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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

RAYMOND ALVIA LAWSON,

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:15-cv-00215-MKD

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

ECF Nos. 15, 20

BEFORE THE COURT are the parties’ cross-motions for summary judgment. ECF Nos. 15, 20. The parties consented to proceed before a magistrate judge. ECF No. 6. The Court, having reviewed the administrative record and the parties’ briefing, is fully informed. For the reasons discussed below, the Court denies Plaintiff’s motion (ECF No. 15) and grants Defendant’s motion (ECF No. 20).

1 **JURISDICTION**

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

3 **STANDARD OF REVIEW**

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

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

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

6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be
13 "of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy." 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's work
20 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in "substantial

1 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
2 C.F.R. § 416.920(b).

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

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

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

1 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
2 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

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

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

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

1 capable of performing other work; and (2) such work “exists in significant
2 numbers in the national economy.” 20 C.F.R. § 416.920(c)(2); *Beltran v. Astrue*,
3 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’S FINDINGS**

5 Plaintiff applied for Title XVI supplemental security income on January 31,
6 2012. Tr. 64, 164-73. Plaintiff alleged a disability onset date beginning March 23,
7 2011.¹ Tr. 38. The application was denied initially, Tr. 64-76, and on
8 reconsideration, Tr. 77-89. Plaintiff appeared at a hearing before an administrative
9 law judge (ALJ) on October 22, 2013. Tr. 35-63. On March 7, 2014, the ALJ
10 denied Plaintiff’s claim. Tr. 18-34.

11 At step one of the sequential evaluation analysis, the ALJ found Plaintiff has
12 not engaged in substantial gainful activity since January 31, 2012, the application
13 date. Tr. 23. At step two, the ALJ found Plaintiff has the following severe
14 impairments: hepatitis C; cirrhosis; lumbar degenerative disc disease; mild right
15 hip osteoarthritis; depressive disorder; anti-social personality disorder;
16 methamphetamine abuse. Tr. 23. At step three, the ALJ found Plaintiff does not
17 have an impairment or combination of impairments that meets or medically equals

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19 ¹ Plaintiff initially alleged an onset date of January 1, 1999, Tr. 65, but later
20 amended the alleged onset date to March 23, 2011. Tr. 38.

1 the severity of a listed impairment. Tr. 24. The ALJ then concluded that Plaintiff
2 has the RFC to perform light work, with the following limitations:

3 [H]e can frequently climb ramps/stairs, stoop, kneel, crouch, and crawl,
4 balance without limit, and never climb ladders/ropes/scaffolds. The
5 claimant should have no exposure to unprotected heights and avoid
6 concentrated exposure to vibration. The claimant can perform semi-skilled
7 tasks (i.e. specific vocational preparation (SVP) of 3) and have superficial
8 interaction with the general public and coworkers.

9 Tr. 25.

10 At step four, the ALJ found Plaintiff is unable to perform any past relevant
11 work. Tr. 29. At step five, the ALJ found that, considering Plaintiff's age,
12 education, work experience, RFC, the Medical-Vocational Guidelines, and the
13 testimony of a vocational expert, there are jobs in significant numbers in the
14 national economy that Plaintiff could perform, such as small products assembler,
15 weld inspector, and inspector packer. Tr. 30. Thus, the ALJ concluded Plaintiff is
16 not disabled as defined under the Social Security Act. Tr. 31.

17 On June 22, 2015, the Appeals Council denied review of the ALJ's decision,
18 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
19 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

20 ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying
supplemental security income benefits under Title XVI of the Social Security Act.

Plaintiff raises the following issues for review:

- 1 1. Whether the ALJ properly determined Plaintiff was a person “closely
- 2 approaching advanced age” under the Medical-Vocational Guidelines
- 3 (the grids);
- 4 2. Whether the ALJ properly discredited Plaintiff’s symptom claims; and
- 5 3. Whether the ALJ properly weighed the medical opinion evidence.

6 ECF No. 15 at 8.

7 **A. Age Grid**

8 First, Plaintiff contends that the ALJ erred in concluding that Plaintiff was a
9 person “closing approaching advanced age” rather than a person of “advanced
10 age.” ECF No. 15 at 8-9. Plaintiff asserts that the ALJ would have been required
11 to find Plaintiff disabled under the grids if the higher age category had been
12 applied. *Id.*

13 The grids set forth rules directing a finding of disability, based on a
14 claimant’s age, education, previous work experience, and residual functional
15 capacity. *See* C.F.R. Pt. 404, Subpt. P, App. 2. The age grid contains three
16 categories: younger persons (under age 50), persons closely approaching advanced
17 age (50-54), and persons of advanced age (age 55 or older). 20 C.F.R. §
18 416.963(c)-(e). When a claimant is within a few days or a few months of reaching
19 an older age category (a “borderline situation”), the ALJ has discretion, but is not
20 required to use the older age category. *Lockwood v. Comm’r of Soc. Sec. Admin.*,

1 616 F.3d 1068, 1071 (9th Cir. 2010); 20 C.F.R. § 416.963(b) (the age categories
2 may not be applied mechanically). While the ALJ is required to consider use of an
3 older age category in a borderline situation, the ALJ does not need to explain in a
4 written decision why an older age category was not used. *Lockwood*, 616 F.3d at
5 1070, 1072-74.

6 The relevant age category is determined based on a claimant's age "during
7 the period that [the agency] must determine if [a claimant] is disabled." 20 C.F.R.
8 § 416.963(b). The relevant adjudicative period for Plaintiff is January 31, 2012,
9 the application date, through March 7, 2014, the date of the ALJ decision.

10 Contrary to Plaintiff's assertion, during the relevant adjudicative period, Plaintiff
11 did not reach the age of 54 ½ years old. He was 51 years old when he applied and
12 he was 53 years, three months and one week old when the ALJ rendered the
13 adverse decision. As a result, Plaintiff was not "within a few days to a few months
14 of reaching" the "advanced age" age category; in fact; he was approximately one
15 year and nine months from reaching age 55. This did not present a borderline
16 situation and the ALJ was not required to consider whether Plaintiff should have
17 been treated as a person of "advanced age."

18 Here, Plaintiff's entire argument appears to be premised on a factual error.
19 Inexplicably, Plaintiff argues in both his opening brief (ECF No. 15 at 8-9) and his
20 reply brief (ECF No. 22 at 2), that he was 54 years and 4 months old on the date of

1 the ALJ's decision.² Plaintiff is incorrect. On March 7, 2014, the date of the
2 ALJ's decision, Plaintiff was 53 years, three months and one week old.³
3 Accordingly, the ALJ did not err in determining that Plaintiff was a "person
4 closely approaching advanced age" and not considering whether Plaintiff should be
5 considered a person of "advanced age."

6 **B. Adverse Credibility Finding**

7 Next, Plaintiff faults the ALJ for failing to provide specific findings with
8 clear and convincing reasons for discrediting his symptom claims. ECF No. 15 at
9 9-13. An ALJ engages in a two-step analysis to determine whether a claimant's

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11 ² Plaintiff was born on November 29, 1960. ECF No. 15 at 2.

12 ³ Plaintiff continues asserting this factual error in his subsequent argument, that he
13 had turned age 55 prior to the Appeals Council issuing its final order denying
14 request for review on June 22, 2015. First, Plaintiff's argument is factually
15 incorrect. On June 22, 2015, Plaintiff was 54 years, six months, and three weeks
16 old. Again, he was not "within a few days to a few months" of reaching age 55.
17 *See* 20 C.F.R. § 416.963(b). Second, Plaintiff cites no authority for the proposition
18 that the relevant adjudicative period ends as of the date of the Appeals Council's
19 final order denying request for review, as opposed to the date of the ALJ's
20 decision.

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

9 Second, “[i]f the claimant meets the first test and there is no evidence of
10 malingering, the ALJ can only reject the claimant’s testimony about the severity of
11 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
12 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
13 citations and quotations omitted). “General findings are insufficient; rather, the
14 ALJ must identify what testimony is not credible and what evidence undermines
15 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
16 Cir. 1995)); *see also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002)
17 (“[T]he ALJ must make a credibility determination with findings sufficiently
18 specific to permit the court to conclude that the ALJ did not arbitrarily discredit
19 claimant’s testimony.”). “The clear and convincing [evidence] standard is the most
20 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,

1 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920,
2 924 (9th Cir. 2002)).

3 In making an adverse credibility determination, the ALJ may consider, *inter*
4 *alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the
5 claimant's testimony or between his testimony and his conduct; (3) the claimant's
6 daily living activities; (4) the claimant's work record; and (5) testimony from
7 physicians or third parties concerning the nature, severity, and effect of the
8 claimant's condition. *Thomas*, 278 F.3d at 958-59.

9 This Court finds that the ALJ provided specific, clear, and convincing
10 reasons for finding Plaintiff's statements concerning the intensity, persistence, and
11 limiting effects of his symptoms not credible. Tr. 26-28.

12 *1. Lack of Objective Medical Evidence*

13 First, the ALJ found that the objective medical evidence did not support the
14 degree of physical limitation alleged by Plaintiff. Tr. 26-27. An ALJ may not
15 discredit a claimant's pain testimony and deny benefits solely because the degree
16 of pain alleged is not supported by objective medical evidence. *Rollins v.*
17 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,
18 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989).

19 However, the medical evidence is a relevant factor in determining the severity of a
20 claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§

1 404.1529(c)(2). Minimal objective evidence is a factor which may be relied upon
2 in discrediting a claimant's testimony, although it may not be the only factor. *See*
3 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). Here, the ALJ set out, in
4 detail, the medical evidence contradicting Plaintiff's claims of disabling back pain;
5 ultimately concluding that "treatment records are inconsistent with the alleged
6 severity" of Plaintiff's physical symptoms. Tr. 26. For example, as noted by the
7 ALJ, near the amended onset date, despite claims of low back pain, Plaintiff had
8 largely unremarkable physical exams. Tr. 26 (citing Tr. 261-62). During an ER
9 visit in March 2011, there was noted mild tenderness to palpation to the low back
10 and over the SI joints. Tr. 26. However, lumbar imaging showed "minimal
11 degenerative changes from L3 to S1 otherwise unremarkable." Tr. 262-64. The
12 ALJ observed that during a subsequent examination four days later, the
13 examination results were minimal. Tr. 26. Plaintiff had normal deep tendon
14 reflexes in the upper and lower extremities, no cervical or thoracic tenderness, no
15 paraspinous muscles in the lumbar region, midline tenderness, but no bony
16 abnormalities, no hip pain, no pain with straight leg raises, and was diagnosed with
17 acute lumbosacral strain. Tr. 26, Tr. 274-76.

18 The ALJ further noted that subsequent treatment records did not show signs
19 of significant worsening of Plaintiff's condition. Tr. 26. Subsequent images of the
20 lumbar spine showed "stable mild degenerative spondylosis" of the lumbar spine

1 without evidence of acute fracture or dislocation and minimal degenerative
2 osteoarthritis of the right hip. Tr. 26 (citing Tr. 366). In a June 2011 examination,
3 Plaintiff walked without a limp, was able to change positions without difficulty,
4 displayed full range of back motion, and had negative straight leg raise in the
5 supine position. Tr. 26 (citing Tr. 355-58). At a July 2011 ER examination,
6 Plaintiff “ambulated with a normal gait.” Tr. 26 (citing Tr. 299).

7 The ALJ further noted that a May 2012 CT scan of the lumbar spine
8 revealed normal alignment without fractures or evidence of spondylosis. Tr. 26
9 (citing Tr. 369). The ALJ did acknowledge that the CT scan indicated a suspected
10 right L2-3 broad-based disc protrusion contacting the right existing L2 nerve root;
11 at the L4-5 level, a central disc protrusion was seen with mild central canal stenosis
12 and mild to moderate left and moderate right neural foraminal stenosis, which may
13 have impinged on the L4 foraminal nerve roots. Tr. 26 (citing Tr. 369). While
14 there was mention of an antalgic gait in the record, the ALJ noted that it was not
15 recurring. Tr. 27 (citing Tr. 344, 363). The ALJ noted that although there was a
16 mention of a positive straight leg raise on the right in the supine position, this also
17 was not recurring. Tr. 27 (citing Tr. 362, 330).

18 After the hearing in 2014, the ALJ ordered a consultative examination and
19 imaging, and x-rays of Plaintiff’s hips came back negative. Tr. 27 (citing Tr. 48-
20 49, 54, 413). During the examination, Plaintiff had a normal gait, negative straight

1 leg testing in both seated and supine positions, and was able to sit comfortably and
2 move about the examination room without obvious discomfort. Tr. 409. The
3 examiner noted no tenderness or spasm of the spine. Tr. 409. Although Plaintiff
4 did have a slightly reduced range of motion of the cervical and dorsolumbar spine,
5 he could ambulate at an average pace without difficulty and he had a full range of
6 motion of the hips. Tr. 409-10. He had a full range of motion in all other areas,
7 including his hip joints. Tr. 409. Here, the ALJ reasonably concluded that
8 Plaintiff's subjective allegations were not supported by the medical record.

9 Similarly, the ALJ noted that Plaintiff's medical records did not substantiate
10 his other subjective claims, specifically regarding liver pain, abdominal pain, and
11 fatigue. Tr. 27. The ALJ noted that there was scant evidence to support the claim.
12 For example, the ALJ noted that in a May 2011 examination, Plaintiff showed no
13 signs of hepatic enlargement. Tr. 27 (citing Tr. 353). The next month, Plaintiff
14 discontinued complaining of liver pain. Tr. 355. The treatment records
15 documented only brief mention of headaches, despite Plaintiff's allegations of
16 three to four headaches a month lasting for days. Tr. 27 (citing Tr. 343-44
17 (isolated complaint of neck pain in March 2012)).

18 The Court notes that the ALJ's decision acknowledges evidence that could
19 be interpreted as favorable to the Plaintiff, including a 2012 CT scan. Tr. 27.
20 However, the medical evidence of record was susceptible to more than one rational

1 conclusion, and therefore the ALJ's conclusion as to the inconsistencies between
2 Plaintiff's alleged physical impairments, and the overall record, must be upheld.
3 *Burch*, 400 F.3d at 679; *see also Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
4 1995) (“[t]he ALJ is responsible for determining credibility”).

5 2. Gaps in Treatment

6 Next, the ALJ found Plaintiff's symptom complaints less than credible
7 because there were significant gaps in his treatment history. Tr. 27. The medical
8 treatment a Plaintiff seeks to relieve his symptoms is a relevant factor in evaluating
9 the intensity and persistence of symptoms. 20 C.F.R. §§416.929(c)(3)(iv), (v).

10 An ALJ is permitted to consider lack of treatment in his credibility determination.

11 *Burch*, 400 F.3d at 681. Moreover, “in assessing a claimant's credibility, the ALJ
12 may properly rely on ‘unexplained or inadequately explained failure to seek
13 treatment or to follow a prescribed course of treatment.’” *Molina*, 674 F.3d at
14 1113 (quoting *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008)).

15 As the ALJ noted, Plaintiff complained of right hip pain in June 2011, yet
16 Plaintiff did not seek additional medical care or treatment for pain until March
17 2012. Tr. 27 (citing Tr. 355-58, Tr. 330-31). The ALJ identified another
18 significant gap in treatment. After seeking treatment in April 2012 and obtaining
19 imaging in May 2012, Plaintiff sought no further medical care. Tr. 27 (citing Tr.
20 348-79). At the hearing in October 2013, Plaintiff confirmed he had not sought

1 any medical care since April 2012. Tr. 39-40. The ALJ further observed that at a
2 consultative examination in 2014, Plaintiff stated he was not taking any medication
3 related to his impairments. Tr. 27 (citing Tr. 407). The ALJ concluded that
4 “[s]uch a gap in treatment puts the degree to which [Plaintiff] was actually limited
5 by symptoms into question.” Tr. 27.

6 Plaintiff contends that he could not afford medical care because he was
7 uninsured. ECF No. 15 at 10. Disability benefits may not be denied because of the
8 claimant’s failure to obtain treatment she cannot obtain for lack of funds. *Gamble*
9 *v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995). Here, however, the ALJ specifically
10 considered the financial considerations and found that “[a]lthough financial
11 constraints may have impacted his ability to obtain care, one would still expect to
12 find some degree of effort to alleviate symptoms if they had been as limiting as
13 alleged.” Tr. 27. The record supports the ALJ’s conclusion. Here, as Defendant
14 notes, Plaintiff admitted that he had not applied for or followed up on medical care
15 that was available to him, and it appeared he may have been insured by the state.
16 Tr. 47-48, 52-53. More importantly, even if Plaintiff could not seek medical care
17 from the clinic, he still could seek assistance at the emergency room, which he had
18 done in the past. *See, e.g.*, Tr. 229-31 (March 4, 2010 ER visit for shortness of
19 breath and cough); Tr. 236-38 (March 15, 2010 ER visit for right elbow pain); Tr.
20 239-41 (March 30, 2010 ER visit for shortness of breath and cough); Tr. 245-46

1 (April 12, 2010 ER visit for laceration); Tr. 247-48 (April 29, 2010 ER visit for
2 swelling in elbow). Given this record, the ALJ's conclusion that the gaps in
3 Plaintiff's treatment history with respect to his back and hip complaints
4 undermined the credibility of his symptom claims was reasonable.

5 Moreover, as of 2014, the ALJ noted that Plaintiff was taking no medication
6 for his impairments. Tr. 27 (citing Tr. 407). Evidence of "conservative treatment"
7 is sufficient to discount a claimant's testimony regarding the severity of an
8 impairment. *Parra v. Astrue*, 481 F.3d 742, (9th Cir. 2007) (citing *Johnson v.*
9 *Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (treating ailments with an over-the-
10 counter pain medication is evidence of conservative treatment sufficient to
11 discount a claimant's testimony regarding the severity of an impairment). These
12 were clear and convincing reasons to discredit Plaintiff's symptom claims.

13 *3. Inconsistent Statements Regarding Substance Abuse*

14 The ALJ found that Plaintiff's credibility was undermined by his
15 misrepresentations and inconsistent statements regarding his substance abuse. Tr.
16 27-28. An ALJ may support an adverse credibility finding by citing to
17 inconsistencies in the claimant's testimony, prior inconsistent statements and
18 general inconsistencies in the record. *Thomas*, 278 F.3d at 958-59 (inconsistencies
19 in the claimant's testimony is properly considered); *Tommasetti*, 533 F.3d at 1039
20 (prior inconsistent statements may be considered); *Molina*, 674 F.3d at 1112 (an

1 ALJ may support an adverse credibility finding by citing to general inconsistencies
2 in the record). Moreover, an ALJ may properly rely on a lack of candor with
3 respect to substance use when assessing credibility. *Thomas*, 278 F.3d at 959
4 (finding that lack of candor regarding substance abuse supported the ALJ's
5 negative conclusions about the claimant's physical description of her pain).

6 For example, the ALJ noted that in May 2011, Plaintiff admitted to recently
7 using methamphetamine. Tr. 28 (citing Tr. 355). However, Plaintiff subsequently
8 denied drug use at a July 15, 2011 ER visit, but his urine screen tested positive for
9 marijuana and methamphetamine. Tr. 28 (citing Tr. 298-301). Then in May 2012,
10 during a psychological examination, Dr. Arnold reported that Plaintiff "was vague
11 regarding his last methamphetamine use but stated it was within the past year." Tr.
12 397. As the ALJ noted, three weeks earlier, on April 26, 2012, Plaintiff tested
13 positive for methamphetamine, amphetamine, ecstasy, and marijuana. Tr. 363.⁴

14 _____
15 ⁴ There is additional evidence in the record regarding Plaintiff's lack of candor
16 regarding his substance abuse. During the May 2012 examination with Dr. Arnold,
17 Plaintiff also was not candid regarding his marijuana use. "When asked about his
18 marijuana use history, he stated he does not use it because 'it makes me dumber.'" Tr.
19 397. Similar to his methamphetamine use, Plaintiff tested positive for
20 marijuana three weeks prior to his evaluation with Dr. Arnold. Tr. 363. Moreover,

1 Plaintiff contends that the ALJ must cite “more than a history of substance
2 abuse to discredit a claimant’s testimony of a mental disability.” ECF No. 15 at
3 10. Here, the ALJ reasonably relied on Plaintiff’s misrepresentations and
4 inconsistent statements regarding his substance abuse in assessing his credibility.
5 This was a clear and convincing reason to discredit his symptom claims.

6 *4. Activities of Daily Living*

7 The ALJ found the limitations alleged by Plaintiff were inconsistent with his
8 activities of daily living. Tr. 27. Evidence about daily activities is properly
9 considered in making a credibility determination. *Fair*, 885 F.2d at 603. A
10 claimant’s daily activities may support an adverse credibility finding if (1) the
11 claimant’s activities contradict his other testimony, or (2) the claimant “is able to
12 spend a substantial part of his day engaged in pursuits involving performance of
13 physical functions that are transferable to a work setting.” *Orn v. Astrue*, 495 F.3d
14 625 639 (9th Cir. 2007) (citing *Fair*, 885 F.2d at 603)). “The ALJ must make

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16 on April 26, 2012, Defendant underwent a disability reevaluation, during which he
17 reported he had used methamphetamine two days prior, but denied any other drug
18 use. Tr. 361. As mentioned previously, he tested positive for methamphetamines,
19 amphetamines, ecstasy, and marijuana; and he “appeare[d] to be intoxicated.” Tr.
20 363.

1 ‘specific findings relating to [the daily] activities’ and their transferability to
2 conclude that a claimant’s daily activities warrant an adverse credibility
3 determination.” *Id.* (quoting *Burch*, 400 F.3d at 681). A claimant need not be
4 “utterly incapacitated” to be eligible for benefits. *Fair*, 885 F.2d at 603.

5 Here, Plaintiff claimed that he avoids using stairs, that he can stand for
6 maybe five minutes, that he has trouble bending and squatting, and that he has a
7 hard time getting around. Tr. 26. Further Plaintiff testified that he is tired a lot,
8 indicating that he sits down to rest. Tr. 26. He also stated that he has headaches
9 three to four times a month, nothing they last for a couple of days. Tr. 26. Here,
10 the ALJ observed that Plaintiff indicated he uses buses for transportation,
11 suggestive of some capacity to concentrate and persist, as well as be around others.
12 Tr. 28. Plaintiff indicated that he attended to his personal care, did his own
13 laundry, prepared his own meals and his daily activities include painting and
14 reading. Tr. 28 (citing Tr. 397). The ALJ failed to demonstrate how these
15 activities contradicted Plaintiff’s other testimony or that he was able to spend a
16 substantial part of his day engaged in these activities and that these activities are
17 transferable to a work setting. Therefore, this reason fails to meet the specific,
18 clear and convincing standard.

19 Nonetheless, in light of the other permissible reasons the ALJ provided for
20 discrediting Plaintiff’s testimony, this Court does not find the ALJ has committed

1 reversible error. *See Molina*, 674 F.3d at 1115 (“[S]everal of our cases have held
2 that an ALJ's error was harmless where the ALJ provided one or more invalid
3 reasons for disbelieving a claimant's testimony, but also provided valid reasons that
4 were supported by the record.” (citations omitted)); *see also Batson v. Comm'r of*
5 *Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (holding that any error the
6 ALJ committed in asserting one impermissible reason for claimant’s lack of
7 credibility did not negate the validity of the ALJ's ultimate conclusion that the
8 claimant’s testimony was not credible).

9 C. Medical Opinion Evidence

10 Plaintiff contends the ALJ improperly considered the medical opinions of
11 examining psychologist John Arnold, Ph.D. and other medical providers. ECF No.
12 15 at 13-15.

13 There are three types of physicians: “(1) those who treat the claimant
14 (treating physicians); (2) those who examine but do not treat the claimant
15 (examining physicians); and (3) those who neither examine nor treat the claimant
16 but who review the claimant’s file (nonexamining or reviewing physicians).”
17 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).
18 “Generally, a treating physician’s opinion carries more weight than an examining
19 physician’s, and an examining physician’s opinion carries more weight than a
20 reviewing physician’s.” *Id.* “In addition, the regulations give more weight to

1 opinions that are explained than to those that are not, and to the opinions of
2 specialists concerning matters relating to their specialty over that of
3 nonspecialists.” *Id.* (citations omitted).

4 If a treating or examining physician’s opinion is uncontradicted, an ALJ may
5 reject it only by offering “clear and convincing reasons that are supported by
6 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

7 “However, the ALJ need not accept the opinion of any physician, including a
8 treating physician, if that opinion is brief, conclusory and inadequately supported
9 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228

10 (internal quotation marks and brackets omitted). “If a treating or examining
11 doctor’s opinion is contradicted by another doctor’s opinion, an ALJ may only
12 reject it by providing specific and legitimate reasons that are supported by
13 substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-31).

14 *1. Dr. Arnold*

15 On May 2, 2012, Dr. Arnold evaluated Plaintiff, Tr. 396-404, and diagnosed
16 Plaintiff with major depressive disorder, recurrent mild to moderate; amphetamine
17 dependence early full remission; r/o pain disorder. Tr. 396. Dr. Arnold opined
18 that Plaintiff was capable of understanding and carrying out simple instructions,
19 noting that he could concentrate for short periods; he could complete simple tasks
20 without close supervision, and not disrupt others; he would work best in positions

1 that had minimal interactions with others. Tr. 397. Dr. Arnold assessed a GAF of
2 54, indicating moderate symptoms. Tr. 396.

3 Because Dr. Arnold's opinions regarding the most severe limitations were
4 contradicted by Dr. Bailey, Tr. 85-87, the ALJ was required to provide specific and
5 legitimate reasons for rejecting portions of Dr. Arnold's opinion. *Bayliss*, 427 F.3d
6 at 1216.

7 First, the ALJ gave little weight to Dr. Arnold's opinion because the level of
8 severity implicated by it was inconsistent with Dr. Arnold's contemporaneous
9 mental status examination and clinical observations. Tr. 29. A medical opinion
10 may be rejected by the ALJ if it is conclusory, contains inconsistencies, or is
11 inadequately supported. *Bray*, 554 F.3d at 1228; *Thomas*, 278 F.3d at 957.
12 Moreover, a physician's opinion may be rejected if it is unsupported by the
13 physician's treatment notes. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir.
14 2003) (affirming ALJ's rejection of physician's opinion as unsupported by
15 physician's treatment notes). As the ALJ noted, Plaintiff performed within the
16 average range on the mini mental status exam, scoring 26 of 30 points. Tr. 29
17 (citing Tr. 401). While Plaintiff refused to perform serial 7 subtractions, Plaintiff
18 did serial 3 additions without error; followed a three-step command; and he
19 performed within normal limits on the Trail Making Test, Part A and Part B. Tr.
20 29 (citing Tr. 400-01). Further, the ALJ noted that Plaintiff had a restricted affect

1 and circumstantial thought content, but appeared alert, displaying normal speech
2 and full eye contact. Tr. 29 (citing Tr. 400-01). Here, the ALJ reasonably
3 determined that the MSE results and clinical findings did not support the level of
4 limitations opined by Dr. Arnold. This was a specific and legitimate reason to
5 reject the opinion.

6 Second, the ALJ discounted Dr. Arnold's opinion because he relied on
7 Plaintiff's self-reported symptom testimony, which the ALJ properly found not to
8 be credible. Tr. 29. A physician's opinion may be rejected if it is based on a
9 claimant's subjective complaints which were properly discounted. *Tonapetyan v.*
10 *Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v. Comm'r of Soc. Sec.*
11 *Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair*, 885 F.2d at 604. As discussed
12 *supra*, the ALJ did not err in discrediting Plaintiff's symptom complaints.

13 Plaintiff contends that the ALJ disregarded Dr. Arnold's observations and
14 findings that justified the limitations. ECF No. 15 at 14. Specifically, Plaintiff
15 asserts that Dr. Arnold "personally observed" various symptoms, such as
16 hopelessness, sleep disturbances, racing thoughts, poor concentration and memory,
17 and interpersonal difficulty. ECF No. 15 at 14. Here, Dr. Arnold's evaluation
18 consisted of an interview of Plaintiff and a personality assessment inventory,
19 which is a personality test based on self-report. It is apparent from reading Dr.
20 Arnold's report that it was based in substantial part on Plaintiff's interview and

1 thus on the discredited self-report of Plaintiff. Tr. 396-97.⁵ This was another
2 specific and legitimate reason to give limited weight to Dr. Arnold's opinions.

3 Third, the ALJ gave Dr. Arnold's opinions less weight because Plaintiff was
4 not forthcoming about the extent of his methamphetamine use at this
5 psychological/psychiatric evaluation. Tr. 29. The record supports the ALJ's
6 finding. *See Coffman v. Astrue*, 469 Fed. App'x 609, 611 (9th Cir. 2012)
7 (affirming ALJ's rejection of examining psychologist's opinion, in part, due to the
8 fact that "plaintiff periodically concealed" his substance abuse from providers);
9 *Serpa v. Colvin*, 2013 WL 4480016, *8 (E.D. Wa., Aug. 19, 2013) (affirming
10 ALJ's rejection of a physician's opinion because it was made without knowledge
11 of the claimant's substance abuse and narcotic-seeking behavior). As noted above,
12 when Dr. Arnold inquired about Plaintiff's methamphetamine use, "[Plaintiff] was
13 vague regarding his last methamphetamine use but stated it was within the past
14 year." Tr. 397. As Defendant notes, Plaintiff had tested positive for

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16 ⁵ Under the section titled "Clinical Interview," Dr. Arnold reported that "[Plaintiff]
17 believes his most recent depression began in 2011 as he is experiencing severe
18 physical pain"; "as a child, he reportedly witnessed domestic violence in the
19 home"; "he has difficulty getting along with authority"; "he does not trust many
20 people and prefers to isolate himself from others." Tr. 397.

1 methamphetamines, amphetamines, ecstasy, and marijuana three weeks before the
2 evaluation.⁶ The ALJ reasonably relied on Plaintiff's lack of candor regarding his
3 substance abuse in giving Dr. Arnolds' opinion weight. This was another specific
4 and legitimate reason to reject the assessed mental limitations.⁷

5 *2. Other Medical Opinion Evidence*

6 Next, Plaintiff generally contends that "the ALJ also chipped away at the
7 disability evidence contained in the opinions of [sic] the ALJ actually adopted,"
8 which Plaintiff argues "includes portions of the opinions of: Robert Bernardez-Fu,
9 M.D.; A. Peter Weir, M.D.; and Dr. Jahnke." ECF No. 15 at 15. Plaintiff has

10 _____
11 ⁶ Plaintiff also was not candid regarding his marijuana use. According to Dr.
12 Arnold, "[w]hen asked about his marijuana use history, he stated he does not use it
13 because 'it makes me dumber.'" Tr. 397. Similar to his methamphetamine use,
14 Plaintiff tested positive for marijuana three weeks prior to his evaluation with Dr.
15 Arnold.

16 ⁷ Plaintiff argues that his statement to Dr. Arnold that he had used
17 methamphetamine approximately a year prior was accurate, contending that
18 Plaintiff tested positive for methamphetamine ten months earlier in July 2011.
19 ECF No. 15 at 15. However, Plaintiff tested positive both in July 2011, Tr. 298-
20 301, and again in April 2012, Tr. 363.

1 made no argument about any of the medical opinions, what limitations were
2 supposedly not adopted and incorporated into the RFC, or how any alleged error
3 was harmful. Here, Plaintiff fails to identify with specificity any discrepancy
4 between these medical opinions and the RFC assessed by the ALJ. Thus, the Court
5 declines to address this issue. *See Carmickle v. Comm'r Soc. Sec. Admin.*, 533
6 F.3d 1155, 1161 n.2 (9th Cir. 2008) (court may decline to address issue not raised
7 with specificity in Plaintiff's briefing).

8 **CONCLUSION**

9 After review, the Court finds that the ALJ's decision is supported by
10 substantial evidence and free of harmful legal error.

11 **IT IS ORDERED:**

- 12 1. Plaintiff's motion for summary judgment (ECF No. 15) is **DENIED**.
13 2. Defendant's motion for summary judgment (ECF No. 20) is **GRANTED**.

14 The District Court Executive is directed to file this Order, enter
15 **JUDGMENT FOR THE DEFENDANT**, provide copies to counsel, and **CLOSE**
16 **THE FILE**.

17 DATED this 29th day of March, 2017.

18 s/Mary K. Dimke
19 MARY K. DIMKE
20 UNITED STATES MAGISTRATE JUDGE