Gritzka as uncontroverted, while the Commissioner
21 points to Dr. Carpenter’s opinions plaintiff could perform modified light work (*see* AR 447, 449,

22 ³ Plaintiff’s counsel re-submitted a page of Dr. Gritzka’s report because the original submission
23 omitted two lines of text. (AR 606-07.)

1 451) as contradictory opinion evidence. Plaintiff rejects this contention, noting the short-term
2 nature of Dr. Carpenter’s opinions (*see id.* (limitations assigned between February 13 and April
3 13, 2015, June 16 and August 16, 2015, and August 31 and October 31, 2015)), and the finding of
4 reviewing State agency physician Dr. Norman Staley that there was no opinion evidence (AR 98,
5 109). Dr. Staley, in May 2015, opined plaintiff could perform modified light work, with, *inter*
6 *alia*, the ability to stand and walk for two hours, sit for about six hours, and occasionally perform
7 postural activities. (AR 107-09.) Plaintiff denies the opinions of Dr. Staley constitute substantial
8 evidence controverting Dr. Gritzka’s opinion given that Dr. Staley did not examine plaintiff,
9 review all of the evidence available for Dr. Gritzka’s review a year later, and relied on the same
10 findings as Dr. Gritzka, while coming to a different conclusion.⁴

11 The ALJ assigned the opinions of Dr. Carpenter limited weight “because the work
12 restrictions, although consistent with the record, are temporary in nature.” (AR 28.) However,
13 while Dr. Carpenter did not indicate they were permanent, the work restrictions were “given
14 consideration insofar as they are consistent with the longitudinal record.” (*Id.*) The ALJ assigned
15 the opinion of Dr. Staley significant weight, finding it consistent with the record, except for
16 occasionally climbing ladders, ropes, and scaffolds because plaintiff’s subjective complaints of
17 intermittent extremity numbness and cervical radiculopathy required him to avoid unprotected
18 heights and climbing ladders. (AR 29-30.) While finding plaintiff’s substantial daily activities,
19 normal EMG, innocuous MRI imaging of the cervical spine, fairly benign physical examinations,

21 ⁴ Plaintiff cites to *Orn*, 495 F.3d at 632, and *Murray v. Heckler*, 722 F.2d 499, 501-02 (9th Cir.
22 1983), in support of this proposition. Those cases held: “When an *examining* physician relies on the same
23 clinical findings as a *treating* physician, but differs only in his or her conclusions, the conclusions of the
examining physician are not ‘substantial evidence.’” *Orn*, 495 F.3d at 632-33 (emphasis added). The Court
addresses below the standards for considering the opinion of a non-examining physician in relation to the
opinion of an examining or treating physician.

1 and more recent conservative treatment supported a light RFC, the ALJ considered plaintiff's
2 complaints of limited ability to lift and carry and recent diagnosis of cervical radiculopathy, and
3 reduced the lifting and carrying restrictions to ten pounds maximum. (AR 30.)

4 Nonexamining State agency medical consultants are highly qualified and experts in the
5 evaluation of Social Security disability claims and, while not binding, their opinions must be
6 considered. 20 C.F.R. §§ 404.1513a(b)(1), 416.913a(b)(1). *Accord* SSR 17-2p (effective March
7 27, 2017; replacing SSR 96-6p)). While the opinion of a nonexamining physician cannot, by itself,
8 constitute substantial evidence justifying the rejection of the opinion of a treating or examining
9 physician, *Lester*, 81 F.3d at 831, “the report of a nonexamining, nontreating physician need not
10 be discounted when it ‘is not contradicted by *all other evidence* in the record.’” *Andrews v. Shalala*,
11 53 F.3d 1035, 1041 (9th Cir. 1995) (quoting *Magallanes*, 881 F.2d at 752 (emphasis in original)).
12 Stated another way, “the findings of a nontreating, nonexamining physician can amount to
13 substantial evidence, so long as other evidence in the record supports those findings.” *Saelee v.*
14 *Chater*, 94 F.3d 520, 522 (9th Cir. 1996).

15 The record in this case contains other evidence supporting the opinion of Dr. Staley,
16 including, but not limited to the multiple short-term restrictions assessed by Dr. Carpenter, a
17 treating physician. Also, while Dr. Staley found no opinion evidence from any source to exist in
18 May 2015, Dr. Carpenter had at that time issued only one of his three assessments. (AR 447
19 (February 13, 2015), AR 449 (June 16, 2015), and AR 451 (September 2, 2015).) The Court finds
20 Dr. Gritzka’s opinion contradicted by the opinion of Dr. Staley. The Court further finds that, even
21 if considered uncontroverted, the ALJ satisfied the clear and convincing standard.

22 The ALJ addressed the argument of plaintiff’s representative that plaintiff had tried, but
23 not been able to perform sedentary jobs due to his difficulty sitting for prolonged periods and need

1 to lie down throughout the day, and the supportive opinion of Dr. Gritzka. (AR 28.) Dr. Gritzka
2 did not treat plaintiff, did review records and examine plaintiff, did so at the request of plaintiff's
3 representative, and was not entitled to the weight accorded treating physicians. The opinion was
4 "prepared to further the claimant's litigation interest." (*Id.*)

5 The ALJ contrasted Dr. Gritzka's opinion with plaintiff's substantial daily activities "(such
6 as hiking, biking, fishing, walking, preparing meals, going out daily, driving three times a week,
7 and taking care of his son)", mild objective findings from Dr. Hanscom, and light record between
8 2011 and early 2015, and found the evidence to support the ability to perform at least sedentary
9 work. (*Id.*) Plaintiff's need to lie down for hours throughout the day did not match his active daily
10 activities or have the support of objective findings. The ALJ found this part of Dr. Gritzka's
11 opinion primarily based on plaintiff's subjective complaints.

12 The ALJ found the record to reflect more severe symptoms in 2015, but noted Dr.
13 Carpenter at that time found plaintiff able to perform modified light work. (AR 28-29, 447-52.)
14 She found inconsistency with Dr. Carpenter, whose opinion "is based on a longstanding doctor-
15 patient relationship and is more credible." (AR 20.) She found inconsistency with the normal gait,
16 intact motor strength, and fairly normal sensory functioning documented in the treatment notes
17 and normal EMG/nerve condition studies. (*Id.* (citing AR 477-513, 526-28, 570-78, 608-30).)
18 While Dr. Gritzka found positive Tinel's signs (AR 601), no such findings were documented by
19 treating providers. The more recent treatment notes (AR 608-30), along with the EMG/nerve
20 condition studies (AR 526-28), showed plaintiff more capable than Dr. Gritzka described. (AR
21 29.) Considering the normal EMG, self-healing soft tissue tear in the MRI finding of the cervical
22 spine (AR 610-11, 624-25), fairly normal motor strength, prior two years of conservative
23 treatment, and "active social life, shopping, driving, hiking, fishing, and partial parental

1 responsibility,” the ALJ found plaintiff able to sit six hours and lift and carry up to ten pounds
2 occasionally. (AR 29.) The treatment notes consistently documented normal mental status during
3 examination (AR 477-492, 514-25, 570-78, 608-30) and did not support concentration deficits.
4 While the record refers to subjective complaints of inability to tolerate some pain medications, it
5 did not show effect on concentration.

6 It was further not clear how Dr. Gritzka managed to conclude, with a reasonable degree of
7 certainty, plaintiff would be off-task at least fifteen percent of the time when the claimant had only
8 a few doctor visits between early 2011 and the end of 2014. (AR 29.) Even after January 2015,
9 his routine treatment did not reflect a level of pain that would warrant three or more absences. He
10 had not had frequent emergency room visits, extended hospitalizations, weekly doctor visits, or
11 medication complications that could reasonably justify unauthorized absences. The record
12 reflected an active individual who hikes, goes camping and fishing, walks one mile, goes out to
13 dinner, prepares meals, and spends time with his son, suggesting the purported need to lie down is
14 a symptom magnification. The ALJ found this portion of the opinion no more than conjecture and
15 primarily based on subjective reports. Dr. Gritzka “appeared to have advocated on his client’s
16 behalf, rather than rendered an objective assessment of medical evidence[.]” and the ALJ declined
17 to accept plaintiff’s representative’s contention. (*Id.*)

18 Plaintiff argues the ALJ improperly rejected Dr. Gritzka’s opinion as obtained for litigation
19 purposes. As a general matter, “[t]he purpose for which medical reports are obtained does not
20 provide a legitimate basis for rejecting them.” *Lester*, 81 F.3d at 832. “An examining doctor’s
21 findings are entitled to no less weight when the examination is procured by the claimant than when
22 it is obtained by the Commissioner.” *Id.* An ALJ may, however, consider the source of a referral
23 for a medical opinion in certain limited circumstances. *See Nguyen v. Chater*, 100 F.3d 1462,

1 1464-65 (9th Cir. 1996) (that fact an “examination was conducted at the request of an attorney is
2 relevant where the opinion itself provides grounds for suspicion as to its legitimacy.”; noting the
3 Court has found the source of a referral relevant “where there is no objective medical basis for the
4 opinion, and where there is evidence of ‘actual improprieties’ on the part of the doctor whose
5 report the ALJ chooses to reject.”) (internal citations to *Burkhart v. Bowen*, 856 F.2d 1335, 1339
6 (9th Cir. 1988), and *Saelee*, 94 F.3d at 523).

7 The Court finds no reasonable basis for considering the source of the referral to Dr. Gritzka.
8 Dr. Gritzka conducted an examination and relied, at least in part, on his own and other findings in
9 rendering his opinion, and there is no evidence of actual improprieties. The ALJ therefore erred
10 in relying on the source of this evidence. However, because the ALJ provided several other clear
11 and convincing reasons for rejecting the opinion of Dr. Gritzka, the Court finds the error harmless.

12 Contrary to plaintiff’s contention, the ALJ was not prohibited from relying on the work
13 restriction evidence from Dr. Carpenter. The ALJ properly rejected the restrictions as medical
14 opinion evidence given their temporary nature. *Carmickle*, 533 F.3d at 1165. However, the fact
15 that Dr. Carpenter, a treating physician, on three occasions and in the time period in which the
16 record reflected more severe symptoms restricted plaintiff to modified light duty for temporary
17 periods of time was relevant and properly considered by the ALJ.

18 Plaintiff also argues the ALJ improperly “played doctor” and that Dr. Gritzka, with
19 possession of the same knowledge of plaintiff’s treatment history, activities, and other medical
20 evidence, provided a stronger interpretation than that offered by the ALJ. The Court disagrees.
21 An ALJ may reject a physician’s opinion upon finding it inconsistent with the medical evidence,
22 evidence of a claimant’s activity, and/or evidence associated with the course of treatment. *See*
23 *Tommasetti*, 533 F.3d at 1041; *Rollins*, 261 F.3d at 856; 20 C.F.R. §§ 404.1527(c)(4),

1 416.927(c)(4). The ALJ here rationally interpreted the opinion of Dr. Gritzka as lacking the
2 support of and inconsistent with the medical evidence, inconsistent with plaintiff's numerous and
3 wide ranging activities, and inconsistent with the evidence of his treatment.

4 An ALJ may also reject the opinion of a physician upon concluding it is based to a large
5 extent on self-reports of a claimant whose testimony the ALJ has properly discounted.
6 *Tommasetti*, 533 F.3d at 1041. The ALJ here reasonably construed portions of Dr. Gritzka's report
7 as based primarily on plaintiff's subjective reports and on conjecture. For example, while Dr.
8 Gritzka clearly attributed the assessment regarding sedentary work and the limitations in standing,
9 walking, sitting, shifting positions, and lifting to plaintiff's diagnoses, his review of records and
10 imaging, the examination, and his experience and expertise, he notably prefaced the limitations in
11 relation to laying down and concentration with a reference to what plaintiff "state[d]" and
12 "complain[ed]" about. (AR 604-04, 607.)

13 As stated above, while the ALJ should have considered an absence of insurance, the
14 evidence associated with plaintiff's treatment was nonetheless notable in that it reflected plaintiff
15 had received treatment prior to early 2015, but that treatment was sporadic and did not address
16 conditions plaintiff alleges disabled him from working. Nor does the fact Dr. Gritzka was aware
17 of plaintiff's treatment record and activities require the ALJ to adopt his interpretation of the record
18 and assessment of plaintiff's functional limitations. The ALJ rationally interpreted the record and
19 her conclusions have the support of substantial evidence.

20 Steps Four and Five

21 Having found no reversible errors for the reasons stated above, plaintiff's mere restating of
22 his arguments does not establish error at step four or step five. *See Stubbs-Danielson v. Astrue*,
23 539 F.3d 1169, 1175-76 (9th Cir. 2008).

CONCLUSION

For the reasons set forth above, this matter is AFFIRMED.

DATED this 3rd day of October, 2018.



Mary Alice Theiler
United States Magistrate Judge

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