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5 UNITED STATES DISTRICT COURT  
6 CENTRAL DISTRICT OF CALIFORNIA  
7 WESTERN DIVISION  
8

9 LAURENCE E. KRAMER, ) Case No. CV 12-5297-MLG  
10 Plaintiff, ) MEMORANDUM OPINION AND ORDER  
11 )  
12 v. )  
13 MICHAEL J. ASTRUE, )  
14 Commissioner of the )  
15 Social Security )  
16 Administration, )  
17 Defendant. )  
18

19 **I. Background**

20 Plaintiff Laurence Kramer seeks judicial review of the  
21 Commissioner's final decision denying his application for disability  
22 insurance benefits ("DIB"). Plaintiff was born on September 14, 1949,  
23 and was 59 years old at the time he filed his application for benefits.  
24 (Administrative Record ("AR") at 129.) He completed three years of  
25 college and has relevant work experience as an architectural drafter,  
26 project manager, teacher, and construction project manager. (AR at 27,  
27 168, 171.) Plaintiff filed his DIB application on May 21, 2009, alleging  
28 disability beginning April 9, 2006, due to bowel related problems,  
diabetes, hip problems and high blood pressure. (AR at 79, 167.)

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1 Plaintiff's application was denied initially on January 5, 2010.  
2 (AR at 80-84.) An administrative hearing was held on January 25, 2011,  
3 before Administrative Law Judge ("ALJ") Zane A. Lang. Plaintiff,  
4 represented by counsel, testified, as did a vocational expert ("VE").  
5 (AR at 44-77.)

6 On January 27, 2011, the ALJ issued an unfavorable decision. (AR at  
7 20-28.) The ALJ found that the medical evidence established that  
8 Plaintiff suffered from the following severe impairments:  
9 diverticulitis, diabetes, and degenerative disc disease of the lumbar  
10 spine. (AR at 22.) The ALJ determined that Plaintiff's impairments did  
11 not meet, and were not medically equal to, one of the listed impairments  
12 in 20 C.F.R., Part 404, Subpart P, Appendix 1. (AR at 24.) The ALJ  
13 further found that Plaintiff retained the following residual functional  
14 capacity ("RFC") to perform light work as defined in 20 C.F.R.  
15 404.1567(b) with the following limitations:

16 lifting and/or carrying 20 pounds occasionally and 10 pounds  
17 frequently, standing and/or walking for 6 hours in an 8-hour  
18 workday, and sitting for up to 6 out of 8 hours, with  
19 occasional performance of postural activities (climbing,  
20 balancing, stooping, kneeling, crouching, and crawling).

21 (Id.)

22 The ALJ concluded that Plaintiff was capable of performing his past  
23 relevant work as a project manager, architectural drafter, teacher, and  
24 construction project manager, and therefore Plaintiff was not disabled  
25 within the meaning of the Social Security Act. See 20 C.F.R. §  
26 416.920(f). (AR at 27.)

27 On April 10, 2012, the Appeals Council denied review. (AR at 1-4.)  
28 Plaintiff then timely commenced this action for judicial review. On

1 January 14, 2013, the parties filed a Joint Stipulation ("Joint Stip.")  
2 of disputed facts and issues. Plaintiff contends that the ALJ erred by  
3 failing to: (1) include in his hypothetical to the VE the mild mental  
4 limitations that the ALJ found Plaintiff to suffer from; and (2) credit  
5 the limitations assessed by the psychiatric consultative examiner.  
6 (Joint Stip. at 3-4.) Plaintiff seeks reversal of the Commissioner's  
7 decision and the payment of benefits or, in the alternative, remand for  
8 a new administrative hearing. (Joint Stip. at 20-21.) The Commissioner  
9 requests that the ALJ's decision be affirmed. (Joint Stip. at 21.)

10 After reviewing the parties' respective contentions and the record  
11 as a whole, the Court finds that the ALJ erred in failing to include  
12 Plaintiff's mild mental limitations in the RFC assessment and in the  
13 hypothetical posed to the VE. The matter will be remanded for further  
14 proceedings consistent with this opinion.<sup>1</sup>

## 16 **II. Standard of Review**

17 Under 42 U.S.C. § 405(g), a district court may review the  
18 Commissioner's decision to deny benefits. The Commissioner's or ALJ's  
19 decision must be upheld unless "the ALJ's findings are based on legal  
20 error or are not supported by substantial evidence in the record as a  
21 whole." *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1990); *Batson v.*  
22 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004); *Parra*  
23 *v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means  
24 such evidence as a reasonable person might accept as adequate to support

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26 <sup>1</sup> As noted above, Plaintiff also contends that the ALJ erred by  
27 failing to credit the limitations assessed by the psychiatric  
28 consultative examiner. The Court does not reach the remaining issue or  
decide whether this issue would independently warrant relief. The ALJ  
may wish to consider this issue upon remand.

1 a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Widmark*  
2 *v. Barnhart*, 454 F.3d 1063, 1066 (9th Cir. 2006). It is more than a  
3 scintilla, but less than a preponderance. *Robbins v. Soc. Sec. Admin.*,  
4 466 F.3d 880, 882 (9th Cir. 2006). To determine whether substantial  
5 evidence supports a finding, the reviewing court "must review the  
6 administrative record as a whole, weighing both the evidence that  
7 supports and the evidence that detracts from the Commissioner's  
8 conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If  
9 the evidence can support either affirming or reversing the ALJ's  
10 conclusion," the reviewing court "may not substitute its judgment for  
11 that of the ALJ." *Robbins*, 466 F.3d at 882.

### 13 **III. Discussion**

14 Plaintiff contends that the ALJ erred by failing to include  
15 Plaintiff's mild mental limitations in the assessment of his RFC and in  
16 the hypothetical posed to the VE at Step Four of the sequential  
17 evaluation. (Joint Stip. at 4.) Although the ALJ found at Step Two of  
18 the sequential evaluation that Plaintiff's mental impairment was not  
19 severe, he did find that Plaintiff's medically determinable mental  
20 impairment caused "mild limitation in activities of daily living, social  
21 functioning, and concentration, persistence, or pace ...." (AR at 23-  
22 24.) However, the ALJ did not include any mental limitations in his  
23 assessment of Plaintiff's RFC. (AR at 24.)

24 The Social Security Regulations provide that the ALJ must consider  
25 all limitations when assessing a claimant's RFC, even if those  
26 limitations are found to be non-severe. See 20 C.F.R. § 404.1545(a)(2)  
27 ("We will consider all of your medically determinable impairments of  
28 which we are aware, including your medically determinable impairments

1 that are not 'severe' ... when we assess your residual functional  
2 capacity." ). In a recent Ninth Circuit opinion directly on point, the  
3 court held that the ALJ erred in failing to include the "mild" mental  
4 limitations caused by the claimant's post-traumatic stress disorder  
5 ("PTSD") in the RFC assessment at Step Four and in the hypothetical to  
6 the VE at Step Five, even where the ALJ found that the claimant's PTSD  
7 was not a severe impairment. *Hutton v. Astrue*, ---Fed Appx. ---, 2012 WL  
8 6040731, \*1 (9th Cir. December 05, 2012).<sup>2</sup>

9 The Commissioner posits various reasons for rejecting *Hutton*, none  
10 of which are persuasive. First, the Commissioner claims that this case  
11 is controlled by *Hoopai v. Astrue*, 499 F.3d 1071 (9th Cir. 2007),  
12 relying on that case for the proposition that an ALJ is not required to  
13 include mild limitations found at Step Two in a claimant's RFC  
14 assessment because those findings are relevant only to the issues of  
15 severity and the listings. (Joint Stip. at 9.) However, *Hoopai* is  
16 inapplicable to this case because *Hoopai* merely holds that satisfaction  
17 of the Step Two threshold of severity is not dispositive of the Step  
18 Five determination of whether the claimant can perform other work in the  
19 economy. *Id.* at 1076. *Hoopai* is silent on the matter at issue here,  
20 whether the ALJ must include mild mental limitations in his assessment  
21 of a claimant's RFC. This issue, however, is directly addressed by  
22 *Hutton*.

23 The Commissioner also seeks to limit *Hutton* to its specific facts  
24 by arguing that the court only granted relief because the ALJ also made  
25 other "compounding errors," such as improperly discrediting the  
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27 <sup>2</sup> Although unpublished Ninth Circuit decisions are not precedent,  
28 they are nevertheless citable in accordance with Fed.R.App.P. 32.1 and  
Ninth Circuit Rule 36-3.

1 claimant's testimony, the treating physicians' opinions, and the VA's  
2 disability rating. (Joint Stip. at 11-12.) However, the *Hutton* court  
3 specifically stated that it was "not bas[ing] [its] action ... on any of  
4 these determinations by the ALJ." 2012 WL 6040731, \*1. Rather, the court  
5 clearly stated that the "ALJ committed legal error by failing to include  
6 Hutton's PTSD in his assessment of Hutton's RFC analysis at Step Four  
7 and in his hypotheticals to the vocational expert at Step Five," *id.*,  
8 regardless of any other additional errors made by the ALJ.

9       The Commissioner also contends that because the ALJ found  
10 Plaintiff's allegations of decreased memory and concentration not fully  
11 credible, he was therefore not required to include the mild mental  
12 limitations in his RFC assessment or in the hypothetical to the VE.  
13 (Joint Stip. at 8, 10.) However, the *Hutton* court rejected a similar  
14 argument, concluding that, "while the ALJ was free to reject Hutton's  
15 testimony as not credible, there was no reason for the ALJ to disregard  
16 his own finding that Hutton's nonsevere PTSD caused some 'mild'  
17 limitations in the areas of concentration, persistence, or pace." 2012  
18 WL 6040731, \*1. Thus, the ALJ was required to include the mild mental  
19 limitations he found in the RFC assessment and in the hypothetical to  
20 the VE, regardless of whether the ALJ doubted Plaintiff's claim that he  
21 had a mental impairment. *Id.*

22       Accordingly, the ALJ erred in failing to include the "mild"  
23 limitations with respect to concentration, persistence or pace in his  
24 assessment of Plaintiff's RFC and in the hypothetical he posed to the  
25 VE. *Id.*

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1 **IV. Conclusion**

2 For the reasons stated above, the decision of the Social Security  
3 Commissioner is **REVERSED** and the action is **REMANDED** for further  
4 proceedings consistent with this opinion.

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6 DATED: January 22, 2013

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8 MARC L. GOLDMAN

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Marc L. Goldman  
United States Magistrate Judge