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

8 Richard P. Sarkovitz,
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10 Plaintiff,

11 v.

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

14 Defendant.

No. CV-12-00676-TUC-BPV

ORDER

15 Plaintiff, Richard P. Sarkovitz, filed this action for review of the final decision of
16 the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The United States
17 Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636 (c) and Fed.R.Civ.P.
18 73, having received the written consent of both parties.

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20 **I. PROCEDURAL HISTORY**

21 Plaintiff filed an application for Disability Insurance Benefits (“DIB”) on January
22 29, 2008 alleging an onset of disability beginning August 9, 2006 due to back pain, high
23 blood pressure, tailbone, shoulder and neck pain, and spine and lower back problems.
24 Transcript/Administrative Record (“Tr.”) 154-157, 190. The application was denied
25 initially and on reconsideration. Tr. 86-89, 91-93. A hearing before an Administrative
26 Law Judge (“ALJ”) was held on October 28, 2009. Tr. 46-69. The ALJ issued a decision
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1 on April 1, 2010, finding Plaintiff not disabled within the meaning of the Social Security
2 Act. Tr. 31-42. This decision became the Commissioner's final decision when the
3 Appeals Council denied review. Tr. 6-8.
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5 Plaintiff then commenced this action for judicial review pursuant to 42 U.S.C. §
6 405(g). (Doc. 1) After considering the record before the Court and the parties' briefing of
7 the issues, the Court affirms Defendant's decision.
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9 **II. THE RECORD ON APPEAL**

10 **A. Plaintiff's Background and Statements in the Record**

11 Plaintiff was sixty (60) years old at the time of the ALJ's decision with a high
12 school degree and past relevant work as a streetcar driver and as a long-haul driver. Tr.
13 51, 54, 173, 177-180, 196.
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15 Plaintiff testified at his hearing before the ALJ on October 28, 2009, that he left
16 his job as a streetcar driver because "I couldn't stay on my feet for 12 hours a day." Tr.
17 54. He states he is unable to work because of his heart condition and arthritis. Tr. 54. His
18 rheumatologist informed him that the only thing he could do to control the pain caused by
19 the condition was to take medications, and "meds just screwed up my system. I couldn't
20 take them." Tr. 55. The arthritis affects his tailbone and "pretty much eliminates sitting."
21 Tr. 57. Plaintiff also testified that he had heart surgery a couple of weeks before the
22 hearing. Tr. 55. His heart condition caused dizziness, blackout spells and passing out. Tr.
23 56-57.
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1 Plaintiff stated he could only sit for about an hour, and stand for 45 minutes to an
2 hour, and gets winded and has to sit down when he walks for three blocks. Tr. 57-58.
3 Pain in his shoulder prevents him from lifting even a gallon jug out of the refrigerator. Tr.
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6 Plaintiff testified that he takes Flexeril for pain, Plavix, a blood thinner, for his
7 heart condition, Coreg, enalapril maleate, and Xanax for anxiety. Tr. 59-60. Although
8 prescribed, Plaintiff doesn't take Indorin because it upsets his stomach and causes
9 constipation. Tr. 60.
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11 In a typical day, Plaintiff takes 15 minutes to get out of bed, goes shopping with
12 his mother once a week though "[l]ots of times I'll have to stay in the vehicle because I
13 can't walk around." Tr. 61 On days that he doesn't shop, he lays down in bed or in a
14 recliner instead. Tr. 64-65. After shopping, he takes a nap from lunchtime to 4:00 in the
15 afternoon, then wakes up to have dinner, watches television until 10:00 p.m., then sleeps.
16 Tr. 61. He does some housework, but his mother stops him when she sees that he is in
17 pain. Tr. 61.
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20 A vocational expert ("VE") testified that his past relevant work as a forklift
21 operator was medium exertion work, and very low semiskilled - unskilled; as a long-haul
22 truck driver was medium exertion level and semiskilled; and as a street car operator was
23 light exertion, very low semiskilled - unskilled. The VE testified that if Plaintiff was
24 restricted to medium work with occasional bending and stooping, avoiding repetitive
25 overhead work with the right arm, he could still perform all of his past relevant work. Tr.
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1 67. If Plaintiff were restricted to light work, he would still be able to perform the work of
2 a streetcar operator, but not as a truck driver or forklift operator. Tr. 67. If Plaintiff was
3 unpredictably dizzy with changes in posture and with possible blackouts, he would not be
4 able to perform any of his past relevant work. Tr. 68.

6 B. Relevant Medical Evidence Before the ALJ¹

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8 1) *Treating Sources*

9 Evidence of Plaintiff's mental impairment from treating sources is scarce, and
10 neither party relies on this evidence. As this evidence is relevant to the Court's harmless
11 error analysis, the Court will review the evidence related to Plaintiff's mental
12 impairments from Plaintiff's treating sources. Prior to the evaluations conducted by the
13 consultative examiners, Plaintiff's treating physician during the time period from
14 February to April, 2008, David Brown, M.D., noted that Plaintiff had a positive history of
15 anxiety. Tr. 273. Though no symptoms of mental impairment were discussed and no
16 mental impairment was diagnosed, a "Chronic Problems/Medications" form in Plaintiff's
17 records indicated anxiety as a chronic problem, and Xanax on the list of medications. Tr.
18 277.

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22 A psychiatric medical evaluation was conducted at "SEABHS" on August 21,
23 2009, by an examiner who concluded that Petitioner had depressed mood, but normal
24 alertness, motor, and perception; good eye contact, concentration, fund of knowledge,
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26 _____
27 ¹ Plaintiff raises no issues regarding the findings of the ALJ in respect to physical
28 or exertional limitations, thus the Court reviews only the evidence related to Plaintiff's
claim that the ALJ erroneously assessed his mental impairments.

1 insight and judgment; was oriented; had intact memory; non-psychotic thought content;
2 and appropriate affect. Tr. 367-68. Treatment with Lexapro was initiated. Tr. 369.

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4 Plaintiff's treating physician Santsaran C. Patel, M.D, continued Plaintiff on
5 Lexapro. Tr. 509. On July 17, 2009 Dr. Patel reported that Plaintiff's symptoms were
6 "well controlled" on Lexapro and Xanax. Tr. 355. Dr. Patel continued to observe that
7 Plaintiff's symptoms were controlled on Xanax in December, 2009. Tr. 424.

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9 2) *Examining State Agency Medical Source*

10 On July 3, 2008, Plaintiff was referred to Machel Martinez, Ph.D., a licensed
11 psychologist, to assist in the determination of disability. Tr. 297-298. Plaintiff reported
12 symptoms to Dr. Martinez of worry, some diminished interests, no pleasure, suicidal
13 ideation, and feeling useless. Plaintiff did not have "difficulty thinking or making
14 decisions. . . [and] usually completes tasks." His concentration is "good when working on
15 the computer and in conversations of interest but wanders when disinterested and when
16 watching TV." Tr. 297.

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19 Martinez examined Plaintiff, observing that his thoughts "were clear, logical and
20 goal oriented" and he performed well on simple recall tests. Tr. 298. Dr. Martinez
21 diagnosed Plaintiff with depressive disorder and anxiety disorder, concluding that
22 "[a]ttention and concentration were adequate and memory grossly intact. He presented
23 with euthymic mood although mild symptoms of depression and anxiety were reported."
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25 Tr. 298.

1 Dr. Martinez completed a Psychological/Psychiatric Medical Source Statement,
2 assessing Plaintiff's limitations caused by mental impairment. Tr. 300. Dr. Martinez
3 noted that Plaintiff would have slight limitations with detailed instructions and slight
4 difficulty adjusting to changes in work setting, but otherwise was able to remember
5 locations and work procedures, understand and remember simple instructions, complete
6 simple tasks, make simple decisions, work with the public, and work without specialized
7 supervision within time frames and maintain regular attendance. Tr. 300.

10 *3) Non-examining State Agency Physicians*

11 Jaine Foster-Valdez, medical consultant, reviewed the evidence and completed a
12 Psychiatric Review Technique. Tr. 310-323. Dr. Foster-Valdez reviewed the evidence
13 and noted that Plaintiff's depression and anxiety were not "severe" impairments (Tr.
14 310). She explained that Dr. Martinez's observations and opinions were relatively benign,
15 indicating only mild symptoms (Tr. 322). A second psychologist, Eugene Campbell,
16 Ph.D., reviewed the evidence and agreed with Dr. Foster-Valdez's assessment.

19 *4) The ALJ's Findings*

20 The ALJ found that Plaintiff had not engaged in substantial gainful activity since
21 the alleged onset date of August 9, 2006 through the date last insured, September 30,
22 2008. Tr. 37, ¶ 2. The ALJ found that Plaintiff has multiple severe impairments:
23 ankylosing spondylitis, arthritis, and hepatitis C. Tr. 37, ¶ 3. The ALJ found that Plaintiff
24 had a medically determinable impairment of depression and anxiety, but, giving great
25 weight to the consultative and examining physicians, found that the impairment would
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1 not cause more than minimal limitations in Plaintiff's ability to perform basic mental
2 work activities and was therefore nonsevere. Tr. 37. Specifically, relying on Dr.
3 Martinez's report and addressing the four functional areas in the psychiatric review
4 technique, the ALJ found mild limitations in activities of daily living, social functioning,
5 and concentration, persistence and pace, and no episodes of decompensation. Tr. 38. The
6 ALJ found that these impairments do not meet or equal a listed impairment. Tr. 38, ¶ 4.
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8 The ALJ stated that the limitations alone were not a RFC assessment, because the mental
9 RFC requires a more detailed assessment by itemizing various functions contained in the
10 broad categories found in paragraph B of the adult mental disorders listings in 12.00 of
11 the Listing of Impairments ("paragraph B criteria"). Tr. 38 (citing SSR 96-8p). The ALJ
12 stated that the RFC determination reflected the degree of limitation the undersigned
13 found in the "paragraph B" mental function analysis. Tr. 38. The ALJ found that Plaintiff
14 had the RFC to perform light work, with limitations to occasional bending and stooping
15 and avoid repetitive overhead reaching with his right arm. Tr. 38, ¶ 5. The RFC did not
16 include any limitations caused by Plaintiff's depression and anxiety. The ALJ found that
17 Plaintiff was capable of performing his past relevant work as a street car operator as
18 actually and generally performed, and thus, the ALJ concluded that Plaintiff is not
19 disabled. Tr. 40, ¶¶ 6-7.

24 *5) Additional Evidence Submitted to the Appeals Council*

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26 After the ALJ's April 1, 2010 decision, Plaintiff submitted additional evidence in
27 the form of medical records and a representative's brief to the Appeals Council. Tr. 377-
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1 515. The Appeals Council found that the additional evidence did not provide a basis for
2 changing the ALJ's decision. Tr. 7.

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4 **III. DISCUSSION**

5 A. Argument

6 Plaintiff raises one point of error. Plaintiff contends that the ALJ erred by failing
7 to include the mental limitations that she found Plaintiff suffered from in the assessment
8 of Plaintiff's RFC and in the hypothetical to the VE. (Doc. 19). The Commissioner
9 contends that Plaintiff failed to show that the ALJ overlooked any concrete, work-related
10 limitation caused by his mental impairments, and, even if there was error, such error was
11 harmless. (Doc. 21).
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14 B. Standard of Review

15 The Court has the "power to enter, upon the pleadings and transcript of the record,
16 a judgment affirming, modifying, or reversing the decision of the Commissioner of Social
17 Security, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The
18 Commissioner's decision to deny benefits "should be upheld unless it is based on legal
19 error or is not supported by substantial evidence." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d
20 1194, 1198 (9th Cir. 2008). In determining whether the decision is supported by
21 substantial evidence, the Court "must consider the entire record as a whole and may not
22 affirm simply by isolating a 'specific quantum of supporting evidence.'" *Id.* (quoting
23 *Robbins v. Soc.Sec.Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)).
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1 Whether a claimant is disabled is determined using a five-step evaluation process.
2 To establish disability, the claimant must show (1) he has not worked since the alleged
3 disability onset date, (2) he has a severe impairment, and (3) his impairment meets or
4 equals a listed impairment or (4) his residual functional capacity (RFC) precludes him
5 from performing his past work. At step five, the Commissioner must show that the
6 claimant is able to perform other work. *See* 20 C.F.R. §§ 404.1520(a)-(g).
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9 C. Analysis

10 A special psychiatric review technique (“PRT”) is used to evaluate the presence
11 and severity of mental impairment. *Keyser v. Comm’r Soc. Sec. Admin.*, 648 F.3d 721,
12 725 (9th Cir. 2011); 20 C.F.R. § 404.1520a(a); SSR 96-8p, 1996 WL 374184, at *4; *see*
13 *also* 20 C.F.R. pt. 404, subpt. P, app. 1, (“the Listing of Impairments”), § 12.00 *et seq.*
14 Under the PRT, if the claimant presents a colorable claim of mental impairment, the ALJ
15 must determine whether the claimant has a medically determinable mental impairment,
16 rate the degree of functional limitation for four functional areas, and determine the
17 severity of the mental impairment. *Keyser*, 648 F.3d at 725. The ALJ clearly met this
18 requirement by rating and assessing Plaintiff’s limitations in each of these four functional
19 areas and finding that Plaintiff’s “mild limitations” in three of four categories did not
20 result in a severe mental impairment.
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24 Finally, regardless of severity, the ALJ is required to consider all of a claimant’s
25 medically determinable impairments when making an RFC determination. *See* C.F.R. §
26 404.1545(a)(2). Plaintiff asserts that, with respect to mental impairments, an ALJ must
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1 take the degree of functional loss imposed by the severe impairment as described in the
2 four broad categories outlines in 20 C.F.R. § 404.1520a and provide a “more detailed
3 assessment by itemizing various functions” as summarized at steps two and three. (Doc.
4 19, at 6) Plaintiff argues that ALJ failed to perform this mandated analysis. (*Id.* at 4-5)
5 The ALJ’s RFC assessment was not erroneous. Dr. Martinez’s assessment of Plaintiff’s
6 depression and anxiety supports the conclusion that these conditions did not impose any
7 limitations on the RFC. Plaintiff’s depression and anxiety were not sufficiently severe
8 such that it would significantly affect his ability to work beyond the exertional
9 limitations. As correctly noted by the ALJ, the mild limitations identified in the
10 paragraph B criteria are not an RFC assessment, but are used to rate the severity of
11 mental impairments at steps two and three of the sequential evaluation process. The RFC,
12 which is assessed before going from step three to step four, requires a more detailed
13 assessment by itemizing various functions contained in the broad categories found in
14 paragraphs B and C of the Listing of Impairments. *See* 20 C.F.R. §404.1520(a)(4); SSR
15 96-8p, 1996 WL 374184, at *4. The ALJ conducted this assessment when he performed
16 the PRT at step two. Rating the degree of functional limitation is based on the extent to
17 which the claimant's impairment(s) interferes with his ability to function independently,
18 appropriately, effectively, and on a sustained basis. 20 C.F.R. § 404.1520a(c)(2). In the
19 category of activities of daily living the ALJ found Plaintiff prepared most meals,
20 vacuumed his room, can drive short distances, bathes and dresses regularly with some
21 difficulty raising his arms, manages his own finances, walks his dog, and spends time on
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1 the computer reading the news. Tr. 38. In the category of social functioning the ALJ
2 found Plaintiff had good eye contact, was friendly, and cooperative. *Id.* In the area of
3 concentration, persistence or pace, the ALJ found that Plaintiff had adequate
4 concentration and was able to complete simple tasks during Dr. Martinez’s examination.
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6 *Id.* The ALJ found no episodes of decompensation. This detailed assessment did not
7 include any significant nonexertional limitations that the ALJ failed to incorporate into
8 the RFC.
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10 Plaintiff further argues that failure to set forth mental limitations in the
11 hypothetical propounded to the VE is reversible error. (Doc. 19, at 7.) The burden is on
12 Plaintiff to demonstrate not only the error, but also that it affected his “substantial rights.”
13 *See Ludwig v. Astrue*, 681 F.3d 1047, 1053 (9th Cir. 2012)(citing *Shinseki v. Sanders*, 556
14 U.S. 396, 407 (2009); *see Molina v. Astrue*, 674 F.3d 1104, 1118 (9th Cir. 2012). In
15 deciding whether error was harmless, this Court applies “the same kind of harmless-error
16 rule that courts ordinarily apply in civil cases, [...] [i]n other words, courts must review
17 cases without regard to errors that do not affect the parties’ substantial rights.” *Molina*,
18 674 F.3d at 1118 (internal citations and quotations omitted); *see also* 28 U.S.C.
19 §2111(codifying the federal harmless error rule for civil cases)). Plaintiff submits that,
20 during the hearing, the VE confirmed that even a five to ten second lapse of attention
21 would preclude the ability to perform the functions of a streetcar operator. (Doc. 19, at
22 8)(citing Tr. 68.) The hypothetical given to the VE suggested that these lapses of
23 attention would be due to unpredictable dizziness, with possible blackouts. Plaintiff
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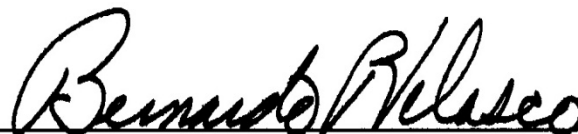
1 argues that, under this hypothetical, his mild mental limitations in social functioning and
2 concentration, persistence, or pace, result in the inability to operate a streetcar and attend
3 to passengers. (Doc. 19, at 7.) There is no evidence in the record, however, that supports
4 a finding that Plaintiff's mental limitations would result in any lapse of attention as
5 significant as that proposed by the hypothetical, or any concrete limitation that might
6 conflict with the duties of his past relevant work as a streetcar driver. Thus, even if the
7 ALJ failed to consider Plaintiff's mental limitation in determining the RFC and
8 propounding questions to the VE, because such error would be "inconsequential to the
9 ultimate nondisability determination," it is harmless and does not warrant vacating the
10 ALJ's decision. *See Molina*, 674 F.3d at 1115 (quoting *Carmickle*, 533 F.3d 1155, 1162
11 (9th Cir. 2008).

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15 Accordingly,

16 IT IS ORDERED:

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18 1. The Commissioner's decision denying benefits is AFFIRMED.
19 2. The Clerk of the Court is instructed to enter judgment accordingly and close this
20 case.

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22 Dated this 31st day of January, 2014.
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27 Bernardo P. Velasco
28 United States Magistrate Judge