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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 DAVID E. SCHAK,

8 Plaintiff,

9 v.

10 CAROLYN W. COLVIN¹, Acting
Commissioner of Social Security,

11 Defendant.

NO: 12-CV-0617-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

12
13 BEFORE THE COURT are the parties' cross motions for summary
14 judgment (ECF Nos. 14, 16). Plaintiff is represented by Maureen J. Rosette and
15 Dana C. Madsen. Defendant is represented by Catherine Escobar. The Court has
16 ¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on
17 February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure,
18 Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit.
19 No further action need be taken to continue this suit by reason of the last sentence
20 of 42 U.S.C. § 405(g).

1 reviewed the administrative record and the parties' completed briefing and is fully
2 informed. For the reasons discussed below, the Court grants Defendant's motion
3 and denies Plaintiff's motion.

4 JURISDICTION

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
9 limited: the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means
12 relevant evidence that "a reasonable mind might accept as adequate to support a
13 conclusion." *Id.* (quotation and citation omitted). Stated differently, substantial
14 evidence equates to "more than a mere scintilla[,] but less than a preponderance."
15 *Id.* (quotation and citation omitted). In determining whether this standard has been
16 satisfied, a reviewing court must consider the entire record as a whole rather than
17 searching for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. If the evidence in the record "is
20 susceptible to more than one rational interpretation, [the court] must uphold the

1 ALJ’s findings if they are supported by inferences reasonably drawn from the
2 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district
3 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
4 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
5 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
6 The party appealing the ALJ’s decision generally bears the burden of establishing
7 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

8 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

9 A claimant must satisfy two conditions to be considered “disabled” within
10 the meaning of the Social Security Act. First, the claimant must be “unable to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than twelve
14 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
15 “of such severity that he is not only unable to do his previous work[,] but cannot,
16 considering his age, education, and work experience, engage in any other kind of
17 substantial gainful work which exists in the national economy.” 42 U.S.C. §
18 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§

1 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
2 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);
3 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
5 404.1520(b); 416.920(b).

6 If the claimant is not engaged in substantial gainful activities, the analysis
7 proceeds to step two. At this step, the Commissioner considers the severity of the
8 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
9 claimant suffers from “any impairment or combination of impairments which
10 significantly limits [his or her] physical or mental ability to do basic work
11 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
12 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
13 however, the Commissioner must find that the claimant is not disabled. *Id.*

14 At step three, the Commissioner compares the claimant’s impairment to
15 several impairments recognized by the Commissioner to be so severe as to
16 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

1 If the severity of the claimant’s impairment does meet or exceed the severity
2 of the enumerated impairments, the Commissioner must pause to assess the
3 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),
4 defined generally as the claimant’s ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
6 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant’s
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (“past relevant work”). 20 C.F.R. §§ 404.1520(a)(4)(iv);
11 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
12 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
13 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
14 analysis proceeds to step five.

15 At step five, the Commissioner considers whether, in view of the claimant’s
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant’s age,
19 education and work experience. *Id.* If the claimant is capable of adjusting to other
20 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§

1 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
2 work, the analysis concludes with a finding that the claimant is disabled and is
3 therefore entitled to benefits. *Id.*

4 The claimant bears the burden of proof at steps one through four above.
5 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
6 the analysis proceeds to step five, the burden shifts to the Commissioner to
7 establish that (1) the claimant is capable of performing other work; and (2) such
8 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
9 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

10 ALJ’S FINDINGS

11 Plaintiff applied for disability insurance benefits and supplemental security
12 income on December 5, 2011, with an alleged onset date of September 1, 2011. Tr.
13 213-19, 220-228. His applications were initially denied, as was his request for
14 reconsideration. Tr. 134-37, 141-43, 151-53. Plaintiff filed a request for a hearing
15 and appeared with an attorney at a hearing before an administrative law judge
16 (“ALJ”) on August 1, 2012. Tr. 154-55, 36-83.

17 The ALJ issued a decision on August 22, 2012. Tr. 20-30. At step one, the
18 ALJ found that Plaintiff had not engaged in substantial gainful activity since
19 September 1, 2011, the alleged onset date. Tr. 22. At step two, the ALJ found that
20 Plaintiff had severe medical impairments, *id.*, but at step three, the ALJ determined

1 that Plaintiff's impairments, alone or in combination, did not meet or medically
2 equal one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1,
3 Tr. 23. The ALJ then determined that Plaintiff had residual functional capacity to
4 perform a wide range of light work as defined in 20 C.F.R. 404.1567(b) and
5 416.967(b). At step four, the ALJ determined that the claimant was unable to
6 perform any past relevant work. Tr. 29. However, because Plaintiff had the
7 residual capacity to perform work existing in significant numbers in the national
8 economy in representative occupations such as cashier and hand packager, the ALJ
9 found that Plaintiff was not disabled at step five. Tr. 29-30.

10 On November 2, 2012, the Appeals Council denied Plaintiff's request for
11 review, making the ALJ's decision the Commissioner's final decision for purposes
12 of judicial review. Tr. 1-6, 20 C.F.R. § 404.981.

13 ISSUES

14 Plaintiff identifies three issues for review: (1) whether the ALJ set forth
15 specific and legitimate reasons supported by substantial evidence in the record for
16 rejecting the opinion of John Arnold, PhD, who completed a psychological
17 evaluation of Plaintiff; (2) whether the ALJ properly rejected Plaintiff's symptom
18 testimony regarding his impairments; and (3) whether the ALJ's failure to include
19 accepted limitations from Allen D. Bostwick, PhD, in the hypothetical question to
20 the vocational expert warrants remand. ECF No. 14 at 13-16.

1 DISCUSSION

2 **A. Whether the ALJ Properly Rejected Dr. Arnold’s Opinion**

3 Plaintiff contends that he was more limited from a psychological standpoint
4 than what was determined by the ALJ. ECF No. 14 at 13. Specifically, he contends
5 that the ALJ improperly rejected the opinion of John Arnold, Ph.D, in determining
6 claimant’s residual capacity because the ALJ did not set forth specific and
7 legitimate reasons supported by substantial evidence in the record for rejecting Dr.
8 Arnold’s opinion. *Id.* at 13-14.

9 A treating physician's opinions are entitled to substantial weight in social
10 security proceedings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
11 (9th Cir. 2009). If a treating or examining physician's opinion is uncontradicted, an
12 ALJ may reject it only by offering “clear and convincing reasons that are supported
13 by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
14 “However, the ALJ need not accept the opinion of any physician, including a
15 treating physician, if that opinion is brief, conclusory and inadequately supported
16 by clinical findings.” *Bray*, 554 F.3d at 1228 (quotation and citation omitted). A
17 physician's opinion may be discounted if it relies on a claimant's unreliable self-
18 report. *Bayliss*, 427 F.3d at 1217; *see also Buckner–Larkin v. Astrue*, 450 Fed.
19 Appx. 626 (9th Cir. 2011) (“if the ALJ determines that the subjective complaints of

1 the claimant are not credible, that is sufficient reason for discounting a physician's
2 opinion that is based on these complaints.”) *citing Bray*, 554 F.3d 1219.

3 “If a treating or examining doctor's opinion is contradicted by another
4 doctor's opinion, an ALJ may only reject it by providing specific and legitimate
5 reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d at 1216
6 (*citing Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir.1995)). It is the role of the
7 trier of fact, not this Court, to resolve conflicts in evidence. *Richardson v. Perales*,
8 402 U.S. 389, 400 (1971). If evidence supports more than one rational
9 interpretation, the court may not substitute its judgment for that of the
10 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999); *Allen v.*
11 *Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

12 Here, two psychologists, Drs. Arnold and Bostwick, evaluated and reported
13 on Plaintiff’s psychological function. Dr. Bostwick reported that Plaintiff “presents
14 with no new, severe psychopathology and thus no new psychological limitations or
15 restrictions to gainful full time employment from a psychological standpoint.” Tr.
16 351. The ALJ gave less weight to Dr. Arnold’s conclusions:

17 In July 2012, John Arnold, Ph.D, conducted a psychological evaluation of
18 the claimant and assessed him with a pain disorder associated with both
19 physical factors and a general medical condition; major depressive disorder,
20 single episode, moderate; and rule out learning disorder, not otherwise
specified. In his report findings, Dr. Arnold noted that there were no records
for review prior to the evaluation, and he was unable to administer
psychological testing instruments due to the claimant’s inability to
comprehend the test questions. In this case, Dr. Arnold relied, in great part,

1 upon the subjective allegations of the claimant, and his diagnostic interview
2 only, in arriving at his conclusions, and therefore, little weight has been
3 afforded to those findings and conclusions based on a limited, one-time
4 interview.

5 Tr. 27-28 (internal citations omitted). In contrast, the ALJ afforded greater weight
6 to Dr. Bostwick's report:

7 Dr. Bostwick documented that the claimant's "cognitive examination results
8 [were] compromised by his short abrasive responses, diminished persistence,
9 and little attempt to present himself in a socially appropriate manner."
10 However, Dr. Bostwick did opine that the claimant "is probably functioning
11 within the low Average range of general intellectual ability," and "when [the
12 claimant] applies himself more his attention an concentration are low
13 Average, his memory is mildly impaired, and his comprehension and
14 retention of verbal information is within functional limits." Dr. Bostwick
15 was unable to assess the claimant's higher-level reasoning and problem
16 solving abilities, reportedly due to diminished effort on the part of claimant.
17 Dr. Bostwick further reported that the claimant may be mildly limited in
18 social functioning due to his "self-defeating" personality traits, and although
19 he exhibits variable attention and concentration, pace, and persistence, Dr.
20 Bostwick was of the opinion that the claimant generally ranges from low
Average to moderately impaired. However, Dr. Bostwick attributed these
traits as a matter of choice, rather than "deleterious effects from a mental
health disorder." He noted that, despite the claimant's hearing impairment
and reported reading and writing impairments, the claimant presented with
no new, severe psychopathology or psychological limitations or restrictions
that would prevent gainful, fulltime employment from a psychological
standpoint. The undersigned concurs with the findings of Dr. Bostwick to
the extent that it supports the above residual functional capacity assessment.

Tr. at 26 (internal citations omitted).

Plaintiff points out that the ALJ found that Dr. Arnold relied primarily on
Plaintiff's subjective complaints, but gave significant weight to Dr. Bostwick's

1 opinion, which likewise relied primarily on Plaintiff's subjective complaints. ECF
2 No. 14 at 14. However, as Defendant contends, both psychologists performed
3 clinical examinations and interviews and came to different conclusions regarding
4 Plaintiff's functioning and impairment. The ALJ accordingly had to resolve a
5 conflict between the two opinions. Given a choice between the findings of two
6 psychologists who had interviewed Plaintiff, the ALJ gave greater weight to the
7 psychologist who had, in addition to the interview, reviewed Plaintiff's records:
8 Dr. Bostwick. The ALJ specifically cites Dr. Arnold's lack of access to claimant's
9 records, and the fact that Dr. Arnold based his opinion on the "interview only" in
10 the ALJ's decision to give "little weight" to his findings and conclusions. Tr. 27-
11 28.

12 The record supports the ALJ's determination of credibility. Dr. Bostwick's
13 report is more detailed than that of Dr. Arnold. Dr. Bostwick submitted a six-page
14 written report, comprised of a review of the claimant's background information,
15 review of records, and discussion of how Dr. Bostwick determined his mental
16 status. Tr. 346-352. In contrast, Dr. Arnold's evaluation is filled out in a standard
17 form, with brief sentences and checked boxes. Tr. 361-368. Thus, while Dr. Arnold
18 "assessed Mr. Schak's ability to do work activities" and Dr. Bostwick did not do so
19 directly, Dr. Arnold's assessment of those activities is represented by check boxes
20 on a form. Tr. 363.

1 It is the role of the trier of fact, not this Court, to resolve conflicts in
2 evidence. *Richardson*, 402 U.S. at 400. Having reviewed the entire record, the
3 Court finds that the ALJ’s rejection of Dr. Arnold’s conclusion concerning
4 Plaintiff’s mental limitations is grounded in specific and legitimate reasons
5 supported by substantial evidence.

6 **B. Whether the ALJ Properly Rejected Claimant’s Symptom Testimony**

7 Plaintiff further contends that the ALJ did not properly reject his symptom
8 testimony regarding his physical impairments, noting that the ALJ is required to
9 “state specifically why Mr. Schak’s testimony regarding his limited ability to sit,
10 stand, walk, lift, as well as his need to rest frequently throughout the day, was not
11 credible and what facts in the record led to that conclusion.” ECF No. 14 at 15, 16.
12 Plaintiff contends that the ALJ merely made a boilerplate statement in rejecting his
13 symptom testimony. ECF No. 14 at 16.

14 In order to find Schak’s testimony unreliable, the ALJ is required to make “a
15 credibility determination with findings sufficiently specific to permit the court to
16 conclude that the ALJ did not arbitrarily discredit claimant's testimony.” *Thomas v.*
17 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002). An ALJ must perform a two-step
18 analysis when deciding whether to accept a claimant's subjective symptom
19 testimony. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). The first step is a
20 threshold test from *Cotton v. Bowen* requiring the claimant to “produce medical

1 evidence of an underlying impairment which is reasonably likely to be the cause of
2 the alleged pain.” 799 F.2d 1403, 1407 (9th Cir. 1986); *see also Bunnell v.*
3 *Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991). “Once a claimant meets the *Cotton* test
4 and there is no affirmative evidence suggesting [he] is malingering, the ALJ may
5 reject the claimant's testimony regarding the severity of [his] symptoms only if
6 [she] makes specific findings stating clear and convincing reasons for doing so.”
7 *Smolen*, 80 F.3d at 1283–84 (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
8 1993)). In weighing the claimant’s credibility, the ALJ may consider many factors,
9 including ““(1) ordinary techniques of credibility evaluation, such as the claimant's
10 reputation for lying, prior inconsistent statements concerning the symptoms, and
11 other testimony by the claimant that appears less than candid; (2) unexplained or
12 inadequately explained failure to seek treatment or to follow a prescribed course of
13 treatment; and (3) the claimant's daily activities.”” *Tommasetti v. Astrue*, 533 F.3d
14 1035, 1039 (9th Cir. 2008) (quoting *Smolen*, 80 F.3d at 1284). If the ALJ's finding
15 is supported by substantial evidence, the court may not engage in second-guessing.
16 *Tommasetti*, 533 F.3d at 1039. “Contradiction with the medical record is a
17 sufficient basis for rejecting the claimant's subjective testimony.” *Carmickle v.*
18 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008).

19 Plaintiff claims that the ALJ failed to provide clear and convincing reasons
20 supported by substantial evidence for discrediting his subjective complaints. ECF

1 No. 14 at 16. At the hearing, Plaintiff testified to a myriad of symptoms and
2 limitations. He testified to being unable to watch a television program without
3 getting up, Tr. 66; taking four or five naps throughout the day due to exhaustion,
4 Tr. 66; that his legs would go numb, forcing him to elevate them, Tr. 69; being
5 unable to bend down to tie his shoes, Tr. 69; and that it hurt to climb stairs, Tr. 70-
6 71. However, the ALJ found that

7 After careful consideration of the evidence, the undersigned finds that the
8 claimant’s medically determinable impairments could reasonably be
9 expected to cause the alleged symptoms; however, the symptoms and
10 limitations described are not sufficiently supported by commensurate
11 objective medical findings of abnormality consistent with an assessment of
12 total disability under the Social Security Act.

13 Tr. 25. Thus, Mr. Schak’s testimony met the *Cotton* test, but failed the credibility
14 determination under the second step.

15 Contrary to Plaintiff’s assertions, however, the ALJ provided a number of
16 clear and convincing reasons for discounting the claimant’s testimony. After the
17 “boilerplate” statement that the claimant’s self-described limitations were “not
18 sufficiently supported by commensurate objective medical findings,” the ALJ goes
19 on to detail the medical findings that fail to establish “abnormality consistent with
20 an assessment of total disability.” Tr. 25. For example, the ALJ noted that the CT
scan details normal renal activity, Tr. 25; noted that an MRI showed no significant
pathology other than mild disc degeneration, Tr. 25; referred to a note from the

1 claimant's treating physician's review of the radiology studies stating that there
2 was "not much there," Tr. 25; and cited Dr. Daniel Dibble's pain management
3 assessment finding that the claimant had reported "100% reduction in his left-
4 sided, low back pain" after treatment, Tr. 26. The ALJ also refers to the findings of
5 Peter Weir, M.D., who reported that the claimant's lumbar spine movements were
6 "nearly normal," and that claimant exhibited "no pain behavior or discomfort,
7 sitting comfortably throughout the interview and examination...[and] ambulating
8 without difficulty to and from his vehicle in the parking lot." Tr. 27. Dr. Weir
9 further reported that claimant had reported that his hearing issues had never really
10 bothered him. Tr. 27. The ALJ's summary includes Dr. Weir's assessment that
11 "although the claimant would experience difficulty communicating in situations
12 involving background noise due to his mildly impaired hearing, the claimant's
13 chronic lumbosacral strain, and absence of evidence supporting a diagnosis of
14 arthritis, would pose no other functional limitations on the claimant."

15 Tr. 27. The ALJ also places "great weight" on the opinions and conclusions of
16 Minh Vu, M.D., who cited claimant's minimal evidence of disc disease and no
17 evidence of neurological deficit or neuromuscular deficiencies. Tr. 28. Dr. Vu
18 opined that claimant would be limited to no more than a wide range of light
19 exertion. Tr. 28.

1 Testimony that contradicts a medical opinion is a clear and convincing
2 reason to find a claimant not credible. *Carmickle*, 533 F.3d at 1161. Here, the
3 claimant’s testimony contradicted the bulk of the medical opinions and evidence.
4 As noted above, the medical evidence spoke to milder physical ailments than
5 Plaintiff testified to, and the ALJ appropriately noted that evidence. Having
6 thoroughly reviewed the record, the Court concludes that these reasons are
7 supported by substantial evidence. The ALJ did not err in relying upon them as a
8 basis for not fully crediting Plaintiff’s testimony about the disabling effects of his
9 impairments.

10 **C. Whether the ALJ Failed to Include Dr. Bostwick’s Accepted**

11 **Limitations in the Hypothetical**

12 Plaintiff contends that the ALJ’s failure to include Dr. Bostwick’s accepted
13 limitations in the hypothetical question to the vocational expert is sufficient to
14 require remand. Plaintiff argues that the ALJ afforded significant weight to Dr.
15 Bostwick’s evaluation—which stated that the claimant’s attention, concentration,
16 pace, and persistence were between low-average to moderately limited—yet did
17 not include such limitations in the hypothetical question to the vocational expert.
18 ECF No. 14 at 14. Defendant counters that Dr. Bostwick opined that Plaintiff’s
19 concentration, persistence, and pace varied from “low average” due to Plaintiff’s
20 choice, rather than mental impairment, and the ALJ is not required to account for

1 vocational limitations unrelated to Plaintiff's impairments, citing 20 C.F.R. §§
2 404.1545(a), 416.945(a) ("Your residual functional capacity is the most you can
3 still do despite your limitations."). Furthermore, Defendant contends, the ALJ
4 limited Plaintiff to work involving one-to-three step instructions, and, as such, in
5 fact accounted for Plaintiff's possible concentration difficulties in the residual
6 functional capacity. ECF No. 16 at 11.

7 "Hypothetical questions posed to the vocational expert must set out *all* the
8 limitations and restrictions of the particular claimant...." *Embrey v. Bowen*, 849
9 F.2d 418, 422 (9th Cir. 1988). "Unless the record indicates that the ALJ had
10 specific and legitimate reasons for disbelieving a claimant's testimony as to
11 subjective limitations such as pain, those limitations must be included in the
12 hypothetical in order for the vocational expert's testimony to have any evidentiary
13 value." *Embrey*, 849 F.2d at 423. "If the assumptions in the hypothetical are not
14 supported by the record, the opinion of the vocational expert that claimant has a
15 residual working capacity has no evidentiary value." *Gallant v. Heckler*, 753 F.2d
16 1450, 1456 (9th Cir. 1984).

17 Here, the Court is unpersuaded by Plaintiff's contention that the ALJ
18 improperly failed to include Dr. Bostwick's limitations in the hypothetical. Dr.
19 Bostwick's report notes that "when [claimant] applies himself more his attention
20 and concentration are low Average, his memory is mildly impaired, and his

1 comprehension and retention of verbal information is within functional limits.” Tr.
2 350. The report concludes that the variation between low Average and moderately
3 impaired result from “choice rather than deleterious effects from a mental health
4 disorder.” Tr. 351. Thus, there is support from the record that, though claimant
5 functions at low Average levels for attention and concentration, with a mildly
6 impaired memory, his comprehension is within functional limits and that any
7 variance can be accounted for by “choice.” Accordingly, the record supports
8 “specific and legitimate” reasons for discounting the claimant’s testimony with
9 respect to subjective limitations.

10 Furthermore, as Defendant argues, the ALJ limited Plaintiff to work
11 involving one-to-three step instructions, indicating that the ALJ accounted for
12 possible concentration difficulties in the residual functional capacity. Tr. 24 (“He
13 would be unable to perform work that involves more than one-to-three step tasks,
14 detailed work, or more than occasional changes in the work setting.”). The ALJ
15 included this limitation in the hypothetical to the vocational expert. Tr. 73.

16 Having thoroughly reviewed the record, the Court concludes that the ALJ
17 appropriately reflected claimant’s mental limitations in the hypothetical to the
18 vocational expert.

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CONCLUSION

The ALJ's decision is based on substantial evidence and free of legal error. The record is fully developed and supports in its entirety the ALJ's denial of benefits.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment (ECF No. 14) is **DENIED**.
2. Defendant's Motion for Summary Judgment (ECF No. 16) is **GRANTED**.

The District Court Executive is hereby directed to file this Order, enter Judgment for Defendant, provide copies to counsel, and **CLOSE** this file.

DATED March 18, 2014.



Thomas O. Rice
THOMAS O. RICE
United States District Judge