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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Kristoffer Shaun Cornelius,

Plaintiff,

vs.

Carolyn W. Colvin, Acting  
Commissioner of Social Security  
Administration,

Defendant.

No. CV-13-00535-PHX-SPL

**ORDER**

Plaintiff Kristoffer Shaun Cornelius seeks judicial review and reversal of the final decision of the Commissioner of the Social Security Administration (“SSA”) denying his application for Social Security disability benefits.<sup>1</sup>

**I. Background**

On March 29, 2010, Plaintiff filed an application for Social Security disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act. (AR<sup>2</sup> 30, 208-15.) Plaintiff alleges that he became unable to work on March 1, 2010, due to his disabling conditions of attention deficit hyperactivity disorder (“ADHD”), depression, anxiety, obsessive-compulsive disorder (“OCD”), bipolar disorder, post-traumatic stress disorder (“PTSD”), and sleep deprivation. (AR

<sup>1</sup> The request for oral argument is denied because the issues have been fully briefed and oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

<sup>2</sup> Administrative Record

1 132, 136.) On August 12, 2010, the SSA denied Plaintiff's application (AR 132-39), and  
2 on December 17, 2010, the SSA denied Plaintiff's request for reconsideration (AR 141-  
3 47). Pursuant to Plaintiff's request (AR 148-49), a hearing was held on November 29,  
4 2011, before Administrative Law Judge ("ALJ") Joan G. Knight (AR 46-82).

5 Applying the five-step sequential framework,<sup>3</sup> on January 4, 2012, the ALJ issued  
6 a decision ruling that Plaintiff is not disabled and is not entitled to disability benefits.  
7 (AR 30-41.) At step one, the ALJ found that Plaintiff had not engaged in substantial  
8 gainful activity since March 1, 2010, his alleged disability onset date. (AR 32.) At step  
9 two, the ALJ found that Plaintiff had the following severe impairments: "bipolar disorder,  
10 NOS,<sup>4</sup> generalized anxiety disorder, attention deficit hyperactivity disorder, alcohol  
11 dependence, in reported remission since July 15, 2011, and amphetamine dependence, in  
12 reported remission since July 15, 2011." (AR 32.)

13 At step three, the ALJ found that Plaintiff's impairments did not meet or equal one  
14 of the listed impairments described in 20 C.F.R. § 404, Subpart P, Appendix 1. (AR 33-  
15 34.) In making this determination, the ALJ considered the degree to which claimant's  
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17 <sup>3</sup> In deciding whether a claimant is disabled and eligible for Social Security  
18 disability benefits, an ALJ employs a five-step sequential analysis, determining:

- 19 (1) whether the claimant is doing substantial gainful activity;  
20 (2) whether the claimant has a severe medically determinable  
21 physical or mental impairment or combination of impairments  
22 that has lasted for more than 12 months; (3) whether the  
23 impairment meets or equals' one of the listings in the  
24 regulations; (4) whether, given the claimant's residual  
25 functional capacity, the claimant can still do his or her past  
26 relevant work; and (5) whether the claimant can make an  
27 adjustment to other work.

23 *Molina v. Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012) (citing 20 CFR §§ 404.1520,  
24 416.920). *See also* 42 U.S.C. § 423(d)(1)(a). "If a claimant is found to be 'disabled' or  
25 'not disabled' at any step in the sequence, there is no need to consider subsequent steps."  
26 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 20 C.F.R. § 404.1520). The  
27 claimant bears the burden of proof at steps one through four of the sequential process. *Id.*;  
28 *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998). At step five, the burden shifts to  
the Commissioner to show that the claimant can perform other substantial gainful work  
that exists in the national economy. *Tackett*, 180 F.3d at 1098; *Reddick*, 157 F.3d at 721.

<sup>4</sup> NOS stands for "Not Otherwise Specified." American Psychiatric Association,  
Diagnostic and Statistical Manual of Mental Disorders 381 (4th ed. TR 2000).

1 mental impairments interferes which the four broad functional areas (referred to as  
2 “paragraph B” listing criteria). *See* 20 C.F.R. §§ 404.1520a(c), 416.920a(c). In areas of  
3 activities of daily living, the ALJ found that Plaintiff had mild restrictions; in the area of  
4 social functioning, the ALJ found that Plaintiff had mild difficulties; in the area of  
5 concentration, persistence, or pace, the ALJ found Plaintiff had moderate difficulties; and  
6 in the area of episodes of decompensation, the ALJ found Plaintiff had two episodes of  
7 decompensation. (AR 33-34.)

8 At step four, the ALJ found that Plaintiff had the residual functional capacity<sup>5</sup>  
9 (“RFC”) “to perform a full range of work at all exertional levels but with the following  
10 nonexertional limitations: the claimant is capable of simple, unskilled work.” (AR 34.)  
11 The ALJ stated that the RFC assessment reflected “the degree of limitation the [ALJ  
12 found] in the ‘paragraph B’ mental function analysis.” (AR 34.) Based on his residual  
13 functional capacity finding, the ALJ found that Plaintiff could no longer perform his past  
14 work. (AR 39.) At step five, the ALJ found that Plaintiff could perform other jobs that  
15 exist in significant numbers in the national economy. (AR 40.) The ALJ therefore  
16 concluded that Plaintiff was not disabled as defined by the Social Security Act. (AR 41.)

17 On February 7, 2013, the Appeals Council denied Plaintiff’s request for review,  
18 and the ALJ’s decision therefore became the final decision of the Commissioner of the  
19 SSA. (AR 2-4.) Having exhausted the administrative review process, on March 13,  
20 2013, Plaintiff sought judicial review of the ALJ’s decision by filing a Complaint in this  
21 Court pursuant to 42 U.S.C. § 405(g). (Doc. 1.)

## 22 **II. Standard of Review**

23 The district court has the “power to enter, upon the pleadings and transcript of  
24 record, a judgment affirming, modifying, or reversing the decision of the Commissioner,  
25 with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The district  
26 court reviews the ALJ’s decision under the substantial evidence standard and must affirm

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28 <sup>5</sup> A claimant’s residual functional capacity is defined as the most he or she can do  
despite his or her limitations. 20 C.F.R. § 404.1545(a)(1).

1 the decision if it is supported by substantial evidence and it is free from legal error. *Orn*  
2 *v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007); *Marcia v. Sullivan*, 900 F.2d 172, 174 (9th  
3 Cir. 1990). Substantial evidence means more than a mere scintilla, but less than a  
4 preponderance; “it is such relevant evidence as a reasonable person might accept as  
5 adequate to support a conclusion.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir.  
6 2007); *see also Reddick*, 157 F.3d at 720. Even if the ALJ erred, however, “[a] decision  
7 of the ALJ will not be reversed for errors that are harmless.” *Burch v. Barnhart*, 400 F.3d  
8 676, 679 (9th Cir. 2005).

9 In reviewing the ALJ’s decision, the district court considers the record as a whole,  
10 weighing both the evidence that supports and that which detracts from the ALJ’s  
11 conclusions. *Reddick*, 157 F.3d at 720; *Tylitzki v. Shalala*, 999 F.2d 1411, 1413 (9th Cir.  
12 1993); *Orn*, 495 F.3d at 630. Where “the evidence can reasonably support either  
13 affirming or reversing a decision, [the district court] may not substitute its judgment for  
14 that of [the ALJ].” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). *See also*  
15 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). It reviews “only the reasons  
16 provided by the ALJ in the disability determination and may not affirm the ALJ on a  
17 ground upon which he did not rely.” *Orn*, 495 F.3d at 630

### 18 **III. Discussion**

19 Arguing that this case should be remanded for an award of benefits, Plaintiff  
20 claims that the ALJ erred: (1) by failing to incorporate adopted medical opinion evidence;  
21 (2) by improperly rejecting medical opinion evidence; and (3) by improperly rejecting  
22 Plaintiff’s testimony regarding his impairments. (Docs. 26, 28.) In response, Defendant  
23 agrees that the ALJ erred in resolving her findings on medical opinion evidence, but  
24 disputes whether the ALJ would be required to find Plaintiff disabled. (Doc. 27.)  
25 Therefore, Defendant argues that this case should be remanded for further proceedings.  
26 (Id.)

#### 27 **A. Residual Functional Capacity Assessment**

28 First, the ALJ erred by failing to discern the limitations that were accounted for

1 in determining Plaintiff had a RFC to perform “simple, unskilled work.” (AR 34.) *See* 20  
2 CFR § 404.1520a(e). In determining a claimant’s RFC, an ALJ must consider the nature  
3 and extent of a claimant’s mental limitations and restrictions to determine his ability to  
4 work on a regular and continuing basis. 20 C.F.R. § 416.945(c); 20 C.F.R. §  
5 404.1545(a)(2). “A limited ability to carry out certain mental activities, such as  
6 limitations in understanding, remembering, and carrying out instructions, and in  
7 responding appropriately to supervision, coworkers, and work pressures in a work setting,  
8 may reduce [a claimant’s] ability to do past work and other work.” 20 C.F.R. §  
9 416.945(c).

10 In her decision, the ALJ found that Plaintiff was moderately limited in  
11 concentration, persistence, or pace.<sup>6</sup> (AR 33.) In making this finding, the ALJ relied on  
12 opinions of Sheri Tomak, Psy.D., and Sharon Steingard, D.O., which she accorded  
13 significant weight. (AR 33, 37-38, 101-128, 421-427.) Dr. Steingard found Plaintiff’s  
14 score on the “Mini-Mental State Examination” suggested cognitive impairment, his  
15 “[p]ersistence will be poor” as he does not have any history of sustaining work or  
16 “maintaining appropriate adult responsibilities,” and has “limitations in understanding  
17 social cues and disregards some social norms.” (AR 426-427.) Dr. Tomak opined that  
18 Plaintiff was moderately limited in his ability to understand, remember, and carry out  
19 detailed instructions, maintain attention and concentration for extended periods, perform  
20 activities within a schedule, complete a normal workday and workweek without  
21 interruptions from psychologically based symptoms and to perform at a consistent pace  
22 without an unreasonable number and length of rest periods, and respond appropriately to  
23 changes in the work setting. (AR 109-11.)

24 The ALJ did not address however, whether Plaintiff could perform “simple,  
25 unskilled work” despite his functional limitations in concentration, persistence, or pace.

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27 <sup>6</sup> “Concentration, persistence, or pace” refers to the “ability to sustain focused  
28 attention and concentration sufficiently long to permit the timely and appropriate  
completion of tasks commonly found in work settings.” 20 C.F.R. § 404, Sub. P, App. 1  
§ 12.00(c)(3).

1 “The basic mental demands of competitive, remunerative, unskilled work include the  
2 abilities (on a sustained basis) to understand, carry out, and remember simple  
3 instructions; to respond appropriately to supervision, coworkers, and usual work  
4 situations; and to deal with changes in a routine work setting.” SSR 85-15 (emphasis  
5 added). *See also* 20 C.F.R. § 404.1568 (“Unskilled work is work which needs little or no  
6 judgment to do simple duties that can be learned on the job in a short period of time.”).  
7 The ability to meet the mental demands to perform unskilled “simple tasks” may be  
8 limited by “concentration, persistence, or pace” if an individual cannot complete simple  
9 tasks “at a consistent pace without an unreasonable number and length of rest periods, or  
10 without undue interruptions or distractions.” 20 C.F.R. Part 404, Subpt. P, App. 1 §  
11 12.00(c)(3). Although the ALJ discussed the medical evidence of record, she did not set  
12 forth her findings regarding Plaintiff’s specific limitations in concentration, persistence,  
13 or pace, nor did she provide a reasoned bridge between his limitations and his ability to  
14 perform simple, unskilled work. Therefore, the ALJ erred in her assessment of Plaintiff’s  
15 RFC.

#### 16 **B. Vocational Expert Testimony**

17 The ALJ further erred in failing to take into account all of Plaintiff’s limitations in  
18 propounding hypotheticals to the vocational expert. An ALJ must include all restrictions  
19 in the hypothetical question posed to the vocational expert, including moderate  
20 limitations in concentration, persistence, or pace. 20 C.F.R. §§ 404.1545, 416.945;  
21 *Magallanes v. Bowen*, 881 F.2d 747, 756 (9th Cir. 1989); *Valentine v. Comm’r of Soc.*  
22 *Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) (a hypothetical that fails to take into  
23 account a claimant’s limitations is defective).

24 The ALJ first posed a hypothetical describing a person who, in performing  
25 unskilled work, is “restricted to performing simple work tasks.” (AR 77.) This  
26 hypothetical was inadequate. The medical opinions adopted by the ALJ suggest that  
27 Plaintiff’s deficiencies in concentration, persistence, or pace limit his ability to carry out  
28 work tasks on a continued basis regardless of the nature or complexity of the work to be

1 performed. See *O'Connor-Spinner v. Astrue*, 627 F.3d 614, 620 (7th Cir. 2010) (“The  
2 ability to stick with a given task over a sustained period is not the same as the ability to  
3 learn how to do tasks of a given complexity.”); *Stewart v. Astrue*, 561 F.3d 679 (7th Cir.  
4 2009); *Newton v. Chater*, 92 F.3d 688, 695 (8th Cir. 1996) (holding “simple jobs” was  
5 insufficient to cover concentration, persistence, or pace deficiencies). For this reason, the  
6 ALJ’s second more restrictive hypothetical of an individual limited “to performing  
7 simple, repetitive tasks” also did not adequately incorporate Plaintiff’s limitations. (AR  
8 77.) *O'Connor-Spinner*, 627 F.3d at 620 (generally, “employing terms like ‘simple,  
9 repetitive tasks’ on their own will not necessarily exclude from the VE’s consideration  
10 those positions that present significant problems of concentration, persistence and pace”).

11 Because the ALJ failed to direct the vocational expert to the totality of Plaintiff’s  
12 limitations, the expert’s testimony had “no evidentiary value to support a finding that  
13 [Plaintiff] can perform jobs in the national economy.” *DeLorme v. Sullivan*, 924 F.2d  
14 841, 850 (9th Cir. 1991). Having relied on the vocational expert’s opinion, the ALJ’s  
15 finding that Plaintiff was not disabled was not based on substantial evidence.

### 16 **C. Remand for Further Proceedings**

17 Finding there are outstanding issues that must be resolved before a determination  
18 of disability can be made, the Court concludes that remanding this case for further  
19 proceedings, rather than for an award of benefits, is appropriate. An ALJ’s decision shall  
20 be reversed and remanded for the calculation and award of benefits only where: “(1) the  
21 record has been fully developed and further administrative proceedings would serve no  
22 useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting  
23 evidence, whether claimant testimony or medical opinion; and (3) if the improperly  
24 discredited evidence were credited as true, the ALJ would be required to find the  
25 claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014);  
26 see also *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996); *Swenson v. Sullivan*, 876  
27 F.2d 683, 689 (9th Cir. 1989).

28 Plaintiff first argues that Dr. Steingard’s opinion, if credited, is a basis for

1 remanding this case for a determination of benefits. If such evidence were credited,  
2 however, it is not clear that Plaintiff would be found disabled on remand. At the  
3 conclusion of the hearing, Plaintiff's counsel posed two hypotheticals to the vocational  
4 expert incorporating the opinion of Dr. Steingard as follows:

5 [U]nder understanding and memory, "The score on the Mini-  
6 Mental Status Exam does suggest cognitive impairment. The  
7 score is 22 out of 20. Psychological testing would be helpful  
8 to further assess concentration IQ and the possibility of  
9 learning disability."

10 The next section is the sustained concentration and  
11 persistence: "Persistence will be poor. He does not have any  
12 history of sustaining work. He does not have a history of  
13 maintaining appropriate adult responsibilities. He put little  
14 effort into some of the tasks on the Mini-Mental Status  
15 Examination. He was distracted by the phone ringing in the  
16 interview. Social interaction: interaction is limited but not  
17 impaired. He seems to have some limitations in understanding  
18 social queues and disregards some social norms such as not  
19 eating in the waiting room and not eating in a doctor's office.  
20 Interaction is not precluded. He was otherwise respectful. He  
21 did not display emotional ability adaptation. Cognitively, he  
22 can perform simple and repetitive tasks. He can be a  
23 passenger in a private vehicle. He is capable of using public  
24 transportation. He should not be managing benefits if deemed  
25 eligible to receive them."

26 Would you agree that a person with those limitations would  
27 be precluded from all work on a sustained basis?

28 A Am I to understand there's no emotional ability?

Q There was no emotional ability. He did not display  
emotion ability during the evaluation.

A During the evaluation.

Q And I guess I – in answering this question, I would  
like you to focus on the sustained concentrating and  
persistence, where it's persistence will be poor.

A Right. I'm also thing [sic] about the little effort.

Q And I would just ask you to take that at face value  
because he does – the doctor, she doesn't say why there was  
little effort, whether it was related to illness or attitude or  
anything. So just take it at face value that during the – I'll  
read it again: "He puts little effort into some of the tasks on  
the Mini-Mental Status Examination."\  
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A Mm-hmm.

Q “He was distracted by the phone ringing in the interview.”

A I’m having trouble answering that in that there seems to be a variance in information. Because we don’t know what little effort – when she’s saying he displayed ‘little effort’ on some tasks, we don’t know what that’s due to.

Q Well, let me ask a different question then.

A Okay.

Q Let’s just take the statement “persistence will be poor.” Based on your experience as a vocational expert, would you agree that someone with poor persistence would have trouble maintaining employment?

A Yes, I would.

(AR 79-81.) Here, in response to counsel’s hypotheticals, the vocational expert found Dr. Steingard’s opinion unclear. The vocational expert was unable to answer whether “a person with those limitations would be precluded from all work on a sustained basis.” While counsel narrowed his hypothetical to “someone with poor persistence,” contrary to Plaintiff’s portrayal, the vocational expert did not find that this limitation would preclude a person from all work on a sustained basis. Rather, the vocational expert only responded affirmatively that a person with such limitation would have “trouble maintaining employment.” Without more, it cannot be said that Dr. Steingard’s opinion, if credited, would mandate a finding of disability on remand.

Second, Plaintiff argues that the opinion of treating psychiatrist Amnon Kahane, M.D, if credited, is a basis for remanding this case for an award of benefits. Finding the record has not been fully developed, the Court does not reach whether the ALJ erred in her treatment of Dr. Kahane’s opinion evidence. In offering various reasons for rejecting Dr. Kahane’s check-box medical assessment form, the ALJ appears to rely on an evaluation of his treatment notes. (AR 38, 419-420.) However, beyond the check-box form, the record contains only a one-page “Prescriber Progress Note” completed by Dr. Kahane in which he finds Plaintiff was stable and his condition was controlled by

1 medication. (AR 380.) Further, while the ALJ refers to treatment notes in rejecting the  
2 check-box medical assessment form completed by treating physician Jeffery Edelman,  
3 M.D., the record contains no treatment records from Dr. Edelman. (AR 39, 538-39.)  
4 Without clarification and explanation regarding these discrepancies, the Court cannot  
5 adequately evaluate the strength of the discredited evidence and determine if it is clear  
6 that the ALJ would be required to find Plaintiff disabled on remand. *See Garrison, 759*  
7 *F.3d at 1021.*

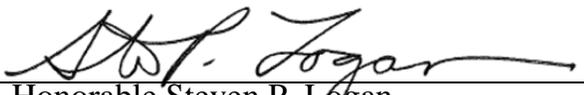
8 Lastly, no hypothetical was posed to the vocational expert that incorporated the  
9 limitations outlined in Plaintiff's testimony. Therefore, even if the discredited testimony  
10 were credited as true, the record does not show whether the ALJ would be required to  
11 find Plaintiff disabled on remand based on this evidence.

#### 12 **IV. Conclusion**

13 In sum, the Court has considered the record as a whole, weighing both the  
14 evidence that supports and that which detracts from the ALJ's conclusions. The Court  
15 concludes there are significant outstanding issues and will remand this case to the ALJ  
16 for further proceedings and a new decision. On remand, in addition to reevaluating the  
17 evidence and taking new testimony, the ALJ should accept any additional medical  
18 evidence into record that exists for the period at issue. Accordingly,

19 **IT IS ORDERED** that the final decision of the Commissioner of Social Security  
20 is **VACATED** and **REMANDED** to the Commissioner of the Social Security  
21 Administration for further proceedings consistent with this order.

22 Dated this 19th day of September, 2014.

23  
24   
25 Honorable Steven P. Logan  
26 United States District Judge  
27  
28