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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PHILLIP DEWITT,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03171-JTR

ORDER GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 15, 18. Attorney Cory J. Brandt represents Phillip Franklin DeWitt (Plaintiff); Special Assistant United States Attorney Daniel P. Talbert represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

JURISDICTION

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on January 16, 2009, alleging disability since May 1, 2004, due to major depression, posttraumatic stress disorder (PTSD), and compulsive personality disorder. Tr. 142-147, 172, 177. The applications were

1 denied initially and upon reconsideration. Tr. 84-88, 91-97. Administrative Law
2 Judge (ALJ) James W. Sherry held a hearing on October 26, 2011, at which
3 Plaintiff, represented by counsel, and vocational expert, Debra LaPoint, testified.
4 Tr. 41-76. The ALJ issued an unfavorable decision on December 15, 2011. Tr.
5 19-29. The Appeals Council denied review on January 29, 2013. Tr. 1-7. Plaintiff
6 filed an action for judicial review on February 19, 2013. Tr. 622. Plaintiff filed a
7 subsequent application for SSI on February 21, 2013. Tr. 662. On January 19,
8 2014, the United States District Court for the Eastern District of Washington issued
9 an order granting Plaintiff's motion for summary judgement and remanding the
10 case for additional proceedings. Tr. 654-655. On remand the February 21, 2013,
11 application was consolidated with the January 16, 2009, applications, and ALJ
12 Larry Kennedy¹ held a hearing on April 22, 2015, at which Plaintiff and vocational
13 expert, Trevor Duncan, testified. Tr. 556-594, 662. The ALJ issued an
14 unfavorable decision on July 13, 2015, which became the final decision of the
15 Commissioner after 60 days. *See* 20 C.F.R. § 404.984. The final decision of the
16 Commissioner is appealable to the district court pursuant to 42 U.S.C. § 405(g).
17 Plaintiff filed this action for judicial review on November 28, 2015. ECF No. 1, 4.

18 **STATEMENT OF FACTS**

19 The facts of the case are set forth in the administrative hearing transcript, the
20 ALJ's decision, and the briefs of the parties. They are only briefly summarized
21 here.

22 Plaintiff was 29 years old at the alleged date of onset. Tr. 142. Plaintiff
23 completed a bachelor's degree in accounting since the alleged date of onset. Tr.
24 570. He last worked for a friend as an accounting clerk and the work ended in
25 2012. Tr. 117, 565. Prior to working as an accounting clerk, Plaintiff was in
26 prison from 1998 to 2009. Tr. 567.

27
28 ¹All future references to the ALJ is a reference to ALJ Larry Kennedy.

1 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
2 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
3 (1) the claimant can make an adjustment to other work, and (2) specific jobs exist
4 in the national economy which the claimant can perform. *Batson v. Comm’r of*
5 *Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot make
6 an adjustment to other work in the national economy, a finding of “disabled” is
7 made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

8 ADMINISTRATIVE DECISION

9 On July 23, 2015, the ALJ issued a decision finding Plaintiff was not
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had engaged in substantial gainful
12 activity from October 1, 2009, through December 31, 2010. Tr. 538-539. The
13 ALJ continued the five step sequential evaluation process for the period of time
14 Plaintiff was not engaged in substantial gainful activity. Tr. 539.

15 At step two, the ALJ determined Plaintiff had the following severe
16 impairments: bipolar disorder, major depressive disorder, anxiety/PTSD,
17 obsessive-compulsive disorder (OCD), and personality disorder. Tr. 539.

18 At step three, the ALJ found Plaintiff did not have an impairment or
19 combination of impairments that met or medically equaled the severity of one of
20 the listed impairments. Tr. 539-541.

21 At step four, the ALJ assessed Plaintiff’s residual function capacity and
22 determined he could perform a range of work at all exertional levels with the
23 following nonexertional limitations:

24
25 [H]e must avoid concentrated exposure to pulmonary irritants such as
26 dust, fumes, odors, gases, and poor ventilation. He is limited to
27 frequent handling and fingering with his nondominant upper extremity.
28 He can perform simple, routine tasks and follow short, simple
instructions. He can do work that needs little or no judgment and he

1 can perform simple duties that can be learned on the job in a short
2 period. He requires a work environment with minimal supervisor
3 contact. (Minimal contact does not preclude all contact, rather it means
4 contact does not occur regularly. Minimal contact also does not
5 preclude simple and superficial exchanges or being in proximity to the
6 supervisor). He can work in proximity to coworkers but not in a
7 cooperative or team effort. He requires a work environment that has no
8 more than superficial interactions with coworkers. He requires a work
9 environment that is predictable and with few work setting changes, that
is, a few routine and uninvolved tasks according to set procedures,
sequence, or pace with little opportunity for diversion or interruption.
He requires a work environment without public contact.

10 Tr. 541. The ALJ identified Plaintiff's past relevant work to include hand
11 packager and a composite job of receptionist and data entry clerk. Tr. 547. The
12 ALJ concluded that Plaintiff was able to perform his past relevant work as a hand
13 packager. *Id.*

14 In the alternative to a step four determination denying benefits, the ALJ
15 made a step five determination that considering Plaintiff's age, education, work
16 experience and residual functional capacity, and based on the testimony of the
17 vocational expert, there were other jobs that exist in significant numbers in the
18 national economy Plaintiff could perform, including the jobs of hand packager,
19 production assembler, and laundry laborer. Tr. 548. The ALJ thus concluded
20 Plaintiff was not under a disability within the meaning of the Social Security Act at
21 any time from the alleged date of onset, May 1, 2004, through the date of the
22 ALJ's decision, July 23, 2015. Tr. 548.

23 **ISSUES**

24 The question presented is whether substantial evidence supports the ALJ's
25 decision denying benefits and, if so, whether that decision is based on proper legal
26 standards. Plaintiff contends that the ALJ erred by (1) failing to accord proper
27 weight to the opinions of Mark Cross, Ph.D., Aaron Anderson, D.O., and Carlson
28 Carter, LMHP; (2) failing to properly consider Plaintiff's testimony about the

1 severity of his symptoms, (3) failing to form a proper step four determination; and
2 (4) failing to form a proper step five determination.

3 **DISCUSSION**

4 **A. Evaluation of Medical Evidence**

5 Plaintiff argues the ALJ failed to properly consider and weigh the medical
6 opinions expressed by Mark Cross, Ph.D., Aaron Anderson, D.O., and Carlson
7 Carter, LMHP. ECF No. 15 at 13-19.

8 In weighing medical source opinions, the ALJ should distinguish between
9 three different types of physicians: (1) treating physicians, who actually treat the
10 claimant; (2) examining physicians, who examine but do not treat the claimant;
11 and, (3) nonexamining physicians who neither treat nor examine the claimant.
12 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
13 weight to the opinion of a treating physician than to the opinion of an examining
14 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
15 more weight to the opinion of an examining physician than to the opinion of a
16 nonexamining physician. *Id.*

17 When a treating physician's opinion is not contradicted by another
18 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
19 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
20 physician's opinion is contradicted by another physician, the ALJ is only required
21 to provide "specific and legitimate reasons" for rejecting the opinion of the first
22 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
23 an examining physician's opinion is not contradicted by another physician, the
24 ALJ may reject the opinion only for "clear and convincing" reasons. *Lester*, 81
25 F.2d at 830. When an examining physician's opinion is contradicted by another
26 physician, the ALJ is only required to provide "specific and legitimate reasons" for
27 rejecting the opinion of the examining physician. *Id.* at 830-831.

28 The specific and legitimate standard can be met by the ALJ setting out a

1 detailed and thorough summary of the facts and conflicting clinical evidence,
2 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
3 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
4 conclusions, he “must set forth his interpretations and explain why they, rather
5 than the doctors’, are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
6 1988).

7 **1. Mark Cross, Ph.D.**

8 Plaintiff challenges the weight the ALJ gave to Dr. Cross’s opinion. ECF
9 No. 15 at 14-17.

10 Dr. Cross conducted an evaluation and risk assessment on February 9, 2009.
11 Tr. 322-328. From then on, Dr. Cross treated Plaintiff. Tr. 563. Dr. Cross wrote a
12 letter on September 22, 2010, detailing Plaintiff’s diagnosis and responses to
13 medications. Tr. 422-723. Dr. Cross completed a Department of Social and
14 Health Services (DSHS) Psychological/Psychiatric Evaluation form on February 9,
15 2010, in which he diagnosed Plaintiff with PTSD, OCD, and Bipolar II Disorder.
16 Tr. 816-821. Dr. Cross opined that Plaintiff had a marked² to severe³ limitation in
17 the abilities to relate appropriately to co-workers and supervisors, to interact
18 appropriately in public contact, to respond appropriately to and tolerate the
19 pressures and expectations of a normal work setting, and to maintain appropriate
20 behavior in a work setting; and a moderate⁴ to marked limitation in the abilities to
21 exercise judgement and make decisions. Tr. 819. Dr. Cross concluded his opinion
22 by stating Plaintiff was capable of “[a] job with very low demands – no
23 interactions/involvement with others.” *Id.*

24
25 ²A marked limitation is defined as “Very significant interference.” Tr. 819.

26 ³A severe limitation is defined as “Inability to perform one or more basic
27 work-related activities.” Tr. 819.

28 ⁴A moderate limitation is defined as “Significant in[ter]ference” Tr. 819.

1 Dr. Cross completed a Mental Medical Source Statement form on July 13,
2 2011, in which he opined that Plaintiff had a marked⁵ to severe⁶ limitation in the
3 abilities to interact appropriately with the general public, to accept instructions and
4 respond appropriately to criticism from supervisors, to get along with co-workers
5 or peers without distracting them or exhibiting behavioral extremes, and to
6 maintain socially appropriate behavior and to adhere to basic standards of neatness
7 and cleanliness; he opined Plaintiff had a marked limitation in the abilities to work
8 in coordination with or proximity to others without being distracted by them and to
9 complete a normal workday and workweek without interruptions from
10 psychologically based symptoms and to perform at a consistent pace without an
11 unreasonable number and length of rest periods; he opined that Plaintiff had a
12 moderate⁷ limitation in the abilities to carry out detailed instructions, to maintain
13 attention and concentration for extended periods, to perform activities within a
14 schedule, maintain regular attendance and be punctual within customary
15 tolerances, and to ask simple questions or request assistance; he opined Plaintiff
16 had a mild⁸ to moderate limitation in the ability to respond appropriately to
17 changes in the work setting. Tr. 426-428. Additionally, Dr. Cross opined that

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19 ⁵A marked limitation is defined as “Very significant interference with basic
20 work-related activities i.e., unable to perform the described mental activity for
21 more than 33% of the work day.” Tr. 426.

22 ⁶A severe limitation is defined as “Inability to perform one or more basic
23 work-related activities.” Tr. 426.

24 ⁷A moderate limitation is defined as “Significant interference with basic
25 work-related activities i.e., unable to perform the described mental activity for at
26 least 20% of the workday up to 33% of the work day.” Tr. 426.

27 ⁸A mild limitation is defined as “No significant interference with basic
28 work-related activities.” Tr. 426.

1 should Plaintiff work a 40-hour per week job, it was more probably than not that
2 Plaintiff would miss some work due to mental impairments. Tr. 428. However,
3 Dr. Cross could not estimate the number of days per month, stating that it “would
4 depend on job situation/task [and] amount of interaction with public/others.” *Id.*
5 Dr. Cross then wrote a second letter on August 23, 2011, stating that the limitations
6 set forth in the July 13, 2011, mental medical source statements “appear to remain
7 accurate for Mr. DeWitt.” Tr. 429.

8 On July 15, 2012, Dr. Cross completed a second Mental Medical Source
9 Statement form with identical terms and definitions, in which he opined that
10 Plaintiff had a severe limitation in the ability to completed a normal workday and
11 workweek without interruptions from psychologically based symptoms and to
12 perform at a consistent pace without an unreasonable number and length of rest
13 periods, to maintain social appropriate behavior and to adhere to basic standards of
14 neatness and cleanliness; a marked to severe limitation in the abilities to interact
15 appropriately with the general public, and to accept instructions and respond
16 appropriately to criticism from supervisors, to get along with co-workers or peers
17 without distracting them or exhibiting behavioral extremes; a marked limitation in
18 the abilities to maintain attention and concentration for extended periods and to
19 work in coordination with or proximity to others without being distracted by them;
20 and a moderate limitation in the abilities to understand and remember very short
21 and simple instructions, to understand and remember detailed instructions, to carry
22 out detailed instructions, to perform activities within a schedule, maintain regular
23 attendance and be punctual within customary tolerances, to ask simple questions or
24 request assistance, and to respond appropriately to changes in the work setting. Tr.
25 756-758. Again, Dr. Cross opined that Plaintiff would more probable than not
26 miss some work due to mental impairments if he were employed at a 40-hour per
27 week schedule, but could not estimate the number of days missed per month. Tr.
28 758.

1 The ALJ gave Dr. Cross' February 2010 assessment, September 2010 letter,
2 July 2011 opinion, and July 2012 opinion little weight because they were (1)
3 inconsistent with Plaintiff's longitudinal treatment history, (2) inconsistent with his
4 cooperative interactions with his providers, (3) inconsistent with his performance
5 on mental status examinations, (4) inconsistent with his documented daily
6 activities and social functioning, (5) Dr. Cross did not treat Plaintiff frequently
7 enough , and (6) the opinion was based on Plaintiff's self-reports. Tr. 545-546.

8 The ALJ's first three reasons for rejecting Dr. Cross' opinions failed to meet
9 the specific and legitimate standard. In his decision, the ALJ simply made the
10 assertions that the inconsistencies existed; he failed to discuss any evidence to
11 support such inconsistencies. Tr. 545. Therefore, the ALJ failed to set forth his
12 interpretations and explain why they, rather than Dr. Cross', are correct. As such,
13 these three reasons are not sufficient to reject the opinion

14 The ALJ's fourth reason for rejecting these opinions, that the opinions were
15 inconsistent with Plaintiff's documented daily activities and social functioning, is a
16 specific and legitimate reason, but only as to the February 2010 opinion. A
17 claimant's testimony about her daily activities may be seen as inconsistent with the
18 presence of a disabling condition. *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th
19 Cir.1990). To support this determination, the ALJ noted that Plaintiff was able to
20 work at substantial gainful activity levels in the fourth quarter of 2009 through
21 2010 while taking online college courses and earning a degree in accounting. Tr.
22 545. At step one, the ALJ determined that Plaintiff had engaged in substantial
23 gainful activity from October 1, 2009, through December 31, 2010. Tr. 538-539.
24 Plaintiff failed to challenge this step one determination in his briefing. ECF No.
25 15. The court ordinarily will not consider matters on appeal that are not
26 specifically and distinctly argued in an appellant's opening brief. *See Carmickle v.*
27 *Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). Therefore, the
28 Plaintiff was working at substantial gainful activities levels when the February

1 2010 opinion was penned. While the opinion stated that Plaintiff was capable of a
2 job with very low demands and no interactions or involvement with others, the
3 evidence showed that Plaintiff's job exceeded these limitations. Tr. 819. Plaintiff
4 testified that he worked as an accounting clerk, which included answering the
5 phone and putting away records. Tr. 565. During this time, Plaintiff was also
6 taking courses online to earn an accounting degree. Tr. 570. Considering the
7 demands of both the job and the online courses, both in complexity and
8 interactions with others, the ALJ did not error in concluding that these activities
9 were inconsistent with Dr. Cross' opinions.

10 However, the ALJ determined that by the end of 2010, Plaintiff was no
11 longer employed at substantial gainful activity levels. Tr. 538-539. Therefore, this
12 reason does not meet the specific and legitimate standard for the subsequent
13 opinions in July of 2011 and July of 2012.

14 The ALJ's fifth reasons for rejecting Dr. Cross' opinions, that Dr. Cross had
15 not seen Plaintiff with enough frequency to support his opinion, is a specific and
16 legitimate reason. The Ninth Circuit has held that when a treating physician's
17 opinion is provided an extended period of time after treatment it is an acceptable
18 reason to reject an opinion. *See Lewis v. Barnhart*, 220 F. App'x 545, 548 (9th
19 Cir. 2007) (finding that the fact the doctor had not treated the claimant since
20 November of 2000 is a specific and legitimate reason for discounting the opinion).
21 To support his rationale, the ALJ noted that (1) Dr. Cross had not seen Plaintiff for
22 three months when he offered his July 2011 opinion, (2) he only saw Plaintiff once
23 a quarter, (3) Dr. Cross himself stated that only seeing the Plaintiff quarterly made
24 it difficult to complete the requested Medical Source Statement forms, and (4) the
25 July 2012 opinion resulted from a request by Plaintiff to fill out the form like he
26 had before, but to leave off the part of about his ability to perform even a menial
27 job. Tr. 546.

28 Dr. Cross provided an opinion on July 13, 2011, and treated Plaintiff on

1 August 23, 2011. Tr. 810. Dr. Cross then sent a letter confirming that the July 13,
2 2011, opinion was accurate at the time of Plaintiff's August 23, 2011, appointment.
3 Tr. 810. While, Dr. Cross' July 2011 opinion may have been confirmed by the
4 August 23, 2011, treatment, Dr. Cross still cast doubt on his ability to accurately
5 complete these Mental Medical Source Statement forms when only seeing Plaintiff
6 on a quarterly basis in his July 6, 2012, letter. Tr. 807. Additionally, substantial
7 evidence supports the ALJ's conclusion that Plaintiff instructed Dr. Cross how to
8 complete the form in Plaintiff's July 6, 2012, letter stating, "Just fill out like you
9 did other one except don't put I can work a menial job." Tr. 808. Therefore, the
10 ALJ provided legally sufficient reasons for rejecting the July 2011 and the July
11 2012 opinions.

12 The final reason the ALJ gave for rejecting Dr. Cross' opinions, that they
13 were based on Plaintiff's self-reports, is not a specific and legitimate reason. A
14 doctor's opinion may be discounted if it relies on a claimant's unreliable self-
15 report. *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti v.*
16 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). But the ALJ must provide the basis
17 for his conclusion that the opinion was based on a claimant's self-reports. *Ghanim*
18 *v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014). Here, the ALJ failed to discuss a
19 basis for his conclusion that the opinion was based on Plaintiff's self-reports. Tr.
20 546. Therefore, this reason fails to meet the specific and legitimate standard.

21 Here, the ALJ has provided at least one specific and legitimate reason for
22 rejecting each of Dr. Cross' opinion. Therefore, any errors in the ALJ's treatment
23 of Dr. Cross' opinions were harmless. *See Tommasetti*, 533 F.3d at 1038 (an error
24 is harmless when "it is clear from the record that the . . . error was inconsequential
25 to the ultimate nondisability determination").

26 **2. Aaron Anderson, D.O.**

27 On June 20, 2011, Dr. Anderson completed a Medical Report form, in which
28 he diagnosed Plaintiff with bipolar disorder, OCD, PTSD, depression. Tr. 424. He

1 opined that Plaintiff would need to lie down during the day for naps due to his
2 insomnia. *Id.* Dr. Anderson opined that if Plaintiff were employed at a 40-hour a
3 week job, he would miss work due to medical impairments four or more days per
4 month. Tr. 425. Dr. Anderson stated that these impairments had existed since
5 January 2004 and that Plaintiff was currently off all meds and was not stable for
6 work. *Id.*

7 The ALJ gave Dr. Anderson's opinion little weight because they were (1)
8 inconsistent with Plaintiff's longitudinal treatment history, (2) inconsistent with his
9 cooperative interactions with his providers, (3) inconsistent with his performance
10 on mental status examinations, (4) inconsistent with his documented daily
11 activities and social functioning, and (5) it was based on Plaintiff's self-reports.
12 Tr. 545-546.

13 The ALJ's first reason for rejecting Dr. Anderson's opinion, that it was
14 inconsistent with the longitudinal treatment history, meets the specific and
15 legitimate standard. Inconsistency with the majority of objective evidence is a
16 specific and legitimate reason for rejecting physician's opinions. *Batson*, 359 F.3d
17 at 1196. The ALJ specifically noted that at the time of Dr. Anderson's opinion,
18 Plaintiff was not taking his medication and that when taking his medication, his
19 impairments were successfully treated. Tr. 545. Dr. Anderson's opinion noted
20 twice that Plaintiff was currently off of medications and, therefore, not stable for
21 work. Tr. 425. Throughout his decision, the ALJ noted that Plaintiff improved
22 with medication. Tr. 542-544. Therefore, the ALJ properly determined that Dr.
23 Anderson's opinion was inconsistent with the medical evidence because evidence
24 showed that Plaintiff's impairments improved with medications and Plaintiff had
25 taken medication between January 2004 and the date of Dr. Anderson's opinion.
26 Therefore, the symptoms at the severity he opined had not been present since
27 January 2004.

28 The ALJ simply stated the remaining four conclusions for why Dr.

1 Anderson’s opinion was rejected without providing any explanations as to why he
2 came to this determination. *Embrey*, 849 F.2d at 421-422 (the ALJ is required to
3 do more than offer his conclusions, he “must set forth his interpretations and
4 explain why they, rather than the doctors’, are correct.”). Therefore, these
5 remaining reasons failed to meet the specific and legitimate standard. However,
6 these errors were harmless, because the ALJ provided a specific and legitimate
7 reason for rejecting Dr. Anderson’s opinion. *See Tommasetti*, 533 F.3d at 1038.

8 **3. Carlson Carter, LMHP**

9 Mr. Carter completed a Psychological/Psychiatric Evaluation for the
10 Washington Department of Social and Health Services on November 17, 2008. Tr.
11 242-245. Mr. Carter opined that Plaintiff had a marked⁹ limitation in the abilities
12 to interact appropriately in public contacts, and the respond appropriately to and
13 tolerate the pressures and expectations of a normal work setting and a moderate¹⁰
14 limitation in the abilities to understand, remember, and follow complex (more than
15 two step) instructions, to exercise judgment and make decisions, to relate
16 appropriately to co-workers and supervisors, and to care for himself, including
17 personal hygiene and appearance. Tr. 244. Mr. Carter noted that Plaintiff’s ability
18 to perform was enhanced by taking his medications. *Id.*

19 The ALJ gave Mr. Carter’s opinion little weight because they were (1)
20 inconsistent with Plaintiff’s longitudinal treatment history, (2) inconsistent with his
21 cooperative interactions with his providers, (3) inconsistent with his performance
22 on mental status examinations, (4) inconsistent with his documented daily
23 activities and social functioning, and (5) it was based on Plaintiff self-reports. Tr.

24
25 ⁹A marked limitation is defined as “Very significant interference with basic
26 work-related activities.” Tr. 242.

27 ¹⁰A moderate limitation is defined as “Significant [interference] with basic
28 work-related activities.” Tr. 242.

1 545-546.

2 Unlike Dr. Cross and Dr. Anderson, Mr. Carter is not an acceptable medical
3 source; instead, he is considered an “other source.” *See* 20 C.F.R. §§ 404.1513(d),
4 416.913(d). Generally, the ALJ should give more weight to the opinion of an
5 acceptable medial source than to the opinion of an “other source,” such as a
6 therapist. 20 C.F.R. §§ 404.1513(d), 416.913(d). An ALJ is required, however, to
7 consider evidence from “other sources,” 20 C.F.R. §§ 404.1513(d), 416.913(d);
8 S.S.R. 06-03p, “as to how an impairment affects a claimant’s ability to work,”
9 *Sprague*, 812 F.2d at 1232. An ALJ must give reasons that are germane to each
10 “other source” to discount their opinions. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th
11 Cir. 1993).

12 Here, the five reasons the ALJ provided for rejecting Mr. Carter’s opinion
13 qualify as reasons germane to Mr. Charter. Therefore, the ALJ did not error in his
14 rationale for rejecting Mr. Charter’s opinion.

15 **B. Credibility**

16 Plaintiff contests the ALJ’s adverse credibility determination in this case.
17 ECF No. 15 at 19-21.

18 It is generally the province of the ALJ to make credibility determinations,
19 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific
20 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
21 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s
22 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d
23 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. “General findings are
24 insufficient: rather the ALJ must identify what testimony is not credible and what
25 evidence undermines the claimant’s complaints.” *Lester*, 81 F.3d at 834.

26 The ALJ found Plaintiff less than fully credible concerning the intensity,
27 persistence, and limiting effects of his symptoms. Tr. 542. The ALJ reasoned that
28 Plaintiff was less than fully credible because his symptom reporting was contrary

1 to (1) daily activities and social interactions, and (2) medical evidence. Tr. 542-
2 544.

3 **1. Daily Activities and Social Interactions**

4 The ALJ's first reason for finding Plaintiff less than fully credible, that
5 Plaintiff's activities cast doubt on his alleged limitations, is a specific, clear and
6 convincing reason to undermine Plaintiff's credibility.

7 A claimant's daily activities may support an adverse credibility finding if (1)
8 the claimant's activities contradict his testimony, or (2) "the claimant is able to
9 spend a substantial part of his day engaged in pursuits involving performance of
10 physical functions that are transferable to a work setting." *Orn*, 495 F.3d at 639
11 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

12 Here, the ALJ determined that Plaintiff's testimony was inconsistent with his
13 daily activities. First, the ALJ noted that Plaintiff reported difficulty interacting
14 with others while incarcerated, but records from the Department of Corrections
15 showed that he had no infractions and denied any violence while in prison. Tr.
16 542. At the hearing, Plaintiff testified that he had difficulty getting along with
17 others in prison and was getting in trouble. Tr. 578-579. However records show
18 he had no infractions. Tr. 249. The ALJ also noted that Plaintiff reported that he
19 did not drive, but in May of 2009, he indicated that he did drive. *Id.* citing Tr. 213,
20 363. The ALJ noted that Plaintiff reported difficulty staying on task in June 2009,
21 but his earnings doubled in the third quarter of 2009 and by the fourth quarter,
22 Plaintiff was earning substantial gainful activity levels. Tr. 543. At the hearing
23 Plaintiff testified that he dropped out of his online college program, but he also
24 reported that he completed the degree. Tr. 570, 578, 801. The ALJ also noted that
25 Plaintiff reported being unable to take orders from others, but was able to care for
26 Mr. Wells at his instruction. Tr. 543, 572. The ALJ adequately supported his
27 determination that Plaintiff's testimony was inconsistent with his daily activities by
28 stating what evidence undermined what testimony. Therefore, the ALJ did not

1 error in his treatment of Plaintiff's testimony.

2 **2. Contrary to the objective medical evidence**

3 The ALJ's second reason for finding Plaintiff less than credible, that
4 Plaintiff's symptoms are not supported by objective medical evidence, supports the
5 ALJ's determination that Plaintiff was less than fully credible.

6 Although it cannot serve as the sole ground for rejecting a claimant's
7 credibility, objective medical evidence is a "relevant factor in determining the
8 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261
9 F.3d 853, 857 (9th Cir. 2001). Here, the ALJ summarized Plaintiff's allegations on
10 various disabilities reports and at the hearing. Tr. 542. Then, the ALJ provided
11 citations to the medical record showing his symptoms were relativity controlled
12 when Plaintiff took his medications. Tr. 543-544. Therefore, Plaintiff's statement
13 of disabling impairments were not supported by the evidence showing Plaintiff's
14 impairments were controlled when taking medication.

15 The ALJ did not error in his determination that Plaintiff was less than fully
16 credible.

17 **C. Step Four**

18 Plaintiff argues that the ALJ failed to make all the findings of facts required
19 at step four. ECF No. 15 at 21-23. Defendant's briefing does not challenge the
20 argument in depth, but instead asserts that any error resulting at step four is
21 harmless due to the ALJ's legally sufficient step five determination. ECF No. 18
22 at 17. The Court agrees that the step five determination was sufficient; therefore,
23 any error resulting from the step four determination would be harmless. *See*
24 *Tommasetti*, 533 F.3d at 1042.

25 **D. Step Five**

26 Plaintiff argues that the ALJ's hypothetical question to the vocational expert
27 was inadequate because it failed to account for Plaintiff's limitations. ECF No. 15
28 at 23-24. An ALJ is only required to present the vocational expert with those

1 limitations the ALJ finds to be credible and supported by the evidence. *Osenbrock*
2 *v. Apfel*, 240 F.3d 1157, 1165-1166 (9th Cir. 2001). Here, the ALJ has provided
3 legally sufficient reasons for not including the limitations opined by Dr. Cross, Dr.
4 Anderson, and Mr. Carter. *See supra*.

5 Plaintiff also asserts that the ALJ erred in his residual functional capacity
6 determination because he failed to include the moderate limitations opined by
7 Patricia Kraft, Ph.D. ECF No. 15 at 15-16. A claimant's residual functional
8 capacity is "the most [a claimant] can still do despite [her] limitations." 20 C.F.R.
9 § 416.945(a); *see also* 20 C.F.R. Part 404, Subpart P, Appendix 2, § 200.00(c)
10 (defining residual functional capacity as the "maximum degree to which the
11 individual retains the capacity for sustained performance of the physical-mental
12 requirements of jobs"). In formulating the residual functional capacity
13 determination, the ALJ weighs medical and other source opinions and also
14 considers the claimant's credibility and ability to perform daily activities. *See,*
15 *e.g., Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009).

16 Dr. Kraft was a medical consultant for the Social Security Administration
17 who reviewed Plaintiff's file and completed a Mental Residual Functional
18 Capacity Assessment form, also known as Form SSA-4734-F4-SUP, on September
19 11, 2009. Tr. 413-415. In section one of the form, Dr. Kraft opined that Plaintiff
20 had a moderate¹¹ limitation in the abilities to maintain attention and concentration
21 for extended periods, to work in coordination with or proximity to others without
22 being distracted by them, to complete a normal workday and workweek without
23 interruptions from psychologically based symptoms and to perform at a consistent
24 pace without an unreasonable number and length of rest periods, to interact
25 appropriately with the general public, to get along with coworkers or peers without
26 distracting them or exhibiting behavioral extremes, and to respond appropriately to
27 changes in the work setting. Tr. 413-414. Then under the "Functional Capacity

28 ¹¹There is no definition for the term moderate. Tr. 413-415.

1 Assessment,” Dr. Kraft stated the following:

2 [Claimant] is able to understand, remember and following through with
3 simple and complex instructions. His attention, concentration,
4 persistence and pace will be intermittently slowed [due to] interference
5 of compulsions, anxiety, and dysphoria. Nonetheless capable of
6 productive work.

7 Best away from the demands of [general public]; should not work with
8 disadvantaged adults or children. Can manage superficial interactions
9 with others in the work place.

10 May take longer to adjust to routine changes given his high levels of
11 anxiety and OCD behaviors. No other deficits of adaptation noted.

12 Tr. 415. The psychological nonexertional limitations included in the ALJ’s
13 residual functional capacity determination included:

14 He can perform simple, routine tasks and follow short, simple
15 instructions. He can do work that needs little or no judgment and he
16 can perform simple duties than can be learned on the job in a short
17 period. He requires a work environment with minimal supervisor
18 contact. (Minimal contact does not preclude all contact, rather it means
19 contact does not occur regularly. Minimal contact also does not
20 preclude simple and superficial exchanges or being in proximity to the
21 supervisor). He can work in proximity to coworkers but not in a
22 cooperative or team effort. He requires a work environment that has no
23 more than superficial interactions with coworkers. He requires a work
24 environment that is predictable and with few work setting changes, that
25 is, a few routine and uninvolved tasks according to set procedures,
26 sequence, or pace with little opportunity for diversion or interruption.
27 He requires a work environment without public contact.

28 Tr. 541.

The Program Operations Manual System¹² (POMS) DI 24510.060 details

¹²The POMS does not impose judicially enforceable duties on the Court or
the ALJ, but it may be “entitled to respect” under *Skidmore v. Swift & Co.*, 323

1 Social Security’s Operating Policy as to the Mental Residual Functional Capacity
2 Assessment Form SSA-4734-F4-SUP. According to this POMS provision, section
3 one of the form “is merely a worksheet to aid in deciding the presence and degree
4 of functional limitations and the adequacy of documentation and does not
5 constitute the [residual functional capacity] assessment.” POMS DI 24510.060.
6 Instead, section three, titled “Functional Capacity Assessment,” is for “recording
7 the mental [residual functional capacity] determination. It is in this section that the
8 actual mental [residual functional capacity] assessment is recorded, explaining the
9 conclusions indicated in section I, in terms of the extent to which these mental
10 capacities or functions could or could not be performed in work settings.” *Id.*
11 Therefore, it is the narrative in section three that is Dr. Kraft’s residual functional
12 capacity opinion, not the moderate limitations noted in section one.

13 The limitations addressed in the narrative section are consistent with the
14 ALJ’s residual functional capacity assessment. Therefore, Dr. Kraft’s opinion was
15 part of the ALJ’s residual functional capacity analysis, which was presented to the
16 vocational expert, and the step five determination is without error.

17
18
19 U.S. 134 (1944), to the extent it provides a persuasive interpretation of an
20 ambiguous regulation. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587–88, 120
21 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *Lockwood v. Comm’r Soc. Sec. Admin.*, 616
22 F.3d 1068, 1073 (9th Cir. 2010). Here, the issue is not determining the meaning of
23 an ambiguous regulation, but instead understanding how to correctly read a form
24 produced and distributed by the Social Security Administration to its Medical
25 Consultants. Therefore, by relying on the POMS provision in this case, the Court
26 is not allowing the provision to set a judicially enforceable duty on the ALJ, but
27 only using it as a guide to define the parameters of a Medical Consultant’s opinion
28 on an agency supplied form.

1 **CONCLUSION**

2 Having reviewed the record and the ALJ's findings, the Court finds the
3 ALJ's decision is supported by substantial evidence and free of legal error.

4 Accordingly, **IT IS ORDERED:**

5 1. Defendant's Motion for Summary Judgment, **ECF No. 18**, is
6 **GRANTED.**

7 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED.**

8 The District Court Executive is directed to file this Order and provide a copy
9 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**
10 **and the file shall be CLOSED.**

11 DATED June 6, 2016.

A handwritten signature in black ink, appearing to read "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE