



1 further development of the record and a new hearing was held on November 8, 2012,  
2 before ALJ Payne. Plaintiff, represented by counsel, testified at this hearing, as did  
3 Jinnie Lawson as a Vocational Expert (VE). On January 25, 2013, the ALJ issued a  
4 decision finding the Plaintiff not disabled and denying him benefits. The Appeals  
5 Council denied a request for review and the ALJ's decision became the final  
6 decision of the Commissioner. This decision is appealable to district court pursuant  
7 to 42 U.S.C. §405(g) and §1383(c)(3).

### 8 9 **STATEMENT OF FACTS**

10 The facts have been presented in the administrative transcript, the ALJ's  
11 decision, the Plaintiff's and Defendant's briefs, and will only be summarized here.  
12 Plaintiff has a high school education and past relevant work experience as a sales  
13 representative and as a telemarketer. Plaintiff alleges a closed period of disability  
14 from January 25, 2004, through December 29, 2005. During that period, he was 44-  
15 45 years old.

### 16 17 **STANDARD OF REVIEW**

18 "The [Commissioner's] determination that a claimant is not disabled will be  
19 upheld if the findings of fact are supported by substantial evidence...." *Delgado v.*  
20 *Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere  
21 scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less  
22 than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);  
23 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.  
24 1988). "It means such relevant evidence as a reasonable mind might accept as  
25 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91  
26 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may  
27 reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457  
28 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT- 2**

1 On review, the court considers the record as a whole, not just the evidence supporting  
2 the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir.  
3 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

4 It is the role of the trier of fact, not this court to resolve conflicts in evidence.  
5 *Richardson*, 402 U.S. at 400. If evidence supports more than one rational  
6 interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749  
7 F.2d 577, 579 (9th Cir. 1984).

8 A decision supported by substantial evidence will still be set aside if the proper  
9 legal standards were not applied in weighing the evidence and making the decision.  
10 *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.  
11 1987).

## 12 ISSUES

13 Plaintiff argues the ALJ erred in not finding Plaintiff disabled during the  
14 closed period by: 1) improperly discounting the opinions of the examining  
15 psychologists, and 2) improperly discounting Plaintiff's credibility regarding his  
16 mental limitations.

## 18 DISCUSSION

### 19 SEQUENTIAL EVALUATION PROCESS

20 The Social Security Act defines "disability" as the "inability to engage in any  
21 substantial gainful activity by reason of any medically determinable physical or  
22 mental impairment which can be expected to result in death or which has lasted or can  
23 be expected to last for a continuous period of not less than twelve months." 42  
24 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A). The Act also provides that a claimant  
25 shall be determined to be under a disability only if her impairments are of such  
26 severity that the claimant is not only unable to do her previous work but cannot,  
27 considering her age, education and work experiences, engage in any other substantial  
28 gainful work which exists in the national economy. *Id.*

1           The Commissioner has established a five-step sequential evaluation process for  
2 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;  
3 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines  
4 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20  
5 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker  
6 proceeds to step two, which determines whether the claimant has a medically severe  
7 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and  
8 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination  
9 of impairments, the disability claim is denied. If the impairment is severe, the  
10 evaluation proceeds to the third step, which compares the claimant's impairment with  
11 a number of listed impairments acknowledged by the Commissioner to be so severe  
12 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and  
13 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or  
14 equals one of the listed impairments, the claimant is conclusively presumed to be  
15 disabled. If the impairment is not one conclusively presumed to be disabling, the  
16 evaluation proceeds to the fourth step which determines whether the impairment  
17 prevents the claimant from performing work she has performed in the past. If the  
18 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§  
19 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,  
20 the fifth and final step in the process determines whether she is able to perform other  
21 work in the national economy in view of her age, education and work experience. 20  
22 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

23           The initial burden of proof rests upon the claimant to establish a prima facie  
24 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
25 Cir. 1971). The initial burden is met once a claimant establishes that a physical or  
26 mental impairment prevents her from engaging in her previous occupation. The  
27 burden then shifts to the Commissioner to show (1) that the claimant can perform  
28 other substantial gainful activity and (2) that a "significant number of jobs exist in the

1 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
2 1498 (9th Cir. 1984).

3  
4 **ALJ'S FINDINGS**

5 The ALJ found that during Plaintiff's alleged closed period of disability: 1)  
6 Plaintiff had severe impairments, including musculoskeletal impairment of the spine,  
7 attention deficit hyperactivity disorder (ADHD), and dysthymic disorder; 2) Plaintiff  
8 did not have an impairment or combination of impairments that met or equaled any  
9 of the impairments listed in 20 C.F.R. § 404 Subpart P, App. 1; 3) Plaintiff had the  
10 residual functional capacity (RFC) to perform work that did not involve lifting or  
11 carrying more than a maximum of 10 pounds frequently or more than a maximum of  
12 20 pounds occasionally, or standing and/or walking for more than a total of 6 hours;  
13 he had moderate limitations in the ability to understand, remember and carry out  
14 detailed instructions, but was able to understand, remember, and carry out short and  
15 simple instructions and remember locations and work like procedures; he had  
16 moderate difficulty maintaining attention and concentration for extended periods and  
17 interacting with supervisors; he had mild to moderate limitations in the ability to  
18 interact with the public and get along with coworkers and peers without being  
19 distracted by them; and he was able to respond appropriately to changes in the work  
20 setting;<sup>1</sup> 4) Plaintiff's RFC prevented him from performing his past relevant work;  
21 and 5) Plaintiff's RFC allowed him to perform other jobs existing in significant  
22 numbers in the national economy, including laundry worker, housekeeper/cleaner,  
23 copy machine operator, and document preparer. Accordingly, the ALJ concluded the  
24 Plaintiff was not disabled between January 25, 2004, and December 29, 2005.

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26 \_\_\_\_\_  
27 <sup>1</sup> The ALJ defined "mild" as minimal ability to interference to function in a  
28 work setting, and "moderate" as occasional interference on the ability to function  
in the work setting. (Tr. at p. 24).

1 **MEDICAL SOURCE OPINIONS**

2 On September 2, 2004, Philip G. Barnard, Ph.D., a psychologist, examined the  
3 Plaintiff. On September 24, 2004, Dr. Barnard completed a Washington Department  
4 of Social and Health Services (DSHS) evaluation form in which he diagnosed  
5 Plaintiff with ADHD, dysthymic disorder, and mathematics disorder. (Tr. at p. 210).  
6 He indicated that Plaintiff was moderately limited in his abilities to understand,  
7 remember and follows complex (more than two step instructions); learn new tasks;  
8 and exercise judgment and make decisions. (Tr. at p. 211). For the purposes of this  
9 evaluation, “moderate” limitations are those which result in a “[s]ignificant  
10 interference with basic work-related activities.” (Tr. at p. 209). Dr. Barnard wrote  
11 that Plaintiff had “[p]roblems with attention and concentration,” difficulty in learning  
12 new tasks,” and that he was “emotionally explosive” and “depressed” which  
13 exacerbates problems with attention and concentration.” (Tr. at p. 211). Dr. Barnard  
14 also indicated Plaintiff had “moderate” limitations in his abilities to relate  
15 appropriately to co-workers and supervisors, interact appropriately in public contacts,  
16 respond appropriately to and tolerate the pressures and expectations of a normal work  
17 setting, and control physical or motor movements and maintain appropriate behavior.  
18 He wrote that Plaintiff was “anxious and depressed” and that he had a “low  
19 frustration tolerance.” (*Id.*). Dr. Barnard also indicated that “[w]ithin 6 mo period  
20 of time with treatment[,] Mr. Still should be able to return to gainful employment.”  
21 (Tr. at p. 212). The anticipated treatment included psychotropic medication,  
22 individual counseling every other week, and a referral to the DVR (Division of  
23 Vocational Rehabilitation) for re-training. (*Id.*). Dr. Barnard noted Plaintiff had yet  
24 to receive any mental health treatment. (*Id.*). He also noted that the cognitive and  
25 social functional limitations opined by him would last a maximum of 12 months and  
26 a minimum of 6 months. (*Id.*).

27 Subsequently, Plaintiff was seen at La Clinica Community Health. In  
28 December 2004, Valerie Krause, M.D., noted Plaintiff was being treated with

1 Strattera for his ADHD which Plaintiff indicated had improved his focus and  
2 concentration. (Tr. at p. 237). Dr. Krause also observed that:

3 He does complain of a worsening mood, however. His mood  
4 is poor. He feels sleepy all the time and just wants to stay  
5 in bed. He can get necessary things done but things that  
6 are not 100% necessary, he will not even attempt to start  
7 these tasks or finish them. He feels his energy and appetite  
8 is okay. He has never been treated for depression in the  
9 past. He notes he commonly has poor mood over the  
10 holiday season, although this is worse than in the past.  
11 December 2, 2004 is the birthday of a daughter that he  
12 no longer has visitation rights to and this depresses him  
13 very much. He has had some thoughts about harming  
14 himself or suicide including cutting himself with a knife  
15 or choking himself with fishing wire, but he had never had  
16 any suicide attempts. He is not having these thoughts  
17 actively over the past week, and he has no plans to carry  
18 out. He does live with his wife. He has not expressed to  
19 her any of the suicidal thoughts, but does talk to her about  
20 his mood.

21 (Tr. at p. 237).

22 As a result, Dr. Krause started Plaintiff on Prozac for “symptoms of major  
23 depressive disorder with some suicidal thoughts but no active plan or intent.” (Tr. at  
24 p. 237).

25 On January 5, 2005, Sergio Flores, M.D., at La Clinica, noted that Plaintiff was  
26 “doing well on fluoxetine<sup>2</sup>” and “denies any suicidal ideation.” (Tr. at p. 239).  
27 Plaintiff also reiterated that “his attention is much improved with the use of Strattera.”  
28 (*Id.*). On January 20, 2005, Dr. Krause indicated that Plaintiff was “doing well on  
medication,” noting that:

He feels his mood is great, his focus, concentration and  
reading comprehension are at a level where they have never  
been. He is enjoying doing things such as reading that he  
has never done before. He has no suicidal or homicidal  
ideation. His only side effect is a bit of fatigue.

(Tr. at p. 240).

In May 2005, Plaintiff saw Dr. Flores again. The doctor’s assessment was:

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<sup>2</sup> Generic name for Prozac.

1 Depression is stable. Continue with fluoxetine at the same  
2 dose.

3 Attention deficit disorder of the adult, stable. Continue  
4 Strattera. He feels psychologically and emotionally stable.  
5 He denies any suicidal ideation. He has not seen any psych  
6 doctors since September 2004, I recommended him that ideally  
7 he should have followup by psychiatry on a regular basis.  
8 Psych consultation done today.

9 (Tr. at p. 241).

10 In June 2005, Dr. Flores reported Plaintiff's depression was stable and that he  
11 denied any suicidal ideation. (Tr. at p. 243). In July 2005, however, Dr. Flores  
12 reported that Plaintiff had "been crying often in the last two weeks in spite of taking  
13 his medication" and had "called this clinic . . . to see if he would be able to increase  
14 the dose of his medication for depression." (Tr. at p. 245). Plaintiff denied any  
15 suicidal ideation, but Dr. Flores decided to increase Plaintiff's dosage of fluoxetine.  
16 (*Id.*).

17 On September 27, 2005, Plaintiff was psychologically examined by Jan M.  
18 Kouzes, Ed.D.. Dr. Kouzes indicated that information for her evaluation was  
19 gathered by reviewing Dr. Barnard's evaluation and "a Mental Disability Report  
20 recently provided by the Social Security Administration (Form SSA-3368)." (Tr. at  
21 p. 213).<sup>3</sup> Dr. Kouzes concurred with Dr. Barnard's diagnoses and assigned the  
22 Plaintiff a current Global Assessment of Functioning (GAF) score of 55. (Tr. at p.  
23 215). A GAF score between 51 and 60 indicates "moderate symptoms" or "moderate"  
24 difficulty in social, occupational, or school functioning. *American Psychiatric Ass'n,*  
25 *Diagnostic & Statistical Manual of Mental Disorders*, (4<sup>th</sup> ed. Text Revision  
26 2000)(DSM-IV-TR at p. 34). Dr. Kouzes noted that Plaintiff's assessment was that  
27 "psychotropic medication seems to have helped him stabilize his mood and improve  
28 his sense of well-being." (Tr. at p. 215). Nevertheless, the doctor opined that

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<sup>3</sup> It is not clear to which SSA "Mental Disability Report" Dr. Kouzes was referring.



1 “[w]ithout individual counseling, proper medication and vocational rehabilitation,  
2 Mr. Still’s prognosis is assessed to be guarded.” (*Id.*). Dr. Kouzes added the  
3 following:

4 Mr. Still demonstrated a fair ability to reason. Although he  
5 showed a fair ability to communicate and appears to have  
6 appropriate insight into his psychological and physical  
7 problems, his present issues of depression, anxiety, anger,  
8 emotional lability and impulsivity, and past history of  
9 criminal behaviors make his recovery to a normal life and  
10 productive work a difficult task. Continuous individualized  
11 counseling, close monitoring, and proper medication will  
12 likely be necessary and important to help stabilize his  
13 condition and to improve his well-being.

14 (Tr. at p. 216).

15 In early October 2005, Sharon Underwood, Ph.D., completed a Mental RFC  
16 assessment and a Psychiatric Review Technique form based on her review of the  
17 record. It does not appear, however, that she had the benefit of Dr. Kouzes’  
18 evaluation as she concluded there was “[i]nsufficient evidence for mental prior to  
19 9/24/04, went back 3 mos. for start of sufficient evidence 6/04.” (Tr. at p. 218). She  
20 concluded the Plaintiff was moderately limited in his ability to maintain attention and  
21 concentration for extended periods; in his ability to complete a normal workday and  
22 workweek without interruptions from psychologically based symptoms and to  
23 perform at a consistent pace without an unreasonable number and length of rest  
24 periods; in his ability to interact appropriately with the general public; and in his  
25 ability to accept instructions and respond appropriately to criticism from supervisors.  
26 (Tr. at pp. 217-18). Dr. Underwood wrote:

27 Capable of simple and complex tasks according to ability  
28 shown on cognitive tasks. However, cognitively he would  
do poorer if he was working beyond his physical comfort.  
Able to interact appropriately with others in formal  
situations. Currently stable on medications. Would do  
best with only occasional work with the public due to  
history of irritability.

(Tr. at p. 218). Consistent therewith and in regard to the “B” Criteria of the Listings  
in the Psychiatric Review Technique form, Dr. Underwood indicated Plaintiff had

1 moderate difficulties in maintaining social functioning and in maintaining  
2 concentration, persistence or pace, and was mildly restricted in his activities of daily  
3 living. (Tr. at p. 231).

4 Psychologist Marian F. Martin, Ph.D., testified at the August 2010  
5 administrative hearing regarding Plaintiff's mental condition during the alleged  
6 closed period of disability. In conjunction with her testimony, Dr. Martin completed  
7 a Psychiatric Review Technique form. In it, she concluded that Plaintiff had a "mild"  
8 limitation in terms of performing activities of daily living and in maintaining social  
9 functioning, and "moderate" difficulties in maintaining concentration, persistence or  
10 pace. (Tr. at p. 277). Dr. Martin noted that there were no records indicating any  
11 counseling or psychiatric treatment, other than the Plaintiff taking medication. (Tr.  
12 at p. 279). The doctor opined that Dr. Kouzes' evaluation indicated "adequate social  
13 functioning, with participation in church activities and with friends." (*Id.*).

14 Dr. Martin also completed a "Mental Medical Source Statement" in which she  
15 indicated Plaintiff had "moderate" limitations in his abilities to understand and  
16 remember detailed instructions, to carry out detailed instructions, to maintain  
17 attention and concentration for extended periods, and to accept instructions and  
18 respond appropriately to criticism from supervisors. (Tr. at pp. 281-82). With regard  
19 to Plaintiff's ability to work in coordination with or proximity to others without being  
20 distracted by them, Dr. Martin indicated the limitation ranged from mild ("no  
21 significant limitation"), to "moderate." (Tr. at p. 282). In the narrative portion of the  
22 "Mental Medical Source Statement," under the section titled "Mental Functional  
23 Capacity Assessment," Dr. Martin wrote:

24 Claimant should not have significant difficulty remembering  
25 locations and work-like procedures. He should be able to  
26 understand, remember and carry out short, simple instructions.  
27 Claimant may have moderate difficulty understanding, remembering  
28 and carrying out detailed instructions. He may have moderate  
difficulty maintaining attention and concentration for extended  
periods. He may have mild to moderate difficulty working in  
coordination with or proximity to others without being distracted  
by them. Claimant should not have more than mild difficulty

1 performing activities within a schedule or completing a normal  
2 workday and workweek without interruptions from psychologically  
3 based symptoms.

4 Claimant may have moderate difficulty interacting with supervisors,  
5 but he should not have more than mild difficulty interacting with  
6 the public and getting along with peers without distracting them.  
7 He should have no more than mild difficulty maintaining socially  
8 appropriate behavior. He should have no difficulty requesting  
9 assistance and asking simple questions.

10 Claimant is not likely to have more than mild difficulty responding  
11 to changes in the work setting. He should not have difficulty  
12 setting realistic goals, being aware of normal hazards or traveling  
13 in unfamiliar places.

14 (Tr. at p. 283).

15 At the administrative hearing, Plaintiff's counsel noted that Dr. Underwood had  
16 indicated Plaintiff was "moderately limited" in his ability to complete a normal  
17 workday and workweek without interruptions from psychologically based symptoms  
18 and to perform at a consistent pace without an unreasonable number and length of rest  
19 periods (Tr. at p. 218), whereas Dr. Martin indicated there was "no significant  
20 limitation." (Tr. at p. 282). Dr. Martin's response was:

21 Well, I guess I did not feel that his diagnosis would reach  
22 the level that would interfere to a moderate level with the,  
23 you know, with the normal work week; you know, a normal  
24 work day, because of psychological symptoms. So a dysthymic  
25 disorder is a sort of chronic mild level of depression. It looked  
26 like it was responding well to medication. And ordinarily, it  
27 should not interfere significantly with a work setting.

28 (Tr. at p. 471).

Dr. Martin testified she disagreed with Dr. Barnard's assessment of a moderate  
limitation with regard to interacting with the public and co-workers because there  
were other indications he was interacting appropriately in other settings such as his  
church, bible study groups and volunteering. (Tr. at p. 472). She did not believe that  
getting along with co-workers was an issue for the Plaintiff. (*Id.*).

It is settled law in the Ninth Circuit that in a disability proceeding, the opinion  
of a licensed treating or examining physician or psychologist is given special weight

1 because of his/her familiarity with the claimant and his condition. *Benecke v.*  
2 *Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Holohan v. Massanari*, 246 F.3d 1195,  
3 1202 (9<sup>th</sup> Cir. 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9<sup>th</sup> Cir. 1998));  
4 *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996); *Smolen v. Chater*, 80 F.3d 1273,  
5 1285-88 (9<sup>th</sup> Cir. 1996); *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d  
6 1453, 1463 (9<sup>th</sup> Cir. 1995); *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir. 1989). If  
7 the treating or examining physician's or psychologist's opinion is not contradicted,  
8 it can be rejected only for clear and convincing reasons. *Lester*, 81 F.3d at 830. If  
9 contradicted, the ALJ may reject the opinion if specific, legitimate reasons that are  
10 supported by substantial evidence are given. *See Flaten*, 44 F.3d at 1463; *Fair*, 885  
11 F.2d at 605. "[W]hen evaluating conflicting medical opinions, an ALJ need not  
12 accept the opinion of a doctor if that opinion is brief, conclusory, and inadequately  
13 supported by clinical findings." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9<sup>th</sup> Cir.  
14 2005). The opinion of a non-examining medical advisor/expert need not be  
15 discounted and may serve as substantial evidence when it is supported by other  
16 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,  
17 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995).

18 In his January 25, 2013 decision, ALJ Payne had this to say about the opinions  
19 of Drs. Barnard and Kouzes:

20 Some weight has been given to Dr. Barnard's September  
21 2004 opinion that the claimant had moderate limitations  
22 in the ability to understand, remember and follow complex  
23 instructions, learn new tasks; exercise judgment and make  
24 decisions; relate appropriately to coworkers, supervisors  
25 and in public contacts; respond appropriately to and  
26 tolerate the pressures and expectations of a normal work  
27 setting; and maintain appropriate behavior. However, it  
28 is noted this opinion was given prior to the claimant's  
alleged period of disability and before he was begun  
on Straterra and Prozac. Evidence during the pertinent  
period establishes the claimant was not as limited as  
Dr. Barnard thought.

In light of the claimant's good response to medication,  
the undersigned does not give significant weight to  
Dr. Kouzes' opinion that the claimant had issues of

1 depression, anxiety, anger, emotional lability, impulsivity,  
2 and history of criminal behavior that made recovery to  
3 a normal life and productive work a difficult task.  
4 Some weight is given to Dr. Kouzes' opinion that the  
5 claimant had fair ability to reason, adequate social  
6 functioning, fair ability to communicate and appropriate  
7 insight.

8 At the prior hearing on August 2, 2010, Dr. Martin  
9 persuasively testified the claimant had a number of  
10 moderate mental limitations, as outlined above. In  
11 light of the longitudinal evidence of record, significant  
12 weight is given to Dr. Martin's opinion.

13 The opinions of the non-examining State agency medical  
14 and psychological consultants tend to support the claimant's  
15 ability for the wide range of light work outlined above  
16 during the alleged closed period of disability.

17 (Tr. at pp. 28-29).

18 The non-exertional mental limitations which ALJ Payne presented to the VE  
19 in his hypothetical to her were taken essentially verbatim from the narrative contained  
20 in Dr. Martin's August 2, 2010 "Mental Medical Source Statement."

21 There is no question the ALJ erred in stating that Dr. Barnard's evaluation was  
22 rendered prior to the alleged period of disability. Indeed, it was rendered some nine  
23 months after the alleged onset date of January 25, 2004. Nevertheless, the ALJ was  
24 accurate in stating that Dr. Barnard's evaluation occurred prior to Plaintiff taking  
25 Strattera and Prozac. This is evident from Dr. Barnard's evaluation itself. The  
26 records from La Clinica, which prescribed the medication for Plaintiff, clearly reveal  
27 an improvement in Plaintiff's mental condition such that by early January 2005,  
28 Plaintiff had achieved stability with regard to both his ADHD and depression and  
denied further suicidal ideation which he had expressed to Dr. Krause in December  
2004. This stability continued through June 2005. While it is true that in July 2005,  
Plaintiff indicated he had "been crying often in the last two weeks in spite of taking  
his medication," he continued to deny any suicidal ideation and Dr. Flores increased  
Plaintiff's dosage of fluoxetine. Notes from subsequent appointments at La Clinica  
in August and November 2005 suggest the increased dosage of fluoxetine was helpful

1 to the Plaintiff. (Tr. at pp. 246 and 251).<sup>4</sup>

2 Dr. Kouzes acknowledged the medication had helped Plaintiff's mood and  
3 improved his sense of well-being. It is true she indicated Plaintiff's prognosis was  
4 guarded "[w]ithout individual counseling, proper medication and vocational  
5 rehabilitation," but all indications were that Plaintiff was receiving "proper  
6 medication" and approximately three months later, he returned to substantial gainful  
7 employment as a janitor at Wal-Mart without the benefit of any counseling or  
8 vocational rehabilitation. (Tr. at pp. 484; 501-02). Furthermore, Dr. Kouzes did not  
9 provide as specific an analysis of Plaintiff's functional limitations as Dr. Barnard did,  
10 and so it cannot be assumed she fully agreed with the pre-medication limitations  
11 expressed by him, even though she agreed with his diagnoses. Indeed, it is not  
12 apparent that Dr. Kouzes would have necessarily disagreed with the functional  
13 limitations subsequently opined by Dr. Martin at the August 2010 administrative  
14 hearing.

15 The ALJ provided specific and legitimate reasons, supported by substantial  
16 evidence, to not give full weight to the opinions of Drs. Barnard and Kouzes, and to  
17 adopt the limitations expressed by Dr. Martin which are supported by and consistent  
18 with other evidence in the record, as discussed below.

19  
20 **CREDIBILITY**

21 An ALJ can only reject a plaintiff's statement about limitations based upon a  
22 finding of "affirmative evidence" of malingering or "expressing clear and convincing  
23 reasons" for doing so. *Smolen*, 80 F.3d at 1283-84. "In assessing the claimant's  
24 credibility, the ALJ may use ordinary techniques of credibility evaluation, such as  
25 considering the claimant's reputation for truthfulness and any inconsistent statements  
26

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27 <sup>4</sup> None of the La Clinica doctors offered an assessment regarding Plaintiff's  
28 functional limitations and his ability to return to gainful employment.

1 in her testimony." *Tonapeytan v. Halter*, 242 F.3d 1144, 1148 (9<sup>th</sup> Cir. 2001). See  
2 also *Thomas v. Barnhart*, 278 F.3d 947, 958 (9<sup>th</sup> Cir.2002)(following factors may be  
3 considered: 1) claimant's reputation for truthfulness; 2) inconsistencies in the  
4 claimant's testimony or between her testimony and her conduct; 3) claimant's daily  
5 living activities; 4) claimant's work record; and 5) testimony from physicians or third  
6 parties concerning the nature, severity, and effect of claimant's condition).

7 The ALJ provided clear and convincing reasons supported by substantial  
8 evidence to find Plaintiff not entirely credible regarding his testimony about his  
9 functional mental limitations. This is borne out by Plaintiff's own reporting to his  
10 doctors once he commenced taking medication. In December 2004, Plaintiff told Dr.  
11 Krause that with regard to his ADHD, Strattera had improved his focus and  
12 concentration such that he could more meaningfully participate in his Bible study  
13 class. (Tr. at p. 237). By January 20, 2005, after he had started Prozac for his  
14 depression, it was reported by Plaintiff that "his mood is great, his focus,  
15 concentration, and reading comprehension are at a level where they have never been.  
16 He is enjoying doing things such as reading that he [h]as never done before. He has  
17 no suicidal or homicidal ideation." (Tr. at p. 240). In May 2005, he reported his  
18 ADHD and depression were "much improved with medication," he denied any  
19 suicidal ideation, his relationship with his wife was good, and his mood was much  
20 better. (Tr. at p. 241). In a subsequent appointment at La Clinica in August 2005,  
21 Plaintiff reported that apart from pain in his left ear, he was feeling fine. (Tr. at p.  
22 246). And in November 2005, Plaintiff indicated that with his increased dosage of  
23 Prozac, he was able to "maintain a better mood, less depression, no suicidal  
24 thoughts," and that he was also doing well with his current dose of Strattera for  
25 ADHD and had "no other significant complaints." (Tr. at p. 251).

26 Nothing that Plaintiff told Dr. Kouzes was inconsistent with the  
27 aforementioned. He told the doctor that he "plays mahjong on the computer for an  
28 hour or longer and watches news on TV;" "does some reading on the computer in the

1 evening before going to bed:” and “can completely care for himself, including  
2 personal hygiene.” (Tr. at p. 215). Even more significantly, Dr. Kouzes reported:

3 Mr. Still appears to have adequate social functioning beyond  
4 his interaction with his immediate family. He indicated that  
5 [he] goes to church every Sunday and volunteers as an usher.  
6 He stated he has a few friends and participates in a bible study  
7 group every week. He said he does not like to talk on the phone.  
8 As for his favorite pastimes, he indicated that he enjoys  
9 fishing, hiking, camping, playing games on the computer,  
10 repairing computers, and taking and developing photographs.

11 (Tr. at p. 215).

12 Dr. Martin’s RFC accords with Plaintiff’s own statements about his mental  
13 condition after he commenced taking medication for ADHD and depression. This is  
14 the RFC which was presented in the hypothetical question posed by the ALJ to the  
15 VE (Tr. at pp. 509-12) to which the VE responded by identifying certain jobs  
16 existing in significant numbers in the national economy. (Tr. at pp. 513-14).<sup>5</sup>

## 17 CONCLUSION

18 Substantial evidence supports the ALJ’s conclusion that Plaintiff was not  
19 disabled for a continuous period of twelve months during the time from January 25,  
20 2004 to December 29, 2005. The evidence supports more than one rational  
21 interpretation and therefore, the decision of the ALJ must be upheld. No later than  
22 January 5, 2005, and perhaps earlier, Plaintiff had the RFC, as determined by the  
23 ALJ, to perform other jobs existing in significant numbers in the national economy.

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24 <sup>5</sup> Plaintiff does not specifically raise an issue about the propriety of the  
25 ALJ’s hypothetical to the VE nor the VE’s response thereto. Under cross-  
26 examination by Plaintiff’s counsel, the VE explained why she believed the  
27 functional limitations presented by the VE allowed Plaintiff to perform the jobs  
28 identified by her (Tr. at pp. 519-524).



1 Defendant's Motion For Summary Judgment (ECF No. 21) is **GRANTED**  
2 and Plaintiff's Motion For Summary Judgment (ECF No. 18) is **DENIED**. The  
3 Commissioner's decision denying benefits is **AFFIRMED**.

4 **IT IS SO ORDERED.** The District Executive shall enter judgment  
5 accordingly and forward copies of the judgment and this order to counsel of record.

6 **DATED** this 26th of June, 2015.

7  
8 *s/Lonny R. Suko*

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LONNY R. SUKO  
10 Senior United States District Judge