

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge
3 (“ALJ”) are supported by substantial evidence and are free from material error.¹

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On June 29, 2006, plaintiff filed an application for Supplemental Security
7 Income benefits. (Administrative Record (“AR”) 58-61). Plaintiff asserted that he
8 became disabled on September 1, 2001, due to schizophrenia. (AR 101). The ALJ
9 examined the medical record and held a hearing, which plaintiff did not attend, on
10 June 6, 2007. (AR 5-7). The ALJ “decide[d] the matter on the record.” (AR 7).

11 On July 18, 2008, the ALJ determined that plaintiff was not disabled
12 through the date of the decision. (AR 13-21). Specifically, the ALJ found:
13 (1) plaintiff suffered from “severe impairments in the musculoskeletal system from
14 status post surgical repair of cervical spine fracture and a long history of
15 polysubstance abuse and consequent mood disorder” (AR 15); (2) plaintiff’s
16 impairments, considered singly or in combination, did not meet or medically equal
17 one of the listed impairments (AR 15-16); (3) plaintiff retained the residual
18 functional capacity to perform light work with certain restrictions (AR 16);²
19 (4) plaintiff has no past relevant work (AR 19); (5) plaintiff can perform jobs that
20 exist in significant numbers in the national economy (AR 20); and (6) plaintiff’s
21 allegations regarding his limitations were not entirely credible. (AR 18).

22 The Appeals Council denied plaintiff’s application for review. (AR 1-3).

24 ¹The harmless error rule applies to the review of administrative decisions regarding
25 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
26 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social
27 Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of
application of harmless error standard in social security cases).

28 ²The ALJ determined that plaintiff could perform light work “except the claimant is
limited to occasional postural activities. Mentally, the claimant is able to perform simple,
routine, repetitive, nonpublic tasks.” (AR 16).

1 **III. APPLICABLE LEGAL STANDARDS**

2 **A. Sequential Evaluation Process**

3 To qualify for disability benefits, a claimant must show that he is unable to
4 engage in any substantial gainful activity by reason of a medically determinable
5 physical or mental impairment which can be expected to result in death or which
6 has lasted or can be expected to last for a continuous period of at least twelve
7 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.
8 § 423(d)(1)(A)). The impairment must render the claimant incapable of
9 performing the work he previously performed and incapable of performing any
10 other substantial gainful employment that exists in the national economy. Tackett
11 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

12 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
13 sequential evaluation process:

- 14 (1) Is the claimant presently engaged in substantial gainful activity? If
15 so, the claimant is not disabled. If not, proceed to step two.
- 16 (2) Is the claimant's alleged impairment sufficiently severe to limit
17 his ability to work? If not, the claimant is not disabled. If so,
18 proceed to step three.
- 19 (3) Does the claimant's impairment, or combination of
20 impairments, meet or equal an impairment listed in 20 C.F.R.
21 Part 404, Subpart P, Appendix 1? If so, the claimant is
22 disabled. If not, proceed to step four.
- 23 (4) Does the claimant possess the residual functional capacity to
24 perform his past relevant work? If so, the claimant is not
25 disabled. If not, proceed to step five.
- 26 (5) Does the claimant's residual functional capacity, when
27 considered with the claimant's age, education, and work
28 experience, allow him to adjust to other work that exists in

1 significant numbers in the national economy? If so, the
2 claimant is not disabled. If not, the claimant is disabled.

3 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
4 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

5 **B. Standard of Review**

6 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
7 benefits only if it is not supported by substantial evidence or if it is based on legal
8 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
9 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
10 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
11 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
12 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
13 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
14 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

15 To determine whether substantial evidence supports a finding, a court must
16 “consider the record as a whole, weighing both evidence that supports and
17 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
18 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
19 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
20 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
21 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

22 **IV. DISCUSSION**

23 **A. Medical Evidence**

24 Plaintiff contends that the ALJ erred by failing to consider properly the
25 opinions of a non-examining state agency physician, Dr. Karen Loomis, and a
26 licensed clinical social worker, Karen Banker. (Plaintiff’s Motion at 2-4).

27 Plaintiff’s arguments lack merit.

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1 **1. Dr. Loomis**

2 Dr. Loomis completed a “Mental Residual Functional Capacity
3 Assessment” form and a “Psychiatric Review Technique” form on August 22,
4 2006, and reviewed a case analysis form on the same date. (AR 158-73). Dr.
5 Loomis’s opinion represented her “summary conclusions derived from the
6 evidence in the file.” (AR 158). On the “Mental Residual Functional Capacity”
7 form Dr. Loomis opined, among other things, that plaintiff had at most moderate
8 limitations in some functions associated with understanding and memory,
9 sustained concentration and persistence, social interaction, and adaptation. (AR
10 158-59). She concluded that plaintiff’s mental residual functional capacity was
11 compatible with “remembering short and simple instructions,” performing “simple
12 repetitive task[s] for a full workday and full workweek,” interacting “with peers
13 and supervisors, but not with the public[,]” and adapting to “the usual work
14 setting.” (AR 160). On the “Psychiatric Review Technique” form, Dr. Loomis
15 indicated that plaintiff did not have a schizophrenic, paranoid, or other psychotic
16 disorder that “precisely satisf[ied] the diagnostic criteria” specified on the form,
17 but that he had “[s]chizophrenia by history.” (AR 163). She again noted that
18 plaintiff had moderate limitations in maintaining social functioning and
19 maintaining concentration, persistence, or pace. (AR 169). On the case analysis
20 form, Dr. Loomis stated that there was “[s]ufficient [e]vidence to make [a]
21 decision,” and concluded that plaintiff “is capable of understanding, remembering
22 and carrying out simple repetitive tasks. [He] is able to maintain concentration,
23 persistence and pace throughout a normal workday/workweek as related to simple
24 tasks. [He] is able to interact adequately with coworkers [and] supervisors but
25 may have difficulty dealing with the demands of general public contact. [He] is
26 able to make adjustments and avoid hazards in the workspace.” (AR 173).

27 Plaintiff’s contention that the ALJ “rejected the State Agency findings
28 without providing legally sufficient reasons” lacks merit. (Plaintiff’s Motion at 3).

1 Although the ALJ did not adopt Dr. Loomis’s diagnosis of schizophrenia by
2 history, there is no evidence that the ALJ rejected her opinion. The ALJ
3 specifically cited the forms she completed: “I have also read and considered the
4 findings and opinions of the State Agency review examiners and medical
5 consultants at Exhibits 2F, 3F, and 4F [AR 158-73 – Dr. Loomis’s opinions].”
6 (AR 19, 158-73). Moreover, the ALJ stated he gave “some significant weight to
7 [the State Agency review examiners’ and medical consultants’] assertions as they
8 are not inconsistent with the overall medical evidence.” (AR 19). The ALJ
9 accurately summarized Dr. Loomis’s opinion as

10 indicating that [plaintiff’s] understanding and memory
11 were compatible with remembering short and simple
12 instructions and concentration and attention were
13 adequate for simple repetitive task[s] for a full workday
14 and full workweek. [Plaintiff’s] social interaction
15 capacity was adequate for dealing with peers and
16 supervisors, but not with the public, and his adaptation
17 capacity was intact for the usual work setting.

18 (AR 19). As the ALJ mentioned, he accounted for these findings in his residual
19 functional capacity assessment, which limited plaintiff to “perform[ing] simple,
20 routine, repetitive, nonpublic tasks.” (AR 16, 19). Thus, the Court cannot
21 conclude that the ALJ rejected Dr. Loomis’s opinion. The ALJ’s failure to adopt
22 her diagnosis of schizophrenia by history was, at most, harmless error, as Dr.
23 Loomis herself believed plaintiff was not disabled (AR 160, 173). See Stout, 454
24 F.3d at 1044 (harmless error if “inconsequential to the ultimate disability
25 determination”). A remand or reversal on this basis is not warranted.

26 **2. Ms. Banker**

27 Ms. Banker, a licensed clinical social worker, diagnosed plaintiff with
28 recurrent severe major depression with psychotic features, generalized anxiety,

1 and alcohol and drug abuse; and she assigned him a Global Assessment of
2 Functioning (“GAF”) score of 43.³ (AR 128). It is not clear whether Ms. Banker
3 actually examined plaintiff, as she signed her name on December 22, 2004, under
4 the heading “Person Authorized To Diagnose (if clinician is not so authorized),” to
5 a form signed by a clinician on November 4, 2004. (AR 128). There is no
6 indication in the record that Ms. Banker examined plaintiff on any other occasion.

7 The Court rejects plaintiff’s argument that the ALJ “rejected Ms. [Banker’s]
8 findings without providing legally sufficient reasons.” (Plaintiff’s Motion at 4).
9 To establish that he has a medical impairment such as those diagnosed by Ms.
10 Banker (recurrent severe major depression with psychotic features and generalized
11 anxiety), it was incumbent upon plaintiff to submit evidence from an “acceptable
12 medical source[.]” See 20 C.F.R. § 416.913(a). A licensed clinical social worker
13 such as Ms. Banker is not an “acceptable medical source.” Id. Moreover, an ALJ
14 must provide an explanation only when he rejects “significant probative
15 evidence.” See Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984)
16 (citation omitted). Plaintiff has not demonstrated that Ms. Banker’s findings
17 constitute significant or probative evidence. The form completed by Ms. Banker
18 comprises little more than a list of diagnoses and does not discuss any objective
19 medical evidence. (See AR 128). An ALJ need not accept a medical opinion “that
20 is conclusory and brief and unsupported by clinical findings.” Tonapetyan v.
21 Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). Ms. Banker’s assessment of a GAF
22 score does not transform her opinion into significant probative evidence. GAF
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25 ³A GAF score is a clinician’s judgment of an individual’s overall level of functioning. It
26 is rated with respect only to psychological, social, and occupational functioning, without regard
27 to impairments in functioning due to physical or environmental limitations. See American
28 Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”), 32
(4th ed. 2000). A GAF score between 41 and 50 indicates “[s]erious symptoms (e.g., suicidal
ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social,
occupational, or school functioning (e.g., no friends, unable to keep a job).” DSM-IV at 32.

1 scores, standing alone, are not determinative of mental disability for purposes of
2 social security claims. See McFarland v. Astrue, 288 Fed. Appx. 357, 359 (9th
3 Cir. 2008) (ALJ’s failure to address GAF scores specifically did not constitute
4 legal error).⁴ In any event, the ALJ’s residual functional capacity assessment
5 accounts for plaintiff’s mental impairments, is not inconsistent with the GAF score
6 assessed by Ms. Banker, and is supported by substantial evidence. To the extent
7 the ALJ erred by failing to discuss Ms. Banker’s opinion, any such error was
8 harmless. Accordingly, a remand or reversal on this basis is not warranted.

9 **B. Plaintiff’s Credibility**

10 Plaintiff next argues that the ALJ rejected his testimony “without providing
11 legally sufficient reasons.” (Plaintiff’s Motion at 6-7). The Court disagrees.

12 “To determine whether a claimant’s testimony regarding subjective pain or
13 symptoms is credible, an ALJ must engage in a two-step analysis.” Lingenfelter v.
14 Astrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, “the ALJ must determine
15 whether the claimant has presented objective medical evidence of an underlying
16 impairment ‘which could reasonably be expected to produce the pain or other
17 symptoms alleged.’” Id. (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir.
18 1991) (en banc)).

19 “Second, if the claimant meets this first test, and there is no evidence of
20 malingering, ‘the ALJ can reject the claimant’s testimony about the severity of
21 [his] symptoms only by offering specific, clear and convincing reasons for doing
22 so.’” Lingenfelter, 504 F.3d at 1036 (citations omitted). “In making a credibility
23 determination, the ALJ ‘must specifically identify what testimony is credible and
24 what testimony undermines the claimant’s complaints.’” Greger v. Barnhart, 464
25 F.3d 968, 972 (9th Cir. 2006) (citation omitted). “The ALJ must cite the reasons
26 why the claimant’s testimony is unpersuasive.” Orn v. Astrue, 495 F.3d 625, 635

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28 ⁴The court may cite unpublished Ninth Circuit opinions issued on or after January 1,
2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a).

1 (9th Cir. 2007) (citation and quotation marks omitted). In weighing credibility,
2 the ALJ may consider factors including: the nature, location, onset, duration,
3 frequency, radiation, and intensity of any pain; precipitating and aggravating
4 factors (e.g., movement, activity, environmental conditions); type, dosage,
5 effectiveness, and adverse side effects of any pain medication; treatment, other
6 than medication, for relief of pain; functional restrictions; the claimant’s daily
7 activities; and “ordinary techniques of credibility evaluation.” Bunnell, 947 F.2d
8 at 346 (citing Social Security Ruling (“SSR”) 88-13⁵; quotation marks omitted).
9 The ALJ may consider (a) inconsistencies or discrepancies in a claimant’s
10 statements; (b) inconsistencies between a claimant’s statements and activities;
11 (c) exaggerated complaints; and (d) an unexplained failure to seek treatment.
12 Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If properly supported,
13 the ALJ’s credibility determination is entitled to “great deference.” See Green v.
14 Heckler, 803 F.2d 528, 532 (9th Cir. 1986).

15 In this case, the ALJ found that plaintiff’s “medically determinable
16 impairments could reasonably be expected to produce the alleged symptoms;
17 however, [plaintiff’s] statements . . . concerning the intensity, persistence and
18 limiting effects of these statements are not credible to the extent they are
19 inconsistent with the residual functional capacity assessment.” (AR 18). The ALJ
20 provided several reasons for discounting plaintiff’s credibility. First, he noted that
21 plaintiff “is not compliant with treatment as he runs out of medication and he was
22 very inconsistent in keeping his mental health appointments,” suggesting “that his
23 symptoms may not be as severe as he purports.” (AR 17) (citing Exhibits 2F, 7F,
24 11F, 12F [AR 158-69, 182-92, 207-20]). The record is indeed replete with

26 ⁵Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903
27 F.2d 1273, 1275 n.1 (9th Cir. 1990). Such rulings reflect the official interpretation of the Social
28 Security Administration and are entitled to some deference as long as they are consistent with the
Social Security Act and regulations. Massachi v. Astrue, 486 F.3d 1149, 1152 n.6 (9th Cir.
2007) (citing SSR 00-4p).

1 indications that plaintiff has not been compliant with his medications and has
2 frequently missed appointments. (AR 144, 149, 150, 154, 156, 157, 177, 178,
3 190, 192, 211). The ALJ properly considered plaintiff’s failure consistently to
4 “seek treatment or to follow a prescribed course of treatment” in assessing his
5 credibility. See Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996).

6 Next, the ALJ found that plaintiff’s criminal history detracted from his
7 credibility. The ALJ noted that plaintiff had been “incarcerated with a history of
8 multiple arrests as a juvenile and as an adult for felony burglary”; that plaintiff “is
9 a self-admitted gang member”; and that plaintiff had been “charged with lying and
10 making false statements to police officers.” (AR 17) (citing Exhibits 5F at 6 [AR
11 179], 10F [AR 203-06])). The ALJ properly considered plaintiff’s criminal history
12 in assessing his credibility. See Steward v. Astrue, 2009 WL 3757401, at *7 (C.D.
13 Cal. Nov. 3, 2009) (“By utilizing ordinary techniques of credibility evaluation, the
14 ALJ rejected Plaintiff’s credibility partially based on her past criminal history.”)
15 (citing Thomas, 278 F.3d at 958-59; Smolen, 80 F.3d at 1284).

16 The Court does not specifically address the ALJ’s other reason for
17 discounting plaintiff’s credibility, but it has determined that it does not detract
18 from the ALJ’s ultimate credibility determination. See Carmickle v.
19 Commissioner of the Social Security Administration, 533 F.3d 1155, 1162 (9th
20 Cir. 2008). A reversal or remand is not warranted on this basis.

21 **C. Side Effects of Medication**

22 Finally, the Court rejects plaintiff’s contention that the ALJ erred by failing
23 to consider the side effects from plaintiff’s medication. (Plaintiff’s Motion at 7-8).
24 A claimant bears the burden of demonstrating that his use of medications caused a
25 disabling impairment. See Miller v. Heckler, 770 F.2d 845, 849 (9th Cir. 1985)
26 (claimant failed to meet burden of proving medication impaired his ability to work
27 because he produced no clinical evidence). The only evidence plaintiff points to
28 in support of his contention are cursory references in disability report forms that

1 he experiences nausea and blurred vision from his medications. (Plaintiff's
2 Motion at 6) (citing AR 104, 112). Plaintiff offers no objective evidence that his
3 medication affected him in the way he claims, let alone that it interfered with his
4 ability to work. See Osenbrock v. Apfel, 240 F.3d 1157, 1164 (9th Cir. 2001)
5 (“There were passing mentions of the side effects of [plaintiff’s] medication in
6 some of the medical records, but there was no evidence of side effects severe
7 enough to interfere with [his] ability to work.”). The ALJ did not err.⁶

8 **V. CONCLUSION**

9 For the foregoing reasons, the decision of the Commissioner of Social
10 Security is affirmed.

11 LET JUDGMENT BE ENTERED ACCORDINGLY.

12 DATED: August 11, 2010

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/s/

14 Honorable Jacqueline Chooljian
15 UNITED STATES MAGISTRATE JUDGE
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25 ⁶Plaintiff appears to suggest that the ALJ erred by failing to consider all possible side
26 effects related to plaintiff’s medication. (Plaintiff’s Motion at 7-8). Plaintiff’s argument has no
27 merit. The ALJ was not required to address undocumented medication side effects. See Miller,
28 770 F.2d at 849 (ALJ properly rejected allegations of impairment from medication side effects
where plaintiff produced no clinical evidence that narcotics use impaired his ability to work);
Osenbrock, 240 F.3d at 1164.