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

9 Glenn Lane Nudelman,
10 Plaintiff,

No. CV-20-08301-PCT-MTL

11 v.

ORDER

12 Commissioner of Social Security
13 Administration,

14 Defendant.

15 Plaintiff Glenn Lane Nudelman challenges the Social Security Administration's
16 ("SSA") determination that he does not qualify for Disability Insurance Benefits ("DIB")
17 under Title II of the Social Security Act because he is not disabled. Nudelman filed a
18 Complaint with this Court seeking judicial review of that determination. (Doc. 1.) The
19 Court has reviewed the briefs (Docs. 18, 23, 29) and the Administrative Record (Doc. 17,
20 "AR") and now affirms the administrative law judge's ("ALJ") decision (AR at 13–34).

21 **I. BACKGROUND**

22 On April 6, 2017, Nudelman filed his application for DIB, alleging that he had been
23 disabled since May 31, 2016. (AR at 16, 208.) The Commissioner denied Nudelman's
24 application initially and on reconsideration. (*Id.* at 121–24, 126–29.) Nudelman appeared
25 at a hearing on October 31, 2019 before an ALJ. (*Id.* at 35–93.) On February 5, 2020, the
26 ALJ issued a written decision finding Nudelman not disabled. (*Id.* at 13–34.) Nudelman
27 requested review of his claim and on September 14, 2020, the Appeals Council denied
28 review making the ALJ's decision final and ripe for this Court's review. (*Id.* at 1–6.)

1 Nudelman now seeks judicial review of the Commissioner’s decision pursuant to 42 U.S.C.
2 § 405(g).

3 After reviewing and considering the medical opinions and records, the ALJ
4 evaluated Nudelman’s disability based on the following severe impairments: degenerative
5 disc disease of the cervical and lumbar spines, carpal tunnel syndrome, ulnar neuropathy,
6 and osteoarthritis of the hips. (*Id.* at 19–21.) In making this determination, she reviewed
7 the entire record, including medical records and opinions and statements from Nudelman.
8 (*Id.* at 18–27.) She also evaluated his “medically determinable mental impairment of a
9 depressive disorder” and determined that it “does not cause more than minimal limitation
10 in the claimant’s ability to perform basic mental work activities and is therefore non-
11 severe.” (*Id.* at 19; *see id.* at 19–21.) When making the mental health determination, she
12 reviewed the entire record, including medical records and statements from Nudelman,
13 opinion evidence, and “the four broad areas of mental functioning set out in the disability
14 regulations for evaluating mental disorders and in the Listing of Impairments (20 CFR,
15 Part 404, Subpart P, Appendix 1) . . . known as the paragraph B criteria.” (*Id.* at 19.) She
16 found that Nudelman “does not have an impairment or combination of impairments that
17 meets or medically equals the severity of one of the listed impairments in 20 CFR Part 404,
18 Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and 404.1526).” (*Id.* at 21.)

19 Next, the ALJ calculated Nudelman’s residual functional capacity (“RFC”). She
20 determined that he had the RFC “to perform light work as defined in 20 CFR 404.1567(b)
21 except [he] cannot climb ladders, ropes, or scaffolds. [He] can frequently balance, stoop,
22 kneel, crouch, or crawl.” (*Id.* at 21; *see id.* at 21–26.) When determining his RFC, she
23 analyzed conflicting medical and opinion evidence. (*Id.* at 21–26.) Nevertheless, she found
24 that the medical record demonstrates functional abilities and behaviors inconsistent with
25 the duration, frequency, and severity of his alleged limitations. (*Id.*) Based on his RFC, she
26 determined that he could perform past relevant work as a physician as generally performed,
27 but not as he claimed he performed it. (*Id.* at 26–27.) Accordingly, she found that he was
28 not disabled during the relevant period. (*Id.* at 27.)

1 **II. STANDARD OF REVIEW**

2 In determining whether to reverse an ALJ’s decision, the district court reviews only
3 those issues raised by the party challenging the decision. *See Lewis v. Apfel*, 236 F.3d 503,
4 517 n.13 (9th Cir. 2001). The Court may set aside the Commissioner’s disability
5 determination only if it is not supported by substantial evidence or is based on legal error.
6 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is more than a
7 scintilla, but less than a preponderance; it is relevant evidence that a reasonable person
8 might accept as adequate to support a conclusion considering the record as a whole. *Id.* To
9 determine whether substantial evidence supports a decision, the Court must consider the
10 record as a whole and may not affirm simply by isolating a “specific quantum of supporting
11 evidence.” *Id.* Generally, “[w]here the evidence is susceptible to more than one rational
12 interpretation, one of which supports the ALJ’s decision, the ALJ’s conclusion must be
13 upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (citation omitted). Finally,
14 the Court may not reverse an ALJ’s decision on account of an error that is harmless. *Stout*
15 *v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055–56 (9th Cir. 2006). “The burden of
16 showing that an error is harmful normally falls upon the party attacking the agency’s
17 determination.” *Molina v. Astrue*, 674 F.3d 1104, 1119 n.11 (9th Cir. 2012) (quoting
18 *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009)). “An error is harmless if it is
19 inconsequential to the ultimate nondisability determination, or if the agency’s path may
20 reasonably be discerned, even if the agency explains its decision with less than ideal
21 clarity.” *Treichler v. Comm’r of Soc. Sec.*, 775 F.3d 1090, 1099 (9th Cir. 2014) (citations
22 and internal quotation marks omitted).

23 To determine whether a claimant is disabled, the ALJ follows a five-step process.
24 20 C.F.R. § 404.1520(a). The claimant bears the burden of proof on the first four steps, but
25 the burden shifts to the Commissioner at step five. *Tackett v. Apfel*, 180 F.3d 1094, 1098
26 (9th Cir. 1999). At the first step, the ALJ determines whether the claimant is presently
27 engaging in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). If so, the claimant
28 is not disabled, and the inquiry ends. *Id.* At step two, the ALJ determines whether the

1 claimant has a “severe” medically determinable physical or mental impairment. *Id.*
2 § 404.1520(a)(4)(ii). If not, the claimant is not disabled, and the inquiry ends. *Id.* At step
3 three, the ALJ considers whether the claimant’s impairment or combination of impairments
4 meets or medically equals an impairment listed in Appendix 1 to Subpart P of 20 C.F.R.
5 Part 404. *Id.* § 404.1520(a)(4)(iii). If so, the claimant is automatically found to be disabled.
6 *Id.* If not, the ALJ proceeds to step four. *Id.* At step four, the ALJ assesses the claimant’s
7 RFC and determines whether the claimant is still capable of performing past relevant work.
8 *Id.* § 404.1520(a)(4)(iv). If so, the claimant is not disabled, and the inquiry ends. *Id.* If not,
9 the ALJ proceeds to the fifth and final step, where the ALJ determines whether the claimant
10 can perform any other work in the national economy based on the claimant’s RFC, age,
11 education, and work experience. *Id.* § 404.1520(a)(4)(v). If so, the claimant is not disabled.
12 *Id.* If not, the claimant is disabled. *Id.*

13 **III. DISCUSSION**

14 Nudelman raises three arguments. First, he argues that the ALJ failed to properly
15 weigh the medical opinion evidence. (Doc. 18 at 13–22; Doc. 29 at 6–7.) Second, he argues
16 that the ALJ improperly considered his mental and functional limitations when determining
17 his RFC. (Doc. 18 at 3–13; Doc. 29 at 2–6.) Third, he argues that Andrew Saul’s
18 appointment constituted a violation of separation of powers. (*See* Doc. 18 at 22–25;
19 Doc. 29 at 8–25.) As a result, he did not legally exercise power as Acting Commissioner.
20 (*See Id.*) Therefore, Nudelman argues, the ALJ’s authority is “constitutionally defective”
21 because her power derives from her appointment by Andrew Saul. (Doc. 18 at 22;
22 *see* Doc. 18 at 22–25; Doc. 29 at 8–25.)

23 **A. Medical Opinion Evidence**

24 In 2017, the rules for evaluating medical evidence were revised. For claims filed on
25 or after March 27, 2017, the revised rules apply. *See Revisions to Rules Regarding the*
26 *Evaluation of Medical Evidence*, 82 FR 5844-01, 2017 WL 168819 (January 18, 2017).
27 Under the revised rules, all evidence an ALJ receives is considered, but the rules create
28 specific articulation requirements regarding how medical opinions and prior administrative

1 medical findings are considered. 20 C.F.R. §§ 404.1520c(a)–(b), 416.920c(a)–(b). The
2 revised rules do not require an ALJ to defer to or assign every medical opinion a specific
3 evidentiary weight. 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, the ALJ determines
4 the persuasiveness of the piece of evidence’s findings based on factors outlined in the
5 regulations. 20 C.F.R. §§ 404.1520c(a)–(b), 416.920c(a)–(b). The most important factors
6 are consistency and supportability, but the regulations list others that may be considered:
7 the treatment relationship, specialization, and whether the source has familiarity with other
8 evidence in the claim or an understanding of the disability program’s policies and
9 evidentiary requirements. 20 C.F.R. §§ 404.1520c(a), (c), 416.920c(a), (c).

10 Regardless of whether the source is an “accepted medical source[],” the revised
11 rules require ALJs to articulate how they consider medical opinions from all medical
12 sources. 20 C.F.R. §§ 404.1520c, 416.920c (“We will articulate in our determination or
13 decision how persuasive we find all of the medical opinions and all of the prior
14 administrative medical findings in your case record.”). The revised rules also expanded the
15 list of acceptable medical sources to include licensed audiologists, licensed advance
16 practice registered nurses, and licensed physician assistants. *See* 20 C.F.R. §§ 404.1502,
17 416.902. These articulation requirements do not apply to the consideration of evidence
18 from nonmedical sources. 20 C.F.R. §§ 404.1520c(d), 416.920c(d).

19 Nudelman argues “the ALJ’s finding that any of the Agency or consultative
20 examinations were persuasive is completely inconsistent with her own findings that [he]
21 was limited to light work, had mild limitations in understanding, remembering and
22 applying information, and had impairments that lasted long enough to be disabling.”
23 (Doc. 18 at 16.) He goes on to argue that “[t]he ALJ effectively mischaracterized the
24 evidence from the Agency physicians as supporting her conclusions, such that it appeared
25 she had relied on medical opinions, when in fact she relied only on her own lay perception
26 of Mr. Nudelman’s limitations in making her RFC finding.” (*Id.*) This flawed reasoning,
27 he argues, “rendered the articulation of her findings insufficient to support her conclusion
28 that [he] was not disabled.” (*Id.* at 16–17.)

1 He also argues that many of the ALJ's conclusions are incongruent with the record.
2 (*Id.* at 17–18.) First, he asserts that her conclusion that the “Agency’s physical medical
3 opinions were ‘partially persuasive’” does not match her findings. (*Id.* at 17.) He highlights
4 the same deviation with her findings regarding his mental impairments. (*Id.*) Because of
5 these irregularities, he argues that she merely stated she relied on the Agency opinions as
6 a pretense without actually doing so. (*Id.*) And so, he asserts, she failed to publish a fair
7 articulation of her conclusions. (*Id.*) Similarly, he argues that the ALJ’s findings regarding
8 the consultative examinations was inconsistent with her final decision. (*Id.* at 17–18.)

9 Nudelman argues that these incongruities exist because the ALJ improperly relied
10 on her own lay opinion rather than the medical opinions in the record—something which
11 “courts in wide-ranging jurisdictions, including the Ninth Circuit, have cautioned ALJs
12 against.” (*Id.* at 18.) This is because, he asserts, “[she] simply was not qualified to substitute
13 her judgment for that of qualified medical professionals.” (*Id.* at 19.) He argues that she
14 substituted her lay opinion because the record was not fully developed, and, instead of
15 inserting her opinion, she should have sought additional medical opinions to further
16 develop the record. (*Id.* at 19–20.) Failing to do so was error. (*Id.*)

17 Finally, Nudelman argues that the ALJ failed to develop the record regarding his
18 hearing impairment. (*Id.* at 20.) He argues that “[i]n concluding that his hearing loss was
19 not even a severe impairment, the ALJ relied on her own faulty reasoning and
20 mischaracterized Mr. Nudelman’s own testimony.” (*Id.* at 20.) He then outlines four ways
21 in which she erred on this issue. (*Id.* at 20–21.) First, she mischaracterized his statements
22 by “incorrectly stat[ing] that he did not wear hearing aids, but” he argues “what he actually
23 said was that he didn’t wear them all the time.” (*Id.*) Second, he asserts her conclusion is
24 illogical because she “suggested his hearing loss would not impact his work because it had
25 not over the prior ten years; however, she cited specifically to a statement where Mr.
26 Nudelman explained that he could not use a stethoscope with hearing aids.” (*Id.* at 21.)
27 These first two points, he argues, establish at least moderate to severe hearing loss and
28 show it affected his work. (*Id.*) Third, he asserts, “the fact that [his] hearing loss did not

1 seem, to the ALJ, to have impacted his job as he performed it was irrelevant since the ALJ
2 only concluded that he could return to his job as it was performed in the national economy”
3 and “the job of physician requires the ability to hear frequently, from one-third to two-
4 thirds of the workday.” (*Id.*) Fourth and finally, he notes that the question of whether his
5 hearing loss had impacted his work in the past was not addressed at the hearing and argues
6 that this notion lacks support in the record. (*Id.*)

7 The Commissioner argues that the ALJ did properly evaluate the medical opinions
8 when determining Nudelman’s functional abilities and that her “findings were based on a
9 reasonable interpretation of the evidence.” (Doc. 23 at 7.) The Commissioner begins by
10 asserting that the ALJ reasonably found that the administrative medical findings of Dr.
11 Salk and Dr. Titus were persuasive. (*Id.* at 8.) The Commissioner highlights that Dr. Salk
12 and Dr. Titus found “that [Nudelman] did not have a severe mental impairment” based on
13 their review of the record. (*Id.* at 8; AR at 25–26, 99, 113.) For example, their findings
14 were consistent with his perfect score on a Mini-Mental State Exam. (AR 392.) The
15 Commissioner also argues that Dr. Salk’s and Dr. Titus’ opinions were consistent with Dr.
16 Patrick’s opinion, which found that Nudelman had no mental limitations. (Doc. 23 at 8;
17 AR at 393.) And so, the Commissioner asserts that the ALJ’s finding “that [Nudelman] had
18 a non-severe mental impairment that did not require any” RFC limitations was reasonable.
19 (Doc. 23 at 8.)

20 Next, the Commissioner argues that Nudelman’s “argument that the ALJ erred
21 because the State agency consultants did not review the entire record is meritless.” (*Id.*)
22 The Commissioner asserts that the ALJ, not physicians, is responsible for evaluating the
23 record and assessing a claimant’s functional abilities. (*Id.*) Additionally, the Commissioner
24 argues, “there is no requirement that the State agency medical consultants review the entire
25 record for the ALJ to rely on their opinions.” (*Id.*) Instead, the Commissioner argues, “[t]he
26 issue is whether the State agency prior administrative medical findings are supported and
27 consistent with the record.” (*Id.* at 9.) And so, the Commissioner asserts that the ALJ here
28 properly evaluated the record and that her conclusion was reasonable. (*Id.*) The

1 Commissioner also argues that the ALJ reasonably found that Dr. Coleman’s and Dr.
2 Bargan’s prior administrative medical findings were no more than partially persuasive. (*Id.*;
3 AR at 26, 99, 112.) Finally, the Commissioner asserted that “[Nudelman’s] argument that
4 the ALJ mischaracterized her deference to the State agency physicians is meritless”
5 because she properly weighed that evidence after considering the entire record.
6 (Doc. 23 at 10; *see id.*)

7 After that, the Commissioner argues that the ALJ reasonably considered the
8 opinions of Dr. Patrick and Dr. Bremmer. (*See id.*) The Commissioner asserts that if the
9 ALJ’s findings are not in-line with these opinions, it does not mean that the ALJ erred. (*See*
10 *id.*) Instead, the Commissioner asserts that those opinions were consistent with the
11 evidence in the record at the time, but evidence submitted later pointed to different
12 conclusions. (*Id.*) And that is why, the Commissioner argues, the ALJ did not adopt the
13 opinions despite finding that they were “persuasive to the extent [that] they supported a
14 finding that [Nudelman] had no mental limitations and did not require additional physical
15 limitations in the RFC.” (*Id.*) The Commissioner also highlights that Nudelman “has failed
16 to point to probative evidence that shows he is more limited.” (*Id.*) And, despite
17 Nudelman’s arguments, the Commissioner asserts “the ALJ was not required to further
18 develop the record because it was adequate for the ALJ to make a disability determination.”
19 (Doc. 23 at 10; *see Doc. 23 at 10–11.*) The Commissioner also argues that, although
20 Nudelman did not allege a hearing problem as a basis for disability when filing for benefits,
21 the ALJ reasonably evaluated the record regarding Nudelman’s hearing impairment claim.
22 (Doc. 23 at 11.)

23 Finally, the Commissioner argues that the ALJ reasonably found that Dr.
24 Livingstone’s and Dr. Kaperonis’ opinions were not persuasive. (Doc. 23 at 11–13.) The
25 Commissioner asserts the ALJ reasonably found that Dr. Livingstone’s opinion was not
26 persuasive because (1) his findings were not consistent with the record, (2) he did not
27 provide objective testing to support his medical findings, (3) his findings were not
28 consistent with Nudelman’s daily activities, and (4) his opinion concluded that Nudelman

1 was disabled almost 5 years before his alleged onset date. (*Id.* at 11–12.) The
2 Commissioner also argues that the ALJ reasonably found Dr. Kaperonis’ opinion was not
3 persuasive because (1) Dr. Kaperonis’ opinion was not supported by objective testing, (2)
4 it was inconsistent with the record, and (3) it was inconsistent with Dr. Kaperonis’ own
5 treatment notes. (*Id.* at 12–13.) Finally, the Commissioner argues that the ALJ reasonably
6 considered Dr. Livingstone’s and Dr. Kaperonis’ opinions because, even though their
7 opinions were consistent with each other, they were inconsistent with the rest of the
8 evidence. (*Id.* at 13.)

9 Nudelman counters that “it is well-settled that an ALJ cannot make her own, lay
10 assessment regarding a claimant’s physical condition.” (Doc. 29 at 6.) He argues that the
11 difference between the Agency consultant findings, the medical opinions of the persuasive
12 consultative examiners, and the ALJ’s ultimate conclusions indicate that the ALJ made her
13 own lay assessment of the record. (*Id.*) For example, he highlights that “the Agency
14 physician consultants and consultative examiners identified no physical or mental
15 limitations” and that the ALJ found these opinions persuasive. (*Id.*) But she “issued a
16 decision with many severe impairments and significant work-related limitations.” (*Id.*) He
17 also argues that her rejection of Dr. Livingstone’s medical opinion is indicative of “ends-
18 based reasoning.” (*Id.* at 7.) Finally, regarding his hearing loss, he asserts that “[t]here is
19 no statutory or case law provision that would preclude a medical condition from
20 consideration in a disability claim just because it was not listed on the initial application.”
21 (*Id.*) Instead, he argues, “[t]he ALJ’s interpretation of the evidence was based on her own
22 assumptions and a mis-representation of the evidence.” (*Id.*)

23 As more thoroughly addressed below, the ALJ’s assessment of the persuasive value
24 of each medical opinion was reasonable. Additionally, the ALJ reasonably interpreted the
25 evidence regarding Nudelman’s hearing loss. Therefore, this Court finds that the ALJ’s
26 assessment of Nudelman’s physical condition was reasonable and not the product of the
27 ALJ inappropriately inserting her own lay opinion.

28

1 1. Dr. Livingstone

2 In May 2016, Dr. Livingstone issued an opinion that Nudelman was permanently
3 and totally disabled from his work as a physician. (AR at 24, 343, 988–91.) He renewed
4 this opinion in March 2018 and in August 2018 he completed a form indicating that
5 Nudelman had been disabled since July 2011. (*Id.* at 24–25, 1007–8, 1032.) The ALJ
6 reasonably found that all three of these opinions were not persuasive. These opinions were
7 inconsistent with the findings of other physicians and psychologists who examined
8 Nudelman or his medical records. (*Id.* at 24, 99, 112–13, 393, 401.) Additionally, Dr.
9 Livingstone’s opinions, which include that “[Nudelman] is unable to engage in any work,”
10 (*Id.* at 24), are inconsistent with Nudelman’s history of travelling, golfing, bicycling, and
11 downhill skiing. (*Id.* 24–25, 341, 380, 1007, 1154.) The ALJ also reasonably noted that
12 “the claim that medications make it unsafe for the claimant to work is undermined by the
13 claimant’s ability to function sufficiently well, while on those same medications, to
14 perform activities like skiing.” (*Id.* at 25.) What is more, the March 2018 “opinion points
15 to no objective testing that supports its conclusion.” (*Id.*) Finally, the ALJ’s observation
16 that the August 2018 opinion indicating Nudelman had been disabled since July of 2011
17 contradicts Nudelman’s alleged onset date of May 2016 and conclusion that this
18 inconsistency contributes to the opinion being unpersuasive was reasonable. (*Id.* at 25,
19 1032.)

20 2. Dr. Kaperonis

21 In August 2016, Dr. Kaperonis issued an opinion determining that Nudelman was
22 “totally disabled.” (AR at 25, 360, 380.) The ALJ reasonably found that his opinion was
23 unpersuasive because it was inconsistent with the findings of other physicians and
24 psychologists who examined Nudelman or his medical records. (*Id.* at 24, 99, 112–13, 393,
25 401.) Additionally, the ALJ reasonably observed that Dr. Kaperonis’ opinion was
26 internally inconsistent with his “own notes which indicate the claimant was alert and
27 oriented, had normal speech, had a normal affect, no hallucinations, no thoughts of harming
28 himself or others, and adequate insight and judgment.” (*Id.* at 25; *see id.* at 99, 112–13.)

1 What is more, Dr. Kaperonis’ opinion “points to no compelling evidence, objective testing
2 for example, that would support the claim of total disability.” (*Id.* at 25.)

3 3. Dr. Patrick

4 In June 2017, Dr. Patrick issued an opinion determining that Nudelman “had no
5 conditions which would impose any limitations for 12 continuous months.” (*Id.* at 25;
6 *see id.* at 393.) After reviewing the relevant parts of the record, the ALJ determined that
7 “there [was] scant evidence that the claimant’s mental health [had] deteriorated in the years
8 since this examination to the extent that some accommodation would be necessary.”
9 (*Id.* at 25.) The ALJ also highlighted that Dr. Patrick’s opinion was consistent with the
10 findings of other physicians and psychologists who examined Nudelman’s records.
11 (*Id.* at 99, 112–13.) And so, the ALJ reasonably determined that Dr. Patrick’s opinion was
12 persuasive.

13 4. Dr. Bremmer

14 In August 2017, Dr. Bremmer issued an opinion determining that Nudelman “had
15 no conditions which would impose any limitations for 12 continuous months.” (AR at 25;
16 *see id.* at 401.) After reviewing the record, the ALJ found that while Dr. Bremmer’s opinion
17 was consistent with his examination of Nudelman, “the record does document” that
18 Nudelman suffered “a degree of impairment supported by records from the subsequent two
19 years.” (*Id.* at 25; *see id.* at 1157–60, 1165–66, 1167–70.) Given the conflict between
20 Nudelman’s medical record and Bremmer’s examination, the ALJ reasonably determined
21 that Dr. Bremmer’s opinion was partially persuasive

22 5. Dr. Salk and Dr. Titus

23 Dr. Salk and Dr. Titus are State agency psychological consultants who each
24 independently reviewed Nudelman’s medical records. In July 2017, Dr. Salk determined
25 that Nudelman did not have a severe mental health impairment. (AR at 25, 99.) In October
26 2017, Dr. Titus independently reconsidered the record and also concluded that Nudelman
27 did not have a severe mental health impairment. (*Id.* at 25, 113.) After reviewing the record,
28 the ALJ found that these opinions were consistent with Dr. Patrick’s opinion and that “there

1 is scant evidence that the claimant’s mental health has deteriorated in the years since this
2 examination to the extent that some accommodation would be necessary.” (*Id.* at 25–26;
3 *see id.* at 393.) And so, the ALJ reasonably determined that Dr. Salk’s and Dr. Titus’
4 opinions was persuasive.

5 6. Dr. Coleman and Dr. Bargan

6 Dr. Coleman and Dr. Bargan are State agency medical consultants who each
7 independently reviewed Nudelman’s medical records. In August 2017, Dr. Coleman
8 determined that Nudelman “did not have a severe impairment from any physical
9 condition.” (AR at 26.) In October 2017, Dr. Bargan independently reconsidered the record
10 and reached the same conclusion. (AR at 26, 112.) The record demonstrates that Nudelman
11 “has persistent complaints of limited range of motion in his cervical spine, and at times in
12 his lumbar spine and hips.” (AR at 25; *see, e.g., id.* at 1101, 1154.) Thus, the ALJ
13 reasonably concluded that “[t]he record . . . support[s] more accommodations than
14 provided for in [those] opinions.” (AR at 26.)

15 7. Nudelman’s Hearing Loss

16 Nudelman alleged an impairment from hearing loss, and the ALJ reasonably
17 determined that his hearing loss is not a severe impairment. (AR at 21.) Although
18 Nudelman claimed that he was unable to use a stethoscope with the hearing aids he needed,
19 the fact that he had had this hearing loss since at least 2010 indicates that “he was able to
20 work with [the] condition, gainfully, for years.” (*Id.* at 21; *see id.* at 205, 391, 746, 483.)
21 Additionally, although Nudelman testified that he stopped working, in part, due to his
22 hearing loss, that testimony was weakened by his lengthy testimony that “he stopped
23 work[ing] in large part to get out of his work situation.” (*Id.* at 22.) Thus, the ALJ
24 reasonably determined that his hearing loss was not severe. (*Id.* at 21.)

25 8. The ALJ’s Decision is Consistent with the Record

26 The Court disagrees with Nudelman’s deduction that the difference between the
27 Agency consultant findings, the medical opinions of the persuasive consultative examiners,
28 and the ALJ’s ultimate conclusions indicate that the ALJ made her own lay assessment of

1 the record. Instead, the Court finds that the record indicates that the ALJ performed her job
2 as intended. She reasonably weighed the persuasive value of each piece of evidence and
3 made an RFC determination that synthesized the record at hand.

4 **B. RFC Determination**

5 In laymen’s terms, RFC is what the claimant can do in a work environment in spite
6 of their disabilities or limitations. *See* 20 C.F.R. §§ 404.1545(a), 416.945(a). The Social
7 Security regulations define RFC as the “maximum degree to which the individual retains
8 the capacity for sustained performance of the physical-mental requirements of jobs.”
9 20 C.F.R. Part 404, Subpt. P, App. 2, § 200.00(c). “The ALJ assesses a claimant’s RFC
10 based on all the relevant evidence in [the] case record,” to determine the claimant’s
11 capacity for work. *Laborin v. Berryhill*, 867 F.3d 1151, 1153 (9th Cir. 2017) (quotation
12 marks and citation omitted); *see* 20 C.F.R. §§ 404.1545(a), 416.945(a). The ALJ should
13 consider a claimant’s ability to meet physical and mental demands, sensory requirements,
14 and other functions. *See* 20 C.F.R. §§ 404.1545(b)–(d), 416.945(b)–(d). “[I]n assessing
15 RFC, the adjudicator must consider limitations and restrictions imposed by all of an
16 individual’s impairments, even those that are not ‘severe.’ The RFC therefore should be
17 exactly the same regardless of whether certain impairments are considered ‘severe’ or not.”
18 *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (cleaned up). Additionally,

19
20 The RFC assessment must contain a thorough discussion and
21 analysis of the objective medical and other evidence, including
22 the individual’s complaints of pain and other symptoms and
23 the adjudicator’s personal observations, if appropriate. In other
24 words, the ALJ must take the claimant’s subjective experiences
25 of pain into account when determining the RFC.

26 *Laborin*, 867 F.3d at 1153 (cleaned up).

27 “At step four, a claimant has the burden to prove that he cannot perform his past
28 relevant work ‘either as actually performed or as generally performed in the national
economy.’” *Stacy v. Colvin*, 825 F.3d 563, 569 (9th Cir. 2016) (quoting *Lewis v. Barnhart*,

1 281 F.3d 1081, 1083 (9th Cir. 2002)). “An individual shall be determined to be under a
2 disability only if his physical or mental impairment or impairments are of such severity
3 that he is not only unable to do his previous work but cannot, considering his age,
4 education, and work experience, engage in any other kind of substantial gainful work which
5 exists in the national economy” 42 U.S.C. § 423(d)(2)(A). An ALJ is free to consider
6 any activities that “may be seen as inconsistent with the presence of a condition which
7 would preclude all work activity.” *Curry v. Sullivan*, 925 F.2d 1127, 1130 (9th Cir. 1990).
8 It is well established that an ALJ is also empowered to note a claimant’s daily activities
9 that “involv[e] the performance of physical functions that are transferable to a work
10 setting.” *Orn*, 495 F.3d at 639 (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

11 A claimant can return to previous work if he or she can perform the “actual
12 functional demands and job duties of a particular past relevant job” or “the functional
13 demands and job duties of the past occupation as generally required by employers
14 throughout the national economy.” *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001)
15 (cleaned up).

16 Nudelman argues that the ALJ “never account[ing] for [his] admittedly severe CTS,
17 ulnar neuropathy, or cervical degenerative disc disease” was error. (Doc. 18 at 11.) He
18 begins by asserting that the ALJ found that “[he] had severe CTS, ulnar neuropathy, and
19 cervical degenerative disc disease.” (*Id.* at 12.) And, “[a]s a matter of law, a severe
20 impairment significantly limits a claimant’s ability to perform basic work activities.”
21 (*Id.* at 11.) And so, he argues, those severe limitations “significantly limit[] [his] ability to
22 perform basic work activities.” (*Id.* at 12.) He asserts, “[i]t is impossible to have severe
23 CTS and ulnar neuropathy without any limitations in manipulative ability. Neck and head
24 positioning or manipulative limitations must accompany a severe cervical disorder.” (*Id.*)
25 Because his “case was decided . . . at step four” and “[i]t would be nearly impossible for
26 him to effectively perform his job as a physician with any significant impairment in use of
27 his hands or significant limitations in neck movement,” he argues the ALJ’s RFC
28 determination that he could still work as a physician was in error. (*Id.*; *see id.* at 13.)

1 The Commissioner argues that the ALJ reasonably calculated Nudelman’s RFC.
2 (Doc. 23 at 5–6.) The Commissioner asserts that the ALJ properly considered Nudelman’s
3 severe impairments; activities he enjoys, like skiing; and the medical evidence in the
4 record. (*Id.* at 6.) The Commissioner also argues that “the medical evidence was generally
5 unremarkable.” (*Id.*) Specifically, the Commissioner highlights that Nudelman “had a
6 reduced range of motion in his cervical spine but normal gait, reflexes and a normal range
7 of motion in his upper and lower extremities including his hands;” had CTS which
8 improved with surgery; and presented the “ability to perform several strenuous activities.”
9 (*Id.*) Thus, the Commissioner asserts, the ALJ’s RFC assessment that “[Nudelman] could
10 perform light work with additional restrictions on climbing and the frequency of postural
11 activities” and that “support for additional accommodations is not present in the record”
12 was reasonable. (*Id.* at 6; AR at 23.)

13 Nudelman counters that the Commissioner’s arguments are irrelevant. He contends
14 that “[b]ecause the ALJ found [his carpal tunnel syndrome, ulnar neuropathy, and cervical
15 degenerative disc disease] to be severe, it is undeniable that those impairments were
16 significantly impacting [his] working ability.” (Doc. 29 at 5.) And so, he maintains that
17 “remand must occur for an RFC finding that reflects all of [his] severe impairments.”
18 (*Id.* at 6.)

19 As a threshold matter, despite Nudelman’s arguments to the contrary, it is well
20 established that “[a] severe impairment need not necessarily correspond to limitations on a
21 claimant’s ability to perform basic work activities” *Thomas v. Comm’r of Soc. Sec.*
22 *Admin.*, 480 F. App’x 462, 463 (9th Cir. 2012) (cleaned up). Given the medical evidence,
23 the ALJ reasonably determined that Nudelman’s disability limited him to light work with
24 the additional restriction that he cannot climb ladders, ropes, or scaffolds and the
25 clarification that he can frequently balance, stoop, kneel, crouch, or crawl.¹ (AR at 21;

26
27 ¹ “Light work involves lifting no more than 20 pounds at a time with frequent lifting or
28 carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very
little, a job is in this category when it requires a good deal of walking or standing, or when
it involves sitting most of the time with some pushing and pulling of arm or leg controls.

1 *see id.* at 21–26.) As the ALJ’s opinion outlines, she properly considered the medical
2 evidence in the record after appropriately weighing the evidence before determining
3 Nudelman’s RFC. (*See id.* at 21–26.) The ALJ achieved this through not only an extensive
4 discussion of the medical record, but also by personalizing his RFC. (*Id.*) As previously
5 noted, the ALJ included a restriction on climbing, but made sure to explicitly allow
6 balancing, stooping, kneeling, crouching, and crawling in Nudelman’s RFC. (*Id.*)

7 The care the ALJ took when deciding this case is clear from the in-depth analysis
8 of Nudelman’s claim. For example, she documents his extensive medical history.
9 (*Id.* at 22–23.) In doing so, she reasonably determined that some medical opinions were
10 more persuasive than others. (*See id.* at 21–26.) Specifically, the ALJ found that Ms.
11 Yamamoto’s, Dr. Livingstone’s and Dr. Kaperonis’ medical opinions were not persuasive
12 and found that Dr. Patrick’s, Dr. Salk’s, Dr. Titus’, Dr. Coleman’s, Dr. Bargan’s, and Dr.
13 Bremmer’s opinions were persuasive or partially persuasive. (*See id.* at 24–26.) She also
14 considered his lifestyle choices and activities when making her RFC determination.
15 (*See id.* at 21–26.) Additionally, she reasonably concluded that “[s]upport for additional
16 accommodations is not present in the record; the claimant continues to engage in strenuous
17 activities such as golf, bicycling, and downhill skiing and the need to take pain medication
18 to participate does not undermine support for a finding the claimant can perform the much
19 less strenuous demands of light work.” (*Id.* at 23.) Finally, she observed that, although he
20 suffered from carpal tunnel syndrome, that was improved with surgery and no
21 accommodation was necessary. (*Id.*) Thus, her RFC determination was reasonable.

22 **C. Mental Impairment**

23 When evaluating mental impairment severity, the ALJ must follow a two-step
24 procedure. *See* 20 C.F.R. §§ 404.1520a(a), 416.920a(a). The first step requires evaluating

25 _____
26 To be considered capable of performing a full or wide range of light work, you must have
27 the ability to do substantially all of these activities. If someone can do light work, we
28 determine that he or she can also do sedentary work, unless there are additional limiting
factors such as loss of fine dexterity or inability to sit for long periods of time.”
20 C.F.R. § 404.1567(b).

1 a claimant’s “pertinent symptoms, signs, and laboratory findings to determine whether
2 [claimant has] a medically determinable mental impairment[.]” 20 C.F.R.
3 §§ 404.1520a(b)(1), 416.920a(b)(1). In doing so, the ALJ must also “specify the
4 symptoms, signs, and laboratory findings that substantiate the presence of [each
5 determined] impairment and document [the] findings” 20 C.F.R. §§ 404.1520a(b)(1),
6 416.920a(b)(1).

7 The second step involves the ALJ rating “the degree of functional limitation
8 resulting from [claimant’s] impairment.” 20 C.F.R. §§ 404.1520a(b)(2), 416.920a(b)(2).
9 This process varies case-by-case. For every claimant, the ALJ must consider every piece
10 of relevant evidence and determine the degree to which the claimant’s “ability to function
11 independently, appropriately, effectively, and on a sustained basis” is hindered by his or
12 her mental impairment. 20 C.F.R. §§ 404.1520a(c), 416.920a(c). The ALJ does this by
13 rating the claimant’s degree of functional limitation in four areas: “Understand, remember,
14 or apply information; interact with others; concentrate, persist, or maintain pace; and adapt
15 or manage oneself.” *Id.* The rating system is based on a five-point scale: “None, mild,
16 moderate, marked, and extreme.” *Id.* Beyond this determination, an “ALJ [is] not required
17 to make any more specific findings of the claimant’s functional limitations.” *Hoopai v.*
18 *Astrue*, 499 F.3d 1071, 1077–78 (9th Cir. 2007). Next, the ALJ determines the severity of
19 the mental impairment. *See* 20 C.F.R. §§ 404.1520a(d), 416.920a(d). During this process,
20 to explain and record his or her administrative review, an ALJ must provide the proper
21 documentation including a standard document accounting how the technique was applied.
22 *See* 20 C.F.R. §§ 404.1520a(e), 416.920a(e). Later reviews by written decision must also
23 “document application of the technique.” *See id.*

24 Nudelman argues that the RFC determination “must include all of the limitations
25 the ALJ has found to be supported by the evidence of record, whether from severe
26 impairments or non-severe impairments.” (Doc. 18 at 3.) He argues that because she “found
27 that [he] had at least mild limitations in his ability to understand, remember, and apply
28 information,” which are “not negligible or non-existent,” and did not “[i]dentify] limitations

1 in mental functioning in her decision[;] the ALJ indisputably failed to accommodate any
2 mental limitations she found credible in the RFC finding.” (*Id.* at 4–6.) This is because, he
3 asserts, “no limitation in the RFC finding reflected the mild limitations the ALJ concluded
4 [he] was experiencing.” (*Id.* at 6.) He continues by arguing that “all limitations found
5 credible by the ALJ must be incorporated into the RFC in some form.” (*Id.* at 6.)

6 Citing *Solomon v. Commissioner of Social Security*, 376 F.Supp.3d 1012 (D. Ariz.
7 2019), he argues that this is not harmless error as “[t]he omission of mild mental functional
8 limitations is absolute legal error when the issue involves performing skilled work.”
9 (*Id.* at 7.) And, in this case, “[her] decision depended upon [his] ability to perform his
10 skilled past relevant work.” (*Id.* at 7.) He asserts that reconciling how he could perform his
11 past relevant skilled work given the mental limitations she found was not attempted or
12 addressed in her opinion. (*Id.* at 8.) He also argues that the ALJ failed to explain how he
13 could “[perform] the job of a physician as defined in the DOT” given his mild impairment.
14 (*Id.* at 8; *see id.* at 8–10.) Finally, he asserts that she erred by failing to perform a “function-
15 by-function analysis at step four” when determining his RFC. (*Id.* at 11.)

16 The Commissioner argues that “[t]he ALJ was not required to include mental
17 limitations for Plaintiff’s non-severe mental impairment” and that this determination was
18 a reasonable interpretation of the record. (Doc. 23 at 2; *see id.* at 2–3.) The Commissioner
19 asserts that, after reviewing the record, the ALJ reasonably determined that Nudelman’s
20 depression did not significantly limit his ability to work. (*Id.* at 3.) The Commissioner
21 highlights that the other mental health findings the ALJ made were also consistent with her
22 determination. (*See id.* at 3–4.) The Commissioner also argues that the ALJ’s decision was
23 consistent with Dr. Patrick’s, Dr. Salk’s, and Dr. Titus’ opinions. (*See id.* at 4.) And so, the
24 Commissioner explains, “[b]ecause the ALJ considered the limiting effects of Plaintiff’s
25 impairment and properly found that his mental limitations were minimal, she was not
26 required to include them in the RFC.” (*Id.* at 4.) The Commissioner also asserts that the
27 ALJ did not err by omitting mild mental limitations when Nudelman’s past skilled work
28 was at issue because, “[u]nlike in *Solomon*, the ALJ [reasonably] considered Plaintiff’s

1 mental impairment at step four” and “the record showed generally unremarkable findings
2 including good memory and concentration.” (*Id.*; *id.* at 5; *see id.* at 4–5.) Finally, the
3 Commissioner argues that the ALJ reasonably concluded that Nudelman’s mild limitation
4 in understanding, remembering or applying information “did not cause even a minimal loss
5 of work-related function.” (*Id.* at 5.) Therefore, the Commissioner concludes, it was
6 reasonable for the ALJ to determine that Nudelman could perform his past work. (*Id.*)

7 Nudelman counters that “there was no explanation from the ALJ regarding her
8 decision to exclude the proven limitations from Dr. Nudelman’s non-severe mental
9 impairment.” (Doc. 29 at 2; *see id.*) He also asserts that her explanation for why she did
10 not include a mental function limitation in the RFC finding was insufficient boilerplate
11 language. (*See id.* at 3–4.) Citing *Solomon*, he argues that “fail[ing] to include mental
12 limitations in an RFC finding despite finding mild limitations at step three” is legal error.
13 (*Id.* at 4; *see id.*) He argues this is particularly concerning in this case because his former
14 career as a physician is skilled work. (*See id.* at 4–5.)

15 *Solomon* concerned a 66-year-old man previously worked as a civil engineer.
16 376 F.Supp.3d at 1015. He applied for disability benefits and an ALJ denied his
17 application. *Id.* He then appealed the ALJ decision to the District of Arizona. *Id.* at 1016.
18 The court held that the ALJ erred by failing to consider his mental limitations when
19 calculating his RFC in step 4 and omitting his mental limitations from the hypotheticals
20 the ALJ posed to a vocational expert. *Id.* at 1020–1021. Thus, the court held that while an
21 ALJ is not required to include mental limitations for non-severe mental impairments, they
22 must be considered at step 4. *See id.*

23 This case presents an unusual situation. From the briefs, it is clear that the parties
24 agree that the ALJ performed both steps accurately, they only disagree over her formulation
25 of Nudelman’s RFC. (*See generally*, Docs. 18, 23, 29.) Nudelman’s argument that “all
26 limitations found credible by the ALJ must be incorporated into the RFC in some form” is
27 without merit. (Doc. 18 at 6.) *See Solomon*, 376 F.Supp.3d at 1020–21. What is more, there
28 is sufficient evidence to support the ALJ’s decision regarding the exclusion of any mental

1 limitation accommodations. Her conclusion to refrain from adding a mental impairment
2 accommodation is consistent with Dr. Patrick’s, Dr. Salk’s, and Dr. Titus’ opinions.
3 (See AR at 99, 113, 393.) Her conclusion was also consistent with much of the record.
4 (See AR at 19-20). Finally, she, unlike the ALJ in *Solomon*, did consider Nudelman’s mild
5 mental impairment and reasonably determined that “there is insufficient support for a
6 finding that the claimant experiences even a minimal loss of work-related function from
7 those conditions.” (AR at 27; see AR at 26–27.) Additionally, in contrast to *Solomon*, the
8 ALJ’s hypotheticals posed to the vocational expert properly considered Nudelman’s mental
9 limitations. (AR at 27, 75–92.) Thus, the ALJ’s RFC determination was reasonable and
10 will be affirmed.

11 **D. Separation of Powers**

12 Relying on *Seila Law LLC v. Consumer Financial Protection Bureau*, --- U.S. ---,
13 140 S. Ct. 2183 (2020), Nudelman argues that “the appointment of a single commissioner
14 of the social security administration who is removable only for cause and serves a longer
15 term than the president” under 42 U.S.C. § 902(a)(3)’s removal restriction “violates
16 separation of powers.” (Doc. 18 at 22.) He argues that the SSA’s structure is
17 unconstitutional and leads to an ALJ with an illegitimate delegation of authority deciding
18 his case based on regulations that are illegitimately promulgated. (*Id.* at 22–23.) Thus, he
19 asserts that the United States deprived him of a valid administrative adjudicatory process.
20 (*See id.*) He also argues that, given the ruling in *Carr v. Saul*, --- U.S. ---, 141 S. Ct. 1352
21 (2021), the SSA cannot argue he has forfeited his constitutional challenges by not raising
22 them before the SSA. (Doc. 18 at 23.) Additionally, he asserts that if the Government
23 opposes his arguments, then it needs to explain its change in position regarding the
24 constitutionality of the SSA’s structure. (*See id.* at 23–24.) Finally, he argues that the
25 Government could have easily avoided this constitutional issue “if Mr. Saul had simply
26 stepped down in the wake of” new Supreme Court jurisprudence. (*Id.* at 24; *see id.* at 24–
27 25.) Therefore, as in *Lucia v. Securities and Exchange Commission*, --- U.S. ---, 138 S. Ct.
28 2044, 2055 (2018), he argues “[t]his case should be remanded for a *de novo* hearing before

1 a new ALJ who does not suffer from the unconstitutional taint of having previously heard
2 and decided this case when the ALJ had no lawful authority to do so.” (Doc. 18 at 25.)

3 The Commissioner argues that while the Parties agree that § 902(a)(3) violates
4 separation of powers, “without more, that conclusion does not support setting aside an
5 unfavorable SSA disability benefits determination.” (Doc. 23 at 14; *see id* at 13–14.) The
6 Commissioner asserts that, under *Collins v. Yellen*, --- U.S. ---, 141 S. Ct. 1761 (2021),
7 “even where an unconstitutional statutory removal restriction exists, a plaintiff seeking
8 relief on that basis must show that the restriction actually caused him harm.” (*Id.* at 14.)
9 Quoting from *Collins*, the Commissioner also argues that this case is similar to *Collins* in
10 that “the relevant agency officials were ‘properly appointed’ pursuant to a statute that
11 exhibited ‘no constitutional defect in the . . . method of appointment[.]’” (*Id.* at 15.) Thus,
12 the Commissioner asserts, because Nudelman has not shown that § 902(a)(3) has caused
13 him any compensable harm, the SSA’s actions in this case were legitimate and Nudelman
14 cannot receive a new hearing. (*See id.*)

15 The Commissioner argues that § 902(a)(3) does not apply because the ALJ who
16 adjudicated Nudelman’s case was appointed by an Acting Commissioner. An Acting
17 Commissioner, the Commissioner asserts, is an at-will employee who serves at the behest
18 of the President. (*See id.* at 14–17.) And so, the Commissioner asserts that there is no nexus
19 between the harm Nudelman alleges, an illegitimate administrative adjudication, and
20 § 902(a)(3). (*See id.* at 15–17.) Thus, the Commissioner argues, Nudelman cannot receive
21 a new hearing. (*See id.*)

22 Even if § 902(a)(3) applied to an Acting Commissioner, the Commissioner argues
23 that Nudelman’s claim still fails because he cannot show that § 902(a)(3) inflicts
24 compensable harm on him. (*Id.* at 17.) Under *Collins*, the Commissioner asserts that the
25 ALJ’s actions are not voided because Nudelman has failed to show that § 902(a)(3) has
26 caused a denial of his benefits. (*See id.* at 17–18.) This is clear, the Commissioner argues,
27 because Nudelman has not and cannot show “how the President’s supposed inability to
28 remove the Commissioner without cause might possibly have affected any ALJ’s disability

1 benefits decision, much less the decision on Plaintiff’s specific claim.²” (*Id.* at 18;
2 *see id.* at 18–19.)

3 Nudelman counters that whether an ALJ was appointed by a Commissioner or an
4 Acting Commissioner of the SSA is irrelevant because § 902(a)(3) applies broadly to “[a]n
5 individual serving in the Office of Commissioner,” including an Acting Commissioner of
6 the SSA, making the Acting Commissioner’s tenure unconstitutional. (*See* Doc. 29 at 8–
7 11.) What is more, he argues that the Commissioner’s arguments against remand on this
8 point fail because his challenge regards the delegation of authority from the Acting
9 Commissioner to the ALJ and Appeals Council. (*See id.* at 14–15.) He asserts that the
10 removal statute is unconstitutional and establishes that the Acting Commissioner’s power
11 is unconstitutionally grounded. (*See id.*) As a result, the delegation of that authority to the
12 ALJ and Appeals Council is also tainted. (*See id.*)

13 Nudelman next argues that causation and harm should be presumed in his case.
14 (*Id.* at 16–17.) He asserts that applying *Collins* is a mistake here because this case involves
15 “government actors exercising power which those government actors did not lawfully
16 possess.” (*Id.* at 16.) “Specifically,” he argues “neither the ALJ nor the Appeals Council
17 here had a lawful delegation of authority under which to adjudicate and decide this
18 disability claim.” (*Id.*) Thus, he asserts, *Collins* supports the argument that harm and
19 causation should be presumed in this case. (*See id.* at 16–17.)

20 Finally, Nudelman argues that “[e]ven if a causal connection . . . [was]
21 required . . . [he] has . . . satisfied that requirement.” (*Id.* at 18.) He asserts that causation
22 exists here because but for “the unlawful delegation of authority to this ALJ and the
23 Appeals Council judges,” his injuries would have never happened because they “were only
24 able to adjudicate and decide [his case] based [on] their constitutionally unsound delegation
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26
27 ² The Commissioner makes other arguments in support of affirming the ALJ’s decision and
28 Nudelman responds to these additional arguments. (*Id.* at 20–24.) But the Court does not
address them because they are not necessary for the Court’s decision regarding whether the
ALJ’s decision violates the separation of powers.

1 of authority from Mr. Saul.”³ (*Id.*)

2 In *Seila Law*, the Supreme Court decided the question of whether the Dodd-Frank
3 Act conferred unconstitutional removal protection to the Director of the Consumer
4 Financial Protection Bureau.⁴ 140 S. Ct. at 2191–95. The Court held that for-cause
5 restrictions on the President’s ability to remove the Director of an agency “led by a single
6 Director and vested with significant executive power” infringes on the President’s Article
7 II power to remove executive officers at will.⁵ *Id.* at 2201; *see id.* at 2197. The Court also
8 concluded that the offending provision was severable from the remainder of the statute and
9 remanded for a factual determination of whether the challenged act had been ratified by an
10 Acting Director who was unprotected from the unconstitutional for-cause removal
11 restriction. *Id.* at 2210–11.

12 Securities and Exchange Commission (“SEC”) ALJs are considered “Officers of the
13 United States” within the meaning of the Appointments Clause, as they exercise
14 “significant authority” and discretion. *See Lucia*, 138 S. Ct. at 2052–53. *Lucia* involved a
15 challenge to the authority of the ALJs of the SEC under the Appointments Clause.⁶ *See id.*
16 at 2049–51. The ALJ in *Lucia* was not appropriately appointed because the ALJ was
17 appointed by SEC staff members rather than the Commission itself, a Court of Law, or the

18
19 ³ Nudelman defines his constitutional injuries in this case as the fact that (1) he did not
20 receive “a constitutionally valid hearing and adjudication” from a validly appointed ALJ,
21 (2) “he did not receive a constitutionally valid decision from an ALJ to which he was
22 entitled,” (3) “he received an unfavorable decision from this constitutionally illicit ALJ
23 adjudication process,” (4) “he did not receive a constitutionally valid adjudication process
24 from SSA’s Appeals Council to which he was entitled,” (5) “he did not receive a
25 constitutionally valid determination by the Appeals Council to which he was entitled,” and
26 (6) “he received an unfavorable determination from this constitutionally illicit Appeals
27 Council adjudication process.” (Doc. 29 at 11–12.)

28 ⁴ The Dodd-Frank Act limited the President’s ability to remove the Director to instances of
“inefficiency, neglect, or malfeasance.” *Id.* at 2191.

⁵ The Court recognized limited exceptions set forth in precedent. *Id.* at 2192.

⁶ Under the Appointments Clause, the President alone commands the power to appoint
“Officers of the United States,” except that “the Congress may by Law vest the
Appointment of such inferior Officers, as they think proper, in the President alone, in the
Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2.

1 President. *Id.* at 2050. The Court determined that this was a constitutional error and
2 remanded for a new hearing before a properly appointed ALJ or the Commission itself
3 “[t]o cure the constitutional error.” *Id.* at 2055; *see id.* at 2049–56.

4 In *Collins*, the Supreme Court considered a shareholder suit challenging the
5 Constitutionality of certain acts undertaken by the Federal Housing Finance Agency
6 (“FHFA”) as conservator for Fannie Mae and Freddie Mac—two federally-chartered
7 mortgage financing companies—in the wake of the 2008 housing crisis. 141 S. Ct. at 1770–
8 76. The Court held that while the Housing and Economic Recovery Act’s for-cause
9 removal provision insulated the FHFA’s Director from at-will termination by the President
10 in violation of Article II, “there was no constitutional defect in the statutorily prescribed
11 method of appointment to that office. As a result, there is no reason to regard any of the
12 actions taken by the FHFA in relation to the [challenged law] as void.” *Id.* at 1787. The
13 Supreme Court distinguished the facts of *Collins* from those of *Lucia*, which “involved a
14 Government actor’s exercise of power that the actor did not lawfully possess.” *Id.* at 1788
15 (citation omitted). The Court found no basis to conclude “that any head of the FHFA lacked
16 the authority to carry out the functions of the office.” *Id.* at 1788. The Court further
17 explained, “[s]ettled precedent also confirms that the unlawfulness of the removal
18 provision does not strip the Director of the power to undertake the other responsibilities of
19 his office, including implementing the [challenged act.]” *Id.* at 1788 n. 23. (citing *Seila*
20 *Law*, 140 S. Ct., at 2207–2211.)

21 As the *Collins* Court’s discussion of *Lucia* makes clear, the ALJ’s decision is only
22 per se unconstitutional if he lacked the authority to make it—for example, if he was not
23 properly appointed under the Appointments Clause. *Id.* at 1788; *Lucia*, 138 S. Ct. at 2055
24 (“This Court has also held that the appropriate remedy for an adjudication tainted with an
25 appointments violation is a new hearing before a properly appointed official.”) (cleaned
26 up). Unconstitutional for-cause removal challenges alone, however, will not automatically
27 serve to invalidate the ALJ’s decision. *See Collins*, 141 S. Ct. at 1788–89. The
28 unconstitutional provision must have caused “compensable harm.” *See Collins*, 141 S. Ct.

1 at 1789. As the majority explained in *Collins*, while *Seila Law* was “all but dispositive” on
2 the removal question, it does not dictate that the Court should invalidate as unconstitutional
3 the challenged decision or act.⁷ *Collins*, 141 S. Ct. at 1783.

4 The Court disagrees with Nudelman’s argument that the removal statute establishes
5 that the Acting Commissioner’s power is unconstitutionally grounded such that the
6 delegation of that authority to the ALJ and Appeals Council is also tainted. To begin, the
7 constitutionality of the removal statute is not at issue here because the Court does not need
8 to decide whether the statute is constitutional. Regardless of the statute’s constitutionality,
9 Nudelman’s argument fails. If the statute is constitutional, Nudelman’s argument clearly
10 fails because that is the initial premise of his argument.

11 If the statute is unconstitutional, Nudelman’s argument still fails. As explained in
12 *Collins*, an unconstitutional removal provision alone does not imply the Commissioner,
13 and by extension the ALJ, “lacked the authority to carry out the functions of the office.”
14 *Collins*, 141 S. Ct. at 1788. Thus, unconstitutional for-cause removal provisions do not
15 automatically invalidate the ALJ’s decision. *See id.* at 1788–89.

16 The provision must be unconstitutional and must have caused “compensable harm”
17 to Nudelman. *See id.* at 1789. Nudelman’s argument that there exists a but-for causal chain
18 linking his denial of benefits and § 902(a)(3) is insufficient. There is no immediately
19 apparent connection between the ALJ denying Nudelman’s claims and § 902(a)(3). The
20 ALJ’s opinion was well-reasoned, contained no harmful legal error, considered the entire
21 record, and was supported by the record. Beyond arguing a constitutional taint flowing

22
23 ⁷ Importantly, the *Collins* court explained the difference between what is sufficient to show
24 standing and what is sufficient to show entitlement to relief: “What we said about standing
25 in *Seila Law* should not be misunderstood as a holding on a party's entitlement to relief
26 based on an unconstitutional removal restriction. We held that a plaintiff that challenges a
27 statutory restriction on the President's power to remove an executive officer can establish
28 standing by showing that it was harmed by an action that was taken by such an officer and
that the plaintiff alleges was void. But that holding on standing does not mean that actions
taken by such an officer are void *ab initio* and must be undone.” *Collins*, 141 S. Ct. at 1788
n. 24 (internal citations omitted).

1 from § 902(a)(3), Nudelman fails to point out which, if any, defective regulations were
2 promulgated in this case, how they applied to his claim, and how they affected the outcome
3 such that he suffered a compensable harm. While it is conceivable that this constitutional
4 defect could cause compensable harm, Plaintiff has not shown that connection. A broadly
5 construed but-for causal chain is insufficient. For this reason, the Court declines to opine
6 on whether § 902(a)(3)'s protection applies to an Acting Commissioner of the SSA because
7 even if § 902(a)(3) applies, there is simply no evidence of any harm, let alone compensable
8 harm, inflicted in in this case by § 902(a)(3).

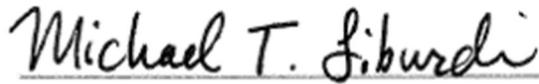
9 **IV. CONCLUSION**

10 Accordingly,

11 **IT IS ORDERED affirming** the February 5, 2020 ALJ decision (AR at 13–34).

12 **IT IS FURTHER ORDERED** directing the Clerk to enter final judgment
13 consistent with this Order and close this case.

14 Dated this 11th day of January, 2022.

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17 _____
18 Michael T. Liburdi
19 United States District Judge
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