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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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| 9 Sean Sells,<br>10 Plaintiff,<br>11 v.<br>12 Commissioner of Social Security<br>13 Administration,<br>14 Defendant. | No. CV-16-04330-PHX-JAT<br>**ORDER** |

15 Pending before the Court is Plaintiff Sean Sells's appeal from the Social Security
16 Commissioner's (the "Commissioner's") partial denial of his application for disability
17 insurance benefits and Supplemental Security Income ("SSI") under the Social Security
18 Act. Plaintiff argues that the administrative law judge ("ALJ") erred by: (1) providing an
19 insufficient basis for rejecting Dr. Robert A. Briggs's neuropsychological evaluation;
20 (2) finding Plaintiff's testimony to be non-credible without providing clear and
21 convincing reasons, supported with substantial evidence; (3) failing to completely review
22 the record; (4) failing to consider the State of Arizona's finding that Plaintiff is seriously
23 mentally ill ("SMI"); and (5) providing an insufficient basis for rejecting licensed clinical
24 social worker ("LCSW") Eileen Ripsin's opinions. (Doc. 15 at 1, 23–24). The Court now
25 rules on Plaintiff's appeal.

26 **I. BACKGROUND**

27 **A. Procedural Background**

28 Plaintiff filed for disability insurance benefits on August 31, 2012, alleging

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disability as of February 10, 2010. (Tr. 26; Doc. 15 at 1–2).[1] He also filed a concurrent application for SSI under Title XVI of the Social Security Act. The ALJ held a hearing in February 2015, in which both Plaintiff and a Vocational Expert (the "VE") testified. (Tr. 49–79). The ALJ issued a decision finding Plaintiff not disabled. (Tr. 26–46). In October 2016, the Appeals Council denied Plaintiff's request for review, making the ALJ's decision to deny benefits the Commissioner's final decision. (Tr. 1–5).

### B. Plaintiff's Background

Plaintiff was born on March 4, 1965. (Tr. 38, 81). He has 157 college credits, but he did not graduate from college. (Tr. 434). His subsequent employment included work as a directory assistant, survey taker, and telemarketer. (Tr. 72).

## II. LEGAL STANDARD

The ALJ's decision to deny benefits will be overturned "only if it is not supported by substantial evidence or is based on legal error." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (quotation marks omitted). "Substantial evidence" means more than a mere scintilla, but less than a preponderance. *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998).

"The inquiry here is whether the record, read as a whole, yields such evidence as would allow a reasonable mind to accept the conclusions reached by the ALJ." *Gallant v. Heckler*, 753 F.2d 1450, 1453 (9th Cir. 1984) (citation omitted). In determining whether there is substantial evidence to support a decision, the Court considers the record as a whole, weighing both the evidence that supports the ALJ's conclusions and the evidence that detracts from the ALJ's conclusions. *Reddick*, 157 F.3d at 720. "Where evidence is susceptible of more than one rational interpretation, it is the ALJ's conclusion which must be upheld; and in reaching [her] findings, the ALJ is entitled to draw inferences logically flowing from the evidence." *Gallant*, 753 F.2d at 1453 (citations omitted); *see also Batson v. Comm'r of the Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). This

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[1] Citations to "Tr." are to the certified administrative transcript of record. (Doc. 14).

is because "[t]he trier of fact and not the reviewing court must resolve conflicts in the evidence, and if the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ." *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992); *see also Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990).

The ALJ is responsible for resolving conflicts in medical testimony, determining credibility, and resolving ambiguities. *See Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Thus, if on the whole record before the Court, substantial evidence supports the Commissioner's decision, the Court must affirm it. *See Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989); *see also* 42 U.S.C. § 405(g) (2012). On the other hand, the Court "may not affirm simply by isolating a specific quantum of supporting evidence." *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (quotation marks omitted).

Notably, the Court is not charged with reviewing the evidence and making its own judgment as to whether a plaintiff is or is not disabled. Rather, the Court's inquiry is constrained to the reasons asserted by the ALJ and the evidence relied upon in support of those reasons. *See Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003).

**A. Definition of Disability**

To qualify for disability benefits under the Social Security Act, a claimant must show that, among other things, he is "under a disability." 42 U.S.C. § 423(a)(1)(E) (2012). The Social Security Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *Id.* § 423(d)(1)(A). A person is:

> under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

*Id.* § 423(d)(2)(A).

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### B. Five-Step Evaluation Process

The Social Security Regulations (the "SSRs") set forth a five-step sequential process for evaluating disability claims. 20 C.F.R. § 404.1520(a)(4) (2016); *see also Reddick*, 157 F.3d at 721. A finding of "not disabled" at any step in the sequential process will end the inquiry. 20 C.F.R. § 404.1520(a)(4). The claimant bears the burden of proof at the first four steps, but the burden shifts to the Commissioner at the final step. *Reddick*, 157 F.3d at 721. The five steps are as follows:

1. First, the ALJ determines whether the claimant is "doing substantial gainful activity." 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant is not disabled.

2. If the claimant is not gainfully employed, the ALJ next determines whether the claimant has a "severe medically determinable physical or mental impairment." *Id.* § 404.1520(a)(4)(ii). To be considered severe, the impairment must "significantly limit[] [the claimant's] physical or mental ability to do basic work activities." *Id.* § 404.1520(c). Basic work activities are the "abilities and aptitudes to do most jobs," such as lifting, carrying, reaching, understanding, carrying out and remembering simple instructions, responding appropriately to co-workers, and dealing with changes in routine. *Id.* § 404.1521(b). Further, the impairment must either have lasted for "a continuous period of at least twelve months," be expected to last for such a period, or be expected "to result in death." *Id.* § 404.1509 (incorporated by reference in 20 C.F.R. § 404.1520(a)(4)(ii)). The "step-two inquiry is a *de minimis* screening device to dispose of groundless claims." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not have a severe impairment, then the claimant is not disabled.

3. Having found a severe impairment, the ALJ next determines whether the impairment "meets or equals" one of the impairments listed in the regulations. 20 C.F.R. § 404.1520(a)(4)(iii). If so, the claimant is found disabled without further inquiry. If not, before proceeding to the next step, the ALJ will make a finding regarding the claimant's "residual functional capacity ["RFC"] based on all the relevant medical and other evidence in [the] case record." *Id.* § 404.1520(e). A claimant's RFC is the most

he can still do despite all his impairments, including those that are not severe, and any related symptoms. *Id.* § 404.1545(a)(1).

4. At step four, the ALJ determines whether, despite the impairments, the claimant can still perform "past relevant work." *Id.* § 404.1520(a)(4)(iv). To make this determination, the ALJ compares his RFC "assessment . . . with the physical and mental demands of [the claimant's] past relevant work." *Id.* § 404.1520(f). If the claimant can still perform the kind of work he previously did, the claimant is not disabled. Otherwise, the ALJ proceeds to the final step.

5. At the final step, the ALJ determines whether the claimant "can make an adjustment to other work" that exists in the national economy. *Id.* § 404.1520(a)(4)(v). In making this determination, the ALJ considers the claimant's RFC and his "age, education, and work experience." *Id.* § 404.1520(g)(1). If the claimant can perform other work, he is not disabled. If the claimant cannot perform other work, he will be found disabled.

In evaluating the claimant's disability under this five-step process, the ALJ must consider all evidence in the case record. *See id.* §§ 404.1520(a)(3), 404.1520b. This includes medical opinions, records, self-reported symptoms, and third-party reporting. *See id.* §§ 404.1527, 404.1529; SSR 06-3P, 71 Fed. Reg. 45593–97 (Aug. 9, 2006).

**C. The ALJ's Evaluation under the Five-Step Process**

At step one of the sequential evaluation process, the ALJ found that Plaintiff did not engage in substantial gainful activity since his alleged onset date. (Tr. 29). At step two, the ALJ concluded that Plaintiff had the following severe impairments: "obstructive sleep apnea, obesity, major depressive disorder, generalized anxiety disorder, and personality disorder." (Tr. 29–30). At step three, the ALJ determined that Plaintiff's mental and physical impairments did not meet or equal any of the listed impairments in the SSRs. (Tr. 30–32).

Before moving on to step four, the ALJ conducted a RFC determination in light of Plaintiff's testimony and the objective medical evidence. (Tr. 33–38). The ALJ found that

Plaintiff had the RFC, during the period of January 25, 2006 to December 1, 2009, to:

> perform a full range of work at all exertional levels but with the following non-exertional limitations: He can never climb ladders, ropes, or scaffolds. He should avoid concentrated exposure to nonweather related extreme cold, dangerous machinery with moving mechanical parts, and unprotected heights that are high or exposed. He should avoid concentrated exposure to toxic or caustic chemicals, poorly ventilated areas, and pulmonary irritants such as fumes, odors, dusts, and gases. He can perform work where only occasional simple decision-making is required and work with only occasional routine changes in the work environment. He can have minimal interaction with the public, coworkers, and supervisors, but can still work in the vicinity of others. He can work with things, not data or people.

(Tr. 33). At step four, the ALJ found that Plaintiff could not perform any past relevant work. (Tr. 38). Finally, the ALJ concluded at step five that, based on Plaintiff's RFC, age, education, and work experience, Plaintiff could perform a significant number of jobs existing in the national economy. (Tr. 39). Consequently, the ALJ found that Plaintiff was not disabled under the Social Security Act during the period beginning on February 10, 2010 and ending on April 27, 2015. (Tr. 40, 41).

## III. ANALYSIS

Plaintiff makes four arguments for why the Court should reverse the ALJ's decision. Specifically, Plaintiff asserts that the ALJ committed the following errors: (1) failing to "mention, consider, evaluate, or provide any reason for rejecting examining specialist, Robert Briggs's . . . neuropsychological evaluation," (Doc. 15 at 15–17); (2) rejecting Plaintiff's credibility without clear and convincing reasons for doing so, (*id.* at 17–21); (3) failing to completely review the record, (*id.* at 21–22); (4) failing to consider a State of Arizona finding that Plaintiff is SMI while rejecting the third-party evidence, (*id.* at 22–23); and (5) rejecting LCSW Eileen Ripsin's opinion without providing "specific reasons, germane to" Ms. Ripsin, (*id.* at 23–24). The Court will now address each argument in turn.

### A. Whether the ALJ Properly Considered Dr. Robert Briggs's Evaluation

Plaintiff first argues that the ALJ erred when she failed to consider or mention Dr.

Briggs's neuropsychological evaluation. (*Id.* at 15). The Commissioner rejoins that the ALJ considered Dr. Briggs's neuropsychological evaluation, and, alternatively, any lack of consideration by the ALJ was harmless error. (Doc. 16 at 3–8).

**1. Legal Standard**

With respect to medical testimony, the Ninth Circuit Court of Appeals (the "Ninth Circuit") distinguishes between the opinions of three types of physicians: (1) those who treat the claimant ("treating physicians"); (2) those who examine but do not treat the claimant ("examining physicians"); and (3) those who neither examine nor treat the claimant ("non-examining physicians"). *Lester v. Chater*, 81 F.3d 821, 830–31 (9th Cir. 1995). As a general rule, the opinion of an examining physician is entitled to greater weight than the opinion of a non-examining physician, but less than a treating physician. *Andrews*, 53 F.3d at 1040–41.

An "ALJ must consider all medical opinion evidence." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (citing 20 C.F.R. § 404.1527(b) (2007)). Although an ALJ "is not bound by an expert medical opinion on the ultimate question of disability, she must provide 'specific and legitimate' reasons for rejecting the opinion" of an examining physician. *Id.*; *see also Lester*, 81 F.3d at 830 ("And like the opinion of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record."). This burden is satisfied where an ALJ sets out "a detailed and thorough summary of the facts and conflicting clinical evidence, stating [her] interpretation thereof, and making findings." *Magallanes*, 881 F.2d at 751 (citation omitted).

**2. Analysis**

Here, the ALJ erred by failing to consider and weigh examining physician Dr. Briggs's neuropsychological evaluation. The ALJ made three citations to Dr. Briggs's evaluation, none of which actually referred to Dr. Briggs's evaluation of Plaintiff. (*See* Tr. 30, 34 (citing Tr. 801–803)). For example, the ALJ cited to Dr. Briggs's evaluation to

recognize that the "record makes note of a conversion disorder, which the medical records fail to support." (Tr. 30 (citing Tr. 801)). However, Dr. Briggs's evaluation simply refers to the conversion disorder diagnosis from nurse practitioner Evette Campos rather than any independent diagnosis. (Tr. 801). Thus, the Court finds that the ALJ erred by failing to consider or even give "specific and legitimate reasons that are supported by substantial evidence" to reject Dr. Briggs's evaluation. *Tommasetti* 533 F.3d at 1041; *see also Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014) ("Where an ALJ does not explicitly reject a medical opinion or set forth specific, legitimate reasons for crediting one medical opinion over another, he errs.").

Next, the Court must consider whether the ALJ's error was harmless. *See Marsh v. Colvin*, 792 F.3d 1170, 1172 (9th Cir. 2015) ("We hold that harmless error analysis applies in this case to assess the impact of the ALJ's failure to . . . mention [a treating or examining phyisican] . . . [or] give 'specific and legitimate reasons that are supported by substantial evidence' for rejecting a treating source's medical opinion." (quoting *Garrison*, 759 F.3d at 1012)). An error is harmless if it is "inconsequential to the ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). "[A] reviewing court cannot consider [an] error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination." *Id.* at 1056.

Here, Plaintiff argues that a number of Dr. Briggs's opinions concerning Plaintiff's functioning would have led the ALJ to conclude that Plaintiff could not work had she credited Dr. Briggs's opinion as true. (Docs. 15 at 16; 17 at 4). Plaintiff summarized these opinions as follows:

> one-third of Plaintiff's neuropsychological functioning tests were in the brain-damaged range, his concentration and attention likely are "significantly compromised" by worry, he is likely to manifest a variety of maladaptive behaviors in an attempt to control his anxiety, he suffers anxiety in interactions where "unconditional acceptance is not guaranteed," . . . and his "bilateral brain-related sensorimotor impairment" is "consistent with residual deficits from multiple head injuries."

(Doc. 15 at 16 (quoting Tr. 809–13)). The Commissioner rejoins that the ALJ's error was harmless because Dr. Briggs's evaluation was not inconsistent with the ALJ's RFC determination. (Doc. 16 at 6).

The Court agrees with the Commissioner and concludes that the opinions of Dr. Briggs are consistent with the ALJ's RFC determination. First, the ALJ's RFC determination comported with Dr. Briggs's observations of Plaintiff's brain impairment. For example, Dr. Briggs noted that 30% of Plaintiff's scores on the component Halstead Impairment Index tests were within the brain-damaged range. (Tr. 809). Dr. Briggs also noted that Plaintiff's score on the General Neuropsychological Deficit Scale indicated "mild impairment of brain functioning." (Tr. 809). Dr. Briggs concluded that Plaintiff "displayed a generally consistent pattern of abilities demonstrating good and intact abilities," and, although Dr. Briggs recognized "residual deficits from multiple closed head injuries," Plaintiff's "cognitive abilities (including memory) are generally intact." (Tr. 813). The ALJ reached a similar conclusion, finding that Plaintiff's functional limitations required that Plaintiff "perform work where only occasional simple decision-making is required and work with only occasional routine changes in the work environment." (Tr. 33). Thus, the ALJ's RFC determination comports with Dr. Briggs's conclusions regarding Plaintiff's brain impairment.

Next, the ALJ's RFC determination is similar to Dr. Briggs's findings on Plaintiff's ability to concentrate. For example, although Plaintiff indicated on the Personality Assessment Inventory that he experienced "a discomforting level of anxiety and tension," which likely "significantly compromised" his "ability to concentrate and attend," Dr. Briggs noted there was "no indication of impaired attention or concentration in the evaluation." (Tr. 810–11). Dr. Briggs further recorded that Plaintiff's performance on the Halstead-Reitan Neuropsychological Test Battery "indicated no impairment of his attentional capacities." (Tr. 805). Finally, Dr. Briggs noted that Plaintiff's scores on the Wechsler Adult Intelligence Scale indicated Plaintiff's "ability to sustain attention, concentrate, and exert mental control . . . in the very superior range [and Plaintiff]

performed better than approximately 98% of his peers in this area." (Tr. 808). The Court finds that the ALJ's RFC determination is consistent with Dr. Briggs's unremarkable findings regarding Plaintiff's level of concentration.

The ALJ's RFC determination is consistent with Dr. Briggs's findings in other areas as well. For example, Dr. Briggs found that Plaintiff's "pattern of responses reveals that he is likely to display a variety of maladaptive behavior patterns aimed at controlling anxiety" and Plaintiff's "self-description indicates significant suspiciousness and hostility in his relations with other." (Tr. 811). Similarly, the ALJ recognized that Plaintiff "can have minimal interaction with the public, coworkers, and supervisors, but can still work in the vicinity of others," and, relatedly, Plaintiff "can work with things, not data or people." (Tr. 33).

Finally, Dr. Briggs noted evidence of "bilateral sensorimotor difficulties," suggesting "bilateral brain-related sensorimotor impairment that is consistent with residual deficits from multiple closed head injuries although [Plaintiff's] cognitive abilities (including memory) are generally intact." (Tr. 813). At step five, the ALJ appeared to consider Plaintiff's sensorimotor impairment in identifying office cleaner as one of the representative occupations Plaintiff could perform. (Tr. 39); *see Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) (recognizing that even if "the ALJ's RFC finding erroneously omitted [the claimant's] postural limitations . . ., any error was harmless since sedentary jobs require infrequent stooping, balancing, crouching, or climbing"). Indeed, the Dictionary of Occupational Titles recognizes that the job of office cleaner requires a "low degree of aptitude ability" for motor coordination, finger dexterity, and manual dexterity. *See* U.S. Dep't of Labor, Dictionary of Occupational Titles 1,792 (4th ed. 1991); *see also Pinto v. Massanari*, 249 F.3d 840, 845–46 (9th Cir. 2001) ("[T]he best source for how a job is generally performed is usually the Dictionary of Occupational Titles." (citations omitted)). Further, as the ALJ recognized, in the national economy, 220,000 office cleaner jobs exist. (Tr. 39); *see Gutierrez v. Comm'r of Soc. Sec.*, 740 F.3d 519, 528 (9th Cir. 2014)

(holding that “25,000 jobs [in the national economy] meets the statutory standard”). Thus, consideration of Dr. Briggs’s assessments related to Plaintiff’s bilateral brain-related sensorimotor impairment would not have altered the ALJ’s ultimate finding that Plaintiff could perform the requirements of an office cleaner.

Plaintiff fails to mention any specific portion of Dr. Briggs’s opinion that is inconsistent with the ALJ’s decision. For example, in his Reply, Plaintiff comprehensively states the standard for harmless error but fails to provide any analysis; instead, Plaintiff offhandedly states, “If Dr. Briggs’[s] opinions concerning Plaintiff’s functioning were credited, Plaintiff would have been found unable to work, per VE testimony.” (Doc. 17 at 4). Such a conclusory and unsupported statement is not enough to show that the ALJ’s error was harmful. *See Shinseki v. Sanders*, 556 U.S. 396, 398 (2009) (“The burden of showing harmfulness is normally on the party attacking an agency’s determination.”). Further, although Plaintiff cites to additional contents of Dr. Briggs’s report, these quotations are not opinions of Dr. Briggs but, rather, self-reported statements by Plaintiff. (*See* Doc. 17 at 3 (citing Tr. 811 (“[Plaintiff] describes himself as a socially isolated individual who has few interpersonal relationships that could be described as close and warm.”))). Thus, these excerpts are not the opinions of Dr. Briggs.

The facts presented here are also different from cases like *Marsh v. Colvin*, where the Ninth Circuit held an ALJ committed harmful error by failing to mention a treating source’s medical opinion. 792 F.3d at 1173. In *Marsh*, the district court had found harmless error because the ignored opinion was “brief and conclusionary.” *See Marsh v. Comm’r of Soc. Sec. Admin.*, No. C 11-02096 CRB, 2012 WL 1496142, at *6 (N.D. Cal. Apr. 27, 2012). In vacating the district court’s decision, the Ninth Circuit noted that, because the doctor’s opinion contradicted the ALJ’s findings, it could not “confidently conclude that the [ALJ’s] error was harmless.” 792 F.3d at 1173 (quotation marks omitted); *see also Wright v. Astrue*, No. CV-09-164-CI, 2010 WL 2264960, at *9 (E.D. Wash. June 2, 2010) (rejecting the Commissioner’s harmless error argument because “the assessments of sedentary and light work . . . [by the doctors] were qualified by *additional*

limitations which were not considered by the ALJ" (emphasis added)). In essence, these cases held a failure to mention a medical opinion is harmful error where the ignored opinion contained limitations that the ALJ otherwise did not consider. Here, however, the Court cannot find—and Plaintiff has failed to present—any portion of Dr. Briggs's opinion that is inconsistent with the ALJ's ultimate decision. Thus, the Court can "confidently conclude" that the ALJ's error was harmless.

**B. Whether the ALJ Properly Discredited Plaintiff's Symptom Testimony**

Plaintiff next argues that the ALJ erred when she determined that Plaintiff's testimony regarding the intensity, persistence, and limiting effects of his impairments was "not fully credible." (Doc. 15 at 17–21; *see* Tr. 35). The Commissioner rejoins that the ALJ "considered [Plaintiff's] complaints, compared them to the evidence of record, and gave legally sufficient reasons for discounting them." (Doc. 16 at 8).

**1. Legal Standard**

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Reddick*, 157 F.3d at 722. If credibility is critical, the ALJ must make an explicit credibility finding. *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006).

In assessing the credibility of a claimant's testimony regarding subjective pain or the intensity of his symptoms, the ALJ must engage in a two-step analysis. *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012). First, as a threshold matter, "the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment 'which could reasonably be expected to produce the pain or other symptoms alleged.'" *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). Second, if the claimant meets the first test, then "the ALJ 'may not discredit a claimant's testimony of pain and deny disability benefits solely because the degree of pain alleged by the claimant is not supported by objective medical evidence.'" *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995) (quoting *Bunnell*, 947 F.2d at 346–47). Rather, "unless an ALJ makes a

finding of malingering based on affirmative evidence thereof," the ALJ may only find the claimant not credible by making specific findings supported by the record that provide clear and convincing reasons to explain his credibility evaluation. *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (citing *Smolen*, 80 F.3d at 1283–84); *see also Lingenfelter*, 504 F.3d at 1036.

In rendering a credibility determination, the ALJ may consider several factors, including: "(1) ordinary techniques of credibility evaluation, such as the claimant's reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony by the claimant that appears less than candid; (2) unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment; and (3) the claimant's daily activities." *Tommasetti*, 533 F.3d at 1039 (quoting *Smolen*, 80 F.3d at 1284). If the ALJ relies on these factors and her reliance is supported by substantial evidence, the Court "may not engage in second-guessing." *Id.* (citing *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002)).

**2. Analysis**

In this case, the ALJ found that Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, [Plaintiff's] statements concerning the intensity, persistence and limiting effects of these symptoms [were] not entirely credible." (Tr. 35). In particular, the ALJ based her credibility determination on Plaintiff's: (1) receipt of unemployment benefits; (2) failure to follow prescribed treatment; (3) failure to take prescribed medication; (4) work history given his longstanding alleged disabilities; (5) testimony being inconsistent with the medical record; and (6) daily activities. (Tr. 31–36).

**a. Receipt of Unemployment Benefits**

The ALJ discounted Plaintiff's allegations about the severity of his symptoms and limitations because Plaintiff received unemployment benefits during the time he was alleging disability. (Tr. 34–35). The receipt of unemployment benefits may undermine a claimant's alleged inability to work full time. *Carmickle v. Comm'r, Soc. Sec. Admin.*,

533 F.3d 1155, 1162 (9th Cir. 2008) (citing *Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir. 1988)). This is because unemployment benefit applications sometimes require that a claimant hold himself out as available for full-time work. *Copeland*, 861 F.2d at 542.

Here, Plaintiff's unemployment benefits application is not in the record before this Court. Moreover, although the ALJ stated that Plaintiff "certified each week his readiness and ability to work, at least in some capacity," the ALJ does not cite to a specific document or testimony containing this language. (Tr. 35). Additionally, the record before the Court does not establish whether Plaintiff held himself out as available for full-time—or even part-time—work. Because the Court cannot determine whether Plaintiff made an assertion regarding his availability for full-time work, his application for and receipt of unemployment benefits does not constitute a clear and convincing reason for discrediting Plaintiff's credibility. *See Carmickle*, 533 F.3d at 1162 (recognizing that receipt of unemployment benefits is only inconsistent with a claimant's disability allegations when a claimant holds himself out as available for full-time work—as opposed to part-time work—in the unemployment benefits application).

**b. Failure to Follow Prescribed Treatment**

In support of her adverse credibility determination, the ALJ noted that Plaintiff failed to follow prescribed treatment. (Tr. 34). The Ninth Circuit has "long held that, in assessing a claimant's credibility, the ALJ may properly rely on 'unexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment.'" *Molina*, 674 F.3d at 1113 (quoting *Tommasetti*, 533 F.3d at 1039). As a threshold matter, Plaintiff argues that the ALJ erred by considering Plaintiff's failure to follow prescribed treatments because she failed to consider the conditions in SSR 82-59. (Doc. 15 at 19); *see* 1982 SSR LEXIS 25. Plaintiff's argument misstates the law. The Ninth Circuit has held that the conditions in SSR 82-59 do not apply where, like here, "the ALJ determined [the claimant] was not disabled, and [the claimant's] failure to seek treatment . . . was merely a factor in the ALJ's credibility determination." *Molina*,

674 F.3d at 1114 n.6. Thus, the ALJ's alleged noncompliance with SSR 82-59 does not constitute error.

The ALJ recognized that Plaintiff denied "'using his [Continuous Positive Airway Pressure ("CPAP") Machine],' despite his concerns of shortness of breath at night and fatigue." (Tr. 34). The ALJ made specific reference to Plaintiff's repeated complaints of discomfort with the CPAP machine and concluded that his "'multiple reasons for non-compliance' greatly undermines his credibility and suggests a lesser severity of impairments than alleged." (Tr. 34). Plaintiff argues that the ALJ should not have used this as a basis to discredit Plaintiff's credibility because "Plaintiff was often homeless." (Doc. 15 at 18). The medical record indicates that Plaintiff referred to his temporary homelessness as a basis for not using his CPAP machine, (Tr. 515, 544, 548); however, after moving into his own apartment, Plaintiff still refrained from using his CPAP machine despite his continued affliction with sleep apnea. As the ALJ indicated, Plaintiff stated multiple times that he was not using the CPAP due to discomfort rather than a lack of ability or resources. (Tr. 34, 701, 1000). Thus, the ALJ properly concluded that Plaintiff's failure to follow his prescribed treatment detracted from his credibility.

**c. Failure to Take Prescribed Medication**

The ALJ also discounted Plaintiff's subjective complaints because Plaintiff failed to take prescribed medications. (Tr. 34, 36). "[U]nexplained or inadequately explained failure to seek treatment or to follow a prescribed course of treatment" may support a negative credibility finding. *Smolen*, 80 F.3d at 1284; *see also Scott v. Colvin*, No. 3:13-cv-00502-HZ, 2014 WL 1096200, at *4 (D. Or. Mar. 18, 2014) (holding that an ALJ properly considered a plaintiff's failure to take prescribed Vicodin when discounting the plaintiff's credibility).

Here, the ALJ recognized that Plaintiff was "'[n]on-compliant with medications due to forgetting to take them,' [and] also reported only taking his Buspar as needed rather than daily as prescribed." (Tr. 34, 996). The ALJ further noted that "Dr. Rabara recorded [Plaintiff] as saying, 'I was given Lexapro and I don't think I want to take it

anyway,' thus indicating a failure to follow prescribed treatment." (Tr. 36, 585). Plaintiff argues that the ALJ should not have used this as a basis to discredit Plaintiff's credibility because "Plaintiff was often . . . without insurance." (Doc. 15 at 18). However, the record is clear—and the ALJ cited to instances where—Plaintiff often forgot or refused to take his prescribed medication while he had insurance coverage. (*See, e.g.*, Tr. 649, 996). Therefore, the ALJ's conclusion that Plaintiff had a history of not complying with prescribed treatment was supported by medical evidence, and such a conclusion was a clear and convincing reason for rejecting Plaintiff's testimony.

**d. Plaintiff's Significant Work History**

The ALJ also based her adverse credibility finding on the fact Plaintiff's sleep apnea, obesity, major depressive disorder, generalized anxiety disorder, and personality disorder did not prevent past work in positions that required greater social interaction than recommended by the RFC assessment. (Tr. 34). An ALJ may properly consider a claimant's ability to work in the past despite longstanding alleged impairments. *See, e.g.*, *Gregory v. Bowen*, 844 F.2d 664, 667 (9th Cir. 1988) (upholding an ALJ's adverse credibility determination where there existed substantial evidence in the record indicating that the claimant's "back problems had not prevented her from working" for many years); *Crosby v. Comm'r of Soc. Sec. Admin.*, 489 F. App'x 166, 168 (9th Cir. 2012) (upholding an ALJ's adverse credibility determination because the claimant's testimony that he suffered debilitating symptoms was inconsistent "with his work history showing that his longstanding conditions did not preclude work in the past").

Here, Plaintiff does not dispute that, despite his longstanding impairments, he was able to work in jobs requiring a high degree of social interaction, such as a telemarketer. (Tr. 34). Moreover, from 1995 to 2008, Plaintiff annually earned more than the threshold for a presumption of SGA, (*compare* Tr. 244–48, *with* Substantial Gainful Activity, Soc. Sec. Admin., http://www.ssa.gov/oact/cola/sga.html (last visited July 14, 2017)), indicating Plaintiff's ability to maintain gainful employment over a long period of time despite his longstanding impairments. Accordingly, the ALJ did not err in considering

Plaintiff's work history when assessing the credibility of his allegations.

**e. Inconsistencies with Medical Record**

Next, the ALJ discounted some of Plaintiff's subjective complaints because they were inconsistent with objective findings in the medical record as well as Plaintiff's statements found within the medical record. (Tr. 34). An ALJ may discount a claimant's testimony when the claimant's medical record reflects better functioning than alleged. *See, e.g.*, *Molina*, 674 F.3d at 1113; *Carmickle*, 533 F.3d at 1161 ("Contradiction with the medical record is a sufficient basis for rejecting the claimant's subjective testimony."). Because an ALJ cannot simply state that a claimant's testimony is contradicted by the record, *see Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001) ("[G]eneral findings are an insufficient basis to support an adverse credibility determination."), the ALJ must specifically identify which "testimony is not credible and what evidence suggests the complaints are not credible," *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993); *see also Greger*, 464 F.3d at 972.

Here, the ALJ recognized that Plaintiff stated his ability "to cope with his current level of anxiety" during medical examinations. (Tr. 34, 709). The ALJ also noted that, despite Plaintiff's complaints of mental health issues, his examination results often reflected normal mood, affect, behavior, judgment, and thought content. (*See* Tr. 34, 546, 956, 966, 980, 993, 1001, 1009, 1037). Plaintiff argues that the ALJ failed to consider that "improved functioning while limiting environmental stressors does not always mean that a claimant can perform full-time work." (Doc. 15 at 19). However, the ALJ did not make such a broad finding that the medical record indicated an established ability to perform full-time work and, instead, more narrowly pinpointed some of Plaintiff's allegations regarding his ability to function that were qualified or contradicted by the medical record. Thus, the inconsistencies between Plaintiff's testimony and the objective medical record are a clear and convincing reason to discount parts of Plaintiff's testimony.

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#### f. Plaintiff's Daily Activities

Finally, the ALJ concluded that Plaintiff's activities of daily living contradicted the level of impairment he claimed. (Tr. 31–34). Daily activities may be grounds for an adverse credibility finding if: (1) the plaintiff's activities contradict his other testimony; or (2) the plaintiff "is able to spend a substantial part of his day engaged in pursuits involving the performance of physical functions that are transferable to a work setting." *Orn*, 495 F.3d at 639 (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

Here, the ALJ noted numerous contradictions between Plaintiff's daily activities and his testimony regarding significant functional limitations. For example, Plaintiff "explained that he independently takes care of his personal hygiene, exercises, prepares meals, cleans his room, does laundry, and grocery shops." (Tr. 31, 267–69, 698). Despite Plaintiff's testimony about his significant social functioning limitations, Plaintiff "noted he interacts with others via a computer, uses public transportation, attends doctor appointments, walks for exercise, and goes to the library." (Tr. 31, 267, 269, 701); *see Attmore v. Colvin*, 827 F.3d 872, 878 n.2 (9th Cir. 2016) (noting that an ALJ may properly consider taking public transportation as an activity of daily living when assessing the severity of a claimant's impairment and social functioning). Plaintiff also "attended Toast Masters where . . . [t]hey teach public speaking and give you spontaneous topics to discuss." (Tr. 34, 271 (quotation marks omitted)). Although Plaintiff alleged poor motor coordination, he was capable of using a computer and typing up to 40 words per minute. (Tr. 34, 271). In addition, despite Plaintiff's alleged poor concentration, he stated he only experienced "occasional drifts in his attention when writing approximately 2,000 to 3,000 words per day." (Tr. 34, 586). Further, he "obsessively" participated in daily activities—including playing video games, listening to music, watching movies, and collecting items—that the ALJ recognized suggested "some ability" to concentrate. (Tr. 34, 270, 732).

Plaintiff argues that the ALJ should not have used Plaintiff's daily activities as a basis to reject Plaintiff's symptom testimony because the ALJ "did not find that Plaintiff

spent a substantial part of his day engaged in" the activities the ALJ discussed. (Doc. 15 at 20). However, the ALJ gave "specific, clear and convincing reasons" for discounting Plaintiff's testimony about the severity and intensity of his symptoms. *See Molina*, 674 F.3d at 1112 (quotation marks omitted); *see also, e.g.*, *id.* at 1113 ("The ALJ could reasonably conclude that [the claimant's] activities, including walking her two grandchildren to and from school, attending church, shopping, and taking walks, undermined her claims that she was incapable of being around people without suffering from debilitating panic attacks."). Further, the ALJ did not rely solely on a claimant's daily activities to discredit his subjective symptom testimony. *See Burch v. Barnhart*, 400 F.3d 676, 680–81 (9th Cir. 2005) (upholding the ALJ's adverse credibility determination based on the claimant's daily activities alongside objective medical findings and lack of consistent treatment). Here, the ALJ has not singularly relied on Plaintiff's daily activities to discredit his claim that his impairments are entirely disabling; she has also relied on Plaintiff's failure to follow prescribed treatment, his work history, and contradictions with the medical record. The ALJ's finding that Plaintiff's daily activities of living were inconsistent with his allegations of total disability was therefore properly based on substantial evidence.

**g. The Credibility Determination Is Sufficiently Supported**

Although the Court does not accept all of the reasons the ALJ cited to support her adverse credibility determination, the ALJ provided sufficient legally adequate reasons that are supported by substantial evidence in support of her credibility determination and, therefore, the Court affirms that determination. *See Batson*, 359 F.3d at 1197 (stating that the court may affirm an ALJ's overall credibility conclusion even when not all of the ALJ's stated reasons are upheld); *see also Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (stating that "[e]ven if we discount some of the ALJ's observations of [the claimant's] inconsistent statements and behavior . . . we are still left with substantial evidence to support the ALJ's credibility determination").

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### C. Whether the ALJ Properly Considered the Evidence

Plaintiff next argues that the ALJ erred by "cherry-picking" from the portions of the record that supported her decision while ignoring evidence that was favorable to Plaintiff. (Docs. 15 at 21–22; 17 at 5–6). The Commissioner argues that the ALJ considered the evidence and her interpretation of the record was rational. (Doc. 16 at 16–19).

#### 1. Legal Standard

"In determining a claimant's RFC, and ALJ must consider all relevant evidence in the record." *Robbins*, 466 F.3d at 883 (quotation marks omitted). If the ALJ rejects significant, probative evidence, the ALJ must explain why. *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). In other words, an ALJ cannot cherry-pick evidence to support her findings. *See Holohan*, 246 F.3d at 1207 (holding that an ALJ erred by selectively considering some entries in the medical record while ignoring others); *see also Davila v. Colvin*, No. CV 14-2844-DFM, 2014 WL 5660455, at *4 (C.D. Cal. Nov. 4, 2014) ("The ALJ may not cherry-pick evidence to support the conclusion that a claimant is not disabled, but most consider the evidence as a whole in making a reasoned disability determination.").

#### 2. Analysis

Plaintiff identifies four ways in which he argues the ALJ failed to consider the entire record by cherry-picking evidence. (Doc. 15 at 21–22). In particular, Plaintiff argues that the ALJ cherry-picked evidence involving the following: (1) Dr. Charles House's opinion; (2) observations from treating nurse practitioners; (3) various notes regarding the need to redirect Plaintiff; and (4) Drs. David Yandell and Larry Waldman's opinions. (*Id.*).

##### a. Consideration of Dr. Charles House's Opinion

Plaintiff first appears to argue that the ALJ erred by giving "significant weight" to Dr. House's opinion but failing to incorporate Dr. House's observations of "rudeness and anger" into her findings. (Doc. 15 at 22; Tr. 435). Contrary to Plaintiff's purported

argument, the ALJ explicitly considered Dr. House's notation that Plaintiff "interacted inappropriate[ly] during this examination." (Tr. 36). Further, the ALJ gave "significant weight" to Dr. House's conclusion that Plaintiff's "ability to get along with co[-]workers, respond appropriately to supervision and maintain socially appropriate behavior is moderately limited." (Tr. 430; *see also* Tr. 33 ("[Plaintiff] can work with things, not data or people.")). Thus, Plaintiff's argument that the ALJ erred by incompletely reviewing Dr. House's opinion fails.

**b. Consideration of the Nurse Practitioners' Observations**

Plaintiff next argues that the ALJ erred by "cherry-picking" observations by multiple nurse practitioners.[2] (Doc. 15 at 22). In particular, although the ALJ cited to notations from the nurse practitioners indicating Plaintiff's "normal mood, affect, behavior, and thought content," Plaintiff argues that the ALJ should have also explicitly considered notations about Plaintiff's "bizarre thoughts, inappropriate judgment, [and] rapid speech," among other observations. (*Id.*).

Nurse practitioners from MIHS treated Plaintiff for various physical impairments. (*See* Tr. 889–1043; Doc. 15 at 23–24). As part of their progress notes, the nurse practitioners recorded various psychiatric observations from the appointments. In her opinion, the ALJ cited to some of these psychiatric observations to contrast LCSW Eileen Ripsin's findings that Plaintiff was severely limited in various aspects of social functioning. (Tr. 37, 658–59). The ALJ also cited to the same psychiatric observations in echoing the findings of Dr. Michael Rabara that Plaintiff had "no more than a mild limitation in concentration." (Tr. 36). The ALJ did not give any specific weight to the nurse practitioner observations and did not reject any of the observations; rather, the ALJ used the observations to undermine claims that Plaintiff experienced severe barriers to

[2] Plaintiff fails to cite to any page in the record when making this argument and, instead, uses the phrase "as noted in above" to describe the source of 11 different notations. (Doc. 15 at 22). Later in his Motion, Plaintiff repeats many of these notations and provides multiple citations. (*Id.* at 24). All of these citations refer to nurse practitioners examining Plaintiff for Maricopa Integrated Health System ("MIHS"). (*See* Tr. 889–1043). Thus, the Court will assume these citations correspond with the argument Plaintiff makes here.

proper social functioning. (Tr. 36–38).

Plaintiff's argument that the ALJ erred in allegedly "cherry-picking" from the evidence is misguided. As a threshold matter, although Plaintiff did not provide a specific weight or reject the nurse practitioners' observations, Plaintiff does not argue that this was error. Thus, the Court will not address an argument Plaintiff did not make. *See, e.g.*, *Cherpes v. Colvin*, Case No. 15-cv-05891 JRC, 2016 WL 7209629, at *2 (W.D. Wash. Dec. 13, 2016) (noting that "[t]he Ninth Circuit has 'repeatedly admonished that we cannot manufacture arguments for an appellant and therefore we will not consider any claims that were not actually argued in appellant's opening brief.'" (quoting *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929–30 (9th Cir. 2003))).

As a result, Plaintiff attempts to argue that once an ALJ cites specific evidence, the ALJ must provide a robust discussion of every other piece of evidence from the relevant opinion; or, in this case, the ALJ would have been required to comment upon every piece of evidence in the over 150 pages of nurse practitioner treatment records.[3] The Ninth Circuit does not recognize such a requirement. *See, e.g.*, *Howard ex rel. Wolff v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003) (stating that "in interpreting the evidence and developing the record, the ALJ does not need to discuss every piece of evidence" (quotation marks omitted)); *Harris v. Astrue*, No. EDCV 09-1689 SS, 2010 WL 1641341, at *9 (C.D. Cal. Apr. 21, 2010) ("Although the ALJ did not explicitly discuss or reject the clinician's assessment, the ALJ's failure to address every single item in the administrative record does not constitute legal error."). Thus, the Court finds the ALJ did not "'cherry-pick' from mixed evidence," (Doc. 15 at 22), but rather cited to specific evidence in the record that contradicted Ms. Ripsin's finding that Plaintiff was severely limited in social functioning. Further, even if the ALJ erred in failing to address all of the

[3] The Court notes that many of the observations Plaintiff addresses were not contradictory, and even appeared in the same summary report, as those observations cited by the ALJ. (*See, e.g.*, Tr. 955–56 (observing normal mood, affect, behavior, judgment, thought content, but Plaintiff was positive for suicidal ideations), 1036–37 (observing normal mood, affect, behavior, judgment, and thought content, but Plaintiff may not be able to give an accurate review of systems)). Thus, Plaintiff is not just arguing that the ALJ had a duty to explicitly consider contradictory evidence but, rather, *all* evidence.

nurse practitioners' observations, Plaintiff has failed to argue—and the Court fails to see—how the outcome would be any different. *See Curry v. Sullivan*, 925 F.2d 1127, 1129 (9th Cir. 1990) (applying the harmless error rule to review of administrative decisions regarding disability).

**c. Consideration of Notes Regarding Redirection**

Similarly, Plaintiff claims that the ALJ erred by failing to mention treatment notes indicating difficulties in "redirecting" Plaintiff. (Doc. 15 at 22). First, contrary to Plaintiff's contention, the ALJ considered some of the references to redirection. (*See, e.g.*, Tr. 36–37 (evaluating Dr. Renee Beinfar's observation that Plaintiff required some redirection and remarking that Dr. Beinfar's "examination notes and testing provides insight into [Plaintiff's] mental abilities and state of mind"), 652).

Second, Plaintiff fails to explain the significance or probative value of these notations about redirection. The Court repeats that, in interpreting the evidence and developing the medical record in a written determination, an ALJ is not required to "discuss every piece of evidence." *Howard*, 341 F.3d at 1012. Rather, an ALJ "must explain why 'significant probative evidence has been rejected.'" *Vincent*, 739 F.2d at 1395.

Here, Plaintiff argues that these instances where Plaintiff was difficult to redirect are significant and probative because the frequent need for redirection would lead the ALJ to conclude that Plaintiff could not perform any jobs within the national economy. (Doc. 15 at 22). In support, Plaintiff refers to the VE's testimony, in which the VE opined that "if [Plaintiff] need[ed] [supervision] all the time on redirect, [he could not sustain the] simple jobs" that the ALJ selected in step five. (Tr. 75; *see* Doc. 15 at 22). However, Plaintiff fails to cite to any treatment provider's notation that indicates Plaintiff required "constant" or some other prolonged redirection; rather, Plaintiff cites only to instances where Plaintiff simply "required redirection to focus on the tests," (Tr. 805), or was "not easily redirected," (Tr. 732), among similar observations. Plaintiff's intermittent need for redirection is not akin to requiring constant redirection. Thus, the Court does not find it

necessary for the ALJ to make explicit reference to every instance Plaintiff was redirected. In other words, each instance of redirection is not significant probative evidence, especially when the ALJ *did* explicitly discuss some instances of redirection. *See also, e.g.*, *Cantrall v. Colvin*, 540 F. App'x 607, 609 (9th Cir. 2013) ("Even assuming that the ALJ failed to address Dr. Moore's opinion about [the claimant's] marked limitations, and this aspect of his report was significant and probative such that the ALJ was required to discuss it, it appears any error was harmless, as the ALJ accounted for similar opinions and [the claimant] fails to argue how the marked limitations would alter the [RFC] or ultimate nondisability determinations." (citations omitted)).

**d. Consideration of Drs. Yandell and Waldman's Opinions**

Finally, Plaintiff claims that the ALJ erred by failing to specifically incorporate Dr. David Yandell and Dr. Larry Waldman's findings regarding "Plaintiff's multiple moderate limitations in the critical work area of 'understand, remember, and carry out simple instructions' without explanation." (Doc. 15 at 22). When an ALJ's findings are consistent with but not identical to a physician's assessed limitations of the claimant, those findings do not constitute a rejection of the physician's opinion. *See, e.g.*, *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1222–23 (9th Cir. 2010) (finding an ALJ's limitations in the RFC determination to be "entirely consistent," although not identical, with a medical source's limitations); *Thomas v. Colvin*, No. 3:14-cv-00667-CL, 2015 WL 4603376, at *5 (D. Or. July 29, 2015) (same). "In other words, when the ALJ evaluates a claimant's RFC, h[er] findings must merely be consistent with the physician's conclusions rather than a carbon copy of the physician's opinion." *Lewis v. Colvin*, No. 3:15-CV-02307-BR, 2017 WL 252284, at *4 (D. Or. Jan. 19, 2017).

Here, the ALJ gave "significant weight" to Drs. Yandell and Waldman's opinions. (Tr. 37). Each doctor's opinion included a summary of their assessments, which stated: "Overall, from a psychological perspective, claimant is able to perform simple and some detailed job tasks on a sustained basis. He will do best in a setting with minimal interaction with others." (Tr. 95–96, 112–13, 136, 157). The ALJ's RFC seemingly

parroted this assessment, noting Plaintiff "can perform work where only occasional simple decision-making is required" and "minimal interaction with the public, coworkers, and supervisors." (Tr. 33). Thus, in choosing to accept Drs. Yandell and Waldman's assessment of the overall diagnostic picture, the ALJ did not err. *See Holohan*, 246 F.3d at 1205 (noting that a treating physician's "statements must be read in context of the overall diagnostic picture he draws"). Further, while Plaintiff appears to disagree with the ALJ's—and, consequently, Drs. Yandell and Waldman's—overall interpretation of the examinations, the Court must uphold the ALJ's conclusion where the evidence is susceptible to more than one rational interpretation. *Tommasetti*, 533 F.3d at 1041 ("ALJ is the final arbiter with respect to resolving ambiguities in the medical evidence.").

Overall, the Court finds that the ALJ properly developed and considered the evidence in the record.

**D. Whether the ALJ Failed to Comply with SSR 06-03p**

Plaintiff finally argues that the ALJ erred by failing to comply with SSR 06-03p in considering "other evidence." (Docs. 15 at 22–24; 17 at 6). In particular, Plaintiff argues that the ALJ should have considered the State of Arizona's finding that Plaintiff is SMI and provided greater weight to LCSW Rispin's opinion. (*Id.*). The Commissioner argues that the ALJ properly discounted both pieces of evidence. (Doc. 16 at 19–23).

**1. Legal Standard**

The SSRs differentiate between "acceptable" medical sources, such as licensed physicians, licensed or certified psychologists, and licensed optometrists, and "other" sources, which include counselors and public social welfare agency personnel. *See* 20 C.F.R. § 404.1513; SSR 06-03p, 2006 SSR LEXIS 5. An ALJ can use "other" medical source opinions in determining the "severity of [the individual's] ability to work." 20 C.F.R. § 404.1513(d). An "other" medical source may not, however, provide medical opinions or be given "controlling" weight as a treating medical source. *See* SSR 06-03p, 2006 SSR LEXIS 5.

An ALJ may discount an "other" medical source if the ALJ provides "germane"

reasons. *Ghanim v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014); *Molina*, 674 F.3d at 1114. The Ninth Circuit has found it sufficient if the "ALJ at least noted arguably germane reasons for dismissing ["other" medical source] testimony, even if [s]he did not clearly link [her] determination to those reasons." *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001). Germane reasons will only be legally sufficient, however, if they are supported by substantial evidence in the record. *See, e.g.*, *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).

Similarly, findings of disability by other state or federal agencies "do[] not necessarily compel the SSA to reach an identical result." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing 20 C.F.R. § 404.1504 (2002)). However, an ALJ is obligated to consider the findings in reaching her decision. *Id. But see* 20 C.F.R. § 404.1504 (2017) (amending the code section to state that the SSA "will not provide any analysis in our determination or decision about a decision made by any other governmental agency or a nongovernmental entity about whether [a claimant is] disabled, blind, employable, or entitled to any benefits").[4] The weight an ALJ is required to give to these other findings of disability, however, depends on whether the agency disability program has "marked similarit[ies]" to the SSA disability program. *McCartey*, 298 F.3d at 1076. One important factor in this analysis is the level of similarity between the two programs' "criteria for determining disability." *Id.*

**2. Analysis**

**a. State of Arizona's SMI Determination**

Plaintiff argues that the ALJ erred by failing to provide any weight to the State of Arizona's SMI determination. (Doc. 15 at 23). The SMI determination included "a finding that Plaintiff suffers from functional impairment in dysfunction of role performance, probable chronic relapsing course of his mental illness, a risk of serious harm to himself, *or* an inability to live independently without supervision." (*Id.* (citing

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[4] Because this amendment to the SSRs applies to claims brought after March 27, 2017, it does not apply to this case.

Tr. 417) (emphasis added)). The ALJ provided two bases for providing little weight to the SMI determination. (Tr. 38). First, the ALJ noted the determination provided "no specific limitation on [Plaintiff's] abilities to perform work-related activities." (Tr. 38). Second, the ALJ recognized that the State used distinct criteria from that used by the SSA to determine disability. (Tr. 38). Although the ALJ appeared to reject the ultimate SMI determination, she recognized it "may provide evidence of the severity of [Plaintiff's] mental impairments." (Tr. 38).

The ALJ properly considered the SMI determination and provided appropriate reasons to reject those findings. Plaintiff has failed to cite to—and the Court cannot find—any evidence in the record regarding the specific basis for the SMI determination. Although Plaintiff refers to the Arizona Department of Health Services Division of Behavioral Health Sciences Provider Manual, which gives a number of criteria that would independently warrant an SMI eligibility determination, no evidence actually states the basis for Plaintiff's SMI determination. (*See* Tr. 417–19). Further, as required, the ALJ considered the criteria used by the SSA and the State and determined the criteria were too divergent to provide significant probative value for SSA purposes. (Tr. 38). Thus, the ALJ did not err by giving little weight to the SMI determination. *See Velazquez v. Colvin*, No. CV-14-02637-PHX-DLR, 2016 WL 537585, at *4 n.1 (D. Ariz. Feb. 11, 2016) (holding that an ALJ did not err in failing to consider a State of Arizona SMI determination because "there is no evidence in the record regarding the basis for the SMI determination" and, thus, "without some context and explanation, [the determination] has little probative value").

**b. LCSW Eileen Ripsin's Opinion**

Plaintiff also argues that the ALJ erred in giving the opinion of LCSW Eileen Ripsin, a licensed clinical social worker, "little weight" because the ALJ "selective[ly]" reviewed the record. (Doc. 15 at 23–24). Ms. Ripsin treated and assessed Plaintiff's mental health for nearly three months in 2013. (Tr. 655–98). In her Mental Impairment Report, Ms. Ripsin rated Plaintiff as having moderately-severe-to-severe impairments in

many areas of social interaction, understanding and memory, and sustained concentration. (Tr. 657–59). The report defined both a moderately severe impairment as that which "seriously interferes with [the] ability to function" and a severe impairment as that which is an "[e]xtreme impairment of [the] ability to function." (Tr. 657).

The ALJ provided "little weight" to Ms. Ripsin's opinions for two reasons. First, the ALJ noted that Ms. Ripsin lacked the "qualifications of an 'acceptable medical source'" and her opinion was therefore not entitled to controlling weight. (Tr. 37). Although Ms. Ripsin is an "other source," allowing the ALJ to reject the opinion for germane reasons supported by substantial evidence, this basis is insufficient by itself to constitute substantial evidence. *See Casas v. Comm'r of Soc. Sec. Admin.*, No. CV-16-08082-PCT-JAT, 2017 WL 2222613, at *11 (D. Ariz. May 22, 2017).

Second, the ALJ recognized the "short treatment relationship" of a few months between Plaintiff and Ms. Ripsin and the inconsistencies between Ms. Ripsin's opinions and "treatment notes indicating normal mood, affect, behavior, orientation, judgment and thought content." (Tr. 37). In support, the ALJ cited psychiatric evaluation notes from nurse practitioner Joanne Baron, (Tr. 541–43; 546–47), and progress notes from nurse practitioner Dedra Wadsworth, (Tr. 955, 966, 980, 993, 1001, 1009, 1019, 1037). The consistency of a medical opinion with the record as a whole is a relevant factor in evaluating a medical opinion. *See Lingenfelter*, 504 F.3d at 1042; *Orn*, 495 F.3d at 631. Here, despite Ms. Ripsin's numerous findings of severe impairments, the overall treatment record—as taken from medical providers who observed Plaintiff over longer periods of time—did not conclude that Plaintiff had such debilitating impairments. The ALJ further recognized that the observations of these medical providers were representative of the overall treatment record. (*See* Tr. 36 (discussing Dr. Rabara's opinions)). Inconsistency with the overall treatment record is germane to the opinion and is supported by the evidence. As a result, the ALJ committed no error.[5]

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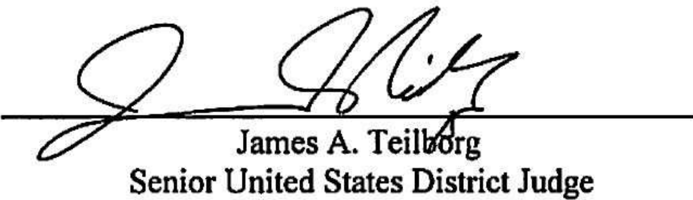
[5] Plaintiff's arguments are largely contingent on the claim that the ALJ "cherry-picked" evidence in the record. The Court found this claim unpersuasive, as described above.

## IV. CONCLUSION

For the foregoing reasons,

**IT IS ORDERED** that the final decision of the Commissioner of Social Security is affirmed. The Clerk of Court shall enter judgment accordingly.[6]

Dated this 26th day of July, 2017.



James A. Teilborg
Senior United States District Judge

[6] To the extent a mandate is required, the judgment shall serve as the mandate.