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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

LUIS ZAVALA,)	NO. CV 15-3408-KS
Plaintiff,)	
v.)	MEMORANDUM OPINION AND ORDER
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social Security,)	
Defendant.)	
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INTRODUCTION

Plaintiff filed a Complaint on May 6, 2015, seeking review of the denial of his applications for a period of disability, disability insurance benefits (“DIB”), and supplemental security income (“SSI”). On March 10, 2016, the parties filed a Joint Stipulation (“Joint Stip.”) in which plaintiff seeks an order reversing the Commissioner’s decision and ordering the payment of benefits or, in the alternative, remanding for further proceedings. (Joint Stip. at 13.) The Commissioner requests that the ALJ’s decision be affirmed or, in the alternative, remanded for further proceedings. (*See id.* at 17.) On August 16, 2016, the parties consented, pursuant to 28 U.S.C. § 636(c), to proceed before the

1 undersigned United States Magistrate Judge. (Dkt. Nos. 16, 24, 25.) The Court has taken
2 the matter under submission without oral argument.

3
4 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

5
6 On November 1, 2011, plaintiff, who was born on November 20, 1973, protectively
7 filed applications for DIB and SSI.¹ (See Administrative Record (“AR”) 16, 159, 185.)
8 Plaintiff alleged disability commencing December 1, 2008 due to: depression; high blood
9 pressure; and a left knee problem. (*Id.* 185.) Plaintiff previously worked as a tow-truck
10 driver (DOT 919.663-026) (AR 46, 186); security guard (DOT 372.667-034) (*id.* 46); and
11 auto reposessor (DOT 241.367-022) (*id.*). After the Commissioner denied plaintiff’s
12 applications initially (*id.* 108-113), plaintiff requested a hearing (*id.* 114). Administrative
13 Law Judge Ariel L. Solotengo (“ALJ”) held hearings on November 21, 2012 and September
14 24, 2013. (*Id.* 53-90 (transcript of November 21, 2012 hearing), 32-52 (transcript of
15 September 24, 2013 hearing).) Plaintiff, who was represented by counsel, testified at both
16 hearings. (See AR 35-46, 56-81, 87-89.) In addition, Elizabeth Brown-Ramos testified as a
17 vocational expert at the November 21, 2012 hearing (*id.* 81-87) and David Rinehart testified
18 as a vocational expert at the September 24, 2103 hearing (*id.* 46-51). On November 12,
19 2013, the ALJ issued an unfavorable decision, denying plaintiff’s applications for DIB and
20 SSI. (*Id.* 13-27.) On March 16, 2015, the Appeals Council, after receiving additional
21 evidence that it made part of the record, denied plaintiff’s request for review. (*Id.* 1-6.)

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¹ Plaintiff was 35 years old on the alleged onset date and thus met the agency’s definition of a younger person.
See 20 C.F.R. § 404.1563(c), 416.963(c).

1 Accordingly, the ALJ determined that plaintiff had not been under a disability, as defined in
2 the Social Security Act, from the alleged onset through the date of the ALJ's decision. (*Id.*
3 27.)
4

5 **STANDARD OF REVIEW**

6

7 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to
8 determine whether it is free from legal error and supported by substantial evidence in the
9 record as a whole. *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). "Substantial evidence
10 is 'more than a mere scintilla but less than a preponderance; it is such relevant evidence as a
11 reasonable mind might accept as adequate to support a conclusion.'" *Gutierrez v. Comm'r of*
12 *Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal citations omitted). "Even when the
13 evidence is susceptible to more than one rational interpretation, we must uphold the ALJ's
14 findings if they are supported by inferences reasonably drawn from the record." *Molina v.*
15 *Astrue*, 674 F.3d 1104, 1110 (9th Cir. 2012).
16

17 Although this Court cannot substitute its discretion for the Commissioner's, the Court
18 nonetheless must review the record as a whole, "weighing both the evidence that supports
19 and the evidence that detracts from the [Commissioner's] conclusion." *Lingenfelter v.*
20 *Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (internal quotation marks and citation omitted);
21 *Desrosiers v. Sec'y of Health and Hum. Servs.*, 846 F.2d 573, 576 (9th Cir. 1988). "The ALJ
22 is responsible for determining credibility, resolving conflicts in medical testimony, and for
23 resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
24

25 The Court will uphold the Commissioner's decision when the evidence is susceptible
26 to more than one rational interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir.
27 2005). However, the Court may review only the reasons stated by the ALJ in his decision
28 "and may not affirm the ALJ on a ground upon which he did not rely." *Orn*, 495 F.3d at

1 630; *see also* *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). The Court will not
2 reverse the Commissioner’s decision if it is based on harmless error, which exists if the error
3 is “‘inconsequential to the ultimate nondisability determination,’ or if despite the legal error,
4 ‘the agency’s path may reasonably be discerned.’” *Brown-Hunter v. Colvin*, 806 F.3d 487,
5 492 (9th Cir. 2015) (internal citations omitted).

7 **DISCUSSION**

8
9 Plaintiff alleges the following error: the ALJ erred at step 3 of the sequential analysis
10 in finding that plaintiff’s mental impairment did not meet or equal a listed impairment,
11 namely Listing 12.05C. (Joint Stip. at 4-10.)

13 **I. Standard.**

14
15 At step three of the sequential evaluation process, the ALJ must determine whether
16 the claimant has an impairment or combination of impairments that meets or equals an
17 impairment listed in the Appendix to federal regulations.² 20 C.F.R. §§ 404.1520(d),
18 416.920(d). Conditions set forth in the Listing of Impairments (“Listings”) are considered so
19 severe that “they are irrebuttably presumed disabling, without any specific finding as to the
20 claimant’s ability to perform his past relevant work or any other jobs.” *Lester v. Chater*, 81
21 F.3d 821, 828 (9th Cir. 1995); *see also* 20 C.F.R. §§ 404.1525, 416.925-416.926.

22
23 The claimant bears the burden of establishing a prima facie case of disability under
24 the Listings. *See Thomas v. Barnhart*, 278 F.3d 947, 955 (9th Cir. 2002). To meet or equal
25 Listing 12.05C for intellectual disability, plaintiff must show all of the following:

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28 ² The Appendix can be found at 20 C.F.R., Pt 404, Subpt. P, App. 1.

- 1 (1) he suffers “significantly subaverage general intellectual functioning with deficits
2 in adaptive functioning [that] initially manifested during the developmental
3 period; *i.e.*, the evidence demonstrates or supports onset of the impairments
4 before age 22”;
- 5 (2) he has “a valid verbal, performance, or full scale IQ of 60 through 70”; and
- 6 (3) he has “a physical or *other* mental impairment imposing an additional and
7 significant work-related limitation of function.”

8
9 20 C.F.R. Part 404, Subpt. P, App. 1 § 12.05.

10
11 “[A]n impairment imposes a significant work-related limitation of function when its
12 effect on a claimant’s ability to perform basic work activities is more than slight or
13 minimal.” *Fanning v. Bowen*, 827 F.2d 631, 633 (9th Cir. 1987). This requirement is met
14 when plaintiff has an additional impairment that is “severe” under 20 C.F.R. §§ 404.1520(c),
15 416.920(c) – that is, when plaintiff has an additional impairment that the ALJ found was
16 “severe” at step 2 of the sequential analysis. 20 C.F.R. Pt. 404, Subpt. P., App. 1 §
17 12.00(A).

18
19 **II. The ALJ’s Decision.**

20
21 The ALJ did not refer to Listing 12.05C in his decision or explain his rationale for
22 finding that plaintiff’s mental impairment did not satisfy its requirements. (*See generally*
23 AR 19-20.) Instead, the ALJ limited his discussion at step 3 to “the Listing[s] pertaining to
24 the Musculoskeletal System and the Respiratory System” and Listing 12.04 (affective
25 disorders). (*Id.* 19.) The ALJ explained that he had determined that plaintiff’s impairments
26 did not meet or equal the criteria of Listing 12.04 because, *inter alia*, plaintiff’s mental
27 impairment “does not cause at least two ‘marked’ limitations or one ‘marked’ limitation and
28 ‘repeated’ episodes of decompensation, each of extended duration.” (*Id.*)

1 **III. The ALJ Failed To Support His Finding That Plaintiff Does Not Satisfy Listing**
2 **12.05C.**
3

4 It appears from the Joint Stipulation that the parties agree that plaintiff satisfied two of
5 criteria for Listing 12.05C – that is, they agree that plaintiff has: (1) a valid full scale IQ
6 score of 70 (AR 431 (reported by the consulting clinical psychologist, Ahmad R. Riahiinejad,
7 Ed. S., Ph.D., on April 10, 2013)); and (2) another “impairment imposing an additional and
8 significant work-related limitation of function,” namely asthma, mild lumbar degenerative
9 disease, and mild osteoarthritis of the left knee (AR 18). (Joint Stip. at 10-12); *see also* 20
10 C.F.R. Part 404, Subpt. P, App. 1 § 12.05. Accordingly, the sole issue in dispute is whether
11 the ALJ should have found that plaintiff also satisfies the first criterion (significantly
12 subaverage general intellectual functioning that initially manifested before age 22).
13

14 However, the ALJ never mentioned Listing 12.05C in his decision. (*See generally* AR
15 19-20.) Instead, he limited his discussion at step 3 to “the Listing[s] pertaining to the
16 Musculoskeletal System and the Respiratory System” and Listing 12.04 (affective
17 disorders). (*Id.*) Accordingly, despite plaintiff’s apparent satisfaction of two of the criteria
18 for Listing 12.05C (IQ score and other additional, significant work-related limitation) and
19 his presentation of some evidence concerning the third criterion (significantly subaverage
20 intellectual functioning that initially manifested before age 22),³ the ALJ made no findings
21 about whether plaintiff satisfied any Listing 12.05C criteria.
22

23 ³ Plaintiff’s school records show that plaintiff was recommended for testing for a learning disability when he was
24 in the fifth grade, but his parents refused to allow testing and instead requested that he repeat the fifth grade. (AR 343.)
25 Plaintiff similarly testified that he was held back in the fifth grade because his reading and writing were below grade
26 level. (*Id.* 78.) He testified that repeating fifth grade did not help him progress as a student. (*Id.*) Plaintiff’s sixth grade
27 teacher also reported that, despite plaintiff repeating fifth grade, he performed “below grade level in most areas” and
28 demonstrated an “inability to read,” “low attention span,” and inability to follow directions. (*Id.* 343.) Plaintiff’s grades
in the subsequent school years suggest that he struggled in the core academic subjects. (*Id.* 341.)

Plaintiff testified that he is unable to determine whether he receives the right change after a cash purchase. (AR 78.) In his March 21, 2012 adult function report, plaintiff wrote that he cannot go out of the house alone because “[he] always get[s] lost.” (*Id.* 204.) He added that he is “very forgetful,” “can’t keep track of things,” is unable to handle a savings account, and is “slow comprehending things.” (*Id.*) On April 10, 2013, consulting clinical psychologist Ahmad R. Riahiinejad, Ed. S., Ph.D., observed that plaintiff “could not recite the alphabet correctly” and diagnosed plaintiff with,

1 Given the ALJ’s silence, the parties can only intuit the ALJ’s rationale for concluding
2 at step 3 that plaintiff’s mental impairment does not meet or equal Listing 12.05C.
3 However, the Court is not similarly free to posit *post hoc* rationalizations for the ALJ’s
4 determination. *See Orn*, 495 F.3d at 630 (“We review only the reasons provided by the ALJ
5 in the disability determination and may not affirm the ALJ on a ground upon which he did
6 not rely.”); *Bray v. Astrue*, 554 F.3d 1219, 1225-26 (9th Cir. 2009) (“Long-standing
7 principles of administrative law require us to review the ALJ’s decision based on the
8 reasoning and factual findings offered by the ALJ – not *post hoc* rationalizations that attempt
9 to intuit what the adjudicator may have been thinking.”); *Connett*, 340 F.3d at 874 (“[W]e
10 cannot rely on independent findings of the district court. We are constrained to review the
11 reasons the ALJ asserts.”). Because the Court cannot ascertain, much less review, the basis
12 for the ALJ’s conclusion that plaintiff does not satisfy the Listing 12.05C criteria, the matter
13 must be remanded for further consideration unless the ALJ’s error is harmless. *See Barbato*
14 *v. Comm’r of Soc. Sec. Admin.*, 923 F.Supp. 1273, 1276 n. 2 (C.D. Cal. 1996) (remand is
15 appropriate when a decision does not adequately explain how a decision was reached
16 because “the Commissioner’s decision must stand or fall with the reasons set forth in the
17 ALJ’s decision, as adopted by the Appeals Council”).

18
19 **IV. The ALJ’s Error At Step 3 Of The Sequential Analysis Is Not Harmless.**

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21 An ALJ’s error is harmless only if it is inconsequential to the ALJ’s ultimate
22 nondisability determination or if, despite any legal error, “the agency’s path may reasonably
23 be discerned.” *Brown-Hunter*, 806 F.3d at 492. These conditions are not satisfied here.

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27 *inter alia*, borderline intellectual functioning. (*Id.* 432.) However, Dr. Riahinejad stated that plaintiff is capable of
28 managing funds on his own behalf and could understand, remember, and carry out simple and repetitive instructions. (*Id.*
433.)

1 First, plaintiff's full scale IQ score of 70 is relevant – although not dispositive –
2 evidence of his IQ prior to age 22. *Cf. Strickland v. Colvin*, No. EDCV 14-0283-MAN,
3 2015 WL 1728354, at *5 (C.D. Cal. Apr. 15, 2015) (valid IQ tests are widely treated as
4 establishing a rebuttable presumption of a fairly constant IQ throughout a claimant's life);
5 *Thorsborne v. Colvin*, No. CV 14-08352-AS, 2015 WL 6758121, at *3-4 (C.D. Cal. Nov. 5,
6 2015) (adopting rebuttable presumption that a claimant's IQ is fairly constant throughout a
7 claimant's life); *Ramirez v. Colvin*, No. CV 13-5473 JC, 2014 WL 360183, *6 (C.D. Cal.
8 Jan. 31, 2014) (same); *Schuler v. Astrue*, No. 09-2126-PLA, 2010 WL 1443892, at *6 (C.D.
9 Cal. Apr.7, 2010) (same); *see also Hodges v. Barnhart*, 276 F.3d 1265, 1268 (11th Cir.
10 2001) (same); *Muncy*, 247 F.3d at 734 (same); *Luckey v. U.S. Dep't of Health & Hum.*
11 *Servs.*, 890 F.2d 666, 668 (4th Cir. 1989) (same); *Guzman v. Bowen*, 801 F.2d 273, 275 (7th
12 Cir. 1986) (same); *but see Frear v. Astrue*, No. CV 12-4532-JPR, 2013 WL 454902, at *5
13 n.6 (C.D. Cal. Feb. 6, 2013) (“Some circuits, although not the Ninth, have held that an IQ
14 score of 70 or below at any age creates a rebuttable presumption that the person had deficits
15 in adaptive functioning before age 22. The Court is not persuaded by those cases for the
16 reasons expressed in *Rhein v. Astrue*, No. 1:09-cv-01754-JLT, 2010 WL 4877796, at *7
17 (E.D. Cal. Nov. 23, 2010), and for the additional reason that this presumption would
18 seemingly apply in every case where Listing 12.05C was at issue.”) (internal citations
19 omitted).

20
21 Second, plaintiff's academic records, which show that he repeated fifth grade, was
22 recommended for testing for a learning disability, and performed below grade level, support
23 the view that plaintiff manifested subaverage intellectual functioning before age 22. *See*
24 *supra* footnote 3. Third and finally, the record shows that plaintiff dropped out of high
25 school after 10th grade and has no G.E.D. or high school diploma (AR 47), facts which may
26 be indicative of a lack of motivation – or an undiagnosed intellectual disability. In light of
27 the foregoing and the other evidence indicating that plaintiff exhibits subaverage intellectual
28 functioning, including his purported inability to recite the alphabet (AR 432), the ALJ's

1 apparent failure to consider whether plaintiff satisfied the criteria for Listing 12.05C was not
2 harmless.

3
4 Accordingly, the matter must be remanded for further consideration. On remand, the
5 ALJ shall: consider plaintiff’s full scale IQ score, his academic records, and any other
6 relevant evidence; and articulate specific reasons supported by substantial evidence for
7 finding that plaintiff has, or has not, satisfied the criteria for Listing 12.05C. Finally, the
8 ALJ may wish to solicit additional evidence, such as the statements of one of plaintiff’s
9 parents or siblings, psychological examinations, and/or the opinion of a medical expert, to
10 fully develop the record. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)
11 (“ALJ in a social security case has an independent duty to fully and fairly develop the record
12 and to assure that the claimant’s interests are considered.” (internal quotation marks and
13 citations omitted)).

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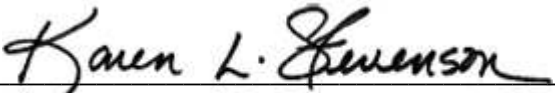
1 **CONCLUSION**

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3 Accordingly, for the reasons stated above, IT IS ORDERED that the decision of the
4 Commissioner is REVERSED, and this case is REMANDED for further proceedings
5 consistent with this Memorandum Opinion and Order.
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7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve copies of this
8 Memorandum Opinion and Order and the Judgment on counsel for plaintiff and for
9 defendant.
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11 LET JUDGMENT BE ENTERED ACCORDINGLY.
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13 DATE: August 24, 2016
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16 KAREN L. STEVENSON
17 UNITED STATES MAGISTRATE JUDGE
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