

1 Based on the record as a whole and the applicable law, the decision of the
2 Commissioner is AFFIRMED. The findings of the Administrative Law Judge
3 (“ALJ”) are supported by substantial evidence and are free from material error.¹

4 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE**
5 **DECISION**

6 On August 17, 2006, plaintiff filed an application for Supplemental Security
7 Income benefits. (Administrative Record (“AR”) 22). Plaintiff asserted that he
8 became disabled on March 10, 2006, due to attempted suicide, depression, pain in
9 feet, shortness of breath, and blackouts. (AR 133). The ALJ examined the
10 medical record and heard testimony from plaintiff, who was represented by
11 counsel, on January 8, 2008. (AR 35-68).

12 On January 24, 2008, the ALJ determined that plaintiff was not disabled
13 through the date of the decision. (AR 22-34). Specifically, the ALJ found:
14 (1) plaintiff suffered from the following severe combination of impairments:
15 asthma, hypertension, and history of drug and alcohol abuse with history of one
16 alcohol induced seizure, and history of drug and alcohol induced mood disorder
17 (AR 25); (2) plaintiff would continue to suffer from a severe impairment or
18 combination of impairments if he discontinued substance use (AR 29);
19 (3) plaintiff did not suffer from an impairment or combination of impairments that
20 meets or medically equals one of the listed impairments (AR 25); (4) if plaintiff
21 discontinued substance use he would not suffer from an impairment or
22 combination of impairments that would meet or medically equal any of the listed
23 impairments (AR 30); (5) plaintiff retained the residual functional capacity to
24 perform sedentary work except that he could not perform even ‘low stress’ work”

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27 ¹The harmless error rule applies to the review of administrative decisions regarding
28 disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196
(9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social
Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of
application of harmless error standard in social security cases).

1 (AR 26); (6) if plaintiff discontinued substance use he would have the residual
2 functional capacity to perform medium work with certain restrictions (AR 30);²
3 (7) plaintiff had no past relevant work (AR 28); (8) considering, among other
4 things, plaintiff's substance use disorders, there were no jobs that exist in
5 significant numbers in the national economy that plaintiff could perform; but (9) if
6 plaintiff discontinued substance use there would be a significant number of jobs in
7 the national economy that plaintiff could perform (AR 33).

8 The Appeals Council denied plaintiff's application for review. (AR 1-3).

9 **III. APPLICABLE LEGAL STANDARDS**

10 **A. Sequential Evaluation Process**

11 To qualify for disability benefits, a claimant must show that he is unable to
12 engage in any substantial gainful activity by reason of a medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of at least twelve
15 months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.
16 § 423(d)(1)(A)). The impairment must render the claimant incapable of
17 performing the work he previously performed and incapable of performing any
18 other substantial gainful employment that exists in the national economy. Tackett
19 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

20 In assessing whether a claimant is disabled, an ALJ is to follow a five-step
21 sequential evaluation process:

- 22 (1) Is the claimant presently engaged in substantial gainful activity? If
23 so, the claimant is not disabled. If not, proceed to step two.
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26 ²More specifically, the ALJ determined that plaintiff "would have the residual functional
27 capacity to perform medium work except he would be unable to walk uneven terrain or balance
28 more than occasionally, he would be unable to climb ladders, ropes and scaffolds or to work
around unprotected heights or dangerous moving machinery, and he would need to avoid
concentrated exposure to respiratory irritants." (AR 30).

1 (2) Is the claimant’s alleged impairment sufficiently severe to limit
2 his ability to work? If not, the claimant is not disabled. If so,
3 proceed to step three.

4 (3) Does the claimant’s impairment, or combination of
5 impairments, meet or equal an impairment listed in 20 C.F.R.
6 Part 404, Subpart P, Appendix 1? If so, the claimant is
7 disabled. If not, proceed to step four.

8 (4) Does the claimant possess the residual functional capacity to
9 perform his past relevant work?³ If so, the claimant is not
10 disabled. If not, proceed to step five.

11 (5) Does the claimant’s residual functional capacity, when
12 considered with the claimant’s age, education, and work
13 experience, allow him to adjust to other work that exists in
14 significant numbers in the national economy? If so, the
15 claimant is not disabled. If not, the claimant is disabled.

16 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th
17 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

18 If the ALJ determines that a claimant is disabled and there is medical
19 evidence that the claimant suffers from drug addiction or alcoholism, the
20 regulations dictate that the ALJ conduct a drug and alcohol analysis (“DAA”) to
21 determine whether such disorder is a contributing factor material to the
22 determination of disability and the extent to which a claimant’s identified
23 limitations would remain if the claimant stopped using drugs or alcohol. See 20
24 C.F.R. § 416.935(b). If the remaining limitations would be disabling, the
25 claimant’s substance abuse is not a contributing factor material to his disability. If
26 the remaining limitations would not be disabling, then the claimant’s substance
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28 ³Residual functional capacity is “what [one] can still do despite [one’s] limitations” and
represents an “assessment based upon all of the relevant evidence.” 20 C.F.R. § 416.945(a).

1 abuse is material and benefits must be denied. See 42 U.S.C. § 423(d)(2)(C) (“An
2 individual shall not be considered to be disabled . . . if alcoholism or drug
3 addiction would . . . be a contributing factor material to the Commissioner’s
4 determination that the individual is disabled.”); 20 C.F.R. § 416.935(b); see also
5 Parra v. Astrue, 481 F.3d 742, 746-47 (9th Cir. 2007) (discussing same), cert.
6 denied, 552 U.S. 1141 (2008); Bustamante v. Massanari, 262 F.3d 949, 955 (9th
7 Cir. 2001) (DAA must be conducted after an initial finding of disability under the
8 sequential evaluation process).

9 **B. Standard of Review**

10 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of
11 benefits only if it is not supported by substantial evidence or if it is based on legal
12 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.
13 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457
14 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion.” Richardson v. Perales,
16 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a
17 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing
18 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

19 To determine whether substantial evidence supports a finding, a court must
20 “consider the record as a whole, weighing both evidence that supports and
21 evidence that detracts from the [Commissioner’s] conclusion.” Aukland v.
22 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d
23 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming
24 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that
25 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

26 **IV. DISCUSSION**

27 Plaintiff essentially contends that the ALJ erred in determining that alcohol
28 abuse is a contributing factor material to his disability. More specifically, plaintiff

1 argues that the ALJ erred in rejecting without explanation the alleged opinion of a
2 treating physician, Dr. Kouros, that plaintiff suffers from a disabling anxiety
3 disorder “separate and apart from continued alcohol abuse.” (Plaintiff’s Motion at
4 8). Plaintiff’s contention lacks merit.

5 Dr. Kouros is a family physician who reportedly treated plaintiff for pain
6 and hypertension. (Plaintiff’s Motion at 7) (citing AR 202). Dr. Kouros was
7 aware of plaintiff’s history of drug and alcohol abuse and of his participation in a
8 substance abuse treatment program. (AR 205). On October 26, 2007, Dr. Kouros
9 completed a “Physical Residual Functional Capacity Questionnaire.” (AR 278-
10 82). He opined that plaintiff was unable to perform even “low stress” work. (AR
11 280-82). Dr. Kouros noted that plaintiff’s diagnoses included “anxiety, psoriasis,
12 [and] [alcohol and intravenous drug abuse]” and that his symptoms included
13 “anxiety, chronic pruritis, slurred speech, [and] absent-minded[ness].” (AR 278).
14 He indicated that “these conditions would produce anxiety attacks” and that
15 plaintiff could not “cope with his existing mental delay status.” (AR 279).
16 Plaintiff reads these statements as indicating that “Dr. Kouros stated that [plaintiff]
17 suffers from anxiety separate and apart from continued alcohol abuse,” and
18 therefore faults the ALJ for failing to find that “anxiety even absent alcohol abuse
19 would render [plaintiff] disabled.” (Plaintiff’s Motion at 8, 10). The Court
20 disagrees with plaintiff’s characterization of Dr. Kouros’s statements. It is far
21 from clear that Dr. Kouros believed plaintiff would be disabled “separate and apart
22 from continued alcohol abuse.” Dr. Kouros diagnosed plaintiff with drug and
23 alcohol abuse and noted that plaintiff’s “conditions would produce anxiety.” (AR
24 278-79). Nowhere did Dr. Kouros state that plaintiff’s anxiety was unrelated to
25 his drug and alcohol abuse. (AR 278-82). A much more natural reading of Dr.
26 Kouros’s statements indicates that he believed plaintiff’s drug and alcohol abuse
27 was among the “conditions [that] would produce anxiety.” (See AR 278, 282).
28 Because Dr. Kouros did not opine that plaintiff suffered from disabling limitations

1 absent his drug and alcohol abuse, the ALJ did not err by failing to provide
2 reasons for rejecting this supposed opinion.

3 Indeed, the ALJ properly relied on the record as a whole to determine that
4 plaintiff's substance abuse is a contributing factor material to his disability. The
5 ALJ cited a consultative psychiatric examination resulting in diagnoses of
6 (1) alcohol and opioid dependence and (2) alcohol and opioid-induced psychotic
7 disorder with hallucinations and mood disorder (AR 27) (citing Exhibit B-3F [AR
8 166-69]); a consultative physical examination assessing plaintiff with the residual
9 functional capacity to perform medium work with certain limitations (AR 26-27)
10 (citing Exhibit B-7F [AR 161-65]); reports from plaintiff's methadone clinic that
11 plaintiff had been using alcohol (AR 27) (citing Exhibit B-7F [AR 195, 216,
12 217]); and plaintiff's statements to physicians that he had been consuming up to
13 six drinks per day as recently as September 2006 and three to four drinks per day
14 as of January 2007 (AR 27-28) (citing Exhibits B-7F, B-8F [AR 195, 259-60]).
15 No medical source opined that plaintiff would suffer from disabling impairments
16 absent his drug and alcohol addiction. Substantial evidence supports the ALJ's
17 determination that substance abuse is a contributing factor material to plaintiff's
18 disability.⁴

19 **V. CONCLUSION**

20 For the foregoing reasons, the decision of the Commissioner of Social
21 Security is affirmed.

22 LET JUDGMENT BE ENTERED ACCORDINGLY.

23 DATED: July 12, 2010

24 _____
/s/

25 Honorable Jacqueline Chooljian
26 UNITED STATES MAGISTRATE JUDGE

27 _____
28 ⁴Moreover, it is plaintiff's burden to prove that drug or alcohol addiction is not a
contributing factor material to his disability – a burden he did not meet in this case. Parra, 481
F.3d at 748.