

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 29, 2018

SEAN F. MCAVOY, CLERK

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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
8

9 JAMIESON K.,

10 Plaintiff,

11 v.
12

13 COMMISSIONER OF SOCIAL
14 SECURITY,

15 Defendant.
16

No.4:17-CV-05071-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

17 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
18 Nos. 15, 16. Attorney Chad L. Hatfield represents Jamieson K. (Plaintiff); Special
19 Assistant United States Attorney Sarah Leigh Martin represents the Commissioner
20 of Social Security (Defendant). The parties have consented to proceed before a
21 magistrate judge. ECF No. 6. After reviewing the administrative record and briefs
22 filed by the parties, the Court **GRANTS** Defendant's Motion for Summary
23 Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

24 **JURISDICTION**

25 Plaintiff filed applications for Supplemental Security Income (SSI) and
26 Disability Insurance Benefits (DIB) on July 8, 2013, Tr. 86, 99, alleging disability
27 since July 11, 2011, Tr. 262, 269, due to human immunodeficiency virus (HIV), a
28 hearing impairment, and a learning disability, Tr. 369. The applications were

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 denied initially and upon reconsideration. Tr. 179-82, 187-99. Administrative
2 Law Judge (ALJ) Mary Gallagher Dilley held a hearing on July 8, 2015 and heard
3 testimony from Plaintiff and vocational expert, Paul Prachyl. Tr. 37-76. The ALJ
4 issued an unfavorable decision on September 25, 2015. Tr. 20-31. The Appeals
5 Council denied review on March 27, 2017. Tr. 1-7. The ALJ's September 25,
6 2015 decision became the final decision of the Commissioner, which is appealable
7 to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for
8 judicial review on May 26, 2017. ECF Nos. 1, 4.

9 **STATEMENT OF FACTS**

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

13 Plaintiff was 46 years old at the alleged date of onset. Tr. 262. His highest
14 level of education was the twelfth grade completed in 1984. Tr. 370. His reported
15 work history includes the jobs of busser/service assistant, cashier, cook, fryer,
16 picker, plant caretaker, and salad bar prepper. Tr. 371, 380. Plaintiff reported that
17 he stopped working on June 1, 2012 because he was laid off for being too slow.
18 Tr. 369. However, he stated that he believed his condition became severe enough
19 to keep him from working as of July 11, 2011. Id.

20 **STANDARD OF REVIEW**

21 The ALJ is responsible for determining credibility, resolving conflicts in
22 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
23 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
24 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
25 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
26 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
27 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
28 being more than a mere scintilla, but less than a preponderance. Id. at 1098. Put

1 another way, substantial evidence is such relevant evidence as a reasonable mind
2 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
3 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
4 interpretation, the court may not substitute its judgment for that of the ALJ.
5 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
6 findings, or if conflicting evidence supports a finding of either disability or non-
7 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
8 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
9 evidence will be set aside if the proper legal standards were not applied in
10 weighing the evidence and making the decision. *Browner v. Secretary of Health*
11 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

12 **SEQUENTIAL EVALUATION PROCESS**

13 The Commissioner has established a five-step sequential evaluation process
14 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
15 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
16 through four, the burden of proof rests upon the claimant to establish a prima facie
17 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
18 burden is met once the claimant establishes that physical or mental impairments
19 prevent him from engaging in his previous occupations. 20 C.F.R. §§
20 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
21 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
22 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
23 which the claimant can perform exist in the national economy. *Batson v. Comm'r*
24 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant
25 cannot make an adjustment to other work in the national economy, a finding of
26 "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

27 **ADMINISTRATIVE DECISION**

28 On September 25, 2015, the ALJ issued a decision finding Plaintiff was not

1 disabled as defined in the Social Security Act.

2 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
3 activity since July 11, 2011, the alleged date of onset. Tr. 23.

4 At step two, the ALJ determined Plaintiff had the following severe
5 impairments: HIV; chronic obstructive pulmonary disease (COPD); hearing loss;
6 and anxiety disorder. Tr. 23.

7 At step three, the ALJ found Plaintiff did not have an impairment or
8 combination of impairments that met or medically equaled the severity of one of
9 the listed impairments. Tr. 23.

10 At step four, the ALJ assessed Plaintiff's residual function capacity and
11 determined he could perform a range of light work with the following limitations:

12
13 He is able to lift and carry 25 pounds occasionally and 20 pounds
14 frequently. He can stand and walk 6 hours in an 8 hour day; he can sit
15 6 hours in an 8 hour day. He needs to avoid high traffic areas during
16 conversation for understanding instructions due to impaired hearing, to
17 wit: a noise level of 3 or less. He must avoid concentrated exposure to
18 noise, fumes, odors, dusts, gases and hazards. He is able to perform
19 simple and well-learned, more complex tasks. He is capable of having
20 casual interaction with the public, coworkers and supervisors.

19 Tr. 25. The ALJ identified Plaintiff's past relevant work as cashier II and
20 concluded that Plaintiff was able to perform this past relevant work. Tr. 28-29.

21 As an alternative to denying Plaintiff's claim at step four, the ALJ made a
22 step five determination that, considering Plaintiff's age, education, work
23 experience and residual functional capacity, and based on the testimony of the
24 vocational expert, there were other jobs that exist in significant numbers in the
25 national economy Plaintiff could perform, including the jobs of housekeeping
26 cleaner, office helper, and parking lot cashier. Tr. 30. The ALJ concluded
27 Plaintiff was not under a disability within the meaning of the Social Security Act at
28 any time from July 11, 2011, through the date of the ALJ's decision. Id.

1 **ISSUES**

2 The question presented is whether substantial evidence supports the ALJ’s
3 decision denying benefits and, if so, whether that decision is based on proper legal
4 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
5 opinion evidence, (2) failing to make a proper step four determination, and (3)
6 failing to make a proper step five determination.

7 **DISCUSSION**

8 **1. Opinion Evidence**

9 Plaintiff argues the ALJ failed to properly consider and weigh the opinion
10 evidence from Tae-Im Moon, Ph.D., Jan M. Kouze, Ed.D., CeCilia Cooper, Ph.D.,
11 and Stephanie Santos, ARNP. ECF No. 15 at 7-11.

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

21 When an examining physician’s opinion is not contradicted by another
22 physician, the ALJ may reject the opinion only for “clear and convincing” reasons,
23 and when an examining physician’s opinion is contradicted by another physician,
24 the ALJ is only required to provide “specific and legitimate reasons” to reject the
25 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be
26 met by the ALJ setting out a detailed and thorough summary of the facts and
27 conflicting clinical evidence, stating her interpretation thereof, and making
28 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is

1 required to do more than offer her conclusions, she “must set forth [her]
2 interpretations and explain why they, rather than the doctors’, are correct.”
3 Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988).

4 **A. Tae-Im Moon, Ph.D.**

5 On February 6, 2013, Dr. Moon completed an evaluation of Plaintiff for the
6 Washington Department of Social and Health Services (DSHS). Tr. 710-15.
7 Following a clinical interview, a mental status exam, and a review of DSHS
8 psychological evaluations dated September 22, 2008 and September 26, 2007, Dr.
9 Moon gave Plaintiff a rule out diagnosis of cognitive disorder not otherwise
10 specified related to his HIV. Tr. 711. He opined that Plaintiff had a marked
11 limitation in the abilities to understand, remember, and persist in tasks by
12 following detailed instructions and to learn new tasks. Tr. 712. He also opined
13 that Plaintiff had a moderate limitation in an additional seven basic work activities.
14 Id.

15 The ALJ gave Dr. Moon’s opinion “little weight” because (1) it conflicted
16 with Plaintiff’s daily activities, (2) it was supplied in a check-the-box format
17 without citations to evidence, and (3) the only evidence Dr. Moon reviewed were
18 prior DSHS evaluations from Plaintiff’s prior determination. Tr. 28. Both parties
19 appear to agree that the specific and legitimate standard is appropriate in reviewing
20 the treatment of Dr. Moon’s opinion. ECF Nos. 15 at 11; 16 at 5.

21 The ALJ’s first reason, that it conflicts with Plaintiff’s daily activities, meets
22 the specific and legitimate standard. A claimant’s testimony about his daily
23 activities may be seen as inconsistent with the presence of a disabling condition.
24 See Curry v. Sullivan, 925 F.2d 1127, 1130 (9th Cir. 1990). The ALJ specifically
25 stated that the opined limitations in learning new tasks and/or understanding,
26 remembering and persisting in tasks by following detailed instructions is
27 inconsistent with Plaintiff’s reported activities of researching and looking for work
28 online, doing crossword puzzles, and being able to finish what he starts. Tr. 28.

1 The ALJ further alludes to her discussion of Plaintiff’s reported activities
2 contained under Finding 4. *Id.* Plaintiff simply asserts that there are no
3 inconsistencies between the opined limitations and the specific activities listed by
4 the ALJ. ECF No. 15 at 9-10. However, the Court finds that the ALJ’s conclusion
5 that the opined limitations were in conflict with Plaintiff’s reported activities is
6 supported by the record. The opined limitations were based on a rule out diagnosis
7 of a cognitive disorder. Tr. 711. A cognitive disorder resulting in limitations in an
8 ability to persist in tasks is inconsistent with playing word games, conducting
9 research, and being capable of following through with activities. Therefore, the
10 ALJ’s first reason is supported by substantial evidence and meets the necessary
11 standard.

12 The ALJ’s second reason, that Dr. Moon completed a check-the-box form
13 without citations to supporting evidence, is a specific and legitimate reason to
14 assign his opinion lessor weight. The ALJ specifically found that “[b]y checking
15 boxes on a template form instead of providing a narrative RFC [residual functional
16 capacity] assessment with citations to persuasive, credible, evidence, Dr. Moon
17 does not appear to have adequately considered the most the claimant can still do.”
18 Tr. 28. This is consistent with Ninth Circuit case law that has expressed a
19 preference for narrative opinions over opinions expressed on a check-the-box form.
20 See *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). However, the Ninth
21 Circuit more recently found that check-the-box forms that do not stand alone, but
22 are supported by records should be “entitled to weight that an otherwise
23 unsupported and unexplained check-box form would not merit.” *Garrison v.*
24 *Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014). Here, there are not hundreds of pages
25 of treatment records in support of Dr. Moon’s check-the-box form as there was in
26 *Garrison*, however, there is a mental status examination and a clinical interview.
27 Tr. 710-15. Here, the mental status exam and the clinical interview led to only a
28 rule out diagnosis, Tr. 711, and a recommendation for additional psychological

1 testing to rule out the diagnosis of a cognitive disorder related to HIV, Tr. 713.
2 The mental status exam did demonstrate difficulties in concentration, Tr. 714, but
3 considering this alone was not sufficient to support a confident diagnosis by Dr.
4 Moon, it is also not enough to support the opined limitations. Therefore, the ALJ's
5 reason that the check-the-box form failed to provide citations to specific evidence,
6 is sufficient to support giving the opinion less weight.

7 The ALJ's third reason, that the only evidence reviewed by Dr. Moon was
8 DSHS consultative reports from 2007 and 2008, is sufficient to give this opinion
9 less weight. The ALJ gave more weight to the opinion of state-agency examiners
10 who reviewed the overall record and provided narrative residual functional
11 capacity statements over the opinion of Dr. Moon, who evaluated Plaintiff but had
12 only reviewed evaluations from 2007 and 2008. Tr. 28. As discussed in more
13 length below, opinions that predate the alleged onset are limited relevance.
14 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008).
15 Therefore, an opinion that is partially based on non-probative evidence can be
16 granted less weight. There was no error in the ALJ's treatment of Dr. Moon's
17 opinion.

18 **B. Jan M. Kouze, Ed.D. and CeCilia Cooper, Ph.D.**

19 Dr. Kouze completed a psychological evaluation on September 26, 2007
20 diagnosing Plaintiff with depressive disorder, alcohol abuse in early full remission,
21 and methamphetamine abuse in early full remission. Tr. 503-08. She also opined
22 that Plaintiff had a marked to severe limitation, one marked limitation, and two
23 moderate limitations in areas of cognitive and social basic functioning. Tr. 505.

24 Dr. Cooper completed a psychological evaluation on February 21, 2008
25 diagnosing Plaintiff with mixed receptive-expressive language disorder and a
26 personality disorder not otherwise specified. Tr. 603-09. Dr. Cooper also
27 provided a medical source statement that Plaintiff would need supervision to
28 ensure that tasks were completed as instructed and that he would occasionally have

1 problems with supervisors and coworkers. Tr. 608.

2 The ALJ did not discuss these opinions specifically by name. However,
3 twice in her decision, she referenced records predating Plaintiff's May 21, 2008
4 denial for benefits, stating that they were for background information only and that
5 the prior applications were not being reopened. Tr. 20, 28. Plaintiff argues that the
6 ALJ was required to discuss and weigh these opinions. ECF No. 15 at 10. The
7 Court disagrees. These opinions reflect Plaintiff's residual functional capacity
8 during a time period that has already been adjudicated. The doctrine of res judicata
9 precludes the Court from reexamining the Plaintiff's residual functional capacity
10 prior to May 21, 2008 except as a comparison to see if Plaintiff's impairments have
11 worsened. *Fair v. Bowen*, 885 F.2d 597, 600 (9th Cir.1989). "Medical opinions
12 that predate the alleged onset of disability are of limited relevance." *Carmickle*,
13 533 F.3d at 1165 (9th Cir. 2008). Here, the ALJ did not apply the presumption of
14 continuing non-disability, Tr. 20-31, so whether or not Plaintiff's impairments
15 have worsened since May 21, 2008 is not an issue. The ALJ is not required to
16 discuss evidence that "is neither significant nor probative." *Howard ex rel. Wolff*
17 *v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003). Therefore, the ALJ's
18 determination refusing to address the medical evidence from the prior application
19 is not an error.

20 **C. Stephanie Santos, ARNP**

21 On December 2, 2013, Nurse Santos completed a Physical Function
22 Evaluation form for DSHS. Tr. 841-43. She diagnosed Plaintiff with (1) anxiety
23 resulting in moderate limitations in sitting, standing, and communicating, (2)
24 COPD resulting in marked limitations in walking, lifting, carrying, handling,
25 pushing, pulling, reaching, and stooping, (3) HIV resulting in none to mild
26 limitations in lifting, carrying, handling, pushing, pulling, reaching, stooping, and
27 crouching, and (4) a hearing impairment resulting in moderate limitations in
28 hearing and communicating. Tr. 842. Nurse Santos then limited Plaintiff to light

1 work, estimating that this limitation would persist with available medical treatment
2 for his lifetime. Tr. 843. The ALJ gave partial weight to the opinion, agreeing that
3 Plaintiff retains the ability to perform light work, but rejecting the marked
4 limitations resulting from COPD because (1) there was no independent respiratory
5 condition apart from Plaintiff’s “smoker’s cough,” (2) the limitations were not
6 consistent with Nurse Santo’s treatment notes, and (3) Nurse Santos did not cite
7 any credible, objective evidence to support this portion of her opinion. Tr. 28.
8 Additionally, the ALJ noted that “there is no indication that Nurse Santos is
9 qualified to assess the claimant’s mental functionality.” Id.

10 Opinions from nurse practitioners are not considered medical opinions
11 because they are not considered “acceptable medical sources.” 20 C.F.R. §§
12 404.1502(a)(7), 416.902(a)(7), 404.1527(a)(1), 416.927(a)(1). However, the ALJ
13 is required to consider these opinions, 20 C.F.R. §§ 404.1527(f)(1); 416.927(f)(1),
14 and the ALJ can only reject such opinions by providing reasons germane to each
15 witness for doing so. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014).

16 Here, the ALJ’s first reason, that there is not an independent respiratory
17 condition, is not supported by substantial evidence. First, the ALJ found COPD as
18 a severe impairment at step two, Tr. 23, and the ALJ stated earlier in her residual
19 functional capacity discussion, that Plaintiff’s COPD was demonstrated by
20 spirometry testing in July of 2013 showing a moderate airway obstruction with a
21 significant response to the bronchodilator, Tr. 26. Therefore, her conclusion that
22 this is nothing more than a “smoker’s cough” is inconsistent with her own findings
23 and the objective medical evidence. The Court notes that the July 2013 Pulmonary
24 Function Test is not fully legible as half the page is missing, but the diagnosis
25 appears to include moderate airway obstruction with significant response to
26 bronchodilator. Tr. 844. Furthermore, any assertion by the ALJ that Plaintiff
27 should be denied benefits due to his continued smoking despite being told to stop
28 is considered questionable practice. *Shramek v. Apfel*, 226 F.3d 809, 813 (7th Cir.

1 2000) (“Given the addictive nature of smoking, the failure to quit is as likely
2 attributable to factors unrelated to the effect of smoking on a person’s health.”).
3 As such, this reason is not legally sufficient.

4 The ALJ’s second reason, that the limitations were not consistent with Nurse
5 Santo’s treatment notes, is supported by substantial evidence and legally sufficient.
6 Once Plaintiff reported that he had run out of his inhaler but was not experiencing
7 acute episodes without it. Tr. 734. Twice Plaintiff reported using the rescue
8 inhaler once a day or less and that he was breathing well. Tr. 846, 849. Twice
9 Plaintiff reported using the inhaler every six hours. Tr. 853, 857. Therefore, there
10 is evidence both for and against the ALJ’s determination and the Court defers to
11 the ALJ’s findings. See Tackett, 180 F.3d at 1097 (If the evidence is susceptible to
12 more than one rational interpretation, the court may not substitute its judgment for
13 that of the ALJ.).

14 The ALJ’s third reason, that Nurse Santos failed to cite any credible,
15 objective evidence in support of her opinion, is supported by substantial evidence
16 and legally sufficient. Plaintiff is accurate that Nurse Santos attached the July
17 2013 Spirometry results, ECF No. 15 at 11 citing Tr. 844, but this supports the
18 diagnosis of the COPD, not the opined severity of limitations. This testing showed
19 significant response to the bronchodilator supporting the conclusion that the
20 condition responds well to medication. Therefore, Nurse Santos failed to cite to
21 any objective evidence in support of the severity of the limitations opined.

22 The ALJ’s reference to Nurse Santos’ qualification to assess Plaintiff’s
23 mental functionality meets the germane standard. Nurse Santos is a nurse
24 practitioner with no stated emphasis or specialty. Tr. 843. A provider’s
25 specialization is one of the factors for the ALJ to consider when addressing the
26 opinions from non-acceptable medical sources. 20 C.F.R §§ 404.1527(f)(1),
27 416.927(f)(1). Therefore, this is an adequate reason to give Nurse Santo’s opinion
28 less weight than the opinion of psychologists. Tr. 27-28.

1 While the first reason provided by the ALJ was not supported by substantial
2 evidence, the subsequent reasons were and they met the germane standard.
3 Therefore, any resulting error would be harmless. See *Tommasetti v. Astrue*, 533
4 F.3d 1035, 1038 (9th Cir. 2008) (An error is harmless when “it is clear from the
5 record that the . . . error was inconsequential to the ultimate nondisability
6 determination.”). This Court finds no harmful error in the ALJ’s treatment of the
7 opinion evidence.

8 **2. Step Four**

9 Plaintiff alleges that the ALJ failed to properly follow the three step analysis
10 set forth in S.S.R. 82-62 when determining whether a claimant could perform his
11 past relevant work. ECF No. 15 at 11-13.

12 Social Security Ruling 82-62 promulgated that when finding that an
13 individual has the capacity to perform his past relevant job, the ALJ’s decision
14 must contain the following specific findings of fact: (1) a finding of fact as to the
15 claimant’s residual functional capacity; (2) a finding of fact as to the physical and
16 mental demands of the past job/occupation; and (3) a finding of fact that the
17 claimant’s residual functional capacity would permit a return to his past job or
18 occupation.

19 Plaintiff alleges that the ALJ erred by (1) failing to include all of Plaintiff’s
20 limitations in the residual functional capacity determination and (2) failing to
21 compare the specific demands of Plaintiff’s past work with his specific functional
22 limitations. ECF No. 15 at 12-13.

23 Plaintiff’s first challenge rests on the assertion that the ALJ erred in his
24 treatment of the opinion evidence when forming the residual functional capacity
25 determination. ECF No. 15 at 12. The Court has found no harmful error on the
26 part of the ALJ for her treatment of the opinion evidence in formulating the
27 residual functional capacity determination. See *supra*. Therefore, Plaintiff’s first
28 challenge to the step four determination fails.

1 Plaintiff's second challenge, that the ALJ failed to compare the specific
2 demands of Plaintiff's past work with his specific functional limitations, is
3 inconsistent with the very specific findings of the ALJ. In coming to her step four
4 determination, the ALJ devoted an entire paragraph to this comparison beginning
5 with the phrase, "In comparing the claimant's residual functional capacity with the
6 physical and mental demands of this work . . ." Tr. 29. The ALJ stated that she
7 accepted the vocational expert's testimony that the claimant could perform this
8 work and that she reviewed the assigned tasks in the Dictionary of Occupational
9 Titles and noise level for the position of cashier II. Therefore, Plaintiff's assertion
10 is unfounded.

11 Furthermore, if the ALJ did error in forming her step four determination, any
12 resulting error would be deemed harmless since the ALJ continued forward in the
13 analysis and made an alternative step five determination. See Tommasetti, 533
14 F.3d at 1038 (An error is harmless when "it is clear from the record that the . . .
15 error was inconsequential to the ultimate nondisability determination.").

16 **3. Step Five**

17 Plaintiff alleges that the hypothetical that was based on the ALJ's residual
18 functional capacity determination and provided to the vocational expert at the
19 hearing lacked several limitations resulting in a flawed step five determination.
20 ECF No. 15 at 13-14. The argument relies on the Court finding the ALJ erred in
21 the treatment of opinion evidence when formulating the residual functional
22 capacity determination. *Id.* The ALJ did not commit harmful error in weighing
23 the opinion evidence when devising her residual functional capacity determination.
24 See *supra*. Therefore, the ALJ did not error in her step five determination.

25 **CONCLUSION**

26 Having reviewed the record and the ALJ's findings, the Court finds the
27 ALJ's decision is supported by substantial evidence and free of harmful legal error.
28 Accordingly, **IT IS ORDERED:**

1 1. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is
2 **GRANTED.**

3 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 15**, is **DENIED.**

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

7 DATED May 29, 2018.



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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE

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