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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 William Thomas Young,  
10 Plaintiff,

No. CV-16-02264-PHX-DGC

**ORDER**

11 v.

12 Carolyn W. Colvin, Acting Commissioner  
13 of Social Security,  
14 Defendant.

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17 Plaintiff William Thomas Young seeks review under 42 U.S.C. § 405(g) of the  
18 final decision of the Commissioner of Social Security denying him disability insurance  
19 benefits and supplemental security income. The Court will remand this case to the  
20 agency with instructions to review the record as a whole and issue a new decision.

21 **I. Background.**

22 On September 30, 2010, Plaintiff applied for disability insurance benefits and  
23 supplemental security income, alleging disability beginning August 20, 2010. Plaintiff  
24 subsequently amended his disability onset date to October 1, 2011. On April 12, 2012, a  
25 hearing was held before the ALJ. On April 25, 2012, the ALJ issued a decision that  
26 Plaintiff suffered from severe impairments but was not disabled within the meaning of  
27 the Social Security Act. The Appeals Council vacated and remanded the ALJ's decision.  
28 A.R. 169.

1 On July 8, 2014, Plaintiff appeared with his attorney and testified at a second  
2 hearing before the ALJ. A vocational expert also testified. On October 2, 2014, the ALJ  
3 issued a second decision, this time holding that Plaintiff did not suffer from a severe  
4 impairment and thus was not disabled within the meaning of the Social Security Act. The  
5 Appeals Council denied Plaintiff's request for review of the hearing decision, making the  
6 ALJ's decision the Commissioner's final decision.

## 7 **II. Legal Standard.**

8 The Court reviews only those issues raised by the party challenging the ALJ's  
9 decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The Court may set  
10 aside the determination only if it is not supported by substantial evidence or is based on  
11 legal error. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is  
12 more than a scintilla, less than a preponderance, and relevant evidence that a reasonable  
13 person might accept as adequate to support a conclusion considering the record as a  
14 whole. *Id.* In determining whether substantial evidence supports a decision, the court  
15 must consider the record as a whole and may not affirm simply by isolating a "specific  
16 quantum of supporting evidence." *Id.*

## 17 **III. The ALJ's Five-Step Evaluation Process.**

18 To determine whether a claimant is disabled for purposes of the Social Security  
19 Act, the ALJ follows a five-step process. 20 C.F.R. § 404.1520(a). The claimant bears  
20 the burden of proof on the first four steps, but at step five, the burden shifts to the  
21 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

22 At the first step, the ALJ determines whether the claimant is engaging in  
23 substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not  
24 disabled and the inquiry ends. *Id.* At step two, the ALJ determines whether the claimant  
25 has a "severe" medically determinable physical or mental impairment.  
26 § 404.1520(a)(4)(ii). If not, the claimant is not disabled and the inquiry ends. *Id.* At step  
27 three, the ALJ considers whether the claimant's impairment or combination of  
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1 impairments meets or medically equals an impairment listed in Appendix 1 to Subpart P  
2 of 20 C.F.R. Pt. 404. § 404.1520(a)(4)(iii). If so, the claimant is automatically found to  
3 be disabled. *Id.* If not, the ALJ proceeds to step four. At step four, the ALJ assesses the  
4 claimant’s residual functional capacity (“RFC”) and determines whether the claimant is  
5 still capable of performing past relevant work. § 404.1520(a)(4)(iv). If so, the claimant  
6 is not disabled and the inquiry ends. *Id.* If not, the ALJ proceeds to the fifth and final  
7 step, where he determines whether the claimant can perform any other work based on the  
8 claimant’s RFC, age, education, and work experience. § 404.1520(a)(4)(v). If so, the  
9 claimant is not disabled. *Id.* If not, the claimant is disabled. *Id.*

10 At step one, the ALJ found that Plaintiff meets the insured status requirements of  
11 the Social Security Act through December 31, 2017, and that he has not engaged in  
12 substantial gainful activity since October 1, 2011. At step two, the ALJ found that  
13 Plaintiff has the following medically determinable impairments: bipolar disorder,  
14 posttraumatic stress disorder (PTSD), personality disorder, polysubstance abuse in  
15 remission, and alcohol abuse in remission. The ALJ also found, however, that none of  
16 these impairments, or a combination of the impairments, significantly limited the ability  
17 of Plaintiff to perform basic work related activities for 12 consecutive months. The ALJ  
18 therefore found that Plaintiff does not have a severe impairment or combination of  
19 impairments under 20 C.F.R. § 404.1521 *et seq.* The ALJ accordingly held that Plaintiff  
20 is not disabled. The ALJ did not proceed to steps three, four, or five.

21 **IV. Analysis.**

22 Plaintiff argues the ALJ erred in finding that he did not have severe impairments a  
23 step two, particularly in light of the ALJ’s failure to explain why his 2014 decision on  
24 this issue contradicted his 2012 decision. Plaintiff makes other arguments, but they are  
25 not relevant to this ruling. Doc. 11.

26 The key question is the appropriate analysis to apply to a step-two decision that  
27 impairments are not severe. A “severe” impairment is “any impairment or combination  
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1 of impairments which significantly limits [a claimant's] physical or mental ability to do  
2 basic work activities.” 20 C.F.R. § 404.1520(c). The “ability to do basic work  
3 activities,” in turn, is defined as “the abilities and aptitudes necessary to do most jobs.”  
4 20 C.F.R. § 404.1521(b). “An impairment is not severe if it is merely ‘a slight  
5 abnormality (or combination of slight abnormalities) that has no more than a minimal  
6 effect on the ability to do basic work activities.” *Webb v. Barnhart*, 433 F.3d 683, 686  
7 (9th Cir. 2005) (quoting S.S.R. 96-3p).

8 Significantly, “the step-two inquiry is a de minimis screening device to dispose of  
9 groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citing *Bowen*  
10 *v. Yuckert*, 482 U.S. 137, 153-54 (1987)). Its purpose “is to do no more than allow the  
11 [Commissioner] to deny benefits summarily to those applicants with impairments of a  
12 minimal nature which could never prevent a person from working.” *Titles II & XVI:*  
13 *Med. Impairments That Are Not Severe*, SSR 85-28 (S.S.A. 1985) (internal quotation  
14 omitted). Therefore, “an ALJ may find that a claimant lacks a medically severe  
15 impairment or combination of impairments only when his conclusion is ‘clearly  
16 established by medical evidence.’” *Webb*, 433 F.3d at 687 (quoting S.S.R. 85-28).

17 The Ninth Circuit has addressed the duty of a court when reviewing a step-two  
18 decision that impairments are not severe. The Court of Appeals stated that the court  
19 should apply the “normal standard of review” and “determine whether the ALJ had  
20 substantial evidence to find that the medical evidence clearly established that [the  
21 claimant] did not have a medically severe impairment or combination of impairments.”  
22 *Id.*

23 The Court finds this instruction quite confusing. As mentioned in the standards set  
24 forth above, substantial evidence is “less than a preponderance.” *Orn*, 495 F.3d at 630.  
25 The reviewing court need not be persuaded by a preponderance of the evidence that the  
26 ALJ’s decision is correct, but must find only “relevant evidence that a reasonable person  
27 might accept as adequate to support a conclusion considering the record as a whole.” *Id.*  
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1 It is not uncommon to find objective medical evidence in a social security record that  
2 supports both parties' positions, and yet the reviewing court is to affirm the ALJ's  
3 judgment if there is substantial evidence supporting it. In other words, the existence of  
4 contrary evidence is *not* a basis for rejecting an ALJ's decision when substantial evidence  
5 supports it. Indeed, "[w]here the evidence is susceptible to more than one rational  
6 interpretation, one of which supports the ALJ's decision, the ALJ's conclusion must be  
7 upheld." *Thomas v. Barnhart*, 278 F3d. 947, 954 (9th Cir. 2002) (citations omitted).

8 How, then, does one apply this test in light of the instruction that step two is a  
9 mere "de minimis" threshold – that a finding of non-severity at step two must be "clearly  
10 established by medical evidence"? *Webb*, 433 F.3d at 687. Is the reviewing court asking  
11 whether there is substantial evidence to support the ALJ's finding that non-severity at  
12 step two is "clearly established"? Or is the reviewing court asking whether there is  
13 evidence in the record that clears the de minimis threshold? If the former, then an ALJ  
14 decision supported by substantial evidence would be affirmed even if there was objective  
15 evidence in the record suggesting that the disability is more than de minimis. If the latter,  
16 the ALJ's decision would be reversed if evidence in the record clears the de minimis  
17 threshold, even if the ALJ had substantial evidence for finding that non-severity was  
18 "clearly established." *Id.*

19 Stated differently, what if the record, as in this case, includes a history of mental  
20 health problems, continuous medication and treatment, and hospitalizations, but the ALJ  
21 finds – after reviewing and carefully discussing opinions of the relevant medical experts,  
22 including opinions that support his finding – that the evidence clearly establishes that the  
23 impairments are not severe? Does the reviewing court affirm? Or, because the record  
24 contains evidence of serious impairment, must the reviewing court conclude that the de  
25 minimis threshold of step two has been cleared and the ALJ should have proceeded to  
26 step three?  
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1           In *Webb*, after stating that a reviewing court should apply the “normal” substantial  
2 evidence standard, the Ninth Circuit reached this conclusion: “the ALJ found that Webb  
3 lacked a medically severe impairment or combination of impairments *despite objective*  
4 *medical evidence* demonstrating back pain, hypertension, knee pain, hip pain, visual  
5 disturbances, memory loss, diverticulitis, lack of sleep, difficulty performing physical  
6 tasks and lack of employment from 1991 through 1997.” *Id.* (emphasis added). In other  
7 words, it appears that the existence of objective medical evidence of a serious impairment  
8 was enough to clear the de minimis threshold and result in reversal of the ALJ’s decision.  
9 The Court of Appeals continued: “[a]lthough the medical record paints an incomplete  
10 picture of Webb’s overall health during the relevant period, *it includes evidence of*  
11 *problems sufficient to pass the de minimis threshold of step two.*” *Id.* (emphasis added).  
12 Again, some evidence of more than de minimis problems seems to have been enough for  
13 step two.<sup>1</sup>

14           This case illustrates the dilemma presented by the *Webb* standard. On one hand,  
15 the ALJ’s 2014 decision includes a careful and thorough examination of the medical  
16 record, explaining in great detail why the ALJ was persuaded that Plaintiff did not have  
17 severe impairments. The ALJ’s conclusion is supported by at least three doctors –  
18 Peetoom, Allison, and Fair – all of whom found Plaintiffs’ impairments to be mild. On  
19 the other hand, the ALJ found, correctly, that Plaintiff had been diagnosed with bipolar  
20 disorder, posttraumatic stress disorder stemming from an incident where he was taken  
21 hostage as a detention officer, personality disorder, polysubstance abuse in remission, and  
22 alcohol abuse in remission. The record contains evidence that Plaintiff has been  
23 hospitalized for these conditions on several occasions, that he has attempted suicide and  
24 engaged in self-cutting, and that he receives regular mental-health treatment through  
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26 <sup>1</sup> In fairness to the Ninth Circuit, *Webb* included an incomplete medical record,  
27 something that Plaintiff has not complained of here. To the contrary, Plaintiff states that  
28 the “medical record in this file is voluminous.” Doc. 11 at 3.

1 medications and counseling. Added to this, of course, is the fact that the ALJ found the  
2 same impairments to be severe at step two of his 2012 decision.

3 The Court believes that the ALJ's thorough opinion is supported by substantial  
4 evidence, but there is also objective evidence in the record suggesting that the  
5 impairments are more than de minimis. The Court concludes that the most important  
6 portion of *Webb*'s teaching is that the standard at step-two is de minimis. The Court also  
7 concludes that the holding of *Webb*, as opposed to its statement of the standard, requires  
8 the Court to reverse if objective evidence suggests that Plaintiff's impairments are more  
9 than de minimis. *Webb*, 433 F.3d at 687. Because such objective evidence exists in this  
10 case – Plaintiff's undisputed diagnoses, his repeated hospitalizations, and his suicidal and  
11 self-destructive behaviors – the Court will reverse the ALJ's decision. The ALJ should  
12 not have stopped at step two. As requested by Plaintiff (Doc. 11 at 19-20), the Court will  
13 remand to the agency with instructions to review the record as a whole and issue a new  
14 decision.

15 **IT IS ORDERED** that the final decision of the Commissioner of Social Security  
16 is **reversed**. This matter is remanded with instructions to review the record as a whole  
17 and issue a new decision. The Clerk shall enter judgment accordingly and **terminate** this  
18 case.

19 Dated this 21st day of February, 2017.

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24 David G. Campbell  
25 United States District Judge  
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