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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                                  |   |                        |
|----------------------------------|---|------------------------|
| FRED AVERBACH,                   | ) | Case No. CV 09-3906-RC |
|                                  | ) |                        |
| Plaintiff,                       | ) |                        |
|                                  | ) |                        |
| vs.                              | ) | OPINION AND ORDER      |
|                                  | ) |                        |
| MICHAEL J. ASTRUE,               | ) |                        |
| Commissioner of Social Security, | ) |                        |
|                                  | ) |                        |
| Defendant.                       | ) |                        |
| _____                            | ) |                        |

Plaintiff Fred Averbach filed a complaint on June 4, 2009, seeking review of the Commissioner's decision denying his applications for disability benefits. On November 17, 2009, the Commissioner answered the complaint, and the parties filed a joint stipulation on February 4, 2010.

**BACKGROUND**

On January 7, 2000, plaintiff, who was born on January 7, 1946, first applied for disability benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. § 423, and the Supplemental Security Income program ("SSI") of Title XVI of the Act, claiming an inability to work since June 19, 1998, due to depression, asthma and kidney

1 stones. A.R. 182-86, 190. After his applications were denied, an  
2 administrative hearing was held before Administrative Law Judge  
3 Richard L. Leopold ("ALJ Leopold"), A.R. 21-25, 180, 554, 578-82, who  
4 issued a decision on August 21, 2001, finding plaintiff is not  
5 disabled. A.R. 12-20, 540-48. Following the Appeals Council's denial  
6 of review, A.R. 6-11, 549-52, plaintiff filed a complaint in this  
7 district court challenging the denial of disability benefits to him.  
8 See Averbach v. Barnhart, CV 03-6303-RC ("Averbach I").<sup>1</sup> On  
9 January 9, 2004, pursuant to the parties' stipulation, this Court  
10 remanded the matter to the Social Security Administration under  
11 sentence four of 42 U.S.C. § 405(g). A.R. 559-64.

12  
13 The Appeals Council, in turn, remanded the matter to ALJ Leopold,  
14 who held further administrative proceedings, A.R. 485, and on July 7,  
15 2005, ALJ Leopold issued a decision again finding plaintiff is not  
16 disabled. A.R. 481-88. Upon review, the Appeals Council determined  
17 ALJ Leopold had failed to comply with its order of remand, A.R. 471-  
18 75, and ordered another ALJ, Sherwin F. Biesman ("the ALJ"), to hold  
19 further administrative proceedings. A.R. 507-19. On April 7, 2008,  
20 the ALJ issued a decision finding plaintiff is not disabled, A.R. 850-  
21 57, and on July 18, 2008, the Appeals Council again remanded the mat-  
22 ter to the ALJ for further proceedings. A.R. 867-70. On January 21,  
23 2009, the ALJ held further administrative proceedings, A.R. 520-39,  
24 and on March 30, 2009, the ALJ again issued a decision finding  
25 plaintiff is not disabled. A.R. 454-64. The Appeals Council declined  
26 review, A.R. 444-45, and the ALJ's decision is now before the Court.

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27  
28 <sup>1</sup> Pursuant to Fed. R. Evid. 201, this Court takes judicial  
notice of relevant documents in Averbach I.

1 DISCUSSION

2 I

3 The Court, pursuant to 42 U.S.C. § 405(g), has the authority to  
4 review the Commissioner's decision denying plaintiff disability  
5 benefits to determine whether his findings are supported by  
6 substantial evidence and whether the Commissioner used the proper  
7 legal standards in reaching his decision. Vasquez v. Astrue, 572 F.3d  
8 586, 591 (9th Cir. 2009); Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th  
9 Cir. 2009). The claimant is "disabled" for the purpose of receiving  
10 benefits under the Act if he is unable to engage in any substantial  
11 gainful activity due to an impairment which has lasted, or is expected  
12 to last, for a continuous period of at least twelve months. 42 U.S.C.  
13 §§ 423(d)(1)(A), 1382c(a)(3)(A); 20 C.F.R. §§ 404.1505(a), 416.905(a).  
14 "The claimant bears the burden of establishing a prima facie case of  
15 disability." Roberts v. Shalala, 66 F.3d 179, 182 (9th Cir. 1995),  
16 cert. denied, 517 U.S. 1122 (1996); Smolen v. Chater, 80 F.3d 1273,  
17 1289 (9th Cir. 1996). In this case, since plaintiff's disability  
18 insured status for Title II purposes<sup>2</sup> expired on December 31, 2001,<sup>3</sup>

19 \_\_\_\_\_  
20 <sup>2</sup> "Title II is an insurance program. Enacted in 1935, it  
21 provides old-age, survivor, and disability benefits to insured  
22 individuals irrespective of financial need. Title XVI is a  
23 welfare program. Enacted in 1972, it provides SSI benefits to  
24 financially needy individuals who are aged, blind, or disabled  
25 regardless of their insured status." Bowen v. Galbreath, 485  
26 U.S. 74, 75, 108 S. Ct. 892, 893, 99 L. Ed. 2d 68 (1988)  
27 (citations omitted). As such, there is no date last insured for  
28 purposes of SSI benefits; rather, benefits are generally payable  
to individuals eligible for SSI beginning "the month following  
the month [the individual] filed the application" for benefits.  
20 C.F.R. § 416.335.

<sup>3</sup> The ALJ determined plaintiff last met the disability  
insured status requirements on December 31, 2001, A.R. 459, and

1 plaintiff must prove he was either permanently disabled or subject to  
2 a condition which became so severe as to disable him prior to that  
3 date. Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998); Armstrong  
4 v. Comm'r of the Soc. Sec. Admin., 160 F.3d 587, 589 (9th Cir. 1998).

5  
6 The Commissioner has promulgated regulations establishing a five-  
7 step sequential evaluation process for the ALJ to follow in a  
8 disability case. 20 C.F.R. §§ 404.1520, 416.920. In the **First Step**,  
9 the ALJ must determine whether the claimant is currently engaged in  
10 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b).  
11 If not, in the **Second Step**, the ALJ must determine whether the  
12 claimant has a severe impairment or combination of impairments  
13 significantly limiting him from performing basic work activities. 20  
14 C.F.R. §§ 404.1520(c), 416.920(c). If so, in the **Third Step**, the ALJ  
15 must determine whether the claimant has an impairment or combination  
16 of impairments that meets or equals the requirements of the Listing of  
17 Impairments ("Listing"), 20 C.F.R. § 404, Subpart P, App. 1. 20  
18 C.F.R. §§ 404.1520(d), 416.920(d). If not, in the **Fourth Step**, the  
19 ALJ must determine whether the claimant has sufficient residual  
20 functional capacity despite the impairment or various limitations to  
21 perform his past work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If not,  
22 in **Step Five**, the burden shifts to the Commissioner to show the  
23 claimant can perform other work that exists in significant numbers in  
24 the national economy. 20 C.F.R. §§ 404.1520(g), 416.920(g).

25 Moreover, where there is evidence of a mental impairment that may  
26 prevent a claimant from working, the Commissioner has supplemented the

27 \_\_\_\_\_  
28 plaintiff does not challenge this finding.

1 five-step sequential evaluation process with additional regulations  
2 addressing mental impairments.<sup>4</sup> Maier v. Comm'r of the Soc. Sec.  
3 Admin., 154 F.3d 913, 914-15 (9th Cir. 1998) (per curiam).  
4

5 Applying the five-step sequential evaluation process, the ALJ  
6 found plaintiff has not engaged in substantial gainful activity since  
7 his alleged onset date. (Step One). The ALJ then found plaintiff  
8 does not have a severe impairment or combination of impairments;  
9 therefore, he is not disabled.<sup>5</sup> (Step Two).

10 //

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13 <sup>4</sup> First, the ALJ must determine the presence or absence of  
14 certain medical findings relevant to the ability to work. 20  
15 C.F.R. §§ 404.1520a(b)(1), 416.920a(b)(1). Second, when the  
16 claimant establishes these medical findings, the ALJ must rate  
17 the degree of functional loss resulting from the impairment by  
18 considering four areas of function: (a) activities of daily  
19 living; (b) social functioning; (c) concentration, persistence,  
20 or pace; and (d) episodes of decompensation. 20 C.F.R. §§  
21 404.1520a(c)(2-4), 416.920a(c)(2-4). Third, after rating the  
22 degree of loss, the ALJ must determine whether the claimant has a  
23 severe mental impairment. 20 C.F.R. §§ 404.1520a(d),  
24 416.920a(d). Fourth, when a mental impairment is found to be  
25 severe, the ALJ must determine if it meets or equals a Listing.  
20 C.F.R. §§ 404.1520a(d)(2), 416.920a(d)(2). Finally, if a  
Listing is not met, the ALJ must then perform a residual  
functional capacity assessment, and the ALJ's decision "must  
incorporate the pertinent findings and conclusions" regarding the  
claimant's mental impairment, including "a specific finding as to  
the degree of limitation in each of the functional areas  
described in [§§ 404.1520a(c)(3), 416.920a(c)(3)]." 20 C.F.R. §§  
404.1520a(d)(3), (e)(2), 416.920a(d)(3), (e)(2).

26 <sup>5</sup> In reaching this conclusion, the ALJ found plaintiff has  
27 "mild" limitations in his activities of daily living, "mild"  
28 difficulties in social functioning and maintaining concentration,  
persistence or pace, and he has experienced no episodes of  
decompensation. A.R. 403.

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II

The Step Two inquiry is "a de minimis screening device to dispose of groundless claims." Smolen, 80 F.3d at 1290; Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005). The Supreme Court has recognized that including a severity requirement at Step Two of the sequential evaluation process "increases the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would be found to be disabled even if their age, education, and experience were taken into account." Bowen v. Yuckert, 482 U.S. 137, 153, 107 S. Ct. 2287, 2297, 96 L. Ed. 2d 119 (1987). However, an overly stringent application of the severity requirement violates the Act by denying disability benefits to claimants who meet the statutory definition of disabled. Corrao v. Shalala, 20 F.3d 943, 949 (9th Cir. 1994).

A severe impairment or combination of impairments within the meaning of Step Two exists when there is more than a minimal effect on an individual's ability to do basic work activities. Webb, 433 F.3d at 686; Mayes v. Massanari, 276 F.3d 453, 460 (9th Cir. 2001); see also 20 C.F.R. §§ 404.1521(a), 416.921(a) ("An impairment or combination of impairments is not severe if it does not significantly limit [a person's] physical or mental ability to do basic work activities."). Basic work activities are "the abilities and aptitudes necessary to do most jobs," including physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling, as well as the capacity for seeing, hearing and speaking, understanding, carrying out, and remembering simple

1 instructions, use of judgment, responding appropriately to  
2 supervision, co-workers and usual work situations, and dealing with  
3 changes in a routine work setting. 20 C.F.R. §§ 404.1521(b),  
4 416.921(b); Webb, 433 F.3d at 686. If the claimant meets his burden  
5 of demonstrating he suffers from an impairment affecting his ability  
6 to perform basic work activities, "the ALJ *must* find that the  
7 impairment is 'severe' and move to the next step in the SSA's five-  
8 step process." Edlund v. Massanari, 253 F.3d 1152, 1160 (9th Cir.  
9 2001) (emphasis in original); Webb, 433 F.3d at 686.

10  
11 The ALJ found at Step Two that plaintiff does not have a severe  
12 impairment or combination of impairments. However, plaintiff contends  
13 this finding is not supported by substantial evidence because the ALJ  
14 did not properly consider the medical opinions of plaintiff's treating  
15 psychiatrist, William Vicary, M.D., and other medical evidence, did  
16 not properly address plaintiff's asthma, erroneously determined  
17 plaintiff was not a credible witness, and improperly discounted lay  
18 witness testimony.

19  
20 The medical opinions of treating physicians are entitled to  
21 special weight because the treating physician "is employed to cure and  
22 has a greater opportunity to know and observe the patient as an  
23 individual." Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987);  
24 Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 600 (9th Cir.  
25 1999). Therefore, the ALJ must provide clear and convincing reasons  
26 for rejecting the uncontroverted opinion of a treating physician, Ryan  
27 v. Comm'r of Soc. Sec., 528 F.3d 1194, 1198 (9th Cir. 2008); Reddick  
28 v. Chater, 157 F.3d 715, 725 (9th Cir. 1998), and "[e]ven if [a]

1 treating doctor's opinion is contradicted by another doctor, the ALJ  
2 may not reject this opinion without providing 'specific and legitimate  
3 reasons' supported by substantial evidence in the record." Reddick,  
4 157 F.3d at 725; Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir.  
5 2008).

6  
7 On September 7, 2001, Dr. Vicary, who has treated plaintiff  
8 continuously since May 19, **1995**, diagnosed plaintiff as having major  
9 depression with the following psychotic features: delusional  
10 behavior; paranoid thinking; inappropriate affect; depression;  
11 anhedonia or pervasive loss of interest in almost all activities;  
12 appetite disturbance; sleep disturbance; emotional withdrawal or  
13 isolation; psychomotor agitation or retardation; decreased energy;  
14 feelings of guilt or worthlessness; difficulty concentrating or  
15 thinking; easy distractibility; anxiety with vigilance and scanning;  
16 and inflexible or maladaptive personality traits that cause either  
17 significant impairment in social or occupational functioning or  
18 subjective distress with seclusiveness or autistic thinking,  
19 pathologically inappropriate suspiciousness or hostility, oddities of  
20 thought, perception, speech and behavior, persistent disturbance of  
21 mood or affect, and pathological dependence, passivity, or  
22 aggressivity. A.R. 395-400, 599-603. Dr. Vicary noted plaintiff was  
23 disheveled and unshaven, had long, stringy hair, his mannerisms were  
24 giddy and inappropriate, and he was slow and lethargic. A.R. 395,  
25 599. Dr. Vicary opined plaintiff has "marked" restrictions in the  
26 activities of daily living, "marked" difficulty maintaining social  
27 functioning, and "marked" difficulties maintaining concentration,  
28 persistence or pace. A.R. 398, 601. Dr. Vicary also opined plaintiff



1 cannot respond appropriately to work, pressure, supervision, and co-  
2 workers. A.R. 400, 603. Dr. Vicary concluded plaintiff: has  
3 "marked" limitations in his ability to understand, remember and carry  
4 out detailed instructions, maintain attention and concentration for  
5 extended periods, perform within a schedule, maintain regular  
6 attendance and be punctual within customary tolerances, sustain an  
7 ordinary routine without special supervision, complete a normal  
8 workday and workweek without interruptions from psychologically-based  
9 symptoms and perform at a consistent pace without an unreasonable  
10 number and length of rest periods, interact appropriately with the  
11 general public, get along with co-workers or peers without distracting  
12 them or exhibiting behavioral extremes, and maintain socially  
13 appropriate behavior and adhere to basic standards of neatness and  
14 cleanliness; has "moderate" limitations in his ability to remember  
15 locations and work-like procedures, understand, remember, and carry  
16 out very short and simple instructions, work in coordination with or  
17 proximity to others without being distracted, make simple work-related  
18 decisions, ask simple questions or request assistance, accept  
19 instructions and respond appropriately to criticism from supervisors,  
20 respond appropriately to changes in the work setting, travel to  
21 unfamiliar places or use public transportation, and set realistic  
22 goals or make plans independently of others; and is not significantly  
23 limited in his ability to be aware of normal hazards and take  
24 appropriate precautions. A.R. 401-02, 604-05. Dr. Vicary recommended  
25 treatment with supportive counseling and psychiatric medication. A.R.  
26 400, 603.

27  
28 On May 30, **2003**, Dr. Vicary again diagnosed plaintiff as having

1 major depression, and also diagnosed plaintiff as having obsessive-  
2 compulsive disorder with: inappropriate affect; depression; anhedonia  
3 or pervasive loss of interest in almost all activities; appetite  
4 disturbance; sleep disturbance; emotional withdrawal or isolation;  
5 psychomotor agitation or retardation; decreased energy; feelings of  
6 guilt or worthlessness; difficulty concentrating or thinking; easy  
7 distractibility; anxiety with apprehensive expectation; recurrent  
8 obsessions or compulsions which are a source of marked distress; and  
9 inflexible or maladaptive personality traits that cause either  
10 significant impairment in social or occupational functioning or  
11 subjective distress with oddities of thought, perception, speech and  
12 behavior, persistent disturbance of mood or affect, pathological  
13 dependence, passivity, or aggressivity, and intense and unstable  
14 interpersonal relationships and impulsive and damaging behavior. A.R.  
15 436-41, 639-44. Dr. Vicary again noted plaintiff's appearance was  
16 disheveled and unkempt, his mannerisms were odd, and his behavioral  
17 patterns were repetitive. A.R. 436, 639. Dr. Vicary opined plaintiff  
18 has a "moderate" restriction in the activities of daily living,  
19 "marked" difficulty maintaining social functioning, continual  
20 difficulties maintaining concentration, persistence or pace, and  
21 continual episodes of decompensation. A.R. 440, 643. Dr. Vicary  
22 again opined plaintiff cannot respond appropriately to work, pressure,  
23 supervision, and co-workers. A.R. 441, 644. Dr. Vicary again  
24 concluded plaintiff: has "marked" limitations in his ability to  
25 maintain attention and concentration for extended periods, perform  
26 activities within a schedule, maintain regular attendance, and be  
27 punctual within customary tolerances, sustain an ordinary routine  
28 without special supervision, work in coordination with or proximity to

1 others without being distracted, complete a normal workday and  
2 workweek without interruptions from psychologically-based symptoms and  
3 perform at a consistent pace without an unreasonable number and length  
4 of rest periods, interact appropriately with the general public, get  
5 along with co-workers or peers without distracting them or exhibiting  
6 behavioral extremes, maintain socially appropriate behavior and adhere  
7 to basic standards of neatness and cleanliness, respond appropriately  
8 to changes in the work setting, be aware of normal hazards and take  
9 appropriate precautions and set realistic goals or make plans  
10 independently of others; has "moderate" limitations in his ability to  
11 understand, remember and carry out detailed instructions and accept  
12 instructions and respond appropriately to criticism from supervisors;  
13 and is not significantly limited in his ability to remember locations  
14 and work-like procedures, understand, remember, and carry out very  
15 short and simple instructions, make simple work-related decisions, ask  
16 simple questions or request assistance, and travel to unfamiliar  
17 places or use public transportation. A.R. 442-43, 645-46.

18  
19 On March 11, **2005**, Dr. Vicary diagnosed plaintiff as having a  
20 bipolar disorder with: inappropriate affect; depression; anhedonia or  
21 pervasive loss of interest in almost all activities; appetite  
22 disturbance; sleep disturbance; emotional withdrawal or isolation;  
23 decreased energy; difficulty concentrating or thinking; easy  
24 distractibility; anxiety with autonomic hyperactivity, motor tension,  
25 and vigilance and scanning; recurrent severe panic attacks manifested  
26 by a sudden, unpredictable onset of intense apprehension, fear,  
27 terror, and sense of impending doom occurring on the average of once a  
28 week; recurrent obsessions or compulsions which are a source of marked

1 distress; and inflexible or maladaptive personality traits that cause  
2 either significant impairment in social or occupational functioning or  
3 subjective distress with seclusiveness or autistic thinking, oddities  
4 of thought, perception, speech and behavior, and persistent  
5 disturbance of mood or affect. A.R. 798-803. Dr. Vicary again noted  
6 plaintiff's appearance was disheveled, he had a foolish smile, and his  
7 behavioral patterns were odd. A.R. 798. Dr. Vicary opined plaintiff  
8 has a "marked" restriction in the activities of daily living, "marked"  
9 difficulty maintaining social functioning, "marked" difficulties  
10 maintaining concentration, persistence or pace, and "moderate"  
11 episodes of decompensation. A.R. 802. Dr. Vicary again opined  
12 plaintiff cannot respond appropriately to work, pressure, supervision,  
13 and co-workers. A.R. 803. Dr. Vicary concluded plaintiff: has  
14 "marked" limitations in his ability to carry out detailed  
15 instructions, maintain attention and concentration for extended  
16 periods, perform activities within a schedule, maintain regular  
17 attendance, and be punctual within customary tolerances, sustain an  
18 ordinary routine without special supervision, get along with co-  
19 workers or peers without distracting them or exhibiting behavioral  
20 extremes, and maintain socially appropriate behavior and adhere to  
21 basic standards of neatness and cleanliness; has "moderate"  
22 limitations in his ability to understand and remember detailed  
23 instructions, carry out very short and simple instructions, work in  
24 coordination with or proximity to others without being distracted,  
25 complete a normal workday and workweek without interruptions from  
26 psychologically-based symptoms and perform at a consistent pace  
27 without an unreasonable number and length of rest periods, interact  
28 appropriately with the general public, accept instructions and respond

1 appropriately to criticism from supervisors, respond appropriately to  
2 changes in the work setting, and set realistic goals or make plans  
3 independently of others; and is not significantly limited in his  
4 ability to remember locations and work-like procedures, understand and  
5 remember very short and simple instructions, make simple work-related  
6 decisions, ask simple questions or request assistance, be aware of  
7 normal hazards and take appropriate precautions, and travel to  
8 unfamiliar places or use public transportation. A.R. 796-97.

9  
10 Finally, on July 19, **2007**, Dr. Vicary again diagnosed plaintiff  
11 as having a bipolar disorder with: inappropriate affect; depression;  
12 anhedonia or pervasive loss of interest in almost all activities;  
13 emotional withdrawal or isolation; decreased energy; inflated self-  
14 esteem; anxiety with apprehensive expectation and vigilance and  
15 scanning; inflexible or maladaptive personality traits that cause  
16 either significant impairment in social or occupational functioning or  
17 subjective distress with seclusiveness or autistic thinking,  
18 pathologically inappropriate suspiciousness or hostility, oddities of  
19 thought, perception, speech and behavior, persistent disturbance of  
20 mood or affect, and pathological dependence, passivity, or  
21 aggressivity, and intense and unstable interpersonal relationships and  
22 impulsive and damaging behavior. A.R. 836-40. Dr. Vicary again noted  
23 plaintiff was disheveled, had dirty long hair, his mannerisms were  
24 odd, and his behavioral patterns were inappropriate. A.R. 836. Dr.  
25 Vicary opined plaintiff has a "moderate" restriction in the activities  
26 of daily living, "marked" difficulty maintaining social functioning,  
27 "marked" difficulties maintaining concentration, persistence or pace,  
28 and "marked" episodes of decompensation. A.R. 839. Dr. Vicary again

1 opined plaintiff cannot respond appropriately to work, pressure,  
2 supervision, and co-workers. A.R. 840. Dr. Vicary concluded  
3 plaintiff: has "marked" limitations in his ability to understand and  
4 remember detailed instructions, maintain attention and concentration  
5 for extended periods, perform activities within a schedule, maintain  
6 regular attendance, and be punctual within customary tolerances, work  
7 in coordination with or proximity to others without being distracted,  
8 complete a normal workday and workweek without interruptions from  
9 psychologically-based symptoms and perform at a consistent pace  
10 without an unreasonable number and length of rest periods, interact  
11 appropriately with the general public, get along with co-workers or  
12 peers without distracting them or exhibiting behavioral extremes, and  
13 maintain socially appropriate behavior and adhere to basic standards  
14 of neatness and cleanliness; has "moderate" limitations in his ability  
15 to remember locations and work-like procedures, carry out detailed  
16 instructions, sustain an ordinary routine without special supervision,  
17 make simple work-related decisions, accept instructions and respond  
18 appropriately to criticism from supervisors, respond appropriately to  
19 changes in the work setting, be aware of normal hazards and take  
20 appropriate precautions, set realistic goals or make plans  
21 independently of others, and tolerate stress in an ordinary work  
22 situation; and is not significantly limited in his ability to  
23 understand, remember and carry out very short and simple instructions,  
24 ask simple questions or request assistance, and travel to unfamiliar  
25 places or use public transportation. A.R. 834-35.

26  
27 Initially, the ALJ found that because Dr. Vicary sees plaintiff  
28 "every seven to eight weeks[,] . . . Dr. Vicary's status as a treating

1 physician [is] questionable[.]”<sup>6</sup> A.R. 856. However, this is not so.  
2 To the contrary, Dr. Vicary has provided medical care to plaintiff for  
3 more than 12 years, and has prescribed medication to plaintiff on a  
4 regular basis for plaintiff’s psychiatric impairments. See, e.g.,  
5 395-402, 407-34, 436-43, 587-88, 598-605, 608-37, 639-46, 704-27, 792-  
6 811, 829-41. Thus, Dr. Vicary is clearly a treating physician. See  
7 Le v. Astrue, 529 F.3d 1200, 1201-02 (9th Cir. 2008) (physician who  
8 saw claimant five times in three years for treatment was treating  
9 physician); Ghokassian v. Shalala, 41 F.3d 1300, 1303 (9th Cir. 1994)  
10 (physician who saw claimant twice within a 14-month period and  
11 prescribed medication to him was treating physician). Second, as both  
12 plaintiff and Dr. Vicary explained, plaintiff is seen as “often as  
13 realistically possible” at the free clinic he attends,<sup>7</sup> “which is  
14 overwhelmed [with] patients and understaffed in volunteer doctors”  
15 such as Dr. Vicary. A.R. 524, 884. Thus, the ALJ’s additional  
16 finding that plaintiff’s “condition is not as disabling as Dr. Vicary  
17 has indicated[,]” A.R. 856, which was based on Dr. Vicary seeing  
18 plaintiff only “every seven to eight weeks,” is completely improper.

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19  
20 <sup>6</sup> The ALJ made his findings regarding Dr. Vicary in his  
21 April 7, 2008 decision, A.R. 856, and, in his more recent 2009  
22 decision, simply stated that “[a]s for the opinion evidence, the  
23 undersigned’s April 7, 2008 decision discussed the weight  
24 accorded to Dr. Vicary’s assessments. This determination has  
25 been unchallenged by the District Court; and therefore, further  
26 discussion is not required.” A.R. 463. This is an odd statement  
27 since this Court had not reviewed the ALJ’s 2008 decision at the  
28 time the ALJ made this statement; nevertheless, the Court will  
treat the ALJ’s 2009 decision as incorporating by reference the  
2008 discussion of Dr. Vicary’s opinions. Dixon v. Massanari,  
270 F.3d 1171, 1178 (7th Cir. 2001); Banks v. Barnhart, 434 F.  
Supp. 2d 800, 805 n. 10 (C.D. Cal. 2006).

<sup>7</sup> Plaintiff lives in his car and survives by panhandling.  
A.R. 511, 516, 522-23, 527-28.

1 See Orn v. Astrue, 495 F.3d 625, 638 (9th Cir. 2007) (Disability  
2 “benefits may not be denied because of the claimant’s failure to  
3 obtain treatment he cannot obtain for lack of funds.” (citation  
4 omitted)); Gamble v. Chater, 68 F.3d 319, 322 (9th Cir. 1995)  
5 (“[M]any Americans are without the means or the opportunity to obtain  
6 necessary medical care. Social Security disability and SSI benefits  
7 exist to give financial assistance to disabled persons because they  
8 are without the ability to sustain themselves. It flies in the face  
9 of the patent purposes of the Social Security Act to deny benefits to  
10 someone because he is too poor to obtain medical treatment that may  
11 help him.” (quoting Gordon v. Schweiker, 725 F.2d 231, 237 (4th Cir.  
12 1984))).

13  
14 The ALJ also accorded “little weight” to Dr. Vicary’s opinions,  
15 finding they were “premature, speculative and conjectural” and  
16 “[t]here are inconsistencies between the opinion[s] and clinical  
17 findings and inconsistencies between the opinion[s] and treatment.”  
18 A.R. 856 (citations omitted). However, the ALJ does not explain how  
19 the opinions were “premature, speculative and conjectural” and does  
20 not identify any inconsistencies. Therefore, these reasons are  
21 grossly “conclusory [and] . . . will not justify [the ALJ’s] rejection  
22 of [Dr. Vicary’s] medical opinion[s].” Regennitter v. Comm’r of the  
23 Soc. Sec. Admin., 166 F.3d 1294, 1299 (9th Cir. 1999); Burger v.  
24 Astrue, 536 F. Supp. 2d 1182, 1187 (C.D. Cal. 2008). Similarly, the  
25 ALJ found Dr. Vicary did not “provide an assessment of the claimant’s  
26 residual functional capacity, which is compatible with the record as a  
27 whole.” A.R. 856. To the extent this finding criticizes Dr. Vicary’s  
28 opinions as inconsistent with other medical opinions, it is again



1 grossly conclusory since the ALJ does not cite any portions of the  
2 record with contrary findings or any incompatible medical opinions,  
3 and to the extent this finding suggests Dr. Vicary did not provide any  
4 assessment of plaintiff's limitations, it is clearly incorrect, as  
5 documented above.

6  
7 Finally, the ALJ rejected Dr. Vicary's opinions because they  
8 "do[] not show objective findings other than the unsupported  
9 conclusion that the claimant suffers marked limitations in various  
10 areas of functioning." A.R. 856. However,

11  
12 [c]ourts have recognized that a psychiatric impairment is  
13 not as readily amenable to substantiation by objective  
14 laboratory testing as is a medical impairment and that  
15 consequently, the diagnostic techniques employed in the  
16 field of psychiatry may be somewhat less tangible than those  
17 in the field of medicine. In general, mental disorders  
18 cannot be ascertained and verified as are most physical  
19 illnesses, for the mind cannot be probed by mechanical  
20 devices in order to obtain objective clinical manifestations  
21 of mental illness. . . . [W]hen mental illness is the basis  
22 of a disability claim, clinical and laboratory data may  
23 consist of the diagnoses and observations of professionals  
24 trained in the field of psychopathology. The report of a  
25 psychiatrist should not be rejected simply because of the  
26 relative imprecision of the psychiatric methodology or the  
27 absence of substantial documentation, unless there are other  
28 reasons to question the diagnostic technique.

1 Sanchez v. Apfel, 85 F. Supp. 2d 986, 992 (C.D. Cal. 2000) (citations  
2 omitted); Christensen v. Bowen, 633 F. Supp. 1214, 1220-21 (N.D. Cal.  
3 1986). Therefore, this also is not a specific and legitimate reason  
4 for rejecting Dr. Vicary's opinions.

5  
6 "Where the Commissioner fails to provide adequate reasons for  
7 rejecting the opinion[s] of a treating . . . physician, [this Court]  
8 credit[s] th[e] opinion[s] 'as a matter of law.'" Lester v. Chater,  
9 81 F.3d 821, 834 (9th Cir. 1996)(citations omitted); Widmark v.  
10 Barnhart, 454 F.3d 1063, 1069 (9th Cir. 2006). Here, properly  
11 crediting Dr. Vicary's opinions, it is clear plaintiff has a severe  
12 mental impairment, and the ALJ's decision to the contrary is not  
13 supported by substantial evidence. Edlund, 253 F.3d at 1159-60.

14  
15 **III**

16 This Court has discretion to award disability benefits to a  
17 plaintiff when there is no need to remand the case for additional  
18 factual findings. McCartey v. Massanari, 298 F.3d 1072, 1076 (9th  
19 Cir. 2002); Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001).  
20 "[W]here the record has been developed fully and further  
21 administrative proceedings would serve no useful purpose, the district  
22 court should remand for an immediate award of benefits." Benecke v.  
23 Barnhart, 379 F.3d 587, 593 (9th Cir. 2004); Moisa v. Barnhart, 367  
24 F.3d 882, 887 (9th Cir. 2004). Here, because Dr. Vicary's opinions,  
25 "when [they are] given the effect required by law, demonstrate[] that  
26 [plaintiff] meets or equals Listing § 12.04,"<sup>8</sup> the record is

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<sup>8</sup> At the time of the most recent administrative hearing,  
Listing 12.04 provided, in pertinent part:

1  
2 *Affective Disorders*: Characterized by a disturbance of  
3 mood, accompanied by a full or partial manic or  
4 depressive syndrome. Mood refers to a prolonged  
5 emotion that colors the whole psychic life; it  
6 generally involves either depression or elation. [¶]  
7 The required level of severity for these disorders is  
8 met when the requirements in both A and B are  
9 satisfied, or when the requirements in C are satisfied.  
10 [¶] A. Medically documented persistence, either  
11 continuous or intermittent, of one of the following:  
12 [¶] 1. Depressive syndrome characterized by at least  
13 four of the following: [¶] a. Anhedonia or pervasive  
14 loss of interest in almost all activities; or [¶] b.  
15 Appetite disturbance with change in weight; or [¶] c.  
16 Sleep disturbance; or [¶] d. Psychomotor agitation or  
17 retardation; or [¶] e. Decreased energy; [¶] or f.  
18 Feelings of guilt or worthlessness; or [¶] g.  
19 Difficulty concentrating or thinking; or [¶] h.  
20 Thoughts of suicide; or [¶] i. Hallucinations,  
21 delusions, or paranoid thinking . . . 3. Bipolar  
22 syndrome with a history of episodic periods manifested  
23 by the full symptomatic picture of both manic and  
24 depressive syndromes (and currently characterized by  
25 either or both syndromes); [¶] And [¶] B. Resulting in  
26 at least two of the following: [¶] 1. Marked  
27 restriction of activities of daily living; or [¶] 2.  
28 Marked difficulties in maintaining social functioning;  
or [¶] 3. marked difficulties in maintaining  
concentration, persistence or pace; or [¶] 4. Repeated  
episodes of decompensation, each of extended duration.  
[¶] OR [¶] C. Medically documented history of a  
chronic affective disorder of at least 2 years'  
duration that has caused more than a minimal limitation  
of ability to do basic work activities, with symptoms  
or signs currently attenuated by medication or  
psychosocial support, and one of the following: [¶] 1.  
Repeated episodes of decompensation, each of extended  
duration; or [¶] 2. A residual disease process that  
has resulted in such marginal adjustment that even a  
minimal increase in mental demands or change in the  
environment would be predicted to cause the individual  
to decompensate; or [¶] 3. Current history of 1 or more  
years' inability to function outside a highly  
supportive living arrangement, with an indication of  
continued need for such an arrangement.

1 complete, and under Step Three, both Title II<sup>9</sup> and SSI disability  
2 benefits should be awarded to plaintiff.<sup>10</sup> Lester, 81 F.3d at 834;  
3 Ramirez v. Shalala, 8 F.3d 1449, 1455 (9th Cir. 1993).

4  
5 **ORDER**

6 IT IS ORDERED that plaintiff's request for relief is granted, and  
7 the Commissioner shall award both Title II and SSI disability benefits  
8 to plaintiff.

9  
10 DATED: August 6, 2010

11 /S/ ROSALYN M. CHAPMAN  
12 ROSALYN M. CHAPMAN  
13 UNITED STATES MAGISTRATE JUDGE

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20 C.F.R. § 404, Subpart P, App. 1, Listing 12.04.

24 <sup>9</sup> Since Dr. Vicary found plaintiff disabled prior to his  
25 date last insured for Title II purposes, plaintiff is entitled to  
both Title II and SSI benefits.

26 <sup>10</sup> Having reached this conclusion, it is not necessary to  
27 address the other arguments plaintiff raises.