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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD J. ROSAS, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security Administration, Defendant.	Case No. CV 13-2756-SP MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION

On May 2, 2013, plaintiff Richard J. Rosas, proceeding pro se, filed a complaint against defendant, the Commissioner of the Social Security Administration ("Commissioner"), seeking a review of a denial of disability insurance benefits ("DIB") and Supplemental Security Income ("SSI"). Both plaintiff and defendant have consented to proceed for all purposes before the assigned Magistrate Judge pursuant to 28 U.S.C. § 636(c). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents four issues for decision: (1) whether plaintiff was

accorded due process at his hearing; (2) whether the ALJ properly considered the opinion of plaintiff's treating and examining physicians; (3) whether the ALJ properly relied on the testimony of the vocational expert ("VE"); and (4) whether the ALJ properly discounted plaintiff's credibility.[1] Memorandum in Opposition to Defendant's Motion to Dismiss ("P. Mem.") at 1-3; Memorandum in Support of Defendant's Answer ("D. Mem.") at 3-8; Memorandum in Reply to Defendant's Answer ("Reply") at 2-3.

Having carefully studied the parties' papers, the Administrative Record ("AR"), and the decision of the ALJ, the court concludes that, as detailed herein, the ALJ accorded plaintiff a fair hearing, properly rejected the opinion of plaintiff's treating physician, properly relied on the VE's testimony, and properly discounted plaintiff's credibility. Consequently, the court affirms the decision of the Commissioner denying benefits.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, who was forty-five years old on his corrected alleged disability onset date,[2] completed school through the ninth grade. *Id*. at 47-48, 151, 163. His

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[1] On January 8, 2014, plaintiff submitted a Memorandum in Opposition to Defendant's Motion to Dismiss, which this court construes as a Memorandum in Support of Plaintiff's Complaint. Plaintiff raised seven issues in the memorandum and an additional issue in his Reply. Reading the vague allegations liberally, the court characterizes plaintiff's issues as set forth above. *See Roy v. Lampert*, 465 F.3d 964, 970 (9th Cir. 2006) (district courts must "construe pro se habeas filings liberally") (quoting *Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005)). Normally the court will not consider issues raised for the first time in a reply brief, but because plaintiff's credibility is related to the issue of whether the ALJ properly considered the opinion of his treating physician, an issue raised in the initial brief, the court will address it as well.

[2] In his applications, plaintiff alleged that his onset of disability date was June 18, 2007. AR at 151. The ALJ determined that the correct alleged onset date was

past relevant work was as a general building contractor, general engineering contractor, electrician, and arc welder. *Id.* at 220-21.

On April 20 and May 13, 2009, plaintiff filed applications for DIB and SSI due to, inter alia, depression, paranoia, back injury, neck injury, carpal tunnel, asbestos cancer, and post traumatic stress disorder ("PTSD"). *Id.* at 124, 132, 155. The Commissioner denied plaintiff's applications, after which he filed for a request for a hearing. *Id.* at 91-97.

On August 24, 2010, plaintiff, represented by counsel, appeared and testified at a hearing before the ALJ. *Id.* at 40-88. The ALJ also heard testimony from Guadalupe Rosas, plaintiff's wife. *Id*. at 77-87.

After the hearing, the ALJ ordered an additional psychological evaluation of plaintiff, which was conducted September 24, 2010. *Id.* at 375-82.

On December 14, 2010, the ALJ retained the assistance of Howard Goldfarb, a VE, and asked that he complete a set of interrogatories. *Id.* at 216. The VE returned the completed interrogatories on May 5, 2011. *Id*. at 218-26. The ALJ gave plaintiff's counsel the VE's responses and the option of commenting on the responses, submitting more evidence, or submitting cross-interrogatories. *Id*. at 228. Plaintiff's counsel submitted a cross-interrogatory for the VE, to which he responded on June 8, 2011.[3] *Id.* at 229, 231, 233.

On July 8, 2011, the ALJ denied plaintiff's claims for benefits. *Id.* at 24-35.

Applying the well-known five-step sequential evaluation process, the ALJ found, at step one, that plaintiff had not engaged in substantial gainful activity since October 17, 2008, the corrected alleged onset date. *Id.* at 27.

At step two, the ALJ found that plaintiff suffered from the following severe

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October 17, 2008, the date plaintiff stopped working. *Id*. at 27.

[3] The VE's response is dated June 8, 2010, but that appears to be a typographical error. *See* AR at 233.

combination of impairments: tension headaches; thoracolumbar strain; bipolar disorder; PTSD; and polysubstance abuse. *Id*.

At step three, the ALJ found that plaintiff's impairments, whether individually or in combination, did not meet or medically equal one of the listed impairments set forth in 20 C.F.R. part 404, Subpart P, Appendix 1 (the "Listings"). *Id.*

The ALJ then assessed plaintiff's residual functional capacity ("RFC"),[4] and determined that plaintiff had the RFC to: lift/carry up to fifty pounds occasionally and twenty-five pounds frequently; stand/walk up to six hours and sit up to six hours in an eight-hour workday; and climb, kneel, crawl, bend, stoop, and balance on a frequent basis. *Id.* at 28. The ALJ also found that plaintiff had the ability to perform complex technical work on a frequent basis, and may perform a full range of simple, routine, and repetitive work with occasional contact with supervisors and the general public at a medium stress level.[5] *Id*. at 28-29.

The ALJ found, at step four, that plaintiff was unable to perform his past relevant work. *Id.* at 33.

At step five, the ALJ found that considering plaintiff's age, education, work experience, and RFC, there were jobs that exist in significant numbers in the national economy that plaintiff could perform, including hand packager, day worker, and woodworking polisher. *Id*. at 33-34. Consequently, the ALJ

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[4] Residual functional capacity is what a claimant can do despite existing exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n.2 (9th Cir. 2007).

[5] The ALJ specified a stress level of five based on a scale of one to ten, citing a dishwasher as an example of one and an air traffic controller as an example of ten. AR at 28-29.

concluded that plaintiff did not suffer from a disability as defined by the Social Security Act. *Id.* at 34-35.

Plaintiff filed a timely request for review of the ALJ's decision, which was denied by the Appeals Council. *Id.* at 4-6. The ALJ's decision stands as the final decision of the Commissioner.

III.

STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration ("SSA") must be upheld if they are free of legal error and supported by substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as amended). But if the court determines that the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001).

"Substantial evidence is more than a mere scintilla, but less than a preponderance." *Aukland*, 257 F.3d at 1035. Substantial evidence is such "relevant evidence which a reasonable person might accept as adequate to support a conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ's finding, the reviewing court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the ALJ's conclusion." *Mayes*, 276 F.3d at 459. The ALJ's decision "'cannot be affirmed simply by isolating a specific quantum of supporting evidence.'" *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the evidence can reasonably support either affirming or reversing

the ALJ's decision, the reviewing court "'may not substitute its judgment for that of the ALJ.'" *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

IV.

DISCUSSION

A. Plaintiff Received a Fair Hearing

Plaintiff's general overarching argument is that the administrative hearing violated his due process rights because: (1) he received ineffective assistance of counsel; (2) the ALJ was biased; and (3) the ALJ did not allow plaintiff to review evidence collected after the hearing and did not consider all of the evidence. P. Mem. at 1-2. Plaintiff's claims are without merit.

"The Supreme Court has held that applicants for social security disability benefits are entitled to due process in the determination of their claims." *Holohan v. Massanari*, 246 F.3d 1195, 1209 (9th Cir. 2001) (citing *Richardson v. Perales*, 402 U.S. 389, 398, 401-02, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)). This includes the right to a full and fair hearing. *See McLeod v. Astrue*, 640 F.3d 881, 885 (9th Cir. 2011) (as amended) ("The ALJ has a duty to conduct a full and fair hearing."); *Oritz v. Colvin*, No. 12-3348, 2013 WL 2468256, at *1 (C.D. Cal. June 6, 2013); *see also Hepp v. Astrue*, 511 F.3d 798, 804 (8th Cir. 2008).

1. Plaintiff Does Not Have a Right to Counsel

Plaintiff contends that he received ineffective assistance of counsel. P. Mem. at 1-2. Specifically, plaintiff argues that his counsel failed to respond to the ALJ's requests, his questions, and the submission of new evidence. *Id.* at 2.

A social security claimant does not have a Sixth Amendment right to counsel. *See Brandyburg v. Sullivan*, 959 F.2d 555, 562 (5th Cir. 1992) ("The Supreme Court has never recognized a constitutional right to counsel at an SSA hearing."); *Holland v. Heckler*, 764 F.2d 1560, 1562 (11th Cir. 1985) (a claimant

has "no *constitutional* right to counsel at a disability benefits hearing") (emphasis in original); *Alvernaz v. Colvin*, No. 13-158, 2014 WL 1338314, at *8 (E.D. Cal. Apr. 2, 2014), *Garth v. Astrue*, No. 11-5592, 2013 WL 257090, at *5 (N.D. Cal. Jan. 23, 2013); *see also* 4 Soc. Sec. Law & Prac. § 46:3 ("A claim of ineffective assistance of counsel during administrative proceedings may not provide a basis for reversing the SSA's denial of benefits, because, given the nonadversarial nature of the administrative process, competent legal representation of a claimant during the process is not a prerequisite to the issuance of a valid administrative decision."). Thus, this claim cannot provide a basis for relief.

2. Plaintiff's Allegations of Bias Are Without Support

Plaintiff argues that the ALJ was biased because, according to plaintiff, the ALJ initially found plaintiff was disabled and then ultimately concluded he was not. P. Mem. at 1-2. Plaintiff also suggests the ALJ withheld records from persons evaluating plaintiff. Reply at 2-3.

ALJs "are presumed to be unbiased." *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). This presumption may be "rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Id*. at 858. Here, plaintiff offers nothing more than conclusory allegations of bias. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (the court is not required to accept as true merely conclusory allegations).

Plaintiff makes two allegations to support his claim of bias. First, plaintiff alleges that the fact the ALJ initially concluded that he was disabled and then later reached the opposite conclusion shows bias. P. Mem. at 1-2. This allegation is unfounded. Throughout the hearing, the ALJ exhibited no indication of his inclinations. Further, even assuming there was evidence the ALJ initially believed that plaintiff was disabled, the ALJ reached his final conclusion after receiving *new evidence*, which, as discussed *infra*, the ALJ properly considered. Thus, even

if the ALJ did change his mind, that would not show he was biased.

Second, plaintiff alleges that the ALJ withheld his medical records from the consultative examiners. Reply at 2-3. Again, plaintiff's allegations are baseless. Plaintiff did not have any psychiatric treatment records prior to January 2010 and thus there were none for Dr. Edward Ritvo, a consultative psychiatrist who examined plaintiff on July 2, 2009, to review. *See* AR at 283. Similarly, Dr. Shahram Jacobs, a consultative internist, did not review any medical records. *Id.* at 277. There is no evidence that these records were available to Dr. Jacobs at the time of the examination. *Compare id*. at 239, 276 (records request sent on June 19, 2009, just ten days prior to Dr. Jacobs's examination). As for Dr. Steven I. Brawer, a consultative psychologist who examined plaintiff on September 24, 2010, he stated that he reviewed a "thick file of records" and cited some of the records that he reviewed. *Id*. at 376-77. The fact that Dr. Brawer did not specifically state that he reviewed plaintiff's psychiatric treatments notes does not prove either that Dr. Brawer did not review them or that the ALJ purposefully excluded them. Dr. Brawer only cited examples of the records he reviewed and did not state it was an inclusive list. Given that Dr. Brawer specifically noted that he reviewed Dr. Park's opinion, it can be reasonably assumed that he also reviewed the supporting treatment notes.

Plaintiff has therefore failed to rebut the presumption against bias.

3. The ALJ Committed No Evidentiary Errors

Plaintiff contends that the ALJ made several evidentiary errors. Specifically, plaintiff alleges that the ALJ failed to notify plaintiff and seek input as to the experts he intended to retain, did not allow plaintiff or his counsel to review evidence submitted after the hearing, and failed to request and review plaintiff's military record. P. Mem. at 1-2.

An ALJ has a duty to fully develop the record. *See Tonapetyan*, 242 F.3d at

1150. "The ALJ may discharge this duty in several ways, including: subpoenaing the claimant's physicians, submitting questions to the claimant's physicians, continuing the hearing, or keeping the record open after the hearing to allow supplementation of the record." *Id.*

Plaintiff's first contention is that the ALJ failed to notify plaintiff and allow his input as to which experts he should retain. P. Mem. at 2. It is the province of the ALJ to retain the experts, but a claimant may object to the selection. *See* 20 C.F.R. §§ 404.1519, 416.919, 404.1519g, 416.919g, 404.1519j, 416.919j. Here, plaintiff offers nothing more than a conclusory allegation that the ALJ did not notify his counsel as to the selection of the consultative examiners. Thus, the court need not accept it as true. Moreover, the ALJ allowed plaintiff's counsel to comment on or object to Dr. Brawer's opinion, which he did not. AR at 200.

Second, plaintiff argues that the ALJ improperly requested additional evidence after the hearing and failed to provide that evidence to plaintiff for review. P. Mem. at 2. As discussed *supra*, the ALJ may keep the record open for the submission of additional evidence if the record is incomplete. Here, after the hearing, the ALJ ordered an additional consultative psychological evaluation, which was conducted by Dr. Brawer on September 24, 2010. AR at 375-82. As just noted, the ALJ gave plaintiff's counsel an opportunity to comment on Dr. Brawer's report. *Id.* at 200. Subsequently, the ALJ retained the assistance of a VE, Howard J. Goldfarb. *Id.* at 217-26. The ALJ forwarded Goldfarb's interrogatory responses to plaintiff's counsel and asked counsel to comment on the responses, submit more evidence, or submit cross-interrogatories. *Id*. at 228. Plaintiff's counsel submitted a cross-interrogatory, and the VE responded. *Id.* at 229, 231, 233. The ALJ's retention of a consultative psychologist and VE were in compliance with his duty to develop the record. Contrary to plaintiff's arguments, the ALJ provided the evidence to plaintiff's counsel and gave counsel an

opportunity to respond.

Finally, plaintiff argues that the ALJ had a duty to request and review plaintiff's military record. The ALJ's duty to develop the record applies only to evidence relevant to his claim. *See, e.g.*, *Humecky v. Astrue*, No. 07-1010, 2009 WL 799178, at *24 (E. D. Cal. Mar. 24, 2009) (ALJ has a duty to explore all relevant facts) (*citing Higbee v. Sullivan*, 975 F.2d 558, 561 (9th Cir. 1991)). Plaintiff served in the military in the early 1980s. The ALJ accepted plaintiff's allegation of PTSD resulting from the Beirut bombing in 1983. *See* AR at 27. Because plaintiff does not specify, it is unclear why the ALJ should have reviewed plaintiff's military record and how doing so would have helped plaintiff's claims. In short, plaintiff's evidentiary claims are without merit.

Accordingly, substantial evidence demonstrates that plaintiff received a fair and unbiased hearing before an unbiased ALJ who fulfilled his duty to develop the record.

B. The ALJ Properly Considered the Expert Opinion Testimony

Although it is not entirely clear, plaintiff appears to argue that the ALJ erred when he credited the opinions of the consultative examiners and gave less weight to his treating physician.[6] P. Mem. at 1-2. The court disagrees.

In determining whether a claimant has a medically determinable impairment, among the evidence the ALJ considers is medical evidence. 20 C.F.R. §§ 404.1527(b), 416.927(b). In evaluating medical opinions, the regulations distinguish among three types of physicians: (1) treating physicians;

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[6] Plaintiff also argues that the ALJ should not have given weight to the state agency physicians. Reply at 1-2. The ALJ relied on the opinions of several of the examining physicians and gave less weight to the opinions of the state agency physicians. *See* AR at 29-30. Because the ALJ did not rely on the opinions of the state agency opinions in reaching his determination, this court will not discuss those opinions.

(2) examining physicians; and (3) non-examining physicians.[7] 20 C.F.R. §§ 404.1527(c), (e), 416.927(c), (e); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (as amended). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's." *Holohan*, 246 F.3d at 1202; 20 C.F.R. §§ 404.1527(c)(1)-(2); 416.927(c)(1)-(2). The opinion of the treating physician is generally given the greatest weight because the treating physician is employed to cure and has a greater opportunity to understand and observe a claimant. *Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).

Nevertheless, the ALJ is not bound by the opinion of the treating physician. *Smolen*, 80 F.3d at 1285. If a treating physician's opinion is uncontradicted, the ALJ must provide clear and convincing reasons for giving it less weight. *Lester*, 81 F.3d at 830. If the treating physician's opinion is contradicted by other opinions, the ALJ must provide specific and legitimate reasons supported by substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide specific and legitimate reasons supported by substantial evidence in rejecting the contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a non-examining physician, standing alone, cannot constitute substantial evidence. *Widmark v. Barnhart*, 454 F.3d 1063, 1067 n.2 (9th Cir. 2006); *Morgan v. Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d 813, 818 n.7 (9th Cir. 1993).

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[7] Psychologists are considered acceptable medical sources whose opinions are accorded the same weight as physicians. 20 C.F.R. §§ 404.1513(a)(2), 416.913(a)(2). Accordingly, for ease of reference, the court will refer to Dr. Brawer as a physician.

1. Medical Opinions

Dr. Park

Dr. Park, a psychiatrist at the Los Angeles County Department of Mental Health, treated plaintiff from January 2010 through at least June 2010. *See* AR at 319-20, 324, 326-31, 368-70. Plaintiff's sessions with Dr. Park were primarily telephonic and their purpose was to follow up on plaintiff's medication. *See id.* Jennifer Kim, an associate social worker, and Debbie Eshtiaghpour, a post-doctoral intern, provided plaintiff with therapy sessions from January 2010 through April 2010 and coordinated with Dr. Park. *See id.* at 316-43, 371-73. During the sessions, Kim observed that plaintiff was oriented and alert, shook his legs nervously, and was verbose. *See, e.g., id*. at 317, 322, 325. Dr. Park and Kim diagnosed plaintiff with bipolar disorder and PTSD secondarily. *Id.* at 332, 334.

On May 21, 2010, Dr. Park completed a Medical Source Statement (Mental), in which he opined that plaintiff had moderate limitations with regard to understanding and memory, sustained concentration and persistence, social interaction, and adaptation. *Id*. at 310-12. Dr. Park also checked boxes indicating that plaintiff would have a substantial loss of ability to: understand, remember, and carry out directions; make simple-work related decisions; respond appropriately to supervisors and co-workers; and deal with changes in a routine work setting. *Id.* at 312. Dr. Park listed excessive mood changes, anger, hearing imagined voices, and confusion as findings that supported his opinion. *Id.*

Dr. Jacobs

Dr. Shahram Jacobs, a consultative internist, examined plaintiff on June 29, 2009. *Id*. at 276-80. Dr. Jacobs did not review any medical records. *Id*. at 277. With respect to plaintiff's back, Dr. Jacobs observed that plaintiff had evidence of muscle spasm in the right paraspinal muscles along the upper mid thoracic spine with tenderness to palpation and tenderness on the left and right lateral rotation, as well as left and right flexion of the lumbar spine. *Id.* at 279. Plaintiff's range of

motion, however, was normal. *Id.* Dr. Jacobs also took a thoracic spine x-ray and did not note any abnormalities. *See id.* at 280. With regard to plaintiff's wrists and hands, Dr. Jacobs observed that plaintiff had no evidence of tenderness to palpation of the wrists, Herbeden's nodes, or Bouchard's nodes. *Id*. at 279. Plaintiff had normal range of motion in the wrists. *Id.*

Based on his examination, Dr. Jacobs concluded that plaintiff did not have any abnormality of the hands and wrists, but found that there was evidence of muscle spasm in the thoracic spine with tenderness to palpation, as well as pain elicited on movement likely with thoracolumbar strain. *Id.* at 280. Dr. Jacobs opined that plaintiff may suffer from tension type headaches but he appeared comfortable during the examination. *Id.* Dr. Jacobs further opined that plaintiff: could lift/carry fifty pounds occasionally and twenty-five pounds frequently; could stand/walk/sit six hours in an eight-hour workday; had unlimited ability to push and pull in both the upper and lower extremities other than lift/carry; and was limited to frequent postural activities. *Id*.

Dr. Ritvo

Dr. Edward Ritvo, a consultative psychiatrist, examined plaintiff on July 2, 2009. *Id.* at 283-288. Dr. Ritvo reviewed no medical records and did not conduct any tests. *See id.* Dr. Ritvo observed that plaintiff was, inter alia, pleasant, talkative, and able to volunteer information spontaneously. *Id*. at 285. Dr. Ritvo also observed that plaintiff had relevant and organized thought processes. *Id.* at 286. Dr. Ritvo noted that plaintiff had some ideas which were "quite unusual," but that they did not fit into a specific diagnosis. *Id.* at 287. As such, Dr. Ritvo diagnosed plaintiff with polysubstance abuse, in long-term remission, and moderate psychosocial stressors, and opined no impairments. *Id.* at 287-88.

Dr. Brawer

Dr. Brawer examined plaintiff on September 24, 2010. *Id*. at 375-82. Dr. Brawer reviewed plaintiff's medical records and administered multiple tests. *See*

id. Dr. Brawer observed that plaintiff was euthymic, had clear speech, and had adequate concentration. *Id*. at 378-79. Dr. Brawer diagnosed plaintiff with: bipolar disorder; PTSD; polysubstance abuse, which was reported to be remission; and low average range intellectual functioning. *Id*. at 381. Based on the test results and observations, Dr. Brawer opined that plaintiff: would be able to perform simple, repetitive tasks; could perform some detailed, varied, or complex tasks; had a mildly diminished ability to sustain attention and concentration for extended periods of time but demonstrated adequate attention during testing; and displayed signs of mood instability and proneness to substance abuse/dependence that may result in mild to moderate limitations in his ability to effectively manage customary work stresses. *Id*. at 381-85. Dr. Brawer further opined that given plaintiff's dysphoria, paranoia, and proneness to interpersonal conflict, plaintiff may have mild to moderate limitations in sustaining cooperative relationships with coworkers and supervisors and would function best in a semi-isolated environment. *Id.* at 382, 384.

2. The ALJ's Findings

The ALJ concluded that plaintiff had a severe combination of the impairments of tension headaches, thoracolumbar strain, bipolar disorder, PTSD, and polysubstance abuse. *Id*. at 27. In his RFC determination, the ALJ found that plaintiff had the ability to perform medium work with the following non-exertional limitations, plaintiff: could frequently perform complex technical work; could perform a full range of simple, routine, and repetitive work; was limited to occasional contact with supervisors and the general public; and was limited to a job with a medium stress level. *Id*. at 28-29. In reaching those determinations, the ALJ gave great weight to the opinions of Dr. Jacobs and Dr. Brawer and less weight to the opinions of Dr. Ritvo and Dr. Park. *Id.* at 29-31. The ALJ gave less weight to Dr. Ritvo because he did not have medical records to review and he did not cite as much relevant objective evidence as Dr. Brawer. *Id*. at 30. The ALJ

gave less weight to Dr. Park because his opinion "reflect[ed] advocacy." *Id.* at 31. The ALJ found that Dr. Park's opinion was not supported by objective evidence or the treatment records, which focused largely on plaintiff's discounted subjective complaints. *Id*. Plaintiff appears to only find fault with the ALJ's acceptance of Dr. Brawer's opinion and the rejection of Dr. Park's opinion.[8]

The ALJ properly relied on Dr. Brawer's opinion. Dr. Brawer's opinion was based on an examination and review of medical records. Plaintiff offers no reason to give Dr. Brawer's opinion less weight.

The ALJ also properly gave less weight to Dr. Park's opinion. One of the reasons the ALJ gave for rejecting Dr. Park's opinion – that it reflected advocacy rather than treatment by Dr. Park – was without merit. The ALJ took issue with the fact that plaintiff's counsel solicited the opinion from Dr. Park. *See id.* Plaintiff's counsel is entitled to solicit Dr. Park's opinion. Indeed, had he not, the ALJ may have noted that the treating physician did not provide an opinion. Nothing in the record suggests that Dr. Park was trying to "advocate" for plaintiff rather than provide a neutral opinion.

Nevertheless, the ALJ cited other specific and legitimate reasons for rejecting the opinion of Dr. Park. First, the ALJ found that Dr. Park's opinion is not supported by objective evidence. AR at 31. The ALJ correctly noted that plaintiff's records reflect that Dr. Park and his associates conducted no tests and recorded few objective observations. *See, e.g., id.* at 322-23. The only objective findings Dr. Park and his associates noted were that plaintiff was oriented and

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[8] The only physician who offered an opinion concerning plaintiff's physical RFC was Dr. Jacobs. To the extent that plaintiff finds fault with Dr. Jacobs' opinion, his only argument is that Dr. Jacobs did not review any medical records. Reply at 1. Plaintiff submitted few medical records, most of were irrelevant to plaintiff's complaints. *See, e.g.,* AR at 257, 274-75 (discussing well visits and unrelated issues). The ALJ discussed the relevant records (spine and hand x-rays), which supported Dr. Jacobs's opinion. *See id.* at 29, 260-61, 264.

alert, shook his legs nervously, and was verbose during sessions. *See, e.g., id*. at 317, 322, 325.

Second, the ALJ's finding that the treatment notes do not support Dr. Park's opinion is also specific and legitimate. *See id.* at 31. Dr. Park based his opinion on plaintiff's excessive mood changes, anger, auditory hallucinations, and confusion. The treatment notes, however, do not reflect any objective observations of those symptoms. Instead, it was plaintiff who relayed information concerning mood changes, anger, and hallucinations to Dr. Park and his associates. *See, e.g., id.* at 322-35. Thus, to the extent that Dr. Park based his opinion on plaintiff's subjective complaints, the ALJ may reject it if plaintiff's credibility is discounted. *See Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995) ("[A]n opinion of disability premised to a large extent upon the claimant's own accounts of his symptoms and limitations may be disregarded, once those complaints have themselves been properly discounted."). As discussed *infra*, the ALJ properly discounted plaintiff's credibility.

In short, the ALJ properly considered the opinions of the treating and examining physicians and provided specific and legitimate reasons supported by substantial evidence for rejecting the opinion of Dr. Park.

C. <u>The ALJ Properly Relied on the VE's Testimony</u>

Plaintiff contends that the vocational expert failed to consider all the limitations, including his lack of a high school diploma and the California Employment Development Department's ("EDD") finding that he was unemployable. P. Mem. at 1, 3. The court disagrees.

At step five, Commissioner bears the burden to show that the claimant retains the ability to perform other gainful activity. *Lounsburry v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a finding that a claimant is not disabled at step five, the Commissioner must provide evidence demonstrating that other work exists in significant numbers in the national economy that the claimant

can perform, given his or her age, education, work experience, and RFC. 20 C.F.R. §§ 404.1512(f), 416.912(f).

The Commissioner may meet her step five burden either by reference to the Medical-Vocational Guidelines at 20 C.F.R. part 404, Subpart P, Appendix 2 or by relying on the testimony of a vocational expert and the Dictionary of Occupational Titles ("DOT") "in evaluating whether the claimant is able to perform other work in the national economy." *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir. 1990) (citations omitted); *see Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001); Social Security Ruling ("SSR") 83-12;[9] *see also* 20 C.F.R. §§ 404.1566(d)(1), 416.966(d)(1) (DOT is a source of reliable job information). The DOT is the rebuttable presumptive authority on job classifications. *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). An ALJ may not rely on a VE's testimony regarding the requirements of a particular job without first inquiring whether the testimony conflicts with the DOT, and if so, the reasons therefor. *Massachi*, 486 F.3d at 1152-53 (discussing SSR 00-4p). In order for an ALJ to accept a VE's testimony that contradicts the DOT, the record must contain "'persuasive evidence to support the deviation.'" *Id.* at 1153 (*quoting Johnson*, 60 F.3d at 1435). Evidence sufficient to permit such a deviation may be either specific findings of fact regarding the claimant's residual functionality, or inferences drawn from the context of the expert's testimony. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997) (as amended).

Here, the ALJ propounded interrogatories to the VE. AR at 218-26. In

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[9] "The Commissioner issues Social Security Rulings to clarify the Act's implementing regulations and the agency's policies. SSRs are binding on all components of the SSA. SSRs do not have the force of law. However, because they represent the Commissioner's interpretation of the agency's regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations." *Holohan*, 246 F.3d at 1203 n.1 (internal citations omitted).

response to a hypothetical person with plaintiff's RFC, the VE responded that such person would be able to perform the jobs of hand packager, day worker, and woodworking polisher. *Id*. at 223-24. Plaintiff's counsel also presented an interrogatory, presenting a hypothetical person with plaintiff's alleged RFC but also limited to: light work; simple, routine, and repetitive work; less than occasional contact with supervisors; rare contact with co-workers; no contact with the general public due to aggressive behavior and manic moods; and a maximum stress level of three based on the ALJ's scale. *Id.* at 229. In response, the VE stated that such hypothetical person would be able to perform the jobs of housekeeper, jewelry preparer, and handwasher. *Id.* at 233.

The VE properly considered the hypotheticals and did not err. First, the VE stated his responses did not conflict with the DOT (*id.* at 225), and plaintiff has not identified a genuine conflict. Contrary to plaintiff's contention, none of the identified jobs require a high school diploma. *See* DOT 920.587-018 (hand packager), 301.687-014 (day worker), 761.684-026 (woodworking polisher). And second, assuming the EDD determined that plaintiff was unemployable, such determination is irrelevant to the VE's response. The VE only had a duty to respond to the hypotheticals presented to him. It is the purview of the ALJ to make the ultimate disability determination. 20 C.F.R. §§ 404.1527(d), 416.927(d).

The ALJ thus properly relied on the VE testimony in reaching his decision. The VE considered all factors presented in the hypotheticals and his responses were consistent with the DOT.

D. <u>The ALJ Properly Discounted Plaintiff's Credibility</u>

Plaintiff argues that the ALJ improperly discounted his credibility. Reply at 2-3. Specifically, plaintiff suggests that the ALJ failed to provide clear and convincing reasons for finding plaintiff less credible. *Id.* The court disagrees.

The ALJ must make specific credibility findings, supported by the record. SSR 96-7p. To determine whether testimony concerning symptoms is credible, the

ALJ engages in a two-step analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ must determine whether a claimant produced objective medical evidence of an underlying impairment "'which could reasonably be expected to produce the pain or other symptoms alleged.'" *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of malingering, an "ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so." *Smolen*, 80 F.3d at 1281; *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). The ALJ may consider several factors in weighing a claimant's credibility, including: (1) ordinary techniques of credibility evaluation such as a claimant's reputation for lying; (2) the failure to seek treatment or follow a prescribed course of treatment; and (3) a claimant's daily activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

At the first step, the ALJ found that plaintiff's medically determinable impairments could reasonably be expected to cause the symptoms alleged. AR at 32. At the second step, because the ALJ did not find any evidence of malingering, the ALJ was required to provide clear and convincing reasons for discounting plaintiff's credibility. The ALJ discounted plaintiff's credibility here because: (1) the objective medical evidence failed to support his claims; (2) he sought little treatment; and (3) his daily activities were inconsistent with plaintiff's stated limitations. *Id.* Some of the ALJ's reasons were clear and convincing reasons supported by substantial evidence.

First, the ALJ correctly noted that the objective evidence does not support plaintiff's allegations. *See id.*; *see also Rollins*, 261 F.3d at 856-57 (lack of objective medicine supporting symptoms is one factor in evaluating credibility). Plaintiff performed adequately on the mental status examinations and tests. *See* AR at 285-87, 378-81. Plaintiff, among other things, was coherent, organized, and talkative, and displayed adequate attention. *See id.* at 285-87, 378-79. These

findings were consistent with observations during his therapy session. *See, e.g., id*. at 317, 322, 325.

Second, the ALJ discounted plaintiff's credibility on the basis that he sought little treatment for his mental impairment. AR at 32. The records reflect that plaintiff first sought mental health treatment in January 2010. *See id*. at 337-43. He appears to have stopped attending therapy in the beginning of April 2010, but continued his medication review sessions through at least June 2010. *See id.* at 368, 371-73. Persons with mental health impairments often do not seek treatment, and thus the failure to seek treatment is not necessarily a clear and convincing reason to discount their testimony. *See Allen v. Comm'r*, No. 11-16628, 2012 WL 5857269, at *2 (9th Cir. Nov. 19, 2012) (The "[f]ailure to seek treatment is not a substantial basis on which to conclude that a claimant's mental impairment is not severe."); *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996) ("[I]t is common knowledge that depression is one of the most underreported illnesses in the country because those afflicted often do not recognize that their condition reflects a potentially serious mental illness."). Thus, although the ALJ was accurate in his observation, plaintiff's limited treatment is not by itself a clear and convincing reason.

Finally, the ALJ found that plaintiff's daily activities were inconsistent with his testimony and written statements. AR at 32. The ALJ clarified that it was not plaintiff's ability to perform "some normal daily activities" that caused him to find plaintiff less credible, but rather the fact that the activities reflected that plaintiff had greater capabilities than he testified to. *Id.* Inconsistency between a claimant's alleged symptoms and her daily activities may be a clear and convincing reason to find a claimant less credible. *See Tommasetti*, 533 F.3d at 1039; *Bunnell*, 947 F.2d at 346-47. Plaintiff testified that he had trouble handling tools due to pain, could not focus on the routine of work, could not finish jobs, was paranoid of all his workers, and was angry. AR at 65-69. But from plaintiff's

and his wife's function reports, it appears that plaintiff was able to spend significant time on the computer – reading, chatting, blogging, or e-mailing – which would be inconsistent with plaintiff's claim that he had trouble focusing. *See id*. at 182, 190. Similarly inconsistent was plaintiff's wife's statement that plaintiff was able to follow written instructions well enough to complete whatever project he was working on. *Id*. at 191. Plaintiff and his wife also stated that plaintiff gets along well with neighbors, friends, and authority figures, and participates in community organizations and meetings, which occur once or twice a month. *Id*. at 183, 191-92. These interactions are inconsistent with plaintiff's testimony of paranoia of his workers. These inconsistencies suggest that plaintiff had a better ability to concentrate and interact with others than he testified to and were adequate to support the ALJ's finding.

Thus, the ALJ cited two clear and convincing reasons to discount plaintiff's credibility. Further, even if these reasons were insufficient by themselves, such error would be harmless. First, plaintiff made other inconsistent statements. *See Tommasetti*, 533 F.3d at 1939 (the ALJ may consider prior inconsistent statements). Plaintiff testified that he had auditory and visual hallucinations and reported the same to Dr. Park and his associates. *See, e.g.,* AR at 75, 321. But plaintiff denied having recent auditory and visual hallucinations to Dr. Ritvo and any auditory hallucinations to Dr. Brawer. *See id.* at 286, 378. Second, assuming plaintiff's alleged limitations are as described by his counsel in the cross-interrogatory to the VE, the VE responded that even given those limitations, plaintiff would still be able to perform other work , including housekeeper, jewelry preparer, and handwasher. *Id.* at 233.

Accordingly, the ALJ provided clear and convincing reasons supported by substantial evidence for finding plaintiff less credible. And in any event, even if plaintiff's limitations were as he alleged, pursuant to the VE's response, he would still be able to perform work.

V.

CONCLUSION

IT IS THEREFORE ORDERED that Judgment shall be entered AFFIRMING the decision of the Commissioner denying benefits, and dismissing this action with prejudice.

DATED: July 28, 2014

SHERI PYM
United States Magistrate Judge