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3 **UNITED STATES DISTRICT COURT**  
4 **EASTERN DISTRICT OF WASHINGTON**

5 RICHARD WAYNE WEBBER II,

6 Plaintiff,

7 vs.

8 NANCY A. BERRYHILL,

9 Acting Commissioner of Social Security,

10 Defendant.

No. 2:15-CV-00295-MKD

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

ECF Nos. 20, 25

11 BEFORE THE COURT are the parties' cross-motions for summary  
12 judgment. ECF Nos. 20, 25. The parties consented to proceed before a magistrate  
13 judge. ECF No. 6. The Court, having reviewed the administrative record and the  
14 parties' briefing, is fully informed. For the reasons discussed below, the Court  
15 denies Plaintiff's motion (ECF No. 20) and grants Defendant's motion (ECF No.  
16 25).

17 **JURISDICTION**

18 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);  
19 1383(c)(3).  
20

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

1 **STANDARD OF REVIEW**

2 A district court’s review of a final decision of the Commissioner of Social  
3 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
4 limited; the Commissioner’s decision will be disturbed “only if it is not supported  
5 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
6 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a  
7 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159  
8 (quotation and citation omitted). Stated differently, substantial evidence equates to  
9 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and  
10 citation omitted). In determining whether the standard has been satisfied, a  
11 reviewing court must consider the entire record as a whole rather than searching  
12 for supporting evidence in isolation. *Id.*

13 In reviewing a denial of benefits, a district court may not substitute its  
14 judgment for that of the Commissioner. If the evidence in the record “is  
15 susceptible to more than one rational interpretation, [the court] must uphold the  
16 ALJ’s findings if they are supported by inferences reasonably drawn from the  
17 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district  
18 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
19 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
20 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The

1 party appealing the ALJ's decision generally bears the burden of establishing that  
2 it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

### 3 **FIVE-STEP EVALUATION PROCESS**

4 A claimant must satisfy two conditions to be considered "disabled" within  
5 the meaning of the Social Security Act. First, the claimant must be "unable to  
6 engage in any substantial gainful activity by reason of any medically determinable  
7 physical or mental impairment which can be expected to result in death or which  
8 has lasted or can be expected to last for a continuous period of not less than twelve  
9 months." 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant's  
10 impairment must be "of such severity that he is not only unable to do his previous  
11 work[,] but cannot, considering his age, education, and work experience, engage in  
12 any other kind of substantial gainful work which exists in the national economy."  
13 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential analysis to  
15 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
16 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner  
17 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
18 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the  
19 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
20 404.1520(b); 416.920(b).

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

10 At step three, the Commissioner compares the claimant's impairment to  
11 severe impairments recognized by the Commissioner to be so severe as to preclude  
12 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more  
14 severe than one of the enumerated impairments, the Commissioner must find the  
15 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

16 If the severity of the claimant's impairment does not meet or exceed the  
17 severity of the enumerated impairments, the Commissioner must pause to assess  
18 the claimant's "residual functional capacity." Residual functional capacity (RFC),  
19 defined generally as the claimant's ability to perform physical and mental work  
20 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§

1 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
2 analysis.

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

10 At step five, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing other work in the national economy.  
12 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,  
13 the Commissioner must also consider vocational factors such as the claimant's age,  
14 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v);  
15 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
16 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
17 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other  
18 work, analysis concludes with a finding that the claimant is disabled and is  
19 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.  
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
4 capable of performing other work; and (2) such work “exists in significant  
5 numbers in the national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.920(c)(2);  
6 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 **ALJ’s FINDINGS**

8 Plaintiff applied for disability insurance benefits and supplemental security  
9 income benefits on June 7, 2010, and June 21, 2010, respectively. Tr. 250-56. In  
10 both applications, Plaintiff alleged a disability onset date of September 1, 2008.  
11 Tr. 250, 252. The claims were denied initially, Tr. 144-50, and on reconsideration,  
12 Tr. 151-55. Plaintiff appeared at a hearing before an Administrative Law Judge  
13 (ALJ) on December 23, 2013.<sup>1</sup> Tr. 93-117. On January 15, 2014, the ALJ denied  
14 Plaintiff’s claim. Tr. 38-46.

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17 <sup>1</sup> This was the second hearing. A prior hearing was held December 21, 2011. Tr.  
18 60-90. On December 29, 2011, the ALJ denied Plaintiff’s claim. Tr. 125-35. On  
19 July 16, 2013, the Appeals Council vacated the ALJ’s decision and remanded for  
20 further proceedings, including a new hearing and new decision. Tr. 141-43.

1 At the outset, the ALJ found that Plaintiff met the insured status  
2 requirements of the Act with respect to his disability benefit claim through June  
3 30, 2010. Tr. 41. At step one, the ALJ found that Plaintiff has not engaged in  
4 substantial gainful activity since the alleged onset date, September 1, 2008. Tr.  
5 41. At step two, the ALJ found that Plaintiff has the following severe  
6 impairments: a personality disorder, not otherwise specified, with depression. Tr.  
7 41. At step three, the ALJ found that Plaintiff does not have an impairment or  
8 combination of impairments that meets or medically equals a listed impairment.  
9 Tr. 41. The ALJ then concluded that Plaintiff has the RFC to perform a full range  
10 of work at all exertional levels, but with the following nonexertional limitations:

11 the claimant is limited to one-to-three step tasks, with superficial contact  
12 with the public and occasional contact with co-workers, and no more than  
13 average production requirements. The undersigned adds: a low stress  
working environment and working with objects/things rather than people.

14 Tr. 42. At step four, the ALJ found that Plaintiff is able to perform his past  
15 relevant work as a store stocker and power machine operator/coater. Tr. 44.  
16 Alternatively, at step five, the ALJ found that, considering Plaintiff's age,  
17 education, work experience, RFC, and the vocational expert's testimony, there are  
18 jobs in significant numbers in the national economy that Plaintiff could perform,  
19 such as laundry worker and dishwasher. Tr. 45. On that basis, the ALJ concluded  
20 that Plaintiff is not disabled as defined in the Social Security Act. Tr. 45-46.

1 On August 24, 2015, the Appeals Council denied review, Tr. 1-4, making  
2 the ALJ's decision the Commissioner's final decision for purposes of judicial  
3 review. See 42 U.S.C. § 1383(c) (3); 20 C.F.R. §§ 416.1481, 422.210.

4 **ISSUES**

5 Plaintiff seeks judicial review of the Commissioner's final decision denying  
6 him disability insurance benefits under Title II and supplemental security income  
7 benefits under Title XVI of the Social Security Act. ECF No. 20. Plaintiff raises  
8 the following issues for this Court's review:

- 9 1. Whether the Court has jurisdiction to consider if the ALJ correctly  
10 followed the Appeals Council's remand order?<sup>2</sup>
- 11 2. Whether the ALJ properly considered Plaintiff's impairments at step two;  
12 and
- 13 3. Whether the ALJ properly discredited Plaintiff's symptom claims.  
14 ECF No. 20 at 11.

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19 <sup>2</sup> Although Plaintiff lists the issue solely as a step two issue, for clarity the Court  
20 separately addresses the propriety of the considering the remand order.



1 **DISCUSSION**

2 **A. Court’s Jurisdiction to Consider if ALJ Followed Appeals Council’s**  
3 **Remand Order**

4 First, Plaintiff contends the ALJ improperly failed to find that depression,  
5 and schizophrenia or psychotic disorder, are severe impairments at step two of the  
6 sequential evaluation. ECF Nos. 20 at 12-14, 26 at 2-3. As an initial matter,  
7 Plaintiff contends that because the ALJ previously found that schizophrenia was a  
8 severe impairment, and on remand the Appeals Council directed the ALJ to make a  
9 new step four determination, the ALJ erred in the current decision by reconsidering  
10 whether impairments were severe at step two.

11 The Court does not have jurisdiction to consider whether the ALJ properly  
12 followed the directions of the Appeals Council on remand. The Ninth Circuit has  
13 held that the Appeals Council’s denial of a second request for review deprives the  
14 district court of jurisdiction to review any failure by the ALJ to follow a prior  
15 remand order. *See Tyler v. Astrue*, 305 F.App’x 331, 332 (9th Cir. 2008)  
16 (unpublished) (“The district court properly declined to evaluate whether the ALJ’s  
17 second decision satisfied the demands of the Appeals Council’s remand . . .  
18 [F]ederal courts only have jurisdiction to review the final decisions of  
19 administrative agencies. When the Appeals Council denied review of the ALJ’s  
20 second decision, it made that decision final, and declined to find that the ALJ had  
not complied with its remand instructions.”) (internal citations omitted); *see also*  
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1 *Conlee v. Colvin*, 31 F. Supp. 3d 1165, 1175 (E.D. Wash. March 31, 2014); *Boyd*  
2 *v. Astrue*, No. C10-1552, 2011 WL 3881488, at \*2 (W.D. Wash. July 18, 2011)  
3 (“Whether an ALJ complies with an Appeals Council remand order is an internal  
4 agency matter which arises before the issuance of the agency’s final decision.  
5 Section 405(g) does not provide this Court with authority to review intermediate  
6 agency decisions that occur during the administrative review process.”); *Thompson*  
7 *v. Astrue*, No. EDCV, 09-1182, 2010 WL 2991488, at \*2 (C.D. Cal. July 27, 2010)  
8 (“[T]he Court’s role is to determine whether the ALJ’s final decision is supported  
9 by substantial evidence, not whether the ALJ complied with the Appeals Council’s  
10 remand order.”). The Appeals Council had an opportunity to address this issue in  
11 the context of Plaintiff’s request for review of the ALJ’s second, current decision.  
12 Here, however, the Appeals Council denied Plaintiff’s request for further review  
13 following the second decision, finding “no reason under our rules to review the  
14 [ALJ’s] decision.” Tr. 1. If the Appeals Council believed that an alleged violation  
15 of its remand order was a material issue, it would have granted Plaintiff’s second  
16 request for review and addressed the alleged violation in that context, i.e., the  
17 Council would have ordered another remand rather than denying further review.

18 In addition to case law, both the regulatory language and plain terms of the  
19 Appeals Council’s order support this view. The Appeals Council granted review  
20 under the substantial evidence provision of the Social Security Administration’s

1 regulations (20 CFR §§ 404.970 and 416.1470). Tr. 141. Pursuant to 20 CFR §§  
2 404.977 and 416.1477, the Appeals Council vacated the prior hearing decision. Tr.  
3 141. The language “vacated” indicates that no findings in the vacated decision are  
4 entitled to deference on remand.

5 Further, the Appeals Council’s order stated

6 [i]n compliance with the above, the Administrative Judge will offer the  
7 claimant an opportunity for a hearing, address the evidence which was  
8 submitted with the request for review, take any further action needed to  
complete the administrative record and issue a new decision.

9 Tr. 142.

10 As the above-quoted language makes clear, the Appeals Council did not  
11 direct the ALJ or the Court to give preclusive effect to the ALJ’s prior step two or  
12 any other findings in the ALJ’s first decision.

13 Accordingly, Plaintiff’s contention with respect to alleged error by the ALJ  
14 in failing to follow the Appeals Council’s remand instructions fails.

15 **B. Step Two**

16 Next, Plaintiff contends the ALJ erred at step two by failing to find that  
17 depression, and psychotic disorder NOS or schizophrenia, were severe  
18 impairments. ECF No. 20 at 12-14. Here, the ALJ found at step two that Plaintiff  
19 suffers from personality disorder not otherwise specified (NOS) “with depression.”  
20 Tr. 41. The Court interprets “with depression” to mean the ALJ found that

1 Plaintiff suffers from depressive symptoms, but that these symptoms do not meet  
2 the criteria for a diagnosis of depression.

3 At step two of the sequential process, the ALJ must determine whether a  
4 claimant suffers from a “severe” impairment, i.e., one that significantly limits his  
5 or her physical or mental ability to do basic work activities. 20 C.F.R. §§  
6 404.1520(c), 416.920(c). To show a severe impairment, the claimant must first  
7 prove the existence of a physical or mental impairment by providing medical  
8 evidence consisting of signs, symptoms, and laboratory findings; the claimant’s  
9 own statement of symptoms alone will not suffice. 20 C.F.R. §§ 404.1508,  
10 416.908. The fact that a medically determinable condition exists does not  
11 automatically mean the symptoms are “severe” or “disabling” as defined by the  
12 Social Security regulations. *See, e.g., Edlund v. Massanari*, 253 F.3d 1152, 1159-  
13 60 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Key v.*  
14 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

15 An impairment may be found to be not severe when “medical evidence  
16 establishes only a slight abnormality or a combination of slight abnormalities  
17 which would have no more than a minimal effect on an individual’s ability to  
18 work.” S.S.R. 85-28 at \*3. Similarly, an impairment is not severe if it does not  
19 significantly limit a claimant’s physical or mental ability to do basic work  
20 activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). Basic work activities, in the

1 context of this case, include understanding, carrying out and remembering simple  
2 instructions; responding appropriately to supervision, coworkers and usual work  
3 situations; and dealing with changes in a routine work setting. 20 C.F.R. §§  
4 404.1521(b), 416.921(b); S.S.R. 85-28 at \*3.

5 Even when non-severe impairments exist, these impairments must be  
6 considered in combination at step two to determine if, together, they have more  
7 than a minimal effect on a claimant's ability to perform work activities. 20 C.F.R.  
8 §§ 404.1523, 416.923. If impairments in combination have a significant effect on  
9 a claimant's ability to do basic work activities, they must be considered throughout  
10 the sequential evaluation process. *Id.*

11 If the ALJ erred by not finding an impairment severe at step two, reversal  
12 may not be required if the step is resolved in the claimant's favor. *See Stout v.*  
13 *Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch v.*  
14 *Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005). Here, the ALJ found personality  
15 disorder NOS, with depression, was a severe mental impairment, Tr. 41, meaning  
16 that the ALJ resolved step two in Plaintiff's favor. Therefore, even if the omission  
17 of depression, and psychotic disorder or schizophrenia was erroneous, the error  
18 was harmless.

19 In support of his step two argument, Plaintiff contends that the ALJ should  
20 have adopted the diagnosis of Stephen Rubin, M.D., the reviewing medical expert

1 who testified at the first hearing. Tr. 62-72. Plaintiff contends that Dr. Rubin  
2 diagnosed schizophrenia, paranoid type, or a psychotic disorder.<sup>3</sup> ECF No. 20 at

3 \_\_\_\_\_  
4 <sup>3</sup> However, as noted, the fact that a medically determinable condition, or diagnosis,  
5 exists does not automatically mean that the symptoms are “severe” or “disabling”  
6 as defined by the Social Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-  
7 60; *Fair*, 885 F.2d at 603; *Key*, 754 F.2d at 1549-50. Here, Dr. Rubin’s opinion  
8 does not support greater limitations than assessed by the ALJ. Dr. Rubin testified  
9 that there is no external corroboration of schizophrenia. Tr. 67. He testified that if  
10 Plaintiff’s psychotic symptoms had been severe, Dr. Rubin would have expected  
11 that Plaintiff would be hospitalized or incarcerated at some point, and neither had  
12 occurred. Tr. 68. Dr. Rubin noted that the record does not show difficulties  
13 resulting from psychotic symptoms or from depression, Tr. 68; and “there isn’t a  
14 lot of clear behavioral evidence” of the severity of Plaintiff’s delusions. Tr. 71.  
15 Dr. Rubin concluded that Plaintiff’s symptoms “don’t seem to have given him a  
16 great deal of trouble[.]” Tr. 128 (ALJ’s first decision) (citing Tr. 68). Dr. Rubin  
17 further observed that, although Plaintiff has reported he feels that his grandparents  
18 are going to harm him, he has continued to live with them, contradicting the  
19 alleged severity of the impairment. Tr. 70-71; *see also* Tr. 371 (in September  
20 2010, Plaintiff told evaluator Dr. Thompson that he had lived with his grandparents

1 13-14 (citing Tr. 67-71). Plaintiff notes that the ALJ inconsistently purported to  
2 adopt and incorporate Dr. Rubin's assessment in the current decision, Tr. 41, but,  
3 after the first decision, the ALJ came to partially disagree with Dr. Rubin because  
4 the ALJ no longer found that schizophrenia (or a psychotic disorder) was a severe  
5 impairment at step two. Because the ALJ found in Plaintiff's favor at step two, as  
6 noted, any error is harmless.

7         The ALJ's revised step two determination is supported by the record. The  
8 ALJ found that the diagnosis of schizophrenia or other psychotic disorder had not  
9 been corroborated between the first and second hearings. Tr. 41. The ALJ gave  
10 several reasons supported by the record for finding that the prior diagnosis was not  
11 corroborated.

12         First, in support of this finding, the ALJ found that there were unexplained  
13 gaps in Plaintiff's treatment, an indication that any psychotic impairment was not  
14 as severe as alleged. Tr. 43. Medical evidence is a relevant factor in determining  
15 the severity of a claimant's impairments. *Rollins v. Massanari*, 261 F.3d 853, 857

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17 for six years). Dr. Rubin also noted that some of Plaintiff's activities, including the  
18 ability to go to counseling, and having expressed a desire to go to college, further  
19 called into question the severity of Plaintiff's allegedly disabling agoraphobia and  
20 other limitations. Tr. 72.

1 (9th Cir. 2001); 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2). Here, while the ALJ  
2 found there were unexplained treatment gaps, Tr. 43, she did not cite to specific  
3 records. The record supports the finding. For example, Plaintiff attended  
4 counseling from April 2010 to November 2010, a period of about seven months,  
5 Tr. 410-18, Tr. 425, and Plaintiff then did not attend counseling after November 5,  
6 2010 until April 2011, a period of about five months. Tr. 431-37. Similarly,  
7 although Plaintiff saw his primary care physician, Daniel Moullet, M.D., at various  
8 times throughout the record, very few appointments were related to mental health  
9 concerns.<sup>4</sup>

10 Second, the ALJ found that other treating records do not support finding that  
11 schizophrenia or other psychotic disorder is severe. Tr. 43. For example, in June  
12 2010, treating physician Michael Snook, M.D., described Plaintiff's schizophrenia

13 \_\_\_\_\_  
14 <sup>4</sup> See, e.g., Tr. 355 (on December 31, 2009, Plaintiff complained of a cough and  
15 was "very pleasant"); Tr. 352 (on February 10, 2010, Plaintiff admitted that he had  
16 not taken psychotropic medication for three weeks because he did not think he  
17 needed it; Dr. Moullet opined that bronchial pneumonia was resolving ); Tr. 347  
18 (on June 15, 2010, Plaintiff and Dr. Snook opined that Plaintiff's schizophrenia  
19 symptoms were fairly well-controlled); Tr. 346 (on July 27, 2010, Plaintiff  
20 followed up for high cholesterol).



1 as fairly well-controlled. Tr. 43 (citing Tr. 347). The effectiveness of medication  
2 and treatment is a relevant factor in determining the severity of a claimant's  
3 symptoms. 20 C.F.R. § 404.1529(c)(3), 616.929(c)(3); *see Warre v. Commissioner*  
4 *of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (Conditions effectively  
5 controlled with medication are not disabling for purposes of determining eligibility  
6 for benefits). Dr. Snook noted that Plaintiff described delusions and hallucinations  
7 "but [he] feel[s] they are controlled." Tr. 43 (citing 347) (Dr. Snook diagnosed  
8 dental caries, muscle tension headaches, and schizophrenia; he further opined that  
9 schizophrenia was "fairly well controlled."). The ALJ also found, as another  
10 example, that at an evaluation in February 2012, Plaintiff told Clark Ashworth,  
11 Ph.D., that he had not had any hallucinations since 2010 because he was on  
12 medication. Tr. 43 (citing Tr. 495).

13 Third, the ALJ found that Plaintiff's examinations have yielded scores that  
14 suggest malingering, another indication that Plaintiff's psychotic impairments are  
15 not as severe as alleged. Tr. 43 (citing Tr. 371) (in September 2010, examining  
16 psychologist Renee Thompson, Psy. D., noted that Plaintiff's scores in October  
17 2009 "had suggested malingering and [Plaintiff's] psychosis disorder required  
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1 confirmation.<sup>5</sup>”). The ALJ then found that at Dr. Thompson’s own evaluation  
2 about a year later, in September 2010, she opined that evidence of malingering or  
3 factitious<sup>6</sup> behavior may have been present. Dr. Thompson found, for example,  
4 that Plaintiff’s M-FAST<sup>7</sup> scores were even more elevated in 2010 than they had

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6 \_\_\_\_\_  
7 <sup>5</sup> Dr. Thompson noted that Plaintiff underwent the October 2009 evaluation to  
8 determine whether he qualified for GAU short-term disability; the diagnosis of  
9 psychotic disorder NOS was historical and based on prescribed antipsychotic  
10 medication; moreover, the diagnosis was provisional, requiring confirmation; rule  
11 out malingering, personality disorder NOS. Tr. 41 (citing Tr. 371). Dr. Thompson  
12 further explained that Plaintiff’s October 2009 M-FAST results suggested  
13 malingering and the MMPI was invalid. Tr. 41 (citing Tr. 371).

14 <sup>6</sup> Malingering means fabricating or exaggerating symptoms of any mental or  
15 physical disorders for personal gain. <https://www.ncbi.nlm.nih.gov>. Factitious, on  
16 the other hand, means not spontaneous or natural; artificial; contrived, but with no  
17 motive for personal gain. [www.dictionary.com/browse/factitious](http://www.dictionary.com/browse/factitious).

18 <sup>7</sup> The M-FAST is the Miller Forensic Assessment of Symptoms Test. Dr.  
19 Thompson noted that the typical cutoff score is 6; however, in October 2009,  
20 Plaintiff scored 13. Tr. 371. See *Tederman v. Colvin*, 2:14-CV-132-JTR, 2015

1 been in 2009, indicating that again Plaintiff had greatly exaggerated his symptoms.  
2 Tr. 43 (citing Tr. 372). Similarly, Dr. Thompson observed that “[i]mpression  
3 management to appear impaired is noted.” Tr. 372. An ALJ may permissibly rely  
4 on evidence of exaggeration as diminishing the credibility of a claimant’s  
5 complaints, *see Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001), and on  
6 testimony from physicians or third parties concerning the nature, severity, and  
7 effect of the claimant’s condition. *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th  
8 Cir. 2002). The ALJ also found, as another example, that Dr. Thompson observed  
9 that Plaintiff was unable to provide specific, and sometimes general, information  
10 about depression, anxiety or anger; Plaintiff endorsed schizophrenia in a  
11 “memorized, list form”; and Plaintiff did not appear anxious, depressed, or  
12 psychotic -- all indicating that any impairment was not severe and was not  
13 corroborated during Dr. Thompson’s examination. Tr. 43 (citing Tr. 372).  
14 Moreover, in February 2012, examining psychologist Clark Ashworth, Ph.D.,  
15 noted that Plaintiff’s MMPI results again were invalid. Tr. 499. The ALJ’s  
16 determination that her prior step two finding (of a diagnosis of schizophrenia or a  
17 psychotic disorder) was not corroborated is supported by the medical evidence.

18  
19 WL 7721210 at \*5 (E.D. Wash. November 27, 2015 (psychologist noted an M-  
20 FAST score of 9 is “significantly elevated”).

1 More importantly, although the ALJ did not adopt the same diagnoses at step  
2 two as in the first decision, she assessed *a more restrictive RFC* in the current  
3 decision – meaning that the ALJ took into account all of the evidence of mental  
4 impairments and included the resulting limitations in the RFC.<sup>8</sup> Therefore, even if  
5 the ALJ erred by not finding schizophrenia or a psychotic disorder was a severe  
6 impairment, the error is also harmless because the limitations attributable to those  
7 impairments and supported by the evidence were incorporated into the RFC.  
8 “Even when part of an ALJ’s five-step analysis is not linguistically completely  
9 clear or exhaustively complete, or precisely factually accurate, some errors are  
10 legally harmless, such as errors which do not affect the ultimate result of the  
11 analysis.” *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th  
12 Cir. 2008) (citing *Parra v. Astrue*, 481 F.3d 742, 747 (9th Cir. 2007)); *Curry v.*  
13 *Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990); *Booz v. Sec’y of Health and Human*  
14 *Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984). Here, Plaintiff generally contends  
15 that he “is much more limited than the ALJ determined[,]” ECF No. 20 at 11, but  
16 Plaintiff has failed to cite any evidence that establishes greater limitations than  
17 ultimately included in the RFC. Moreover, in this case, Plaintiff was not only

18 \_\_\_\_\_  
19 <sup>8</sup>The ALJ amended the prior RFC by adding that Plaintiff requires “a low stress  
20 working environment and working with objects/things rather than people.” Tr. 42.

1 unharmed, he actually benefitted, from the ALJ's changed step two findings  
2 because the ALJ assessed a more restrictive RFC in the second decision.

3       The ALJ is responsible for determining credibility and resolving conflicts in  
4 medical testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)  
5 (Where medical reports are inconclusive, “ ‘questions of credibility and resolution  
6 of conflicts in the testimony are solely functions of the Secretary.’ ”). When the  
7 evidence before the ALJ is subject to more than one rational interpretation, the  
8 court must defer to the ALJ's conclusion. *Baston v. Comm'r of Soc. Sec. Admin.*,  
9 359 F.3d 1190, 1193 (9th Cir. 2004) (“if evidence exists to support more than one  
10 rational interpretation, we must defer to the Commissioner's decision[.]”) (citing  
11 *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)).

12       Here, the ALJ's step two determination is a rational determination supported  
13 by the record and free of harmful error.

#### 14 **C. Adverse Credibility Finding**

15       Plaintiff faults the ALJ for failing to provide specific findings with clear and  
16 convincing reasons for discrediting his symptom claims. ECF No. 20 at 14.

17       An ALJ engages in a two-step analysis to determine whether a claimant's  
18 testimony regarding subjective pain or symptoms is credible. “First, the ALJ must  
19 determine whether there is objective medical evidence of an underlying  
20 impairment which could reasonably be expected to produce the pain or other

1 symptoms alleged.” *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).

2 “The claimant is not required to show that [his] impairment could reasonably be  
3 expected to cause the severity of the symptom [he] has alleged; [he] need only  
4 show that it could reasonably have caused some degree of the symptom.” *Vasquez*  
5 *v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

6 Second, “[i]f the claimant meets the first test and there is no evidence of  
7 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
8 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
9 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting  
10 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). “General findings are  
11 insufficient; rather, the ALJ must identify what testimony is not credible and what  
12 evidence undermines the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81  
13 F.3d 821, 834 (9th Cir. 1995); *Thomas*, 278 F.3d at 958 (“[T]he ALJ must make a  
14 credibility determination with findings sufficiently specific to permit the court to  
15 conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”)). “The  
16 clear and convincing [evidence] standard is the most demanding required in Social  
17 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting  
18 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

19 In making an adverse credibility determination, the ALJ may consider, *inter*  
20 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the

1 claimant's testimony or between his testimony and his conduct; (3) the claimant's  
2 daily living activities; (4) the claimant's work record; and (5) testimony from  
3 physicians or third parties concerning the nature, severity, and effect of the  
4 claimant's condition. *Thomas*, 278 F.3d at 958-59.

5 In challenging the ALJ's credibility finding, Plaintiff cites only to the ALJ's  
6 first decision. ECF No. 20 at 15-16 (citing Tr. 132-33). Because the first decision  
7 was vacated by the Appeals Council, it is irrelevant and therefore unnecessary for  
8 the Court's consideration.

9 This Court finds the ALJ's second decision provided specific, clear, and  
10 convincing reasons for finding that not all of Plaintiff's symptom allegations were  
11 credible. Tr. 44.

#### 12 *1. Minimal Treatment Sought*

13 The ALJ found the degree of mental health limitation Plaintiff alleged was  
14 inconsistent with the minimal treatment sought; as noted, the ALJ found that there  
15 were large unexplained gaps in treatment. Tr. 43. The medical treatment a  
16 Plaintiff seeks to relieve his symptoms is a relevant factor in evaluating the  
17 intensity and persistence of symptoms. 20 C.F.R. §§416.929(c)(3)(iv), (v). "[I]n  
18 assessing a claimant's credibility, the ALJ may properly rely on 'unexplained or  
19 inadequately explained failure to seek treatment or to follow a prescribed course of  
20 treatment.'" *Molina*, 674 F.3d at 1113 (quoting *Tommasetti v. Astrue*, 533 F.3d

1 1035, 1039 (9th Cir. 2008)). The ALJ found that although Plaintiff alleged he  
2 suffered severe symptoms beginning in 2008, unexplained infrequent treatment for  
3 these symptoms undermines Plaintiff's claims. Tr. 43 (the ALJ observed that there  
4 were large gaps in Plaintiff's treatment); *see also* Tr. 134 (in the first decision, the  
5 ALJ found that Plaintiff did not seek mental health treatment for approximately  
6 eight months, from August 2009 until April 2010. Tr. 398, 410. Plaintiff fails to  
7 challenge this reason, thus, the argument is waived on appeal. *See Carmickle*, 533  
8 F.3d at 1161 n. 2 (failure to challenge an ALJ's negative credibility finding on  
9 appeal waives any challenge).

## 10 2. Evidence of Exaggeration

11 Next, the ALJ discounted Plaintiff's testimony because at least two  
12 physicians suggested that Plaintiff exaggerated his symptoms. Tr. 43. The  
13 tendency to exaggerate is a permissible reason for discounting a Plaintiff's  
14 credibility. *See Tonapetyan*, 242 F.3d at 1148 (the ALJ appropriately considered  
15 Plaintiff's tendency to exaggerate when assessing Plaintiff's credibility, which was  
16 shown in a doctor's observation that Plaintiff was uncooperative during cognitive  
17 testing but was "much better" when giving reasons for being unable to work); *see*  
18 *also Thomas*, 278 F.3d at 959 (An ALJ may properly rely on a claimant's efforts to  
19 impede accurate testing of a claimant's limitations when finding a claimant less  
20 than credible).



1 The ALJ found, for example, that in September 2010, examining  
2 psychologist Dr. Thompson reported that Plaintiff's October 2009 scores had  
3 indicated malingering and a diagnosis of psychotic disorder required confirmation.  
4 Tr. 43 (citing Tr. 371). Dr. Thompson opined that Plaintiff's October 2009 M-  
5 FAST scores suggested malingering, and although Plaintiff completed an MMPI,<sup>9</sup>  
6 also in October 2009, those results were invalid. Tr. 43 (citing Tr. 371). The ALJ  
7 found, as another example, that Dr. Thompson opined that Plaintiff endorsed even  
8 more items on the M-FAST in 2010 than he had in 2009, revealing that Plaintiff  
9 exaggerated his symptoms. Tr. 43 (citing Tr. 372) (Dr. Thompson further  
10 observed that Plaintiff's impression management "to appear impaired is noted.").  
11 Moreover, the ALJ found, by way of further example, that on two occasions,  
12 treatment providers found that (after Plaintiff heard the symptomology of other  
13 disorders, bipolar disorder and a brain tumor), Plaintiff then wanted to endorse  
14 those symptoms, another likely indication that his reporting was less than credible.  
15 Tr. 43 (citing Tr. 347) (In June 2010, treating physician Dr. Snook noted Plaintiff  
16 reported that he was worried he had a brain tumor after seeing symptoms on  
17 television that frightened him; however, Dr. Snook opined that Plaintiff had no

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18  
19 <sup>9</sup> In February 2012, Dr. Ashworth opined that Plaintiff's MMPI results again were  
20 invalid. Tr. 499.

1 symptoms of a brain tumor). Similarly, the ALJ found that, also in June 2010,  
2 Plaintiff told a treating counselor he thought that he had bipolar disorder because  
3 he heard someone talking about it in the hall.<sup>10</sup> Plaintiff did not challenge these  
4 findings, thus, the argument is waived. *See Carmickle*, 533 F.3d at 1161 n. 2.

5 Because an ALJ may account for a Plaintiff's exaggeration of symptoms and  
6 behavior during an evaluation or treatment in assessing credibility, this was a  
7 specific, clear and convincing reason to discredit Plaintiff's testimony.

### 8 *3. Improvement with Medication*

9 Next, the ALJ found that Plaintiff's claims lacked credibility because  
10 Plaintiff's condition improved with medication. Tr. 43. The effectiveness of  
11 medication and treatment is a relevant factor in determining the severity of a  
12 claimant's symptoms. 20 C.F.R. § 404.1529(c)(3), 416.929(c)(3); *see Warre*, 439  
13 F.3d at 1006 (Conditions effectively controlled with medication are not disabling  
14 for purposes of determining eligibility for benefits) (internal citations omitted); *see*  
15 *also Tommasetti*, 533 F.3d at 1040 (a favorable response to treatment can  
16 undermine a claimant's complaints of debilitating pain or other severe limitations).

17 The ALJ found that treatment records, including Plaintiff's statements to

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18  
19 <sup>10</sup> The ALJ's citation is incorrect, and appears to be a harmless scrivener's error.  
20 Plaintiff's statement is at Tr. 415.

1 providers, consistently demonstrated improvement in symptoms when Plaintiff  
2 took prescribed psychotropic medications. For example, the ALJ found treating  
3 physician Dr. Snook opined that Plaintiff's schizophrenia was decently controlled.  
4 Tr. 43 (citing 347) (In June 2010, Dr. Snook reported that Plaintiff's schizophrenia  
5 was fairly well controlled). Significantly, in 2012, Plaintiff reported that he had  
6 experienced no hallucinations since taking medication. Tr. 43 (citing Tr. 495) (in  
7 February 2012, Plaintiff told evaluating physician Dr. Ashworth that he had no  
8 hallucinations since 2010 because he was on medication).

9 The ALJ provided another specific, clear and convincing reason for finding  
10 Plaintiff's statements less than credible.

#### 11 *4. Failure to Report Symptoms*

12 The ALJ found that Plaintiff failed to consistently report symptoms or  
13 limitations of a psychotic disorder or schizophrenia, or depression, during  
14 evaluations. Tr. 43. Subjective testimony cannot be rejected solely because it is  
15 not corroborated by objective medical findings, but medical evidence is a relevant  
16 factor in determining the severity of a claimant's impairments. *Rollins*, 261 F.3d at  
17 857; *see also Burch*, 400 F.3d at 681. The ALJ found, for example, that at an  
18 evaluation in February 2012, despite Dr. Ashworth's direct solicitation, Plaintiff  
19 failed to endorse any significant symptomology or limitations. Tr. 43 (citing Tr.  
20 496) (the ALJ found Plaintiff reported only that he sleeps late, stays in his room at

1 his grandparents' home, checks Facebook, and performs limited household chores;  
2 Plaintiff otherwise failed to report any significant limitations or symptoms).

3 Because an ALJ may discount pain and symptom testimony based on lack of  
4 medical evidence, as long as it is not the sole basis for discounting a claimant's  
5 testimony, the ALJ did not err when she found Plaintiff's complaints exceeded and  
6 were not supported by objective evidence, including his own reports to providers.

7 Plaintiff contends that the ALJ when she found him less than credible  
8 because (1) he was cited for driving while under the influence of intoxicants  
9 (DUI); (2) state evaluators pondered whether Plaintiff's paranoia symptoms were  
10 due to substance use; (3) Plaintiff did not disclose substance abuse or the program  
11 he attended after his DUI; and (4) Plaintiff stated that marijuana made him  
12 paranoid and he used methamphetamine. ECF No. 20 at 15 (citing Tr. 132-33).

13 Plaintiff's record citation is to the ALJ's first decision, which, as discussed,  
14 was vacated by the Appeals Council. Accordingly, the ALJ was not required to  
15 discuss these reasons as they were not relevant.

16 In sum, despite Plaintiff's statements to the contrary, the ALJ provided  
17 several specific, clear, and convincing reasons for rejecting Plaintiff's testimony.  
18 *See Ghanim*, 763 F.3d at 1163.

### 19 CONCLUSION

20 After review the Court finds the ALJ's decision is supported by substantial

1 evidence and free of harmful legal error.

2 **IT IS ORDERED:**

3 1. Plaintiff's motion for summary judgment, ECF No. 20, is **DENIED**.

4 2. Defendant's motion for summary judgment, ECF No. 25, is **GRANTED**.

5 The District Court Executive is directed to file this Order, provide copies to  
6 counsel, enter judgment in favor of defendant and **CLOSE** the file.

7 DATED this 23rd day of February, 2017.

8 *s/ Mary K. Dimke*

9 MARY K. DIMKE  
10 U.S. MAGISTRATE JUDGE