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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Paul LoPresto,

10 Plaintiff,

11 vs.

12 Carolyn W. Colvin, Acting Commissioner
13 of the Social Security Administration,

14 Defendant.

No. CV-12-00739-PHX-GMS

ORDER

15 Pending before the Court is the appeal of Plaintiff Paul LoPresto, who challenges
16 the Social Security Administration's decision to deny benefits. (Doc. 1.) For the reasons
17 set forth below, the Court affirms that decision.

18 **BACKGROUND**

19 Plaintiff Paul LoPresto, a Vietnam War veteran, claims that he has been disabled
20 since May 1, 2005. (R. at 25.) He is around 63 years old and has a high school education.
21 (*Id.* at 36, 54.) Prior to the onset of his alleged disability, LoPresto worked as a bus
22 driver, secretary, and golf course pro shop worker and ranger. (*Id.* at 71.) LoPresto
23 submitted a Title II application for disability and disability benefits on February 4, 2008.
24 (*Id.* at 25.) The Social Security Administration ("SSA") denied his claims on August 21,
25 2008, and again on December 31, 2008. (*Id.*) LoPresto subsequently requested a hearing,
26 which was held on April 20, 2010 in Phoenix, Arizona. (*Id.*) On July 28, 2010, the
27 Administrative Law Judge ("ALJ") issued his decision finding that LoPresto was not
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1 disabled under sections 216(i) and 223(d) of the Social Security Act. (*Id.* at 37.)

2 To determine whether LoPresto was disabled, the ALJ undertook the five-step
3 analysis detailed at 20 C.F.R. §§ 404.1520(a) and 416.920(a).¹ (R. at 26.) He determined
4 at the first step that LoPresto had not engaged in substantial gainful activity since May 1,
5 2005, the alleged onset date. (*Id.* at 27.) The ALJ then found that LoPresto had the
6 following severe impairments: chronic knee strain, major depression, generalized anxiety,
7 a post-traumatic stress disorder (“PTSD”), and obesity. (*Id.* at 28.) At step three, the ALJ
8 determined that none of these impairments, either alone or in combination, met or
9 equaled any of the SSA’s listed impairments. (*Id.*)

10 At that point, the ALJ made a determination of LoPresto’s residual functional
11 capacity (“RFC”),² concluding that LoPresto could perform medium unskilled work as
12 defined in 20 C.F.R. § 404.1567(c), except that he cannot climb, squat, kneel, crawl,

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14 ¹ Under the test:

15 A claimant must be found disabled if she proves: (1) that she is not
16 presently engaged in a substantial gainful activity[,] (2) that her
17 disability is severe, and (3) that her impairment meets or equals one
18 of the specific impairments described in the regulations. If the
19 impairment does not meet or equal one of the specific impairments
20 described in the regulations, the claimant can still establish a prima
21 facie case of disability by proving at step four that in addition to the
22 first two requirements, she is not able to perform any work that she
23 has done in the past. Once the claimant establishes a prima facie
24 case, the burden of proof shifts to the agency at step five to
25 demonstrate that the claimant can perform a significant number of
26 other jobs in the national economy. This step-five determination is
27 made on the basis of four factors: the claimant’s residual functional
28 capacity, age, work experience and education.

22 *Hoopai v. Astrue*, 499 F.3d 1071, 1074–75 (9th Cir. 2007) (internal
23 citations and quotations omitted).

24 ² In greater detail, a residual functional capacity (“RFC”) is “an assessment of an
25 individual’s ability to do sustained work-related physical and mental activities in a work
26 setting on a regular and continuing basis.” S.S.R. 96–8p. In particular, the RFC
27 assessment must describe the maximum amount of each work-related activity the
28 individual can perform based on the evidence available in the case record. *Id.* The RFC
determination may be based on a wide variety of evidence in the record—the claimant’s
medical history, laboratory findings, the effects of treatment, reports of daily activities,
lay evidence, recorded observations, medical source statements, effects of symptoms that
are reasonably attributable to a medically determinable impairment, evidence from
attempts to work, the need for a structured living environment, and work evaluations. *Id.*

1 crouch, use his lower extremities, push, pull and interact with the public. (R. at 30.) Still
2 at step four, the ALJ concluded that LoPresto was unable to perform any of his past
3 relevant work. (*Id.* at 35.) The ALJ therefore reached step five and found that LoPresto
4 was not disabled because there are jobs that exist in significant numbers in the national
5 economy that he could perform. (*Id.* at 35–36.) The Appeals Council declined to review
6 the decision. (*Id.* at 1-3.)

7 LoPresto filed the Complaint in this action on April 6, 2012, seeking the Court’s
8 review of the ALJ’s denial of benefits. (Doc. 1.) The matter became fully briefed on
9 December 21, 2012. (Docs. 20, 21, 25.)

10 DISCUSSION

11 I. LEGAL STANDARD

12 A reviewing federal court will address only the issues raised by the claimant in the
13 appeal from the ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir.
14 2001). A federal court may set aside a denial of disability benefits when that denial is
15 either unsupported by substantial evidence or based on legal error. *Thomas v. Barnhart*,
16 278 F.3d 947, 954 (9th Cir. 2002). Substantial evidence is “more than a scintilla but less
17 than a preponderance.” *Id.* (quotation omitted). It “is relevant evidence which,
18 considering the record as a whole, a reasonable person might accept as adequate to
19 support a conclusion.” *Id.* (quotation omitted).

20 Subject to the Ninth Circuit’s standards in particular cases, the ALJ is responsible
21 for resolving conflicts in testimony, determining credibility, and resolving ambiguities.
22 *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). “When the evidence before
23 the ALJ is subject to more than one rational interpretation, we must defer to the ALJ’s
24 conclusion.” *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9th Cir. 2004).
25 This is so because “[t]he [ALJ] and not the reviewing court must resolve conflicts in
26 evidence, and if the evidence can support either outcome, the court may not substitute its
27 judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)
28 (citations omitted).

1 **II. ANALYSIS**

2 LoPresto argues that the ALJ erred by: (A) improperly discounting the assessment
3 of his social worker, Dawn Malone and improperly assigning substantial weight to the
4 opinion of the agency doctors, (B) improperly discounting LoPresto’s own testimony of
5 the severity of his symptoms, and (C) failing to follow the function-by-function
6 determination described in Social Security Ruling (“SSR”) 85-15.³

7 **A. Weight Assigned to Medical Sources**

8 LoPresto challenges how the ALJ dealt with three medical sources: his licensed
9 clinical social worker Dawn Malone, consultative examining physician Dr. Frederick
10 Obitz, and agency reviewing physician Dr. Eugene Campbell.

11 **1. Applicable Standards**

12 The SSA regulations describe a hierarchy of medical sources. The Parties dispute
13 how the ALJ should treat the opinions of different medical sources. The regulations invite
14 the ALJ to review opinion evidence in making a disability determination, and place a
15 premium on “medical opinions.” 20 C.F.R. § 404.1527(a). “Medical opinions are
16 statements from physicians and psychologists or other *acceptable medical sources* that
17 reflect judgments about the nature and severity of your impairment(s), including your
18 symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and
19 your physical or mental restrictions.” *Id.* § 404.1527(a)(2) (emphasis added). “Acceptable
20 medical sources,” in turn, are “[l]icensed physicians”, “[l]icensed or certified
21 psychologists”, “[l]icensed optometrists,” “[l]icensed podiatrists,” and “[q]ualified
22 speech-language pathologists” *Id.* § 404.1513(a); *see also id.* § 404.1502 (referring
23 to § 404.1513(a) for definition of acceptable medical source).

24 The regulations then craft several tiers of those medical opinions. The opinion of a

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26 ³ Social Security Rulings (SSRs) “do not carry the ‘force of law,’ but they are
27 binding on ALJs nonetheless.” *Bray v. Comm’r Soc. Sec. Admin.*, 554 F.3d 1219, 1224
28 (9th Cir. 2009). They “‘reflect the official interpretation of the [SSA] and are entitled to
some deference as long as they are consistent with the Social Security Act and
regulations.’” *Id.* (alteration in original) (quoting *Avenetti v. Barnhart*, 456 F.3d 1122,
1124 (9th Cir. 2006)).

1 treating physician carries more weight than non-treating medical sources. *See Orn v.*
2 *Astrue*, 495 F.3d 625, 631 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
3 1995); 20 C.F.R. § 404.1527(c). Moving down the chain, the opinions of examining
4 physicians generally carry more weight than those of non-examining physicians. 20
5 C.F.R. § 404.1527(c); *Orn*, 495 F.3d at 631. As the Commissioner has stated, “[t]he
6 regulations provide progressively more rigorous tests for weighing opinions as the ties
7 between the source of the opinion and the individual become weaker.” SSR 96-6p. And
8 so “the opinions of physicians or psychologists who do not have a treatment relationship
9 with the individual are weighed by stricter standards, based to a greater degree on
10 medical evidence, qualifications, and explanations for the opinions, than are required of
11 treating sources.” *Id.*

12 The hierarchy described above applies only to “medical opinions”, which are those
13 opinions that come from “acceptable medical sources.” For purposes of this case, Drs.
14 Obitz and Campbell are acceptable medical sources. In addition, other licensed
15 physicians who treated LoPresto and whose notes are part of the record are acceptable
16 medical sources.

17 Malone, a licensed clinical social worker, is not. 20 C.F.R. §§ 404.1513,
18 404.1527; *see also* SSR 06-03p. She is an “other source,” albeit a medical one. The SSA
19 has recognized the value of opinions from other medical sources:

20 With the growth of managed health care in recent years and the emphasis
21 on containing medical costs, medical sources who are not “acceptable
22 medical sources,” such as nurse practitioners, physician assistants, and
23 licensed clinical social workers, have increasingly assumed a greater
24 percentage of the treatment and evaluation functions previously handled
25 primarily by physicians and psychologists. Opinions from these medical
26 sources, who are not technically deemed “acceptable medical sources”
27 under our rules, are important and should be evaluated on key issues such
28 as impairment severity and functional effects, along with the other relevant
evidence in the file.

SSR 06-03p. Nevertheless, contrary to LoPresto’s claim, Malone’s opinion carries less
weight than if she were a licensed physician. An ALJ can discount an opinion from an

1 “other” medical source like Malone so long as he gives “reasons ‘germane’ to [her] for
2 discounting.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). So long as the
3 reason for discounting is “germane” and has evidentiary support in the record, the ALJ
4 does not act improperly.⁴

5 For the reasons described above, the Court declines to accept LoPresto’s argument
6 for why the “germane” standard articulated most recently in *Molina* applies only to lay
7 witnesses, and not to medical sources. That argument runs against the language of the
8 regulations and the Ninth Circuit cases interpreting those regulations.

9 2. Licensed Clinical Social Worker Malone

10 Malone worked with LoPresto from February 12, 2008, through May 30, 2009. (R.
11 at 32.) She saw him for PTSD, major depressive disorder (recurrent), and adjustment
12 disorder with mixed anxiety and depressed mood. (*Id.*) Throughout the course of their
13 visits, she observed from LoPresto’s actions and reports of his actions that he had
14 anxiety, depression, anger, and an impaired ability to manage daily living activities. (*Id.*
15 at 625–37.) She administered a “Mini Status Examination,” which assessed LoPresto’s
16 basic cognitive functions. (*Id.* at 627–30.) LoPresto scored in the normal range. (*Id.*)

17 In a letter to the Veteran’s Administration (“VA”), Malone stated that LoPresto’s
18 symptoms “have all been consistent and persistent[,] . . . chronic and severe.” (*Id.* at 638.)
19 She described “frequent panic attacks while driving.” (*Id.* at 639.) She concluded her
20 letter with the following observations: “Mr. Lopresto relives the trauma of his
21 participation in Vietnam on a daily and consistent basis. Not only does the trauma
22 infiltrate his sleep . . . , but also is intrusive to his thoughts during waking hours. He does
23 not and (cannot) trust others and has had several failed attempts at employment and
24 socialization endeavors.” (*Id.*)

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26 ⁴ SSR 06-03p provides examples of the factors an ALJ might consider when
27 evaluating “other” medical sources: “[h]ow long the source has known and how
28 frequently the source has seen the individual; [h]ow consistent the opinion is with other
evidence; [t]he degree to which the source presents relevant evidence to support an
opinion; [h]ow well the source explains the opinion; [w]hether the source has a specialty
or area of expertise related to the individual's impairment(s).”

1 In connection with LoPresto’s SSA application, Malone filled out a checkbox
2 form entitled “Medical Assessment of the Patient’s Ability to Perform Work Related
3 Activity.” She rated as “severe”⁵ LoPresto’s degree of deterioration in personal habits and
4 interests, as well as his ability to respond appropriately to co-workers and to customary
5 work pressures. (*Id.* at 452–53.) She rated as “moderately severe”⁶ LoPresto’s degree of
6 restriction in daily activities and abilities to relate to other people; to understand, carry
7 out, and remember instructions; to respond appropriately to supervision; to perform
8 simple, complex, repetitive, and varied tasks; to complete a normal workweek without
9 interruptions from psychologically based symptoms; and to perform at a consistent pace
10 without an unreasonable number/length of rest periods. (*Id.*) A vocational expert testified
11 at LoPresto’s hearing and opined that those limitations would preclude all work activity
12 on a sustained basis. (*Id.* at 75.)

13 The ALJ gave two reasons for discounting Malone’s opinions on the degree of
14 LoPresto’s limitations. In his view, the opinion was “inconsistent and appears to be more
15 restrictive than the medical record of evidence documents, in light of the fact that Ms.
16 Malone found the claimant’s mental limitations to be significantly more severe than any
17 other medical opinion, including those of examining physician Dr. [Obitz] and the State
18 Agency.” (*Id.* at 35.) In addition, the ALJ noted that “[t]he possibility always exists that a
19 doctor may express an opinion in an effort to assist a patient with whom he or she
20 sympathizes for one reason or another.” (*Id.*) For the Court to affirm, these reasons must
21 be “germane” to a licensed social worker like Malone and supported by substantial
22 evidence in the record.

23 There is substantial evidence of inconsistency to support the ALJ’s determination.
24 In his order, the ALJ primarily relied on the divergence of opinion between Malone and
25 Drs. Obtiz and Campbell. As discussed below, Dr. Obtiz was an examining physician and
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27 ⁵ Extreme impairment of ability to function. (R. at 452.)

28 ⁶ Impairment which seriously affects ability to function. (*Id.*)

1 Dr. Campbell was a non-examining physician. Both came to conclusions regarding the
2 severity of LoPresto's symptoms that were quite different than Malone. Because both Dr.
3 Obtiz and Dr. Campbell are considered acceptable medical sources and Malone is not, the
4 fact that the conclusions of a non-acceptable medical source differed from the
5 conclusions of acceptable medical sources would be a germane reason, supported in the
6 record, for discounting Malone's opinion.

7 Moreover, there is evidence from LoPresto's other physicians that would allow the
8 ALJ to find an inconsistency. The ALJ set forth several examples where LoPresto's
9 treating physicians at the VA, Drs. Martha Gonzales and Himanshu Patel, report that
10 LoPresto is "doing well" or "doing good" on his medication regime. (*Id.* at 31, 32.) The
11 medical records that the ALJ cited support those statements and show that LoPresto often
12 reported improvement and effectiveness of medication. (*Id.* at 469–80, 496, 641–85,
13 696.) For example, a report from February 26, 2009, states that LoPresto "has improved
14 over the past few years. [He] [d]enies current depressed periods . . . [and] denies
15 irritability or thoughts of harming self or others." (*Id.* at 696.) Consequently, there is
16 substantial evidence to support the ALJ's conclusion that Malone's opinion was
17 "inconsistent . . . [because] Ms. Malone found the claimant's mental limitations to be
18 significantly more severe than any other medical opinion." (*Id.* at 35.) A marked
19 departure from the medical evidence is a germane reason for rejecting the opinion of an
20 "other source," and there is sufficient evidence to uphold the ALJ's determination.

21 **3. Drs. Obitz and Campbell**

22 LoPresto also challenges the weight the ALJ assigned to the conclusions of Drs.
23 Obitz and Campbell. Dr. Obitz examined LoPresto in April 2006. (*Id.* at 284.) Like the
24 other physicians, he diagnosed LoPresto with PTSD. (*Id.* at 287.) He assigned a GAF of
25 50, which means that he thought the symptoms were within the "serious" range. (*Id.*) Dr.
26 Obitz stated his opinion that "the veteran's posttraumatic stress disorder would not
27 preclude all employment. The veteran acknowledges he might work if he could decide
28 what is the right job for him." (*Id.*) The ALJ assigned "substantial weight" to the

1 conclusions of Dr. Obitz “because he examined the claimant and his opinion is consistent
2 with the medical evidence in the record.” (*Id.* at 34.)

3 LoPresto asserts the ALJ cannot assign “substantial weight” to Dr. Obitz’s report
4 because Malone is the equivalent of a treating physician, citing *Orn*, 496 F.3d at 632–33.
5 But *Orn* dealt with a licensed physician and thus is not applicable to this case for the
6 reasons described above—the law does not place Malone on the same plane as a treating
7 physician. The ALJ is thus not precluded from placing great weight on the report of an
8 examining physician.

9 LoPresto next contends that the ALJ improperly interpreted Dr. Obitz’s claim that
10 LoPresto’s symptoms “would not preclude all employment” to mean that LoPresto could
11 perform “medium unskilled work” with movement⁷ and social restrictions. “Ordinarily,
12 RFC is the individual’s *maximum* remaining ability to do sustained work activities in an
13 ordinary work setting on a **regular and continuing** basis, and the RFC assessment must
14 include a discussion of the individual's abilities on that basis. A ‘regular and continuing
15 basis’ means 8 hours a day, for 5 days a week, or an equivalent work schedule.” SSR 96-
16 8p (emphases in original). There is substantial evidence to justify the ALJ’s interpretation
17 of Dr. Obitz’s opinion. Dr. Obitz found that LoPresto’s PTSD causes him serious
18 limitations in how he interacts with others, while at the same time he thought there was a
19 subset of work of which LoPresto was capable. The ALJ concluded that LoPresto
20 maintained the ability to do a level of work so long as he does not “interact with the
21 public.” This is a reasonable interpretation of Dr. Obitz’s opinion. LoPresto argues
22 vigorously that the opinion could mean something far more restrictive. The evidence,
23 however, is open to two interpretations and the Court will not disturb the ALJ’s choice
24 among the two. *See Batson*, 359 F.3d at 1198 (“When the evidence before the ALJ is
25 subject to more than one rational interpretation, we must defer to the ALJ’s conclusion.”).
26 Dr. Obitz physically examined LoPresto, and, although it was just one time, the fact of

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28 ⁷ The movement restrictions appear to be based on LoPresto’s physical ailments,
none of which are raised as a basis for appeal by LoPresto in his brief.

1 that examination could lend greater weight to Dr. Obitz’s opinion in the eyes of the ALJ.
2 The ALJ did not err in giving “substantial weight” to Dr. Obitz’s opinion.

3 Dr. Campbell, a state agency psychologist, reviewed LoPresto’s VA records and
4 Dr. Obitz’s report. He concurred in the diagnosis of PTSD. (R. at 368.) He assigned
5 LoPresto a GAF of 60. (*Id.* at 376.) In the opinion of Dr. Campbell, LoPresto faced mild
6 restrictions in his activities of daily living and mild difficulties in maintaining
7 concentration, persistence, or pace. (*Id.* at 374.) There were moderate difficulties in
8 maintaining social functioning. (*Id.*) Dr. Campbell found moderate limitations on
9 LoPresto’s ability to maintain attention and concentration for extended periods, interact
10 appropriately with the general public, accept instructions and respond appropriately to
11 criticism from supervisors, and get along with coworkers or peers without distracting
12 them or exhibiting behavioral extremes. (*Id.* at 378–79.) On the other hand, he
13 determined that LoPresto can learn and remember simple instructions and tasks, follow a
14 schedule, make decisions and complete simple tasks on a consistent basis, adapt to
15 changes and handle the normal stressors of full time employment, while recognizing that
16 LoPresto “has limitations in working with and around others, but can work in a setting
17 with limited public contact.” (*Id.* at 380.) He concluded that LoPresto “can meet the
18 expectations of full time employment doing simple tasks in a setting with [limited public
19 contact].” (*Id.*) The ALJ assigned “significant weight” to Dr. Campbell’s opinion because
20 “the findings were consistent with the claimant’s subjective symptoms, the objective
21 medical evidence, and the evaluation of consultative examiner Dr. Nath and the medical
22 opinion of examining physician Dr. Obitz.” (*Id.* at 34.)

23 LoPresto’s argument that Dr. Campbell’s opinion could not be considered
24 substantial evidence is incorrect. While a non-examining physicians’ report cannot itself
25 be the sole piece of substantial evidence, it can be part of the basis that supports the
26 ALJ’s decision. This occurs when there is congruity between the conclusions of the non-
27 examining physician on the other medical evidence. *See Thomas v. Barnhart*, 278 F.3d
28 947, 957 (9th Cir. 2002). The ALJ found that Dr. Campbell’s opinion was consistent with

1 the opinions of other doctors and the symptoms reported by LoPresto. LoPresto claims
2 that the ALJ's citation to the evaluation of Dr. Nath was in error because Dr. Nath did not
3 have a full record before him. While that appears to be true, (R. at 342,) Dr. Nath's
4 evaluation is medical opinion evidence that the ALJ was entitled to consider. *See* 20
5 C.F.R. § 404.1527. The ALJ could have placed "significant weight" on the opinion of Dr.
6 Campbell because of its consistency with other evidence in the record.

7 **B. LoPresto's Statements**

8 LoPresto testified at the hearing about the degree of his mental and physical
9 impairments. His described severe depression, irritability, and trouble sleeping. (R. at 52–
10 78.) The ALJ articulated two primary reasons for finding much of his testimony
11 incredible: (1) LoPresto's GAF scores fluctuated even as he reported improvement with
12 medication; (2) LoPresto "made inconsistent statements regarding matters relevant to
13 disability." (*Id.* at 33-34.)

14 The legal standard governing claimant credibility is a matter of dispute between
15 the parties. The Commissioner relies on *Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991)
16 (en banc), where the Ninth Circuit set out to "determine the appropriate standard for
17 evaluating subjective complaints of pain in Social Security disability cases." *Id.* at 342.
18 The *Bunnell* Court opined that once there has been objective medical evidence of an
19 underlying impairment, the ALJ must make specific findings, supported by the record,
20 for why he rejected the claimant's testimony on the severity of the pain. *Id.* at 345–46.
21 This is to ensure that the ALJ "did not 'arbitrarily discredit a claimant's testimony
22 regarding pain.'" *Id.* (quoting *Elam v. R.R. Retirement Bd.*, 921 F.2d 1210, 1215 (9th Cir.
23 1991)). Thus the Commissioner asserts that the standard governing claimant credibility is
24 a "specific finding" standard, which it claims is more in line with the overall "substantial
25 evidence" standard that governs these cases.

26 Many panels of the Ninth Circuit have subsequently held, however, that if there is
27 objective medical evidence of an underlying impairment, "and there is no evidence of
28 malingering, then the ALJ must give 'specific, clear and convincing reasons' in order to

1 reject the claimant's testimony about the severity of the symptoms.” *Molina*, 674 F.3d at
2 1112 (quoting *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)); *see also, e.g.,*
3 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The Commissioner claims
4 that these cases, along with many others, have overruled the *Bunnell* standard in violation
5 of the Ninth Circuit rule that only en banc panels can overrule existing precedent. *See*
6 *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995). That is not the case. *Bunnell*
7 articulated a general standard for dealing with claimant testimony. The many subsequent
8 cases have addressed a subset of cases where there is also no evidence of claimant
9 malingering. There is a “clear and convincing” standard for those situations. This Court
10 cannot sit in judgment of the application of that standard, which is clearly the standard
11 that governs claimant credibility in this circuit. Accordingly, the ALJ’s reasons for
12 finding LoPresto’s testimony incredible must be “clear and convincing.”

13 The first reason dealt with the fluctuation in GAF scores and reports that
14 LoPresto’s symptoms were less severe on medication. “A GAF score is a rough estimate
15 of an individual's psychological, social, and occupational functioning used to reflect the
16 individual's need for treatment.” *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir.
17 1998). The Commissioner, however, has stated that “[t]he GAF scale, which is . . .
18 endorsed by the American Psychiatric Association[,] does not have a direct correlation
19 to the severity requirements in our mental disorders listings.” Revised Medical Criteria
20 for Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50,764–65
21 (Aug. 21, 2000). In other words, the GAF scores provide a very rough outline of a
22 claimant’s ability to function. As the ALJ noted, a GAF of 41-50 indicates serious
23 symptoms and a score of 51-60 denotes moderate symptoms relating to the claimant’s
24 impairment in social occupation, or school functioning. (R. at 33, nn. 2–3.)

25 The ALJ concluded that LoPresto’s GAF was likely 60. (*Id.* at 33.) The ALJ first
26 noted that the GAF scores ranged from 65 to, more recently, 45. He nevertheless
27 discounted the more recent low-end scores of 45 from Drs. Gonzalez and Patel,
28 LoPresto’s treating physicians, because those scores were “mainly attributable to the

1 claimant’s self-reporting of symptoms” and “contrast[ed] sharply with . . . treatment
2 notes showing improvement in the claimant’s symptoms.” (*Id.* at 33.) There is substantial
3 evidence to support the ALJ’s decision to assign less weight to the lower GAF scores.
4 “Impairments that can be controlled effectively with medication are not disabling for the
5 purpose of determining eligibility for SSI benefits.” *Warre v. Comm’r of Soc. Sec.*
6 *Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). Therefore, the effectiveness of medication
7 can support a clear and convincing reason for discounting a claimant’s testimony. The
8 ALJ cites several instances where LoPresto reported “doing well” or showed
9 improvement on the medication regiment for his mental impairments. (R. at 496, 644,
10 647.) That provides substantial evidence for the ALJ’s conclusion that medication
11 alleviated many of LoPresto’s more debilitating symptoms and therefore that the lower
12 GAF scores did not accurately reflect LoPresto’s ability to function. While LoPresto may
13 argue that the fact that medication helped control his symptoms is not necessarily
14 inconsistent with his testimony and a lower GAF score, there is substantial evidence to
15 support the ALJ’s view. That is all that is required to affirm the ALJ’s determination. *See*
16 *Thomas*, 278 F.3d at 954. Because effective control through medication is a clear and
17 convincing reason for rejecting claimant testimony, and there is substantial evidence to
18 support the ALJ’s determination, the ALJ had a proper basis to discount LoPresto’s
19 testimony.

20 The ALJ also stated that LoPresto “has made inconsistent statements regarding
21 matters relevant to the issue of disability.” (R. at 33.) Material inconsistency is a proper
22 basis on which to reject claimant testimony. *Bray v. Comm’r of Soc. Sec. Admin.*, 554
23 F.3d 1219, 1226–27 (9th Cir. 2009). The first alleged inconsistency is that LoPresto told
24 Dr. Nath that he had panic attacks while driving but then stated in his Adult Function
25 Report “that he has no trouble driving.” (R. at 33–34.) The Adult Function Report asks
26 the question “Do you drive?”, and allows the claimant to answer yes or no. (*Id.* at 206.)
27 LoPresto checked “Yes”. (*Id.*) Although the ALJ did not directly refer to the any other
28 evidence on this point in the specific discussion on LoPresto’s credibility, the ALJ cited

1 statements from both LoPresto’s wife and Malone that LoPresto did drive in his decision.
2 (*Id.* at 31, 35.) Just like the form LoPresto filled out, though, both of those forms
3 involved a yes or no question—“Does the disabled person drive?” (*Id.* at 214, 222.) The
4 ALJ’s statement that LoPresto stated “he has no trouble driving” is an overstatement of
5 the record. LoPresto, his wife, and Malone all stated that LoPresto could drive in answer
6 to the same yes/no question. None of them stated that “he ha[d] no trouble driving.”
7 Nevertheless, that all three testified that he drives is evidence that they considered him
8 capable of doing so. To the extent that LoPresto subsequently suggested that he was
9 incapable of driving because of his panic attacks, the ALJ was entitled to consider the
10 contrary evidence.

11 The second alleged inconsistency is that LoPresto told Dr. Nath that he had
12 difficulty maintaining a job since he left the military in 1971, while the uncontroverted
13 evidence is that LoPresto worked as a bus driver for almost thirty years. (*Id.* at 34.) The
14 report from Dr. Nath that the ALJ references reads, however: “[LoPresto] endorsed
15 difficulty getting along with coworkers and taking direction or criticism from employers.
16 As a result, he has been fired from multiple jobs due to his inability to get along with
17 others. He stated the longest job he has had is over 20 years, however he was often
18 isolated from others, performing deskwork.” (*Id.* at 342.) Read literally, LoPresto
19 arguably did not claim that he had difficulty keeping a job—just that he had difficulties
20 with coworkers. LoPresto’s actual statement that he had difficulty getting along with co-
21 workers does not necessarily suggest that LoPresto is unable to work. Nevertheless, to the
22 extent that the ALJ misinterpreted it as a claim that LoPresto could not hold a job in
23 discrediting LoPresto’s testimony generally, it does not provide sufficient support to do
24 so.

25 Nevertheless, the third inconsistency cited by the ALJ is substantial evidence upon
26 which he could discount LoPresto’s credibility. The ALJ notes that while LoPresto
27 claims depression, irritability, and thoughts of harming others, he reported that those
28 symptoms were not present on February 26, 2009. In this same analysis in the same

1 section the ALJ also cites to other reports from LoPresto’s treating physicians that show
2 that on at least five of his most recent treatment visits, the treatment notes reflect that
3 LoPresto’s medication enabled him to control his symptoms. *See* Part II.A.2, *supra*.
4 There is therefore substantial evidence to support the ALJ’s determination that
5 medication enabled LoPresto to control his symptoms. Several doctors on many
6 occasions made reports to that effect. LoPresto focuses on the fact that the ALJ
7 referenced only one of those occasions; nevertheless, the ALJ discussed several such
8 instances in the same section of his analysis where he discussed LoPresto’s credibility.
9 Therefore, there was substantial evidence to support the ALJ’s reliance on this
10 inconsistency.

11 The final inconsistency relates to LoPresto’s work experiences after his service as
12 a bus driver. He worked at a golf course for portions of 2007 and 2008, and as a secretary
13 of a credit union in 2005. (R. at 34.) These periods of work were all quite brief, and the
14 secretary job was part-time. To the ALJ, “[t]he fact that the claimant’s impairment did
15 not prevent him from working at this time, suggests that the claimant stopped working
16 because of termination, which is a reason unrelated to the allegedly disabling impairment.
17 This work may also indicate that the claimant’s daily activities have, at least at times,
18 been somewhat greater than the claimant has reported.” (*Id.* at 34.) At the hearing,
19 LoPresto testified that he was terminated in both instances due to a “conflict with
20 management.” (*Id.* at 57–65.) If a claimant is terminated for reasons other than his
21 impairment, there may be an inconsistency with his claim of inability to work. *See*
22 *Elletson v. Astrue*, 319 F. App’x 621, 622 (9th Cir. 2009). That leaves open the question
23 of whether LoPresto was terminated for reasons other than his impairment. *See*
24 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038 (9th Cir. 2007) (“It does not follow from the
25 fact that a claimant tried to work for a short period of time and, because of his
26 impairments, failed, that he did not then experience pain and limitations severe enough to
27 preclude him from maintaining substantial gainful employment. Indeed, we have
28 suggested that similar evidence that a claimant tried to work and failed actually supported

1 his allegations of disabling pain.”) He testified that he had a “short fuse” that made it
2 difficult for him to work with people. (R. at 60.) Nevertheless, the ultimate connection
3 between LoPresto’s termination and his impairments remains attenuated. He never stated
4 that he was fired because of his PTSD, depression, or anxiety. LoPresto stated only that
5 he was fired in both instances because of conflicts with management. That evidence
6 leaves the ALJ room to make reasonable inferences. The ALJ consequently chose
7 between two reasonable interpretations of LoPresto’s subsequent employment history.
8 The Court cannot disturb that interpretation.

9 The ALJ put forth sufficiently clear and convincing reasons for discounting
10 LoPresto’s testimony that had evidentiary support. Therefore, the ALJ did not err in his
11 treatment of LoPresto’s testimony.

12 C. RFC Determination

13 LoPresto finally claims that the ALJ erred when he stated in the RFC that
14 LoPresto was capable of “unskilled work.” (*Id.* at 30.) LoPresto asserts that the ALJ
15 failed to conduct the function-by-function determination required by SSR 85-15 and
16 instead just assumed that LoPresto was capable of unskilled work because he failed to
17 meet or equal a listed mental impairment at step three of the five-step process. SSR 85-15
18 instructs the ALJ that he “must not assume that failure to meet or equal a listed mental
19 impairment equates with capacity to do at least unskilled work”, and that “all limits on
20 work-related activities resulting from the mental impairment must be described in the
21 mental RFC assessment.” *Id.* The ALJ assigned LoPresto a base of unskilled work and
22 included the limitation that LoPresto “cannot interact with the public.” (R. at 30.)

23 SSR 85-15 details the procedure for determining an RFC for someone in
24 LoPresto’s situation, who has recognized severe mental impairments.

25 Where a person's only impairment is mental, is not of listing severity, but
26 does prevent the person from meeting the mental demands of past relevant
27 work and prevents the transferability of acquired work skills, the final
28 consideration is whether the person can be expected to perform unskilled
work. The basic mental demands of competitive, remunerative, unskilled

1 work include the abilities (on a sustained basis) to understand, carry out,
2 and remember simple instructions; to respond appropriately to supervision,
3 coworkers, and usual work situations; and to deal with changes in a routine
4 work setting. A substantial loss of ability to meet any of these basic work-
5 related activities would severely limit the potential occupational base. This,
6 in turn, would justify a finding of disability because even favorable age,
7 education, or work experience will not offset such a severely limited
8 occupational base.

9 *Id.*

10 The record shows that the ALJ did just that. His RFC included a limitation that
11 LoPresto “cannot interact with the public.” (R. at 30.) That determination is supported by
12 the statements from medical sources that the ALJ both lists and adopts. The medical
13 evidence demonstrated LoPresto’s mental impairments imposed a limitation on his ability
14 to interact with the public. The ALJ noted how Dr. Nath determined

15 that the claimant is able to remember very short, simple instructions,
16 understand and carry out detailed instructions, maintain attention for brief
17 periods of time, sustain an ordinary routine with supervision, and make
18 simple work-related decisions. Additionally, Dr. Nath found that the
19 claimant can ask simple questions, request assistance, accept instructions
20 from supervisors, is aware of normal hazards, can take appropriate cautions,
21 and can adhere to basic standards of neatness and cleanliness.

22 (*Id.* at 32.) There were no specific limitations there. In addition, the ALJ accepted the
23 opinion of Dr. Campbell, who “found marked limitations in categories of social
24 functioning, including the ability to interact appropriately with the general public, accept
25 instructions and respond appropriately to criticism, and the ability to get along with co-
26 workers and peers without distracting them or exhibiting behavioral extremes.” (*Id.* at
27 34.) The ALJ incorporated those concerns into the limitation on public interaction. Dr.
28 Campbell “also summarized that the claimant can learn and remember simple instructions
and tasks, follow a schedule, make decisions, complete simple tasks on a consistent basis,
adapt to changes, and handle the normal stressors of full time employment.” (*Id.*) That
opinion provided no additional limitations. The ALJ gave great weight to those opinions,
and his RFC was consistent with it. There was consequently no error at this stage.

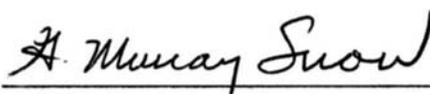
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CONCLUSION

The ALJ did not err in the determinations that LoPresto challenges in this appeal.

IT IS THEREFORE ORDERED that the ALJ's decision is **AFFIRMED**. The Clerk of Court is directed to terminate this case and enter judgment accordingly.

Dated this 15th day of April, 2013.



G. Murray Snow
United States District Judge