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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

RAE LAVERN JONES,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

Case No. 1:15-cv-00225-LJO-SAB

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING GRANTING  
PLAINTIFF’S SOCIAL SECURITY APPEAL  
AND DENYING DEFENDANT’S CROSS-  
MOTION FOR SUMMARY JUDGMENT AND  
REMANDING ACTION

(ECF Nos. 18, 20, 22)

OBJECTIONS DUE WITHIN FOURTEEN  
DAYS

**I.**

**INTRODUCTION**

Plaintiff Rae Lavern Jones (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for disability benefits pursuant to the Social Security Act. The matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Plaintiff suffers from back problems, broken right heel, right shoulder dislocation, head injury, knee problems, breathing problems, affective disorder and osteoarthritis. For the reasons set forth below, it is recommended that Plaintiff’s Social Security appeal be granted, Defendant’s motion for summary judgment be denied, and this action be remanded for further proceedings.

1 **II.**

2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 Plaintiff received a prior unfavorable decision on May 23, 2008 based on severe  
4 impairments of status-post fracture right heel, obesity, and substance abuse disorder. (AR 71-  
5 80.)

6 Plaintiff protectively filed the instant Title XVI application for supplemental security  
7 income on February 8, 2012. (AR 178.) Plaintiff's applications were initially denied on July 5,  
8 2012, and denied upon reconsideration on January 31, 2013. (AR 116-19, 123-27.) Plaintiff  
9 requested and received a hearing before Administrative Law Judge Daniel G. Heely ("the ALJ").  
10 Plaintiff appeared for a hearing on September 17, 2013. (AR 34-70.) On October 21, 2013, the  
11 ALJ found that Plaintiff was not disabled. (AR 16-29.) The Appeals Council denied Plaintiff's  
12 request for review on December 15, 2014. (AR 1-3.)

13 **A. Relevant Hearing Testimony**

14 Plaintiff testified at a hearing on September 17, 2013. (AR 38-62.) While in the Marine  
15 Corp, Plaintiff took 22 college credits. (AR 38.) Plaintiff has not worked since 1984. (AR 39.)  
16 Plaintiff has been involved in some product testing for which he is paid. (AR 39-43.) Plaintiff  
17 goes to an office with a long line of people waiting to get into the testing program. (AR 41.) He  
18 has a patch put on and then it is taken off that same day or the next. (AR 41.) Plaintiff has been  
19 participating in the program for five years. (AR 41.) He goes in daily so they can monitor his  
20 reaction to the products that are being tested. (AR 43.)

21 Plaintiff had a head on collision with another bicycle in 1987 and was told not to work  
22 anymore. (AR 44.) Plaintiff has limited movement of his body parts and takes medication. (AR  
23 44.) When Plaintiff over exerts he gets mucus that causes his breathing to clog up. (AR 44.)  
24 Plaintiff smokes five to fifteen cigarettes a day. (AR 45.) Plaintiff drinks a quart or two of beer  
25 every other day. (AR 45.) Plaintiff is not using any illegal drugs. (AR 46.) He last used  
26 marijuana about eight or nine months prior to the hearing. (AR 61.)

27 Plaintiff is not having any mental health issues. (AR 46.) Plaintiff had mental health  
28 issues back in the day, but quit taking his meds. (AR 46.) Plaintiff is prescribed several

1 medications and takes them as prescribed. (AR 47.) He has no side effects from any of his  
2 medication. (AR 47.)

3 Plaintiff has constant pain in his spine, neck, and back. (AR 55.) Plaintiff does not stand  
4 on his feet for long periods and needs to constantly readjust while sitting. (AR 55.) Plaintiff is  
5 able to stand for a minute or two before he needs to lean on something for balance. (AR 55.)  
6 Plaintiff is able to walk for five to ten minutes. (AR 56.) Plaintiff can lift a box of pots and pans  
7 or plates. (AR 56.) He can lift ten to fifteen pounds. (AR 57.) Plaintiff started hearing voices  
8 after he was put on a certain medication. (AR 57.) Plaintiff sometimes hears voices but they are  
9 mild. (AR 57.) In 1982, Plaintiff hurt his knee playing basketball. (AR 58.) Every two to three  
10 months his knee will swell up on him. (AR 58.) Plaintiff broke the heel in his right foot and has  
11 limited movement in his foot. (AR 59.) He has constant pain in his foot that feels like needles.  
12 (AR 60.) This contributes to his balance issues and his problems walking. (AR 60.) Plaintiff  
13 has pinched nerves in his spine. (AR 60.)

14 Plaintiff is homeless and moves between his sister and his brother's house every day or  
15 two. (AR 47.) Plaintiff has lived on the street in the past. (AR 48.) Plaintiff receives food  
16 stamps and Medi-Cal and shops at the local grocery store. (AR 48.) Plaintiff does not have a car  
17 so he walks or takes the bus. (AR 49.) He used to ride a bike until it was stolen. (AR 49.)  
18 Plaintiff makes seven to eight dollars a month by recycling. (AR 49.)

19 During the day, Plaintiff stays around the house or goes to the park or downtown to  
20 watch television. (AR 50.) Plaintiff watches television eight to twelve hours per day. (AR 50.)  
21 Plaintiff goes to the Salvation Army and church. (AR 51.) Plaintiff is not able to work a  
22 typewriter anymore and cannot afford a cellphone. (AR 50.)

23 Plaintiff has issues with lack of concentration and his memory. (AR 51, 56.) Plaintiff's  
24 lack of concentration is getting worse. (AR 52.) Plaintiff sleeps two to three hours, wakes up,  
25 and sleeps another half hour. (AR 52.) When able to, Plaintiff sleeps during the day. (AR 52.)

26 Plaintiff does not like to be around other people because they ask him for things and it  
27 gets on his nerves and he gets nervous when he is in a crowd. (AR 53, 57.) Plaintiff would have  
28 trouble working because he wants to do things correctly so it slows the work down. (AR 53.)

1 Plaintiff does not have trouble taking instruction from others. (AR 54.) Plaintiff handles stress  
2 by walking away from the situation rather than letting it build and get him in trouble. (AR 54.)

3 A vocational expert, Linda M. Ferra, also testified at the hearing. (AR 63-68.)

4 **B. ALJ Findings**

5 The ALJ made the following findings of fact and conclusions of law:

- 6 • Plaintiff has not engaged in substantial gainful activity since the application date  
7 of February 8, 2012.
- 8 • Plaintiff has the following significant impairments: affective disorder and  
9 osteoarthritis.
- 10 • Plaintiff does not have an impairment of a combination of impairments that meets  
11 or medically equals the severity of one of the listed impairments.
- 12 • Plaintiff has the residual functional capacity to lift or carry 50 pounds  
13 occasionally and 25 pounds frequently. He can sit, stand, and walk six hours in  
14 an eight hour workday; never climb ladders, ropes or scaffolds and occasionally  
15 climb stairs or ramps. Plaintiff should not work around hazards such as moving  
16 dangerous machinery or unprotected heights, and can occasionally operate foot  
17 pedals or foot controls if required. Plaintiff is limited to simple routine and  
18 repetitive tasks with occasional public contact.
- 19 • Plaintiff has no past relevant work.
- 20 • Plaintiff was born on January 23, 1957 and was 55 years old which is defined as  
21 an individual closely approaching advanced age on the date the application was  
22 filed.
- 23 • Plaintiff has at least a high school education and is able to communicate in  
24 English.
- 25 • Transferability of job skills is not an issue because Plaintiff has no past relevant  
26 work.
- 27 • Considering Plaintiff's age, education, work experience, and residual functional  
28 capacity, there are jobs that exist in significant numbers in the national economy

1 that Plaintiff can perform.

- 2 • Plaintiff has not been under a disability, as defined in the Social Security Act,  
3 since the date the application was filed.

### 4 III.

#### 5 LEGAL STANDARD

6 To qualify for disability insurance benefits under the Social Security Act, the claimant  
7 must show that he is unable “to engage in any substantial gainful activity by reason of any  
8 medically determinable physical or mental impairment which can be expected to result in death  
9 or which has lasted or can be expected to last for a continuous period of not less than 12  
10 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five step  
11 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §  
12 404.1520; Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th  
13 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is  
14 disabled are:

15 Step one: Is the claimant presently engaged in substantial gainful activity? If so,  
16 the claimant is not disabled. If not, proceed to step two.

17 Step two: Is the claimant’s alleged impairment sufficiently severe to limit his or  
18 her ability to work? If so, proceed to step three. If not, the claimant is not  
19 disabled.

20 Step three: Does the claimant’s impairment, or combination of impairments, meet  
21 or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the  
22 claimant is disabled. If not, proceed to step four.

23 Step four: Does the claimant possess the residual functional capacity (“RFC”) to  
24 perform his or her past relevant work? If so, the claimant is not disabled. If not,  
25 proceed to step five.

26 Step five: Does the claimant’s RFC, when considered with the claimant’s age,  
27 education, and work experience, allow him or her to adjust to other work that  
28 exists in significant numbers in the national economy? If so, the claimant is not  
disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

29 Congress has provided that an individual may obtain judicial review of any final decision  
30 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g).  
31 In reviewing findings of fact in respect to the denial of benefits, this court “reviews the

1 Commissioner’s final decision for substantial evidence, and the Commissioner’s decision will be  
2 disturbed only if it is not supported by substantial evidence or is based on legal error.” Hill v.  
3 Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means more than a  
4 scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)  
5 (internal quotations and citations omitted). “Substantial evidence is relevant evidence which,  
6 considering the record as a whole, a reasonable person might accept as adequate to support a  
7 conclusion.” Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec’y of  
8 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

9 “[A] reviewing court must consider the entire record as a whole and may not affirm  
10 simply by isolating a specific quantum of supporting evidence.” Hill, 698 F.3d at 1159 (quoting  
11 Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006). However, it is not  
12 this Court’s function to second guess the ALJ’s conclusions and substitute the court’s judgment  
13 for the ALJ’s. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is  
14 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be  
15 upheld.”).

#### 16 IV.

#### 17 DISCUSSION AND ANALYSIS

18 Plaintiff alleges error with both his physical and mental residual functional capacity as  
19 found by the ALJ.

##### 20 A. The ALJ Did Not Apply A Presumption of Non-disability

21 Initially, Plaintiff argues that the presumption of nondisability does not apply to this case.  
22 Defendant responds that the ALJ did not apply the presumption and his determination of  
23 nondisability was based on the review of the evidence. The opinion of the ALJ discusses the  
24 current medical evidence and the decision does not reference the prior finding of nondisability.  
25 In making his disability determination, the ALJ gave the most weight to the opinions of the  
26 agency physicians and stated his reasons for rejecting the limitations imposed by Dr. Kearns.  
27 The Court agrees that the ALJ did not apply a presumption of nondisability but made a  
28 determination of nondisability based upon his review of the evidence in the record.

1           **B.       Residual Functional Capacity Assessment**

2           First, the Court addresses Plaintiff’s argument that the ALJ failed to provide legally  
3 adequate reasons to reject the opinion of Dr. Kearns in developing Plaintiff’s mental residual  
4 functional capacity and in partially rejecting the opinion of Dr. Cushman. Defendant responds  
5 that the ALJ did not reject the opinions of Dr. Kearns and Dr. Cushman but addressed them by  
6 limiting Plaintiff to no more than occasional public contact.

7           The weight to be given to medical opinions depends upon whether the opinion is  
8 proffered by a treating, examining, or non-examining professional. See Lester v. Chater, 81 F.3d  
9 821, 830-831 (9th Cir. 1995). In general a treating physician’s opinion is entitled to greater  
10 weight than that of a nontreating physician because “he is employed to cure and has a greater  
11 opportunity to know and observe the patient as an individual.” Andrews v. Shalala, 53 F.3d  
12 1035, 1040-41 (9th Cir. 1995) (citations omitted). If a treating physician’s opinion is  
13 contradicted by another doctor, it may be rejected only for “specific and legitimate reasons”  
14 supported by substantial evidence in the record. Ryan v. Commissioner of Social Sec., 528 F.3d  
15 1194, 1198 (9th Cir.) (quoting Bayless v. Barnhart, 427 F.3d 1121, 1216 (9th Cir. 2005)).

16           Where the treating physician’s opinion is contradicted by the opinion of an examining  
17 physician who based the opinion upon independent clinical findings that differ from those of the  
18 treating physician, the nontreating source itself may be substance evidence, and the ALJ is to  
19 resolve the conflict. Andrews, 53 F.3d at 1041. However, if the nontreating physician’s opinion  
20 is based upon clinical findings considered by the treating physician, the ALJ must give specific  
21 and legitimate reasons for rejecting the treating physician’s opinion that are based on substantial  
22 evidence in the record. Andrews, 53 F.3d at 1041. The ALJ need not accept the opinion of any  
23 physician that is brief, conclusory, and unsupported by clinical findings. Thomas, 278 F.3d at  
24 957.

25           1.       Diagnosis

26           Plaintiff argues that the ALJ erred by failing to accept or reject the diagnosis of Dr.  
27 Cushman and Dr. Kearns. In his opinion, the ALJ found that Plaintiff had affective disorder and  
28 it was a severe impairment. (AR 21.) In making this determination, the ALJ considered

1 Plaintiff's history of drug abuse which appears to be in remission. (AR 21.) The ALJ found that  
2 Plaintiff's drug and alcohol abuse was not a contributing factor material to the disability  
3 determination. (AR 21.)

4 On October 18, 2011, Plaintiff was diagnosed with unspecified episodic mood disorder.  
5 (AR 280.) Dr. Kearns treatment notes indicate a possible diagnosis of schizophrenia. (AR 375,  
6 376.) Dr. Cushman diagnosed Plaintiff with pain disorder associated with both psychological  
7 factors and a general medical condition, cocaine dependence reportedly in full remission,  
8 cocaine-induced psychotic disorder with hallucinations and delusions in partial remission,  
9 cannabis abuse current, alcohol dependence reportedly in full remission, alcohol-induced mood  
10 disorder, and antisocial personality disorder. (AR 401-402.) In her May 10, 2013 report, Dr.  
11 Kearns listed Plaintiff's diagnosis as psychosis, nos. (AR 429.) The agency physicians  
12 diagnosed Plaintiff with affective disorder. (AR 93.) To the extent that the ALJ used an  
13 incorrect diagnosis it would be harmless error as long as he considered Plaintiff's symptoms and  
14 limitations in developing Plaintiff's RFC.

15 2. The ALJ Erred in Failing to Address Plaintiff's Ability to Deal With Usual  
16 Stressors in the Workplace

17 Plaintiff argues that the ALJ failed to incorporate Dr. Cushman's findings that Plaintiff  
18 would have difficulty getting along with co-workers and the public and would have difficulty  
19 dealing with the usual stressors in the workplace, and Dr. Kearns opinion that Plaintiff would  
20 have difficulty interacting with others and coping with stress. The ALJ gave more weight to the  
21 opinions of the State agency medical consultant and examiner. (AR 27.) The contrary opinion  
22 of a non-examining expert is not sufficient by itself to constitute a specific, legitimate reason for  
23 rejecting a treating or examining physician's opinion, however, "it may constitute substantial  
24 evidence when it is consistent with other independent evidence in the record." Tonapetyan v.  
25 Halter, 242 F.3d 1144, 1149 (9th Cir. 2001).

26 The ALJ found that Plaintiff does have mental impairments, but his symptoms appear to  
27 be caused by his physical impairments. (AR 25.) Dr. Cushman found that Plaintiff had  
28 intellectual functioning in the low-average range. (AR 25, 400.) There were no significant



1 strengths or weaknesses across the subtests that were performed. (AR 25, 400.) Plaintiff was  
2 able to listen to and accurately recall up to six digits forwards, inconsistently four digits  
3 backwards and four sequentially. (AR 25, 400.) This suggested mild difficulties in Plaintiff's  
4 verbal communication skills. (AR 25, 400.)

5 The results on a simple, repetitive graphomotor test and subtests were in the average to  
6 low range due to slowness in processing. (AR 25, 400-401.) Dr. Cushman found that these  
7 results showed slower than thinking speed on tests which appeared to be due to delays in  
8 physical handwriting rather than actual mental processing. (AR 25, 401.) The test results also  
9 suggested that Plaintiff has good cognitive skills in the area of conventional problem solving,  
10 good visual-perceptual abilities, and only mild visual-motor deficits. (AR 25, 401.) The testing  
11 suggested no specific memory deficits relative to his intellectual functioning. (AR 25, 401.)

12 Dr. Cushman found Plaintiff to be oriented in three spheres and able to name thirteen  
13 fruits in thirty seconds which is good performance. (AR 25, 401.) Plaintiff had a Global  
14 Assessment of Function ("GAF") of 55<sup>1</sup> which indicates moderate difficulty in social,  
15 occupational, or school functioning. (AR 25, 402.) Dr. Cushman opined that Plaintiff would  
16 benefit from a homeless treatment program, outpatient psychiatric counseling, and some type of  
17 vocational training program. (AR 25, 402.)

18 Dr. Cushman found that Plaintiff would have difficulties in performing detailed or  
19 complex tasks in a work setting, but is capable of performing simple and repetitive tasks in a  
20 work setting. (AR 25-26, 402.) Plaintiff would have difficulties with regular attendance and  
21 consistent participation, in part due to his homeless situation. (AR 26, 402.) If his homeless  
22 situation was resolved he would regularly attend and participate. (AR 26, 402.) Plaintiff is  
23 capable of working a normal workday and workweek. (AR 26, 402.) Special or additional  
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25 <sup>1</sup> "A Global Assessment of Functioning ("GAF") score is the clinician's judgment of the individual's overall level of  
26 functioning. It is rated with respect only to psychological, social, and occupational functioning, without regard to  
27 impairments in functioning due to physical or environmental limitations." Cornelison v. Astrue, 2011 WL 6001698,  
28 at \*4 n.6 (C.D. Cal. Nov. 30, 2011) (citing American Psychiatric Association, Diagnostic and Statistical Manual of  
Mental Disorders ("DSM-IV"), at 32 (4th ed.2000)). "A GAF score in the range of 51-60 indicates moderate  
symptoms or moderate difficulty in social, occupational, or school functioning ( e.g., few friends, conflicts with  
peers or coworkers)." Cornelison, 2011 WL 6001698, at 4 n.6 (citing American Psychiatric Association,  
Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), at 34).

1 supervision may be needed in the area of monitoring for substance abuse as well as managing  
2 interpersonal relationships in the work setting. (AR 26, 402.) Plaintiff is capable of following  
3 simple verbal instruction from supervisors, but not complex instructions. (AR 26, 402.) Plaintiff  
4 may develop difficulties in getting along with supervisors, coworkers, and the general public  
5 over any length of time. (AR 26, 402.) Plaintiff will have difficulties in dealing with the usual  
6 stressors encountered in a competitive work environment. (AR 26, 402.) Plaintiff is capable of  
7 managing his own funds, but Dr. Cushman has reservations about Plaintiff's emotional stability  
8 in managing his funds. (AR 26, 402.)

9 Dr. Levinson completed a psychiatric review technique and medical source statement on  
10 July 2, 2012. (AR 26, 97.) Dr. Levinson found that Plaintiff had limitations in memory and  
11 understanding with marked limitations in his ability to understand and remember detailed  
12 instructions. (AR 97.) Plaintiff was cognitively capable of understanding and remembering  
13 simple and repetitive instructions, but not able to remember complex or detailed instructions.  
14 (AR 97.) Plaintiff was markedly limited in his ability to carry out detailed instructions and  
15 moderately limited in his ability to maintain concentration persistence and pace for extended  
16 periods of time and his ability to perform activities within a schedule, maintain regular  
17 attendance, and be punctual within customary tolerances. (AR 97.) Plaintiff was capable of  
18 maintaining attention and concentration for 1-2 step tasks, but would have difficulty maintaining  
19 attention and concentration for more complex tasks. (AR 26, 97.) Plaintiff had no limitations in  
20 social interaction. (AR 97.)

21 Dr. Garcia completed a psychiatric review technique on January 25, 2013. (AR 26, 108-  
22 109.) Dr. Garcia determined that Plaintiff had mild restriction of activities of daily living and  
23 difficulties in maintaining social functioning and moderate difficulties in maintaining  
24 concentration, persistence, and pace. (AR 26, 108.) Viewing the medical record, there is  
25 substantial evidence in the record to support the ALJ's finding that Plaintiff is capable of  
26 performing simple routine and repetitive tasks.

27 While the ALJ limited Plaintiff to occasional contact with the public, he did not address  
28 Dr. Cushman's finding that Plaintiff may develop difficulties getting along with some

1 supervisors and co-workers and would have difficulties dealing with the usual stressors  
2 encountered in a competitive work environment. (AR 402.) The agency physicians did not  
3 adopt Dr. Cushman’s opinion because it relied heavily on Plaintiff’s subjective report of  
4 symptoms and limitations and the totality of the evidence does not support the opinion. (AR 98.)  
5 They found that Dr. Cushman’s opinion contains inconsistencies which make it less persuasive,  
6 and the opinion is without substantial support from other evidence in the record. (AR 98.)

7 A psychiatric review technique was completed by an agency physician on July 2, 2012.  
8 (AR 93-95.) Plaintiff was found to have affective disorders and substance addiction disorders.  
9 The opinion states:

10 [Plaintiff] claims that he hears voices, but states that the voices are both inside  
11 and outside his head. He did not appear to be responding to internal stimuli at the  
12 [consultative examination]. The MER indicates that some of the voices may be  
13 due to cocaine use. [Plaintiff] also indicates that his voices are ameliorated with  
14 Risperdal. His alleged voices did not appear to limit his ability to maintain  
15 attention and concentration on psychometric testing.

16 (AR 95.)

17 The agency physician stated that great weight could not be given to Dr. Cushman’s  
18 opinion because the limitation for maintaining regular attendance and participation was based on  
19 Plaintiff’s homelessness and not his psychiatric condition. (AR 95.) Special or additional  
20 supervision to monitor substance abuse could not be considered. (AR 95.) “It would appear that  
21 the other limitations regarding social interaction are due in part to [Plaintiff’s] homelessness, and  
22 possibility [rule out] diagnosis of antisocial personality [disorder]. [Plaintiff] was noted to be  
23 generally cooperative and agreeable throughout the interview and testing with euthymic mood.”  
24 (AR 96.) The assessment only limited Plaintiff to one to two step tasks. (AR 97.)

25 In addressing Dr. Cushman’s opinion the agency physician stated that Dr. Cushman’s  
26 opinion relied heavily on Plaintiff’s subjective reports of his symptoms and limitations and the  
27 totality of the evidence does not support the opinion. (AR 98.) The opinion contains  
28 inconsistencies and is without substantial support from other evidence in the record making it  
less persuasive. (AR 98.) Ultimately, the finding was that Dr. Cushman’s “opinion is an  
overestimate of the severity of [Plaintiff’s] restrictions/limitations and based only on a snapshot

1 of [Plaintiff's] functioning.” (AR 98.) However, Dr. Kearns also opined that Plaintiff has a  
2 psychotic thought pattern and auditory hallucinations that would make coping with stress and  
3 interaction with others difficult. (AR 429.)

4 Other than boilerplate language that Plaintiff's statements in regards to his mental  
5 limitations are not entirely credible, the ALJ did not provide any reasons to reject Plaintiff's  
6 credibility as to his mental impairments, much less clear and convincing reasons. Lester, 81 F.3d  
7 at 834. The ALJ notes there were periods of time for which Plaintiff was not taking medication.  
8 (AR 24-25.) Failure to comply with or seek treatment can support an adverse credibility finding,  
9 Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008), “but it is a questionable practice to  
10 chastise one with a mental impairment for the exercise of poor judgment in seeking  
11 rehabilitation.” Nguyen v. Chater, 100 F.3d 1462, 1465 (9th Cir. 1996); see also Molina v.  
12 Astrue, 674 F.3d 1104, 1114 (9th Cir. 2012) (failure to seek or comply with treatment  
13 attributable to mental illness is not basis to discredit claimant).

14 Here, Plaintiff stopped taking Risperdal because he was concerned with side effects. (AR  
15 462.) As to the failure to seek treatment, there are several instances in the record where Plaintiff  
16 stated that he does not inform people that he hears voices or has phobias for fear that they will  
17 think he is crazy or he will be 5150. (AR 287, 52.) There is also support for Dr. Cushman's  
18 findings as the medical record demonstrates a history of mental health issues.

19 The first mention of mental health issues in the instant record is on October 18, 2011.  
20 (AR 280.) Plaintiff admitted that he was hearing voices and that he was afraid to mention it  
21 because he might be 5150<sup>2</sup> for saying he hears voices. (AR 287.) The record includes a  
22 diagnosis of unspecified episodic mood disorder. (AR 280.)

23 Dr. Kearns began treating Plaintiff November 10, 2011. (AR 376.) At that time, he  
24 reported sleeping poorly, hearing voices, and seeing rodent faces on humans. (AR 376.) He  
25 stated the voices are not too bothersome to him. (AR 376.) The record notes that Plaintiff

26 \_\_\_\_\_  
27 <sup>2</sup> When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled,  
28 a peace officer, . . . or other professional person designated by the county may, upon probable cause, take, or cause  
to be taken, the person into custody and place him or her in a facility designated by the county and approved by the  
State Department of Social Services as a facility for 72-hour treatment and evaluation. Cal. Pen. Code § 5150.

1 probably has schizophrenia, is recently homeless and declines help, but is open to trying  
2 Risperdal. (AR 376.) On December 9, 2011, Plaintiff reported that he is still hearing voices but  
3 the Risperdal helps. (AR 375.)

4 On January 5, 2012, Dr. Kearns noted that Plaintiff probably has schizophrenia and is  
5 self-medicating with alcohol. (AR 375.) On February 6, 2012, the medical record notes,  
6 “Schizophrenia homeless, getting beat-up – not taking med – needs permanent housing.” (AR  
7 373.)

8 On June 4, 2012, Plaintiff reported to Dr. Stearns that he had stopped taking his Risperdal  
9 because he was worried about adverse side effects after seeing advertisements on television.  
10 (AR 462.) He was hearing minimal voices. (AR 462.)

11 On June 7, 2012, Plaintiff reported to Dr. Cushman that he had received inpatient  
12 psychiatric treatment for several days in 1987. (AR 397.) He was hearing voices at the time and  
13 was placed on anti-psychiatric medications. (AR 397.) He stopped taking the medication after  
14 about six months. (AR 397.) Plaintiff reported a history of intermittent outpatient psychiatric  
15 treatment in the form of anti-psychotic medications. (AR 397.) Plaintiff had been hearing  
16 voices since he was about thirty years old. (AR 397.) The voices come from both inside and  
17 outside of his mind. (AR 397.) He tends to hear the voices more at night which causes him to  
18 have difficulty sleeping. (AR 397.) When he takes anti-psychotic medications the voices  
19 decrease but they never completely go away. (AR 397.) Plaintiff also has a history of paranoia,  
20 which is currently significantly improved. (AR 397.)

21 On May 6, 2013, Plaintiff saw Dr. Kearns and stated he was trying to get disability  
22 benefits. (AR 442.) He complained of decreased concentration and hearing voices. (AR 442.)  
23 Risperdal was restarted. (AR 442.)

24 During the September 17, 2013 hearing Plaintiff testified that was not having any mental  
25 health issues. (AR 46.) Plaintiff had mental health issues back in the day, but quit taking his  
26 medications. (AR 46.) Plaintiff stated that he had phobias, but did not generally mention it  
27 because he did not want people to think he is crazy. (AR 52.) Plaintiff also testified that  
28 sometimes he hears voices. (AR 57.) When asked if he was hearing them now, Plaintiff stated

1 that he hears voices but they are mild. (AR 57.) He finds it amazing that people around him  
2 hear them too because they respond “to the questions of noises that they made in [his] head.”  
3 (AR 57.)

4 When Plaintiff was asked during the hearing if he would have trouble handling the stress  
5 in a normal workplace, he stated, “Yeah, it’s easy to walk away from it than let it build and get  
6 you in trouble.” (AR 54.) He handles stress by getting away from it. (AR 54.)

7 The ALJ erred by not providing specific and legitimate reasons to reject the finding of  
8 Dr. Cushman that Plaintiff would have difficulty dealing with the usual stressors encountered in  
9 a competitive work environment. None of the agency physicians addressed this in their opinions  
10 and Dr. Cushman’s opinion is supported by the report of Dr. Kearns who regularly treated  
11 Plaintiff from November 10, 2011. Further, the ALJ did not address the opinion that Plaintiff  
12 would have difficulties interacting with supervisors and co-workers. Therefore, the Court  
13 recommends that Plaintiff’s appeal of the final decision of the Social Security Commissioner be  
14 granted.

15 c. Substantial Evidence Does Not Support the Physical Residual Functional  
16 Capacity Assessment

17 Plaintiff also argues that the ALJ erred by relying on the opinion of Dr. Hernandez that  
18 was not in the medical record in developing his RFC and failing to provide legally sufficient  
19 reasons for rejecting the opinion of Dr. Kearns. Defendant responds that Plaintiff properly  
20 considered that Plaintiff’s physical condition had not changed from the prior decision and gave  
21 legally sufficient reasons for rejecting the opinion of Dr. Kearns.

22 At Step Two, the ALJ found that Plaintiff had the severe impairment of osteoarthritis  
23 without any discussion of Plaintiff’s alleged physical complaints. (AR 21.) The ALJ went on to  
24 consider Plaintiff’s alleged impairments in developing his RFC. (AR 23-27.) Plaintiff was in an  
25 accident in 1984 that resulted in a head and spinal cord injury. (AR 23.) Plaintiff alleged that he  
26 has not been able to do much since then. (AR 23.) Plaintiff states that he gets tired easily and  
27 has back pain on and off. (AR 23.) Plaintiff complains of dizziness, inability to stand or walk  
28 for more than twenty minutes, and can only lift thirty pounds. (AR 23.) Plaintiff is generally

1 able to sit but must shift periodically. (AR 23.)

2 The record notes some back issues at L4 and L5 and L5 and L6 in 2009. (AR 308, 311.)  
3 On April 24, 2009, Plaintiff's examination was normal except for some abnormal bronchial  
4 sounds. (AR 307.) Plaintiff had normal examinations and no pain in August and September  
5 2009. (AR 316, 318.) Plaintiff had some mild spinal tenderness to palpation on November 4,  
6 2009. (AR 313.)

7 On July 26, 2011, Plaintiff was seen and complained of a growth on right thigh and hand  
8 pain. (AR 306.) On August 6, 2011, Plaintiff complained of knee pain after falling down a  
9 flight of stairs. (AR 24, 297.) Plaintiff's knee was swollen and there was a palpable mass with  
10 tenderness, examination was otherwise normal. (AR 297-98.) An x-ray of his right knee  
11 revealed possible small suprapatellar bursal effusion n x-ray was taken and there appeared to be  
12 calcification of the proximal aspect of the medial collateral ligament secondary to injury. (AR  
13 24, 296.)

14 Plaintiff was seen on August 30, 2011 and the record notes that the right lower extremity  
15 was normal on inspection with tenderness on palpation. (AR 24, 304.) Range of motion was  
16 restricted due to pain, but there was no joint instability. (AR 24, 304.) Plaintiff was seen  
17 complaining of knee pain on September 13, 2011, and had normal examination findings. (AR  
18 292.)

19 Plaintiff complained of neck pain on September 28, 2011, after falling two days prior.  
20 (AR 24, 284.) Plaintiff's physical examination was normal with some mild tenderness to the  
21 back at the right scapula on palpation. (AR 285.) Plaintiff was diagnosed with a cervical sprain.  
22 (AR 286.)

23 On October 4, 2011, examination revealed full range of motion in Plaintiff's neck. (AR  
24 24, 289.) Plaintiff complained of back pain, joint pains, and limitations of movement. (AR 289.)  
25 On October 18, 2011, Plaintiff complained of knee pain and had a normal examination. (AR  
26 282, 287.)

27 On October 27, 2011, Plaintiff complained of neck and knee pain and pain in his right  
28 hamstring. (AR 334-38.) Plaintiff had spasms in his neck and some loss of lumbar lordosis with

1 lumbar spine vertebral tenderness. (AR 337.) Plaintiff's right calf was smaller than the left with  
2 a firm mobile 2 cm mass over the mid posterior lateral femur. (AR 337.) The record notes that  
3 Plaintiff is to stop drinking alcohol to excess and no more coke or crystal. (AR 338.)

4 On November 7, 2011, Plaintiff reported having back and neck pain after falling down  
5 the stairs two months prior. (AR 331.) Examination revealed back pain with movement, but  
6 noted gait was steady, at a normal pace, without difficulty. (AR 331-32.)

7 On November 10, 2011, Dr. Kearns noted pain in Plaintiff's right paracervical muscles  
8 and a bony deformity on his right ankle and findings for his right knee. (AR 376.) On  
9 November 16, 2011, Plaintiff had an x-ray of his right foot. (AR 386.) The results showed an  
10 old calcaneal fracture prominent posttraumatic exostosis proximally off the superior edge of the  
11 calcaneus posterior to the distal fibula. (AR 386.)

12 Plaintiff saw Dr. Kearns on December 9, 2011. (AR 375.) Plaintiff complained of knee  
13 and back pain, and a right shoulder dislocation that interfere with his ability to work. (AR 375.)  
14 Plaintiff had an abrasion on his forehead and ecchymosis on left eye. (AR 375.) There were also  
15 findings on his neck. (AR 375.) He was put on Tramadol for his pain. (AR 375.)

16 Plaintiff saw Dr. Ricks at the Podiatry Center on December 27, 2011. (AR 393.)  
17 Plaintiff was found to have significant abnormality of the calcaneus and talus of the right foot  
18 with a fusion of the lateral walls of both of these bones and a large posterior spur that appeared  
19 to be largely asymptomatic. Neither surgery nor removal of the spur were advised as the  
20 symptoms in the right foot were fairly mild considering the severity of the original fracture and  
21 due to the lack of symptoms from the spur. (AR 394.) Plaintiff was advised to try over the  
22 counter arch supports. (AR 394.)

23 Plaintiff was seen on January 5, 2012 and reported he was not using the Tramadol much.  
24 (AR 374.) Plaintiff was seen at the emergency room on January 30, 2012, complaining of arm  
25 pain after being assaulted. (AR 323-28.) Plaintiff stated that he had been assaulted twenty-five  
26 days prior and had two black eyes that were improving. (AR 326.) An x-ray of Plaintiff's left  
27 forearm showed no acute bony injury, but high-density fragments within the soft tissue likely  
28 representing metallic fragments from an old gunshot wound. (AR 324.) Plaintiff's examination



1 showed no abnormalities other than the left forearm. (AR 326-37.)

2 Plaintiff saw Dr. Kearns on February 6, 2012. (AR 373.) He was taking his medications  
3 as needed, but not taking his blood pressure medication because he did not want to get addicted.  
4 (AR 373.) The only consistent medications he took were the ibuprofen and Vicodin. (AR 373.)  
5 He had a hard protuberance at the right distal humerus. (AR 373.) The record notes that  
6 Plaintiff was sitting comfortably in a chair. (AR 373.) A February 16, 2012 x-ray of his right  
7 humerus revealed no bony abnormality, but an atypical deep soft tissue calcification. (AR 385.)

8 On March 22, 2012, Plaintiff reported that he does not always have his medication. (AR  
9 370.) On April 20, 2012, Plaintiff was seen by Dr. Kearns and reported that he was homeless  
10 and drinks daily. (AR 367.) The record notes a mass on his humerus and he awaits MRI, poor  
11 blood pressure control, and chronic pain with high risk for pain meds but does help pathology.  
12 (AR 367.)

13 On June 4, 2012, Plaintiff reported that the tramadol helped with mild pain and the record  
14 records sparing use of tramadol and Vicodin. (AR 462.) On June 21, 2012, Plaintiff had an MRI  
15 of his right humerus which returned a normal examination with no evidence of any bony or soft  
16 tissue mass. (AR 476.) On August 13, 2012, Plaintiff reported that he was out of pain  
17 medication. (AR 457.) Plaintiff reported that he was basically doing well on November 2012.  
18 (AR 24, 452.)

19 On February 7, 2013, Plaintiff reported pain in his neck, back, and feet after having been  
20 off his medication for approximately one and one half weeks. (AR 24, 457.) Plaintiff's next  
21 appointment was on May 6, 2013. (AR 23, 442-44.) He stated he was trying to get disability  
22 benefits and complained of limited range of motion in his right ankle, left knee pain, neck and  
23 back pain, decreased concentration, and hearing voices. (AR 442.) Plaintiff was informed that  
24 he had to choose between using marijuana or an opiate. (AR 442.) Plaintiff chose to use an  
25 opiate. (AR 442.)

26 On May 10, 2013, Dr. Kearns completed a questionnaire re Plaintiff. (AR 429-30.) Dr.  
27 Kearns opined that Plaintiff's medical problems would preclude him from performing fulltime  
28 work at any exertional level. (AR 429.) His primary impairments are psychosis and chronic

1 pain in his neck, back, right foot and right knee. (AR 429.) This opinion is based on x-rays  
2 showing degenerative changes and the auditory hallucinations reported by Plaintiff. (AR 429.)  
3 Dr. Kearns stated that Plaintiff would be able to sit four hours during an eight hour work day and  
4 stand or walk thirty minutes at a time; and can only lift 10 pounds. (AR 429-30.) It was  
5 unknown if Plaintiff has to lie down or elevate his legs, if he has any limitations due to hand  
6 impairments. (AR 430.)

7 Plaintiff had a CT of his abdomen on May 30, 2013, which showed rib fractures on the  
8 right side. (AR 474-75.)

9 Dr. Kearns saw Plaintiff on August 12, 2013 for a follow-up. (AR 438-40.) Plaintiff  
10 denied using marijuana since his last visit and reported he had been in a fight with a friend. (AR  
11 438.) He had mild tenderness in his right ribs. (AR 438.) Plaintiff had a CT scan of his head on  
12 August 17, 2013. (AR 473.) There was no acute intracranial abnormality identified, but Plaintiff  
13 had a fracture of the right mandible. (AR 473.)

14 Plaintiff saw Dr. Kearns on August 26, 2013 for removal of sutures from his chin. (AR  
15 432-34.) Plaintiff admitted to heavy drinking and received the laceration when he fell while  
16 intoxicated. (AR 432.) The record notes active alcohol abuse and it was explained to Plaintiff  
17 that he would no longer be prescribed hydrocodone because it was not a safe option for him.  
18 (AR 432.)

19 The ALJ gave weight to the opinions of the state agency examiner opinions and found  
20 that Dr. Kearns opinion was highly conservative. (AR 27.) The ALJ stated that Dr. Kearns  
21 limited Plaintiff to less than sedentary in exertional levels but did not know if he had any  
22 limitations in his ability to reach, handle, feel, push/pull or grasp. (AR 27.) While Dr. Kearns  
23 opined that Plaintiff can sit for four hours, stand or walk for thirty minutes at a time, and only lift  
24 ten pounds the objective evidence does not support such limitations. (AR 27.) Dr. Fast opined  
25 that Plaintiff could lift or carry 50 pounds occasionally and 25 pounds frequently, could sit, walk,  
26 or stand 6 hours in an 8 hour workday. (AR 26.) This opinion was concurred with by Dr.  
27 Coleman. (AR 26.)

28 The only reason the ALJ provided for failing to give weight to Dr. Kearns opinion was

1 that it was highly conservative and the objective evidence does not support the limitations.  
2 Further, the ALJ did not provide any reasons that more weight was given to the opinions of the  
3 agency physicians. While the ALJ cited the opinion of Dr. Hernandez as support of the RFC, Dr.  
4 Hernandez opinion was not part of the medical record here. For these reasons, the Court finds  
5 that substantial evidence does not support the ALJ’s findings regarding Plaintiff’s physical RFC.

6 **b. This Action Should be Remanded for Further Proceedings**

7 Plaintiff argues that the opinions of Dr. Cushman and Dr. Kearns should be credited as  
8 true, and this action should be remanded for payment of benefits. Defendant responds that the  
9 ALJ already incorporated Plaintiff’s limitations into Plaintiff’s RFC and any remand would  
10 require the ALJ to resolve what Plaintiff’s limitations would mean from a capability standpoint.

11 The Court has the discretion to remand a case for either an award of benefits or for  
12 additional evidence. Smolen, 80 F.3d at 1292. The remand should be for “an award of benefits  
13 where (1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2)  
14 there are no outstanding issues that must be resolved before a determination of disability can be  
15 made, and (3) it is clear from the record that the ALJ would be required to find the claimant  
16 disabled were such evidence credited.” Id. District courts have flexibility in applying the credit  
17 as true rule. Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).

18 Further, “[a] claimant is not entitled to benefits under the statute unless the claimant is, in  
19 fact, disabled, no matter how egregious the ALJ’s errors may be.” Strauss v. Comm’r of the Soc.  
20 Sec. Admin., 635 F.3d 1135, 1138 (9th Cir. 2011). The Ninth Circuit has recently clarified that  
21 “we may remand on an open record for further proceedings ‘when the record as a whole creates  
22 serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social  
23 Security Act.’ ” Burrell v. Colvin, 775 F.3d 1133, 1141 (9th Cir. 2014) (quoting Garrison v.  
24 Colvin, 759 F.3d 995, 1020 (9th Cir. 2014)).

25 Dr. Kearns opined that Plaintiff’s psychotic thought pattern and auditory hallucinations  
26 would make coping with stress and interacting with others difficult. (AR 429.) As Plaintiff  
27 states in his opening brief Dr. Cushman’s opinion is equivocal. Dr. Cushman’s opinion indicates  
28 that Plaintiff’s mental limitations will not preclude him from working, but he will have



1 **CONCLUSION AND RECOMMENDATION**

2 Based on the foregoing, IT IS HEREBY RECOMMENDED that:

- 3 1. Plaintiff’s appeal from the decision of the Commissioner of Social Security be  
4 granted;
- 5 2. Defendant’s cross-motion for summary judgment be denied; and
- 6 3. This action be remanded for further development of the record as discussed  
7 herein

8 These findings and recommendations are submitted to the district judge assigned to this  
9 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within fourteen  
10 (14) days of service of this recommendation, any party may file written objections to these  
11 findings and recommendations with the Court and serve a copy on all parties. Such a document  
12 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The  
13 district judge will review the magistrate judge’s findings and recommendations pursuant to 28  
14 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified  
15 time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th  
16 Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

17 IT IS SO ORDERED.

18 Dated: April 8, 2016

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21 UNITED STATES MAGISTRATE JUDGE  
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