

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RACHEEDAD TREOLA
ROBERSON,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security
Defendant.

Case No. CV 16-05455-KES

**MEMORANDUM OPINION
AND ORDER**

Racheedad Treola Roberson (“Plaintiff”) appeals the final decision of the Social Security Commissioner denying her application for supplemental security income (“SSI”). For the reasons stated below, the Commissioner’s decision is **AFFIRMED.**

**I.
BACKGROUND**

Plaintiff applied for SSI alleging disability beginning on November 1, 2010. Administrative Record (“AR”) 10. A hearing was held before an administrative law judge (“ALJ”) on February 24, 2014. AR 25-60. A second hearing was held

1 on November 17, 2014, before a different ALJ. AR 61-101. The second ALJ
2 issued a decision denying benefits on December 8, 2014. AR 7-24.

3 II.

4 STANDARD OF REVIEW

5 A. Substantial Evidence and Harmless Error.

6 Under 42 U.S.C. § 405(g), a district court may review the Commissioner’s
7 decision to deny benefits. The ALJ’s findings and decision should be upheld if
8 they are free from legal error and are supported by substantial evidence based on
9 the record as a whole. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389,
10 401 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial
11 evidence means such relevant evidence as a reasonable person might accept as
12 adequate to support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter v.
13 Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).

14 “A decision of the ALJ will not be reversed for errors that are harmless.”
15 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). Generally, an error is
16 harmless if it either “occurred during a procedure or step the ALJ was not required
17 to perform,” or if it “was inconsequential to the ultimate nondisability
18 determination.” Stout v. Comm’r of SSA, 454 F.3d 1050, 1055 (9th Cir. 2006).

19 B. The Five-Step Evaluation Process.

20 A person is “disabled” for purposes of receiving Social Security benefits if he
21 is unable to engage in any substantial gainful activity owing to a physical or mental
22 impairment that is expected to result in death or which has lasted, or is expected to
23 last, for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A);
24 Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). A claimant for disability
25 benefits bears the burden of producing evidence to demonstrate that he was
26 disabled within the relevant time period. Johnson v. Shalala, 60 F.3d 1428, 1432
27 (9th Cir. 1995).

28 The ALJ follows a five-step sequential evaluation process in assessing

1 whether a claimant is disabled. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Lester
2 v. Chater, 81 F.3d 821, 828 n. 5 (9th Cir. 1996). In the first step, the Commissioner
3 must determine whether the claimant is currently engaged in substantial gainful
4 activity; if so, the claimant is not disabled and the claim must be denied. 20 C.F.R.
5 §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

6 If the claimant is not engaged in substantial gainful activity, the second step
7 requires the Commissioner to determine whether the claimant has a “severe”
8 impairment or combination of impairments significantly limiting his ability to do
9 basic work activities; if not, a finding of not disabled is made and the claim must be
10 denied. Id. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

11 If the claimant has a “severe” impairment or combination of impairments, the
12 third step requires the Commissioner to determine whether the impairment or
13 combination of impairments meets or equals an impairment in the Listing of
14 Impairments (“Listing”) set forth at 20 C.F.R., Part 404, Subpart P, Appendix 1; if
15 so, disability is conclusively presumed and benefits are awarded. Id.
16 §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

17 If the claimant’s impairment or combination of impairments does not meet or
18 equal an impairment in the Listing, the fourth step requires the Commissioner to
19 determine whether the claimant has sufficient residual functional capacity (“RFC”)
20 to perform his past work; if so, the claimant is not disabled and the claim must be
21 denied. Id. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). The claimant has the burden
22 of proving he is unable to perform past relevant work. Drouin, 966 F.2d at 1257. If
23 the claimant meets that burden, a prima facie case of disability is established. Id.

24 If that happens or if the claimant has no past relevant work, the
25 Commissioner then bears the burden of establishing that the claimant is not
26 disabled because he can perform other substantial gainful work available in the
27 national economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). That
28 determination comprises the fifth and final step in the sequential analysis. Id.

1 §§ 404.1520, 416.920; Lester, 81 F.3d at 828 n. 5; Drouin, 966 F.2d at 1257.

2 **C. The ALJ’s Application of the Five-Step Evaluation Process.**

3 At step one, the ALJ determined that Plaintiff had not engaged in substantial
4 activity since her alleged onset date and, in fact, had never worked. AR 13. At step
5 two, the ALJ determined that Plaintiff had no severe physical impairments, but the
6 following severe mental impairments: “bipolar disorder and polysubstance
7 dependence, in remission.” AR 13. At step three, the ALJ determined that these
8 impairments, or the combination thereof, did not meet or medically equal the
9 severity of one of the impairments in the Listing. AR 14.

10 At step four, the ALJ determined that Plaintiff had the RFC to perform a full
11 range of work at all exertional levels but with the following non-exertional
12 limitations: “She is limited to occasional detailed or complex tasks. She can have
13 frequent contact with coworkers, supervisors and the general public. She would
14 have 5 to 10 percent reduction in maintaining concentration and attention spread
15 out over a normal workday. She also requires a low stress environment.” AR 15.

16 At step five, relying on the testimony of a vocational expert (“VE”), the ALJ
17 determined that Plaintiff could work as a photocopy machine operator, mail
18 clerk/sorter, or laundry worker, and that a significant number of such jobs existed
19 nationally. AR 19. The ALJ therefore concluded that Plaintiff was not disabled.
20 AR 20.

21 **III.**

22 **ISSUES PRESENTED**

23 Issue One: Whether the ALJ failed to (1) properly consider the opinion of
24 consultative examiner Dr. Bagner and (2) fully and fairly develop the record.

25 Issue Two: Whether the ALJ posed a hypothetical question to the VE that
26 included all the limitations in Plaintiff’s RFC. (Dkt. 20 [“JS”] at 2.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV.
DISCUSSION

A. The ALJ Accounted for Dr. Bagner’s Opinions in Plaintiff’s RFC.

1. Applicable Law.

Social Security regulations explain that the terms “marked” and “moderate” are part of a “five-point” scale for rating a claimant’s degree of functional limitation. 20 C.F.R. § 404.1520a(c)(4). The five limitations ratings are “none, mild, moderate, marked, and extreme.” (*Id.*) A rating of “extreme” represents “a degree of limitation that is incompatible with the ability to do any gainful activity.” (*Id.*) A “marked” limitation indicates a “degree of limitation is such as to interfere seriously with your ability to function independently, appropriately, effectively, and on a sustained basis.” 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.00(C). In other words, a “marked” limitation means that the “ability to function in this area is seriously limited, but not precluded.” *Timofeeva v. Colvin*, 2016 U.S. Dist. LEXIS 31157, *17 (E.D. Cal. Mar. 9, 2016).

A “moderate” limitation is less serious than a “marked” one. The Hearings Appeals and Litigation Law Manual (“HALLEX”), an internal agency guide, requires that when an ALJ requests a consultative examination, the ALJ should provide the corresponding state agency with a “medical source statement form.” *Serna v. Astrue*, 2008 U.S. Dist. LEXIS 99610, at *7 (C.D. Cal. Dec. 9, 2008) (citing HALLEX I-2-5-20). Form HA-1152, the Medical Assessment of Ability to do Work-Related Activities (Mental), provides definitions for the ratings of none, slight, moderate, marked, and extreme. Per the form, a moderate rating is defined as “there is moderate limitation in this area but the individual is still able to function satisfactorily.” *Id.* (holding ALJ adequately accounted for “moderate” limitations in various areas of mental functioning by limiting claimant’s RFC to “simple, repetitive tasks” and “limited public contact”); see also *Henderson v. Colvin*, 2016 U.S. Dist. LEXIS 1975, at *11 (E.D. Cal. Jan. 7, 2016) (same).

1 Many cases have held that moderate limitations in various areas of mental
2 functioning do not preclude work. See, e.g., Hoopai v. Astrue, 499 F.3d 1071,
3 1077 (9th Cir. 2007) (“We have not previously held mild or moderate depression to
4 be a sufficiently severe non-exertional limitation that significantly limits a
5 claimant’s ability to do work beyond the exertional limitation.”); Edelbrock v.
6 Comm’r of SSA, 2013 U.S. Dist. LEXIS 53681, at *16 (E.D. Cal. Apr.15, 2013)
7 (“Significantly, a limitation to simple tasks incorporates moderate limitations in
8 several areas of cognitive functioning.”); Vaughn v. Colvin, 2015 U.S. Dist. LEXIS
9 121530, at *18 (C.D. Cal. Sept. 11, 2015) (“[A] moderate limitation in a certain
10 area does not require the ALJ to find that plaintiff has no ability to function at all in
11 that area.”)

12 While terms like mild, moderate, marked, and extreme are used to describe
13 the severity of functional limitations, RFC determinations typically use vocational
14 terms such as occasional, frequent, and constant, because they describe the amount
15 of time a claimant can do a certain task. See, Social Security Ruling (“SSR”) 83-
16 10, 1983 SSR LEXIS 30. “Occasionally” means occurring from very little up to
17 one-third of the time. Id. at *13. Occasional is the most restrictive category next to
18 a preclusion. “Frequently” means occurring from one-third to two-thirds of the
19 time. Id. at *14. Because an RFC considers the claimant’s work capacity, to
20 formulate an RFC, the ALJ must translate the claimant’s impairments, as identified
21 in the medical evidence with varying levels of severity, into a concrete description
22 of “the most” the claimant can do, despite any limitations. 20 C.F.R. § 416.945(a).

23 **2. The ALJ’s Treatment of Dr. Bagner’s Opinions.**

24 On February 13, 2013, Ernest A. Bagner, M.D., a board-certified psychiatrist,
25 performed a psychiatric evaluation of Plaintiff. AR 331-335. Dr. Bagner
26 diagnosed Plaintiff with Bipolar Disorder, not otherwise specified. AR 334. Under
27 his report’s “Functional Assessment” section, Dr. Bagner opined that Plaintiff was
28 “moderately” limited in her ability to follow detailed instructions, interact

1 appropriately with the public, co-workers and supervisors, comply with job rules
2 such as safety and attendance, and perform daily activities. AR 334. Dr. Bagner
3 also found that Plaintiff would be “markedly” limited in her ability to respond to
4 changes in a routine work setting and respond to work pressure in a usual work
5 setting. Id.

6 The ALJ gave “reasonable” weight to both the opinions of Dr. Bagner and
7 Dr. Chehrazi, a psychologist who evaluated Plaintiff’s mental health later in June
8 2014. AR 18. The ALJ gave “greater weight to the opinion of Dr. Bagner because
9 Dr. Chehrazi noted that it was difficult to assess [Plaintiff’s] mental abilities due to
10 her poor effort during the examination.” AR 18.

11 The ALJ found that Plaintiff suffers from the severe impairment of bipolar
12 disorder, consistent with Dr. Bagner’s diagnoses. AR 13. The ALJ attempted to
13 account for the three work-related “moderate” limitations found by Dr. Bagner in
14 Plaintiff’s RFC, as follows:

Moderate Limitations (AR 334)	RFC (AR 15)
Following detailed instructions	Limited to occasional detailed or complex instructions
Interacting appropriately with the public, co-workers, and supervisors	Limited to frequent contact with co-workers, supervisors and the public
Complying with job rules such as safety and attendance	5-10% reduction in maintaining concentration and attention over the workday; low stress work environment

23
24 The ALJ also attempted to account for the two “marked” limitations found by
25 Dr. Bagner, (i.e., the ability to respond to changes in a “routine work setting” and
26 respond to work pressure in a “usual work setting”) by restricting Plaintiff to work
27 in a “low stress” work environment where she can be inattentive 5-10% of the time,
28

1 have less-than-constant contact with others, and only face details or complexities
2 “occasionally.” AR 15.

3 The ALJ’s ultimate finding that Plaintiff could work as a photocopying
4 machine operator, mail clerk/sorter, or laundry worker was based on a hypothetical
5 question posed to the VE that was identical to Plaintiff’s RFC. Compare AR 15 and
6 AR 96-98.

7 **3. Analysis.**

8 Plaintiff argues that the ALJ “disregard[ed] ... the marked and moderate
9 limitations found by Dr. Bagner” causing the ALJ to formulate an erroneous RFC
10 for Plaintiff. JS at 20.

11 The Court disagrees. The ALJ adequately accounted for the marked and
12 moderate limitations found by Dr. Bagner by adding relevant restrictions to
13 Plaintiff’s RFC and the hypothetical question posed to the VE. Plaintiff has not set
14 forth any arguments as to why the limitations in either the RFC or the hypothetical
15 do not adequately address Dr. Bagner’s findings.

16 **B. The ALJ was Not Required to Further Develop the Record.**

17 **1. Applicable Law.**

18 The claimant bears the burden of producing evidence to support a finding of
19 disability. See 42 U.S.C. § 423(d)(5) (“An individual shall not be considered to be
20 under a disability unless he furnishes such medical and other evidence of the
21 existence thereof as the Secretary may require”). The Code of Federal Regulations
22 further explains:

23 [Y]ou have to prove to us that you are blind or disabled. Therefore,
24 you must bring to our attention everything that shows that you are
25 blind or disabled. This means that you must furnish medical and other
26 evidence that we can use to reach conclusions about your medical
27 impairments(s) and, if material to the determination of whether you
28 are blind or disabled, its effect on your ability to work on a sustained

1 basis. We will consider only impairment(s) you say you have or
2 about which we receive evidence.

3 20 C.F.R. § 404.1512(a); accord 20 C.F.R. § 404.1512(c) (“You must provide
4 medical evidence showing that you have impairment(s) and how severe it is during
5 the time you say you are disabled”).

6 Nevertheless, the ALJ has a “special duty to fully and fairly develop the
7 record and to assure that the claimant’s interests are considered.” Brown v.
8 Heckler, 713 F.2d 441, 443 (9th Cir. 1983) (holding duty not met where ALJ
9 proceeded without a hearing). This duty, however, is “triggered only when there is
10 ambiguous evidence or when the record is inadequate to allow for proper evaluation
11 of the evidence.” Mayes v. Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001).
12 When triggered, the ALJ may discharge this duty in several ways, including:
13 “subpoenaing the claimant’s physicians, submitting questions to the claimant’s
14 physicians, continuing the hearing, or keeping the record open after the hearing to
15 allow supplementation of the record.” Tonapetyan v. Halter, 242 F.3d 1144, 1150
16 (9th Cir. 2001).

17
18
19
20
21
22
23
24
25
26
27
28

1 **2. Factual Background.**

2 Dr. Avazeh Chehrazi, Ph.D., completed a psychiatric evaluation of Plaintiff
3 in June 2014. AR 457-62. Dr. Chehrazi noted Plaintiff was a “suboptimal
4 historian” who provided vague and brief responses, only “passively cooperated”
5 and “put forth poor effort.” (AR 17, 457). Dr. Chehrazi administered a Wechsler
6 Adult Intelligence Scale test from which he determined that Plaintiff’s full scale IQ
7 was 41, but he deemed the results “invalid ...due to poor effort.”¹ AR 461. Dr.
8 Chehrazi further noted that because of Plaintiff’s poor effort, “it is difficult to
9 comment on her work-related abilities.” AR 461. Still, Dr. Chehrazi found
10 Plaintiff would have “no difficulty” to “understand, remember and carry out short,
11 simplistic instructions” and only moderate difficulty following detailed, complex
12 instructions. AR 462.

13 **3. Summary of Arguments.**

14 Plaintiff contends that the ALJ failed to “fully and fairly develop the record
15 by not stating whether he accepted or rejected the claimant’s full-scale IQ score of
16 41.” JS at 5. According to Plaintiff, “the ALJ should have requested an additional
17 assessment of the claimant’s full scale IQ instead of dismissing the findings without
18 any further evaluation.” Id.

19 The Commissioner counters that Plaintiff received two hearings to present
20 evidence, first on February 24, 2014, and then again on November 17, 2014. AR
21 25-60, 61-101. Plaintiff’s psychological records were reviewed by 5 doctors:
22 examining doctors Ernest A. Bagner III, M.D. (AR 331-36) and Avazeh Chehrazi,
23

24 ¹ As a comparison, an IQ of 108 would be considered average. Salomaa v.
25 Honda Long Term Disability Plan, 642 F.3d 666, 672 (9th Cir. 2011). An IQ of 77
26 is considered “borderline mental retardation.” Schneider v. Comm’r of SSA, 223
27 F.3d 968, 971 (9th Cir. 2000). Someone with “an IQ of approximately 40 [has] the
28 mental capacity of a four or five-year-old.” Smith v. City of Stockton, 185 F. Supp.
3d 1242, 1243 (E.D. Cal. 2016).

1 Ph.D. (AR 457-62), testifying psychological expert Dr. David Peterson (AR 49-55),
2 and reviewing doctors Dara Goosby, Psy.D. (AR 110) and Preston Davis, Psy.D.
3 (AR 112-17).

4 In addition, Plaintiff was represented by counsel prior to the ALJ hearing and
5 decision. AR 167, 195. At the second ALJ hearing, the ALJ asked Plaintiff's
6 counsel if he had reviewed the evidence, whether there was any evidence to add, or
7 whether there was any evidence Plaintiff's counsel "was aware of that would be
8 relevant to this case." AR 64-65. Plaintiff's counsel stated he had reviewed the
9 evidence and there was no additional, relevant evidence, after which the ALJ
10 entered the evidence into the record. AR 65.

11 Considering this history, the Commissioner characterizes as "disingenuous"
12 Plaintiff's argument that the ALJ failed to develop the record. JS at 8. Plaintiff's
13 counsel was aware of Dr. Chehrazi's report noting the invalid IQ testing at the
14 second hearing. Plaintiff's counsel nevertheless stated that he was unaware of any
15 further need to develop the record. AR 65. The Commissioner further argues that
16 remand for further IQ testing would likely be futile, given Plaintiff's noted non-
17 compliance and poor efforts as noted by Dr. Chehrazi and Dr. Peterson.² JS at 8.

18 **4. Analysis.**

19 There is no ambiguity that Dr. Chehrazi could have clarified had he been
20 subpoenaed or sent written questions. Rather, he clearly stated that the results of
21 the IQ testing he performed were "deemed invalid" because of Plaintiff's "poor
22 effort" on the test. AR 61. He opined that individuals functioning in the range
23 indicated by Plaintiff's test scores "would have obvious deficits which were not
24

25 ² Dr. Peterson noted records showing Plaintiff did not take her medication for
26 two months (citing AR 403) and contrasted this with her hearing testimony that she
27 "always" takes her medication (AR 33). AR 51. He also commented on records
28 showing a history of missed appointments and her refusal to attend therapeutic
groups in jail. AR 51-52.

1 seen” as he interacted with Plaintiff. Id. Similarly, the ALJ properly concluded
2 there was no need to continue the hearing yet again or keep the record open to
3 allow supplementation of the record, because counsel affirmed at the second
4 hearing that there was no need for additional evidence. AR 65.

5 Plaintiff’s argument boils down to an assertion that the ALJ had a legal duty
6 to order another round of tax-payer-funded IQ testing in the hope that Plaintiff
7 would make a sincere effort the second time around so that the test would yield
8 accurate results. The ALJ’s duty to develop the record fully and fairly does not
9 extend so far.

10 **C. The Hypothetical Posed to the VE Encompassed Plaintiff’s RFC.**

11 **1. Factual Background.**

12 The ALJ asked the VE to consider a hypothetical person in Plaintiff’s age
13 category with limited education and no work experience. AR 96. The hypothetical
14 person was further defined as having “no physical limitations” but her mental
15 impairment would allow her “to do detailed or complex tasks occasionally, not
16 frequently.” Id. The person could “deal with co-workers, supervisors, and the
17 general public frequently, not constantly”. Id. Additionally, the person would have
18 reduced concentration for 5-10% of the workday, and needs a low stress work
19 environment. AR 97-98.

20 The VE opined that this hypothetical person could perform the following
21 three jobs which are all light, unskilled work requiring a reasoning level of 2³: (1)
22 mail clerk/sorter (DOT 209.587-026); (2) laundry worker (DOT 302.685-010); and
23 (3) photocopying machine operator (DOT 207.685-014). AR 98-99.

24
25
26 ³ The DOT classifies the reasoning skills required to perform different jobs
27 using a scale of 1 to 6. A limitation to only “simple, routine tasks” is consistent
28 with reasoning level 2. Zavalin v. Colvin, 778 F.3d 842, 847 (9th Cir. 2015).

1 **2. Analysis.**

2 Plaintiff contends that in the hypothetical posed to the VE, the ALJ “failed to
3 mention Dr. Bagner’s opinion that Plaintiff was moderately limited in her ability to
4 follow detailed instruction, interact appropriately with the public, co-workers and
5 supervisors, comply with job rules such as safety and attendance, and daily
6 activities.” JS at 12.

7 The Court disagrees. As discussed above, the ALJ accounted for moderate
8 difficulty following detailed instructions by limiting Plaintiff to only occasional
9 detailed or complex tasks. All the jobs discussed by the VE require only reasoning
10 level 2. AR 98-99. The ALJ accounted for moderate difficulty interacting with
11 others by restrictions in the hypothetical to frequent, as opposed to constant,
12 interaction with co-workers, supervisors, and the public. AR 96. The ALJ
13 accounted for Plaintiff’s moderate limitation in complying with job rules such as
14 safety and attendance by limiting Plaintiff to a “low stress” job environment. A
15 “low stress” job environment does not require perfect vigilance in adhering to
16 safety rules to maintain a safe workplace. Indeed, Plaintiff’s RFC allows her to be
17 inattentive 5-10% of the workday. Furthermore, by including multiple restrictions
18 that would reduce the stress normally associated with working, the ALJ reduced the
19 stress that might otherwise cause Plaintiff to miss work.

20 In sum the ALJ’s determination that Plaintiff’s mental impairments would
21 not prevent her from working as a mail clerk/sorter, laundry worker, or photocopy
22 machine operator is supported by substantial evidence.

23 //

24 //

25 //

26 //

27 //

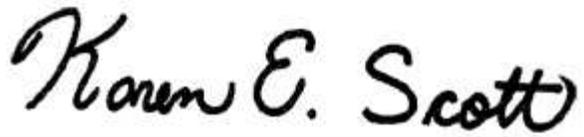
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V.
CONCLUSION

Based on the foregoing, IT IS ORDERED that judgment shall be entered
AFFIRMING the decision of the Commissioner denying benefits.

DATED: March 29, 2017



KAREN E. SCOTT
UNITED STATES MAGISTRATE JUDGE