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

RONALD R. WHYTE,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No. CV 16-06158-RAO

**MEMORANDUM OPINION AND
ORDER**

I. INTRODUCTION

Plaintiff Ronald R. Whyte (“Plaintiff”) challenges the Commissioner’s denial of his application for a period of disability, disability insurance benefits (“DIB”), and supplemental security income (“SSI”). For the reasons stated below, the decision of the Commissioner is AFFIRMED.

II. PROCEEDINGS BELOW

On August 21, 2014, Plaintiff filed a claim for a period of disability, DIB, and SSI alleging disability beginning June 1, 2004. (Administrative Record (“AR”) 88, 98, 108, 204, 210.) His application was denied initially on November 19, 2014, and upon reconsideration on March 16, 2015. (AR 139, 144, 153, 159.) On May

1 12, 2015, Plaintiff filed a written request for hearing, and a hearing was held on
2 October 16, 2015. (AR 34, 165.) Represented by counsel, Plaintiff appeared and
3 testified, along with an impartial vocational expert (“VE”). (AR 36-87.) On
4 February 4, 2016, the Administrative Law Judge (“ALJ”) found that Plaintiff had
5 not been under a disability, pursuant to the Social Security Act,¹ since June 1, 2004.
6 (AR 28-29.) The ALJ’s decision became the Commissioner’s final decision when
7 the Appeals Council denied Plaintiff’s request for review. (AR 1.) Plaintiff filed
8 this action on August 17, 2016. (Dkt. No. 1.)

9 The ALJ followed a five-step sequential evaluation process to assess whether
10 Plaintiff was disabled under the Social Security Act. *Lester v. Chater*, 81 F.3d 821,
11 828 n.5 (9th Cir. 1995). At **step one**, the ALJ found that Plaintiff had not engaged
12 in substantial gainful activity since June 1, 2004, the alleged onset date (“AOD”).
13 (AR 20.) At **step two**, the ALJ found that Plaintiff’s delusional disorder,
14 persecutory type, and history of methamphetamine abuse are severe impairments.
15 (*Id.*) At **step three**, the ALJ found that Plaintiff “does not have an impairment or
16 combination of impairments that meets or medically equals the severity of one of
17 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.” (AR 21.)

18 Before proceeding to step four, the ALJ found that Plaintiff has the residual
19 functional capacity (“RFC”) to:

20 [P]erform a full range of work at all exertional levels but with the
21 following nonexertional limitations: simple, routine and repetitive
22 tasks, but not at a production rate pace (no assembly work); no more
23 than occasional contact with coworkers and supervisors; and no
interaction with the general public.

24 (AR 22.)

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26 ¹ Persons are “disabled” for purposes of receiving Social Security benefits if they
27 are unable to engage in any substantial gainful activity owing to a physical or
28 mental impairment expected to result in death, or which has lasted or is expected to
last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A).

1 At **step four**, based on Plaintiff’s RFC and the vocational expert’s testimony,
2 the ALJ found that Plaintiff was unable to perform past relevant work as a
3 telephone solicitor. (AR 27.) At **step five**, “[c]onsidering the claimant’s age,
4 education, work experience, and residual functional capacity,” the ALJ found that
5 “there are jobs that exist in significant numbers in the national economy that the
6 claimant can perform.” (*Id.*) Accordingly, the ALJ determined that Plaintiff has
7 not been under a disability from the AOD through the date of decision. (AR 28.)

8 **III. STANDARD OF REVIEW**

9 Under 42 U.S.C. § 405(g), a district court may review the Commissioner’s
10 decision to terminate benefits. A court must affirm an ALJ’s findings of fact if they
11 are supported by substantial evidence, and if the proper legal standards were
12 applied. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). “‘Substantial
13 evidence’ means more than a mere scintilla, but less than a preponderance; it is
14 such relevant evidence as a reasonable person might accept as adequate to support a
15 conclusion.” *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing
16 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). An ALJ can
17 satisfy the substantial evidence requirement “by setting out a detailed and thorough
18 summary of the facts and conflicting clinical evidence, stating his interpretation
19 thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
20 1998) (citation omitted).

21 “[T]he Commissioner’s decision cannot be affirmed simply by isolating a
22 specific quantum of supporting evidence. Rather, a court must consider the record
23 as a whole, weighing both evidence that supports and evidence that detracts from
24 the Secretary’s conclusion.” *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir.
25 2001) (citations and internal quotation marks omitted). “‘Where evidence is
26 susceptible to more than one rational interpretation,’ the ALJ’s decision should be
27 upheld.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing
28 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)); *see Robbins*, 466 F.3d at

1 882 (“If the evidence can support either affirming or reversing the ALJ’s
2 conclusion, we may not substitute our judgment for that of the ALJ.”). The Court
3 may review only “the reasons provided by the ALJ in the disability determination
4 and may not affirm the ALJ on a ground upon which he did not rely.” *Orn v.*
5 *Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (citing *Connett v. Barnhart*, 340 F.3d
6 871, 874 (9th Cir. 2003)).

7 **IV. DISCUSSION**

8 Plaintiff raises the following issues for review: (1) whether the ALJ properly
9 assessed Plaintiff’s medically determinable impairments; (2) whether the ALJ
10 properly discounted Plaintiff’s symptom testimony; and (3) whether the ALJ
11 properly determined that Plaintiff could perform a significant number of jobs.
12 (Joint Stipulation (“JS”) 4.) Plaintiff contends that the ALJ failed to properly
13 consider Plaintiff’s impairments, failed to properly consider Plaintiff’s symptoms,
14 and failed to include all of Plaintiff’s impairments in the hypothetical posed to the
15 VE. (*See JS 4-10, 18-19, 29-30.*) The Commissioner disagrees. (*See JS 11-17, 20-*
16 *25, 31-32.*)

17 **A. The ALJ Properly Assessed Plaintiff’s Medically Determinable**
18 **Impairments**

19 Plaintiff argues that the ALJ erred in finding that Plaintiff’s mental
20 impairment does not meet or equal a listed impairment and erred in finding that
21 Plaintiff does not have a physical impairment. (*See JS 4-5, 8.*) The Commissioner
22 argues that Plaintiff failed to carry his burden of establishing the severity of his
23 impairments. (*See JS 11-13, 16.*)

24 **1. The ALJ Properly Considered The Medical Opinion**
25 **Evidence**

26 The ALJ determined the severity of Plaintiff’s impairments based, in part, on
27 physicians’ medical opinions and conclusions. (AR 20.)

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a. Applicable Legal Standards

Courts give varying degrees of deference to medical opinions based on the provider: (1) treating physicians who examine and treat; (2) examining physicians who examine, but do not treat; and (3) non-examining physicians who do not examine or treat. *Valentine v. Comm’r, Soc. Sec. Admin.*, 574 F.3d 685, 692 (9th Cir. 2009). Most often, the opinion of a treating physician is given greater weight than the opinion of a non-treating physician, and the opinion of an examining physician is given greater weight than the opinion of a non-examining physician. *See Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

The ALJ must provide “clear and convincing” reasons to reject the ultimate conclusions of a treating or examining physician. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Lester*, 81 F.3d at 830-31. However, an ALJ need not accept a treating physician’s opinion that is “brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion.” *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (quoting *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986)). When a treating or examining physician’s opinion is contradicted by another opinion, the ALJ may reject it only by providing specific and legitimate reasons supported by substantial evidence in the record. *Orn*, 495 F.3d at 633; *Lester*, 81 F.3d at 830; *Carmickle*, 533 F.3d at 1164. A non-examining physician’s opinion can constitute substantial evidence if it is supported by other evidence in the record and is consistent with it. *Morgan*, 169 F.3d at 600. “An ALJ can satisfy the ‘substantial evidence’ requirement by ‘setting out a detailed and thorough summary of the facts and conflicting evidence, stating his interpretation thereof, and making findings.’” *Garrison*, 759 F.3d at 1012 (citation omitted).

b. Discussion

John Sedgh, M.D., completed an internal medicine consultative examination of Plaintiff in October 2014. (AR 333-38.) Plaintiff’s primary complaints were a tumor in his left ear, partial amputation of his left ear, and hepatitis C. (AR 333.)

1 Plaintiff reported that he had been diagnosed with basal cell carcinoma, and he
2 complained of decreased hearing on his left side. (*Id.*) Upon examination, Dr.
3 Sedgh observed that Plaintiff has 60 percent of the left auricle amputated and
4 decreased hearing in the left ear, but Plaintiff did not wear a hearing aid. (AR 335,
5 337.) Dr. Sedgh opined that Plaintiff could lift or carry 50 pounds occasionally and
6 25 pounds frequently, stand and walk for 6 hours of an 8-hour workday, sit for 6
7 hours of an 8-hour workday, frequently perform postural activities, and manipulate
8 and reach without limitation. (AR 338.) The ALJ noted that Dr. Sedgh's
9 examination did not reveal a basis for any of these functional restrictions. (AR 25-
10 26.) Accordingly, the ALJ gave no weight to Dr. Sedgh's concluding opinion
11 regarding Plaintiff's capacity to work, but the ALJ considered the lack of findings
12 for the purposes of determining the severity and effects of Plaintiff's alleged
13 limitations. (AR 26.) Because Dr. Sedgh's opinion regarding functional limitations
14 was not consistent with his own observations, the ALJ properly rejected it.
15 *Valentine v. Comm. Soc. Sec. Admin.*, 574 F.3d 685, 692-93 (9th Cir. 2009) (ALJ's
16 rejection of treating psychologist's opinion because it was contradicted by doctor's
17 own treatment reports was specific and legitimate reason supported by substantial
18 evidence).

19 Psychiatrist Raymond Yee, M.D., completed a psychiatric consultative
20 examination of Plaintiff in October 2014. (AR 341-47.) Plaintiff reported to Dr.
21 Yee that he has depression and was diagnosed with a delusional disorder. (AR
22 342.) Plaintiff explained that he was treated at Patton State Hospital for about ten
23 months, seven of which were spent in the inpatient psychiatric facility. (AR 344.)
24 After being released from prison, Plaintiff has been going to the Parole Outpatient
25 Clinic. (*Id.*) Plaintiff reported passing Phase 1 of his requirement of attending
26 classes, and in Phase 2, he gets to enroll in school. (*Id.*) Plaintiff expressed that he
27 would like to be a drug and alcohol counselor, obtain higher education, and try to
28 get a job one day. (*Id.*) Dr. Yee observed that Plaintiff had good grooming and

1 hygiene, good eye contact, and no abnormal mannerisms or tics. (AR 344-45.) Dr.
2 Yee also observed that Plaintiff was polite, cooperative, and friendly, and he had
3 productive and coherent speech with appropriate mood and affect. (AR 345.) Dr.
4 Yee found that Plaintiff was oriented and had intact memory. (*Id.*) Plaintiff could
5 correctly calculate, spell, and think abstractly. (AR 345-46.) Dr. Yee diagnosed
6 Plaintiff with history of delusional disorder, persecutory type, and history of
7 amphetamine abuse, with a Global Assessment of Functioning score of 55. (AR
8 346.) Dr. Yee stated that Plaintiff “appears to be psychiatrically stable,” but found
9 that his prognosis was “fair to guarded.” (*Id.*) Dr. Yee opined that Plaintiff could
10 perform simple and repetitive tasks, perform detailed and complex tasks, accept
11 instructions from supervisors, interact with coworkers and the public, perform work
12 activities on a consistent basis without special supervision, maintain regular
13 attendance, complete a normal workday and workweek without interruption from a
14 psychiatric condition, and adequately deal with the usual stressors of competitive
15 employment. (AR 347.) The ALJ gave great weight to Dr. Yee’s opinion, “which
16 factors the claimant’s psychiatric history and current functioning.” (AR 26.)
17 However, the ALJ found that Dr. Yee’s prognosis within the “guarded” realm of
18 “fair to guarded” was entitled to no weight because it was inconsistent with Dr.
19 Yee’s assessment of no mental functional limitations, his belief that Plaintiff was
20 psychiatrically stable, and Plaintiff’s statements about goals and objectives for work
21 and school. (*Id.*) The ALJ properly rejected this portion of Dr. Yee’s opinion. *See*
22 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (finding that a
23 contradiction between a physician’s opinion and his other recorded observations is
24 a clear and convincing reason to discount that opinion).

25 State agency physician E. Wong, M.D., reviewed Plaintiff’s records and
26 concluded that Plaintiff does not have a severe physical impairment. (AR 115.)
27 State agency physician G. Ikawa, M.D., opined that Plaintiff was mildly restricted
28 in activities of daily living, moderately impaired in maintaining social functioning,

1 and mildly impaired in maintaining concentration, persistence, or pace. (AR 117,
2 119-20.) The ALJ found that these opinions were consistent with both objective
3 findings and Plaintiff’s statements regarding his ability to perform daily activities.
4 (AR 25.) The ALJ was therefore permitted to assign great weight to these non-
5 examining opinions. *See Morgan*, 169 F.3d at 600 (“Opinions of a nonexamining,
6 testifying medical advisor may serve as substantial evidence when they are
7 supported by other evidence in the record and are consistent with it.”); *Ruiz v.*
8 *Colvin*, 638 F. App’x 604, 606 (9th Cir. 2016) (finding that the ALJ did not err in
9 giving the greatest weight to non-examining state agency medical consultants
10 because “the ALJ found their opinions consistent with the greater medical record,
11 progress and treating notes, and [the plaintiff]’s description of her daily activities”).

12 In sum, the Court finds that the ALJ properly assessed and weighed the
13 medical opinion evidence.

14 **2. The ALJ Did Not Err In Finding That Plaintiff’s Mental**
15 **Impairment Did Not Meet Or Equal A Listed Impairment**

16 Plaintiff contends that the ALJ erred in finding that Plaintiff’s mental
17 impairment did not meet or equal a listed impairment. (*See JS 4-7.*) The
18 Commissioner contends that Plaintiff failed to meet his burden of establishing that
19 he had a listed impairment. (*See JS 11-13.*)

20 **a. Applicable Legal Standards**

21 At step three, an ALJ must determine whether a claimant has an impairment
22 or combination of impairments that meet or medically equal the severity of an
23 impairment listed in 20 CFR Part 404, Subpart P, Appendix 1. 20 CFR
24 § 404.1594(f)(2). Listed impairments are “designed to operate as a presumption of
25 disability that makes further inquiry unnecessary.” *Sullivan v. Zebley*, 493 U.S.
26 521, 532, 110 S. Ct. 885, 892, 107 L. Ed. 2d 967 (1990). To show that a claimant’s
27 impairment meets a listing, the claimant must meet all of the specified medical
28 criteria for that listing. *Id.* at 530. An ALJ “must evaluate the relevant evidence

1 before concluding that a claimant’s impairments do not meet or equal a listed
2 impairment,” *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001), but it is not
3 necessary to “state why a claimant failed to satisfy every different section of the
4 listing of impairments,” *Gonzalez v. Sullivan*, 914 F.2d 1197, 1201 (9th Cir. 1990).

5 **b. Discussion**

6 The ALJ found that Plaintiff’s mental impairment did not meet or medically
7 equal the severity of Listing 12.04. (AR 21.) To meet this listing, a claimant must
8 satisfy the requirements of both paragraphs A and B, or he must satisfy the
9 requirements of paragraph C. *See* 20 CFR § Pt. 404, Subpt. P, App. 1 (12.04
10 Affective Disorders).

11 In finding that Plaintiff’s impairment did not meet or equal Listing 12.04, the
12 ALJ considered whether the “paragraph B” criteria were satisfied. (AR 21.)
13 Paragraph B requires that the medically documented depressive syndrome, manic
14 syndrome, or bipolar syndrome result in at least two of the following:

- 15 1. Marked restriction of activities of daily living; or
- 16 2. Marked difficulties in maintaining social functioning; or
- 17 3. Marked difficulties in maintaining concentration, persistence, or
18 pace; or
- 19 4. Repeated episodes of decompensation, each of extended
20 duration.

20 20 CFR § Pt. 404, Subpt. P, App. 1 (12.04 Affective Disorders). The ALJ
21 determined that Plaintiff had mild restriction of activities of daily living, noting his
22 ability to care for his own needs, clean, do laundry, and prepare meals. (AR 21.)
23 The ALJ also found that Plaintiff had only mild difficulties in social functioning,
24 noting that he attends AA meetings, goes to the Gay and Lesbian Center for support
25 and resources, has lived with roommates, gets money from friends and relatives,
26 and takes public transportation. (*Id.*) The ALJ found moderate difficulties with
27 concentration, persistence, or pace, noting that Plaintiff enjoys reading, playing
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1 volleyball, and playing table cards. (*Id.*) Finally, the ALJ observed that Plaintiff
2 has experienced no episodes of decompensation of extended duration. (*Id.*) The
3 ALJ concluded that the “paragraph B” criteria are not satisfied because Plaintiff’s
4 mental impairment does not cause at least two “marked” limitations or one
5 “marked” limitation with “repeated” episodes of decompensation. (*Id.*)

6 The ALJ then considered the “paragraph C” criteria. Paragraph C requires a
7 medically documented history of at least two years of a chronic affective disorder
8 that has caused more than a minimal limitation of ability to do basic work activities,
9 with symptoms or signs currently attenuated by medication or psychosocial
10 support, and at least one of the following:

- 11 1. Repeated episodes of decompensation, each of extended
12 duration; or
- 13 2. A residual disease process that has resulted in such marginal
14 adjustment that even a minimal increase in mental demands or
15 change in the environment would be predicted to cause the
16 individual to decompensate; or
- 17 3. Current history of 1 or more years’ inability to function outside
a highly supportive living arrangement, with an indication of
continued need for such an arrangement.

18 20 CFR § Pt. 404, Subpt. P, App. 1 (12.04 Affective Disorders). The ALJ found
19 that the evidence fails to meet the criteria. (AR 21.)

20 Plaintiff contends that the ALJ erred in failing to consider Listing 12.03 for
21 schizophrenia as requested by counsel (AR 43), and he argues that the evidence
22 shows that he meets the criteria of parts A, B, and C of that listing. (JS 4.)
23 Although Plaintiff was diagnosed with schizophrenia (*see* AR 354-55), “[t]he mere
24 diagnosis of an impairment listed in Appendix 1 is not sufficient to sustain a finding
25 of disability.” *Key v. Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985). Plaintiff must
26 also demonstrate that his impairment is as severe as required under the findings for
27 that impairment. *Young v. Sullivan*, 911 F.2d 180, 183-84 (9th Cir. 1990) (citing 20
28 CFR § 404.1525(d)).

1 At the time of the hearing and the ALJ’s decision, Listing 12.03 and Listing
2 12.04 had identical “paragraph B” and “paragraph C” criteria. *See* 20 CFR § Pt.
3 404, Subpt. P, App. 1 (effective Aug. 12, 2015 to May 23, 2016). As discussed
4 above, the ALJ found that the “paragraph B” and “paragraph C” criteria were not
5 satisfied. (*See* AR 21.) Although the ALJ did not expressly consider Listing 12.03
6 for schizophrenia, Plaintiff has not met his burden of proving that he meets all
7 criteria of the listing, including the “paragraph B” or “paragraph C” criteria.

8 Accordingly, the ALJ did not err in determining that Plaintiff’s impairments did not
9 meet or medically equal a listed impairment. *See Perez v. Astrue*, 831 F. Supp. 2d
10 1168, 1175-76 (C.D. Cal. 2011) (finding no error when an ALJ failed to address the
11 listings expressly argued by claimant’s counsel, but fully discussed the record and
12 found that the claimant did not provide evidence that her impairments met or
13 equaled any listing); see also *See Gonzalez*, 914 F.2d at 1201 (stating that it is
14 unnecessary for the ALJ to explain why a claimant failed to satisfy every section of
15 the listing of impairments, and a four-page “evaluation of the evidence” was an
16 adequate statement of the foundation for the ALJ’s conclusions).

17 **3. The ALJ Did Not Err In Finding No Physical Impairment**

18 Plaintiff contends that the ALJ erred in not finding a severe impairment
19 related to Plaintiff’s problems with his ear. (*See* JS 8.) The Commissioner
20 contends that Plaintiff failed to provide any evidence of limitations attributed to his
21 ear impairments. (JS 15-16.)

22 At step two, the ALJ must determine whether a claimant has a severe
23 medically determinable impairment. *See* 20 CFR §§ 404.1520(c), 416.920(c). The
24 existence of a severe impairment is satisfied when the evidence shows that an
25 impairment has more than a minimal effect on an individual’s ability to perform
26 basic work activities. 20 CFR § 404.1521(a); *Smolen v. Chater*, 80 F.3d 1273,
27 1290 (9th Cir. 1996). A determination that an impairment is not severe requires
28 evaluation of medical findings describing the impairment, and an informed

1 judgment as to its limiting effects on a claimant’s ability to do basic work activities.
2 SSR 85–28, 1985 WL 56856, at *4 (Jan. 1, 1985). An impairment or combination
3 thereof is not severe if the clearly established objective medical evidence shows
4 only slight abnormalities that minimally affect a claimant’s ability to do basic work
5 activities. *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005); *Smolen*, 80 F.3d at
6 1290.

7 The ALJ acknowledged Plaintiff’s testimony about his skin cancer and loss
8 of hearing in his left ear, but found that there was “minimal evidence of treatment
9 or adverse effects” of these conditions. (AR 21.) The ALJ noted that there was no
10 record of follow-up for the basal cell carcinoma and no record of audiological
11 testing. (*Id.*) Furthermore, the ALJ observed that Plaintiff did not allege these
12 conditions in his disability application. (*Id.*)

13 The ALJ considered Plaintiff’s October 2014 internal medicine consultative
14 examination, which documented Plaintiff’s partial amputation of his left ear and
15 decreased hearing on the left side. (AR 25.) The examining physician noted that
16 Plaintiff did not use a hearing aid, and he did not assess any functional limitations
17 related to Plaintiff’s ear or hearing. (AR 335, 337-38.) As discussed above, the
18 ALJ also properly assessed and gave great weight to the state agency opinion that
19 Plaintiff did not have a severe physical impairment. (AR 25; *see* AR 115.) The
20 ALJ therefore did not find sufficient clinical evidence to support the severity of
21 Plaintiff’s ear impairments. (AR 21.)

22 While the record shows that Plaintiff had skin cancer and loss of hearing in
23 his left hear, a mere diagnosis of an impairment—or even treatment for it—is
24 insufficient to establish severity at step two, especially when, like the instant case,
25 the *objective* medical evidence in the record fails to show any *work-related*
26 *limitations* connected to the impairment. *See Harvey v. Colvin*, 2013 WL 3899282,
27 at *5 (C.D. Cal. July 29, 2013) (citing *Matthews v. Shalala*, 10 F.3d 678, 680 (9th
28 Cir. 1993)).

1 Plaintiff argues that the ALJ erred in not reviewing the entire record “to
2 understand the nature of the impairment, its ongoing nature and [Plaintiff’s]
3 symptomatology.” (JS 8.) But as the Commissioner notes (JS 16), Plaintiff
4 provided no evidence regarding any limitations arising from these impairments. At
5 the hearing, the ALJ provided Plaintiff’s attorney with 30 days to submit additional
6 relevant medical evidence, but as of the date of the ALJ’s decision, no records had
7 been received. (AR 18, 40, 86; *see* JS 8.)

8 Based on the record as a whole, the ALJ did not err in finding that Plaintiff
9 did not have a severe physical impairment.

10 **B. The ALJ’s Credibility Determination Is Supported By Substantial**
11 **Evidence**

12 Plaintiff contends that the ALJ incorrectly impugned his testimony. (JS 19.)
13 The Commissioner contends that the ALJ set forth valid reasons, supported by
14 substantial evidence, for discounting Plaintiff’s credibility. (JS 24.)

15 **1. Plaintiff’s Testimony**

16 Plaintiff testified that he completed tenth grade and received a GED at the
17 beginning of eleventh grade. (AR 48.) Plaintiff stated that he was currently living
18 at a residence hotel, which he paid for with money “scrape[d] together” from
19 friends and relatives. (AR 44-45.) Plaintiff collects general relief and food stamps,
20 and his investment income has run out. (AR 45.) Plaintiff stated that the attorney
21 who runs his investment was part of a conspiracy to murder him. (AR 46.)
22 Plaintiff agreed with the ALJ’s statement that mental health professionals think that
23 he has delusional thoughts, and Plaintiff stated that he still holds those types of
24 beliefs. (*Id.*)

25 Plaintiff explained that he is on parole and is required to see a psychiatrist
26 once a month. (AR 47.) He stated that he does not see the psychiatrist much and
27 instead sees a clinician. (AR 49-50.) Plaintiff testified that he sought treatment
28 elsewhere because the clinician reports through his parole agent, but as long as he is

1 receiving services from the Parole Outpatient Clinic, he is unable to get services
2 elsewhere unless he pays for them. (AR 49.) Plaintiff stated that he has a “pretty
3 good relationship” with his therapist, and although he was previously worried about
4 saying too much, he is more comfortable and “a little more open with her now.”
5 (AR 49-50.) Plaintiff testified that he has issues with rage and frustration, and he
6 tries to cope with “thoughts that just sort of intrude.” (AR 63.)

7 Plaintiff also sees another doctor via telecom who prescribes medications.
8 (AR 50-51.) Plaintiff takes trazodone and mirtazapine. (AR 51.) Plaintiff testified
9 that he previously took Buspar, Remeron, Abilify, and Seroquel, but he is unable to
10 use them due to side effects such as passing out. (AR 52.) He stopped taking his
11 psychiatric medications because they “don’t make [him] feel very well.” (*Id.*; *see*
12 AR 54.) Plaintiff asked to start his medications again in September 2014. (AR 53.)
13 By March 2015, Plaintiff stopped taking his psychiatric medications, and Plaintiff
14 testified that he “would prefer not to take them at all, actually.” (AR 54.) Plaintiff
15 explained that at that time, he was taking his medications mostly to help him sleep.
16 (AR 55.)

17 Plaintiff explained that when he was in prison, he “felt safe most of the time”
18 and “didn’t have the same stresses” that he currently has. (AR 54.) Plaintiff
19 testified that he would always say that he was stable in prison, even if he was not as
20 stable as he wanted to be. (AR 75.) Plaintiff then stated that he “really did feel
21 stable” in prison because he did not come in contact with people as much and
22 played volleyball all day. (*Id.*)

23 Plaintiff has not worked since he was released from prison, and he stated that
24 he is “basically unemployable.” (AR 48.) Plaintiff explained that he would “like to
25 work,” but he does not know if he is able to. (AR 49.) Plaintiff stated that he has
26 tried to work and has submitted applications to “a few places,” but he has to discuss
27 his conviction. (*Id.*)

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1 Plaintiff stated that his ear bleeds “practically every day,” and he has to clean
2 it several times a day. (AR 61-62.) He does not know what prompts the bleeding,
3 and he often does not notice it. (AR 73-74.) He testified, “I don’t feel physically
4 disabled. Aside from the bleeding, I feel pretty good, actually.” (AR 62.)

5 Plaintiff testified that he attended AA meetings for a while because he was
6 addicted to methamphetamines. (AR 55.) Plaintiff stated that he has not used
7 drugs in the past nine years, since before he was incarcerated. (AR 55-56.)

8 Plaintiff stated that he had volunteered on Saturdays, but he no longer can do
9 so as often because it is now farther from him. (AR 57.) Plaintiff would like to
10 continue volunteering, but it is difficult for him to get there. (*Id.*)

11 Plaintiff began working as a window washer in junior high school and
12 became a professional in 1985. (*Id.*) Plaintiff explained that he did that work until
13 1999, when he had to sell his home and renovate it. (AR 58.) Plaintiff decided that
14 he would rather renovate real estate, but he “never really made much money” in
15 real estate. (*Id.*) Plaintiff was also a telemarketer for about a month, but he “sold
16 absolutely nothing.” (AR 59.) Plaintiff stated that while he was in prison, he
17 worked in the kitchen for about eight months. (AR 61.) Since Plaintiff was
18 released from prison, he made fifty dollars washing a store’s windows twice before
19 the store went out of business. (*Id.*) Plaintiff believes that he is “too old” to make a
20 living washing windows now. (AR 73.)

21 Plaintiff stated that he visits with friends often, and they buy food that
22 Plaintiff cooks for them. (AR 64.) Plaintiff also goes to the library and arranged
23 meetings with a counselor regarding interviewing and networking. (*Id.*) Plaintiff
24 explained that his “very violent” thoughts intruded into his conversation with the
25 counselor, which he did not understand. (AR 64-65.)

26 Plaintiff testified that he has suffered from various levels of depression since
27 he learned that his mother was conspiring to kill him. (AR 65.) Plaintiff explained
28 that he takes certain precautions like barricading his door, changing locations, not

1 answering his phone, and taking different routes to places. (AR 65-66.) Plaintiff
2 stated that he does not feel like he is persecuted, and he does not agree with his
3 diagnosis of delusions. (AR 67.) Plaintiff also stated that he is told that his belief
4 that he is not delusional is part of the delusion. (*Id.*) Plaintiff testified that in his
5 mind, “there was a conspiracy to murder [him], and [he] narrowly escaped by
6 killing one of the participants.” (*Id.*)

7 Plaintiff explained that there were times when he was very paranoid and,
8 although “it’s been proven that people were following [him],” he is sure that there
9 were also times when he incorrectly thought that people were following him. (AR
10 68.) Plaintiff denied visual hallucinations, but he stated that he had auditory
11 hallucinations several years ago. (*Id.*)

12 Plaintiff testified that he cannot work due to fear. (AR 69.) When he is with
13 other people, his thoughts regularly intrude on him and he has to remove himself.
14 (*Id.*) Plaintiff explained that his thoughts also intrude when he is preparing a meal
15 and holding knives. (*Id.*) Plaintiff stated that when he committed his crime, it was
16 not spontaneous and he had a reason for the violence. (AR 69-70.) Plaintiff
17 explained that now he is not angry, but he still has those thoughts. (AR 70.)
18 Plaintiff stated that he will “explode in rage” if he struggles to operate his phone,
19 and he has broken a couple of televisions because he was unable to get the remote
20 to work. (*Id.*) Plaintiff explained that he never feels that rage with people, only
21 with objects. (AR 70-71.) Plaintiff testified that this thinking disconnects him
22 from whatever he is doing, and it happens only when he has contact with people.
23 (AR 72.) Plaintiff stated that he did not develop these thoughts until several
24 months after he got out of prison. (AR 76.) He does not understand why his
25 thoughts are directed at his friends or strangers who have no ill will towards him.
26 (*Id.*)

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1 **2. Applicable Legal Standards**

2 “In assessing the credibility of a claimant’s testimony regarding subjective
3 pain or the intensity of symptoms, the ALJ engages in a two-step analysis.” *Molina*
4 *v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citing *Vasquez v. Astrue*, 572 F.3d
5 586, 591 (9th Cir. 2009)). “First, the ALJ must determine whether the claimant has
6 presented objective medical evidence of an underlying impairment which could
7 reasonably be expected to produce the pain or other symptoms alleged.” *Treichler*
8 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir. 2014) (quoting
9 *Lingenfelter*, 504 F.3d at 1036) (internal quotation marks omitted). If so, and if the
10 ALJ does not find evidence of malingering, the ALJ must provide specific, clear
11 and convincing reasons for rejecting a claimant’s testimony regarding the severity
12 of his symptoms. *Id.* The ALJ must identify what testimony was found not
13 credible and explain what evidence undermines that testimony. *Holohan v.*
14 *Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001). “General findings are
15 insufficient.” *Lester*, 81 F.3d at 834.

16 **3. Discussion**

17 “After careful consideration of the evidence,” the ALJ found that Plaintiff’s
18 “medically determinable impairments could reasonably be expected to cause the
19 alleged symptoms,” but found that Plaintiff’s “statements concerning the intensity,
20 persistence and limiting effects of these symptoms are not entirely credible.” (AR
21 23.) The ALJ noted that the record contains “ample evidence” of credibility issues
22 “suggesting the claimant has never attempted to work outside of his prison term and
23 his views of Social Security Disability as a mere source of financial gain.” (AR
24 23.) Specifically, the ALJ relied on the following reasons: (1) lack of objective
25 medical evidence to support the alleged severity of symptoms; (2) failure to seek
26 treatment; (3) inconsistent statements; and (4) Plaintiff’s statements about his
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1 investment savings.² (AR 23, 26-27.) No malingering allegation was made, and
2 therefore, the ALJ's reasons must be "clear and convincing."

3 **a. Reason No. 1: Lack of Supporting Objective Medical**
4 **Evidence**

5 The lack of supporting objective medical evidence cannot form the sole basis
6 for discounting testimony, but it is a factor that the ALJ may consider in making a
7 credibility determination. *Burch*, 400 F.3d at 681; *Rollins v. Massanari*, 261 F.3d
8 853, 857 (9th Cir. 2001) (citing 20 CFR § 404.1529(c)(2)).

9 The ALJ found that the medical record is "minimal" and does not provide
10 sufficient objective support for Plaintiff's allegations of mental instability and
11 physical problems. (AR 23.)

12 In October 2009, Plaintiff was committed to the California Department of
13 Mental Health and admitted to Patton State Hospital after being found incompetent
14 to stand trial for murder. (AR 289.) Plaintiff did not report any complaints and
15 stated that his admission was "really all just a misunderstanding" due to a problem
16 with his attorney. (*Id.*) He had no psychiatric history except for a 2006 admission
17 to a facility for substance abuse. (*Id.*) Plaintiff had delusions of persecution and
18 believed that his lawyer was conniving with the judge. (AR 289-90.) Plaintiff was
19 described as being linear and goal-directed with a good mood, euthymic affect,
20 normal speech, no abnormal motor activities, intact memory, and fair judgment.
21 (AR 289.) He was alert, oriented, and attentive, but his insight was impaired. (*Id.*)
22 Physically, it was noted that Plaintiff had a left ear amputation for carcinoma of the
23 skin, which caused difficulty with his hearing. (AR 289-90.) Plaintiff also had
24 hepatitis C with a high viral load. (*Id.*) Plaintiff was treated with Seroquel, and he

25 ² Plaintiff contends that the ALJ also improperly considered Plaintiff's activities
26 while in prison. (JS 7.) The ALJ did not raise Plaintiff's activities as a reason to
27 discount his testimony. Instead, the ALJ considered Plaintiff's activities such as
28 volleyball during his assessment of whether Plaintiff's impairment satisfied the
"paragraph B" criteria for a listed impairment. (AR 21.)

1 was compliant with treatment. (AR 290.) Plaintiff was described as friendly and
2 able to interact with peers and staff. (*Id.*) He read books, magazines, and
3 newspapers, and he also did puzzles, played table cards, and played volleyball.
4 (*Id.*) No medication side effects were noted, but his symptoms did not diminish.
5 (*Id.*) Upon discharge, Plaintiff acknowledged the need to “separate [his] delusions
6 from reality” and denied hallucinations. (*Id.*) His mood was stable, affect was
7 appropriate, and insight and judgment were improved. (*Id.*)

8 Treatment notes from December 2010 documented Plaintiff’s restricted
9 affect, depressed mood, poor sleep, poor insight and judgment, and preoccupation
10 with paranoid thoughts. (AR 305, 307.) Plaintiff heard voices that told him to kill
11 people. (AR 305.) He was diagnosed with psychotic disorder and polysubstance
12 dependence, with a GAF score of 54. (AR 309.)

13 At an April 2013 routine appointment, Plaintiff was oriented and had normal
14 speech, cooperative behavior, stable mood, slightly depressed affect, linear and
15 goal-directed thoughts, normal thought content, good judgment, and good insight.
16 (AR 317.) Plaintiff denied a history of hallucinations and did not appear to be
17 responding to internal stimuli. (*Id.*) Plaintiff was observed to have adequate
18 coping skills to manage his current stress. (*Id.*) He “appear[ed] stable with
19 psychotropic medication” and was motivated for mental health sessions. (*Id.*)
20 Plaintiff was assigned a GAF score of 68 and was diagnosed with provisional
21 delusional disorder, depressive disorder NOS, and amphetamine abuse. (*Id.*)

22 In July 2013, Plaintiff reported, “I’m stable.” (AR 316.) At a September
23 2013 follow-up appointment, Plaintiff again “appear[ed] stable” with his
24 medications. (AR 315.) He still believed that there was a conspiracy to kill him,
25 “but there is much less of a threat now.” (*Id.*) Plaintiff had “ample coping
26 strategies” and “positive plans for parole next year.” (*Id.*) It was also noted that
27 Plaintiff’s delusions had a decreased impact on his functioning and behaviors. (*Id.*)

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1 In December 2013, Plaintiff reported that he had not taken medication for his
2 anxiety. (AR 296.) He denied auditory or visual hallucinations, but he reported a
3 lack of motivation, intermittent periods of low mood, persecutory and paranoid
4 delusions, and defensiveness with peers. (*Id.*) He was cooperative and calm, made
5 good eye contact, and spoke with a normal rate and tone. (*Id.*) Plaintiff had
6 euthymic mood, congruent affect, normal thought process, normal attention and
7 concentration, and fair insight and judgment. (*Id.*)

8 Plaintiff reported that he was “doing well” at a routine appointment in March
9 2014. (AR 314.) He stopped his medications about six weeks prior because he was
10 not suffering from depression and had not been depressed “in the last several
11 years.” (*Id.*) Plaintiff reportedly felt better because the medication had made him
12 drowsy and less responsive. (*Id.*) Plaintiff was alert, oriented, well-groomed, and
13 cooperative. (*Id.*) His mood was euthymic and his speech was clear, organized,
14 and coherent with normal rate and tone. (*Id.*) Plaintiff had good insight and
15 judgment, and he was assessed as “stable,” active, and programming without
16 incident. (*Id.*)

17 In June 2014, Plaintiff reported his plans for after his parole and expressed
18 interest in the Ticket to Work program for vocational training. (AR 313.) He
19 acknowledged that his symptoms of depression and anxiety were not
20 overwhelming. (*Id.*) Plaintiff also reported no hallucinations in the past three
21 years. (*Id.*) He was calm, cooperative, conversant, engaged, appropriate and open,
22 talkative, and humorous. (*Id.*) Plaintiff had a bright affect, congruent mood, and
23 coherent and spontaneous speech. (*Id.*) Plaintiff displayed no evidence of
24 perceptual disturbance, delusional statements, or paranoia. (*Id.*) His insight and
25 judgment were good with intact impulse control. (*Id.*) The clinician noted that
26 Plaintiff “seems to be able to function” with minimal symptoms. (*Id.*)

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1 Plaintiff visited the parole clinic in August 2014. (AR 331.) He denied
2 hallucinations and stated that he was not interested in psychotropic medications at
3 that time. (*Id.*)

4 In October 2014, Plaintiff underwent an internal medicine consultative
5 examination. (AR 333-38.) He complained of a tumor in his left ear, partial
6 amputation of his left ear, and hepatitis C. (AR 333.) The examining physician
7 noted Plaintiff's decreased hearing on the left side, but observed that Plaintiff did
8 not wear a hearing aid. (AR 335, 337.) The same month, Plaintiff also underwent a
9 psychiatric consultative examination. (AR 341-47.) Plaintiff was polite,
10 cooperative, and friendly. (AR 345.) The examining psychiatrist observed good
11 grooming, good hygiene, good eye contact, productive and coherent speech,
12 appropriate mood and affect, and no abnormal mannerisms or tics. (AR 344-45.)
13 He assigned Plaintiff a GAF score of 55 and diagnosed Plaintiff with a history of
14 delusional disorder, persecutory type, and a history of amphetamine abuse. (AR
15 346.) The psychiatrist determined that Plaintiff appeared to be "psychiatrically
16 stable." (AR 347.)

17 During an October 2014 medication management appointment, Plaintiff
18 claimed that he wanted to stop his medications for reasons that his doctor found
19 "not convincing." (AR 354.) Plaintiff did not want to try different medication and
20 "just want[ed] to stop them." (*Id.*)

21 In December 2014, Plaintiff reported having a good Thanksgiving holiday at
22 a church with his AA peers. (AR 353.) He regularly volunteered at a homeless
23 breakfast and went to the Gay and Lesbian Center for resources, support, and legal
24 counseling. (*Id.*) Plaintiff reported looking forward to receiving services to learn a
25 career or trade. (*Id.*) His mood was euthymic with congruent affect, and he denied
26 any hallucinations. (*Id.*) Plaintiff reportedly felt stable without his psychotropic
27 medications. (*Id.*) His social worker observed that Plaintiff "appears to be
28 adjusting well to parole and in the community." (*Id.*)

1 The ALJ thoroughly considered Plaintiff's medical records (AR 23-26) and
2 found that they did not support Plaintiff's allegations of disabling mental instability
3 and physical problems. *See Reddick*, 157 F.3d at 725; *see also Garza v. Astrue*, 380
4 F. App'x 672, 674 (9th Cir. 2010) (finding that an ALJ properly considered a
5 claimant's normal exam findings when noting a lack of objective medical evidence
6 to support the claimant's allegations). Although Plaintiff's treatment records may
7 be interpreted in more than one way, the evidence can rationally support the ALJ's
8 determination. Accordingly, the Court must uphold his interpretation of the
9 evidence. *See Ryan*, 528 F.3d at 1198; *Robbins*, 466 F.3d at 882.

10 The Court finds that this is a clear and convincing reason, supported by
11 substantial evidence, for discounting Plaintiff's credibility.

12 **b. Reason No. 2: Failure to Seek Treatment**

13 When assessing a claimant's credibility, an ALJ may consider an
14 unexplained or inadequately explained failure to follow a prescribed course of
15 treatment. *Smolen*, 80 F.3d at 1284. If a claimant complains of disabling pain but
16 fails to seek or follow prescribed treatment, "an ALJ may use such failure as a basis
17 for finding the complaint unjustified or exaggerated." *Orn*, 495 F.3d at 638 (citing
18 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)); *see Burch v. Barnhart*, 400 F.3d
19 676, 681 (9th Cir. 2005).

20 The ALJ noted that Plaintiff alleged disability beginning June 2004, but there
21 were no medical records from that period. (AR 23.) The ALJ also observed that
22 the record "lacks consistent treatment notes from [Plaintiff]'s incarceration,"
23 identifying treatment records from October 2009, December 2010, April 2013, July
24 2013, September 2013, December 2013, March 2014, and June 2014. (AR 23-24.)

25 The Ninth Circuit has criticized the practice of discrediting evidence based
26 on a lack of mental health treatment "both because mental illness is notoriously
27 underreported and because it is a questionable practice to chastise one with a mental
28 impairment for the exercise of poor judgment in seeking rehabilitation."

1 *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1299-300 (9th Cir.
2 1999) (internal quotation marks omitted) (citing *Nguyen v. Chater*, 100 F.3d 1462,
3 1465 (9th Cir. 1996)).

4 Accordingly, the Court finds that this reason is not a clear and convincing
5 reason, supported by substantial evidence, to discount Plaintiff’s credibility.

6 **c. Reason No. 3: Inconsistent Statements**

7 As part of the credibility determination, the ALJ may consider
8 inconsistencies between the claimant’s testimony and his other statements, conduct,
9 and daily activities. *See Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.
10 1997); *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

11 The ALJ found that Plaintiff’s “overbroad and inconsistent testimony
12 suggested he believed he could work and would work if he had a job.” (AR 27.)
13 The ALJ noted that in June 2014, one month before Plaintiff’s parole, he reported
14 that he planned to enter a vocational training program and was “hoping to qualify
15 for a job.” (AR 24; *see* AR 313.) During an October 2014 psychiatric consultative
16 examination, Plaintiff expressed that he would like to be a drug and alcohol
17 counselor. (AR 25; *see* AR 344.) Plaintiff also stated that he wanted to obtain
18 higher education and try to get a job. (*Id.*) In November and December 2014,
19 Plaintiff was looking forward to receiving Department of Rehabilitation services to
20 learn a career or trade. (AR 26; *see* AR 353-54.) The ALJ observed that Plaintiff
21 testified that he was “unemployable” before stating that he does not know if he is
22 able to work. (AR 27; *see* AR 48-49.) The ALJ also noted that Plaintiff confirmed
23 that he had submitted job applications at several places. (AR 27; *see* AR 49.)

24 Although Plaintiff argues that his desire to work or go to school should not
25 detract from his credibility (*see* JS 28), the ALJ was permitted to rely on the
26 inconsistency between Plaintiff’s statements and his allegations of being unable to
27 work due to disability. *See Merritt v. Colvin*, 572 F. App’x 468, 470 (9th Cir.
28 2014) (affirming an ALJ’s finding that a claimant’s “interest in starting a new job is

1 not consistent with [the] marked limitations in the ability to tolerate work
2 pressures” about which the claimant testified); *see also Fregoso v. Astrue*, 2012
3 WL 2195655, at *4 (C.D. Cal. June 14, 2012) (“[P]laintiff’s testimony at the
4 hearing that she had been looking for work was inconsistent with plaintiff’s
5 assertions that she suffers from disabling impairments which preclude her from
6 working at all.”), *aff’d* (9th Cir. Aug. 13, 2013); *Sample v. Schweiker*, 694 F.2d
7 639, 642 (9th Cir. 1982) (“[The ALJ] is entitled to draw inferences logically
8 flowing from the evidence.”).

9 The Court finds that this reason is a clear and convincing reason, supported
10 by substantial evidence, to discount Plaintiff’s credibility.

11 **d. Reason No. 4: Plaintiff’s Statements About His**
12 **Investment Savings**

13 The ALJ found that Plaintiff’s “credibility was again called into question” by
14 Plaintiff’s November 2014 revelation of his “investment savings.” (AR 26; *see* AR
15 354.) Plaintiff stated that he did not plan to access this money because he was
16 receiving free housing, but the ALJ noted that Plaintiff was not eligible to receive
17 General Relief because he continued to own property. (AR 26; *see* AR 354.) By
18 March 2015, Plaintiff reported that he was receiving his investment funds to pay for
19 living expenses. (AR 352.)

20 The ALJ does not explain how this undermines Plaintiff’s credibility, thereby
21 leaving the Court to speculate unacceptably about why the ALJ questioned
22 Plaintiff’s credibility on this basis. *See Ros v. Berryhill*, No. 2:15-CV-2389 DB,
23 2017 WL 896287, at *4 (E.D. Cal. Mar. 7, 2017) (citing *Burrell v. Colvin*, 775 F.3d
24 1133, 1138 (9th Cir. 2014)) (“The court may not speculate as to the ALJ’s findings
25 or the basis of the ALJ’s unexplained conclusions.”). The Commissioner argues
26 that Plaintiff’s statements concerning his resources and income are inconsistent,
27 citing Plaintiff’s social security application that represented that he had no
28 resources or income and Plaintiff’s testimony that he “scrape[s] together money

1 from friends and relatives.” (JS 23-24.) But those were not reasons that the ALJ
2 provided, and the Court may not consider grounds upon which the ALJ did not rely.
3 *See Orn*, 495 F.3d at 630; *Bray v. Commissioner of Social Security Admin.*, 554
4 F.3d 1219, 1225 (9th Cir. 2009) (“Long-standing principles of administrative law
5 require us to review the ALJ’s decision based on the reasoning and factual findings
6 offered by the ALJ—not post hoc rationalizations that attempt to intuit what the
7 adjudicator may have been thinking.”).

8 The Court finds that this reason is not a clear and convincing reason,
9 supported by substantial evidence, to discount Plaintiff’s credibility.

10 **4. Conclusion**

11 Because the Court found that two of the ALJ’s reasons for discounting
12 Plaintiff’s credibility are not clear and convincing, the Court must decide whether
13 the ALJ’s reliance on those reasons was harmless error. *Carmickle v. Comm’r of*
14 *Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008). The relevant inquiry “is not
15 whether the ALJ would have made a different decision absent any error,” but
16 whether the ALJ’s decision is still “legally valid, despite such error.” *Id.* The
17 “remaining reasoning *and ultimate credibility determination* [must be] . . .
18 supported by substantial evidence in the record.” *Id.* (emphasis in original) (citing
19 *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)). Here,
20 given the discussion above concerning the objective medical evidence and
21 Plaintiff’s inconsistent statements, the Court concludes the ALJ’s credibility finding
22 is legally valid and supported by substantial evidence.

23 **C. The ALJ Properly Determined That Plaintiff Could Perform A** 24 **Significant Number Of Jobs**

25 Plaintiff contends that the ALJ improperly assessed his RFC and erred in
26 relying on the VE’s answers to a hypothetical that excluded some of Plaintiff’s
27 limitations. (*See JS 9, 29.*) The Commissioner contends that both the RFC and the
28 hypothetical that the ALJ posed to the VE are supported by substantial evidence.

1 (See JS 14-17, 31-32.)

2 **1. The RFC Is Supported By Substantial Evidence**

3 Plaintiff contends that the ALJ did not properly assess the record and thus the
4 RFC is not supported by substantial evidence. (JS 9.) The Commissioner contends
5 that the ALJ reasonably relied on the medical opinion evidence when determining
6 Plaintiff's RFC. (JS 14-17.)

7 **a. Applicable Legal Standard**

8 The ALJ is responsible for assessing a claimant's RFC "based on all of the
9 relevant medical and other evidence." 20 CFR §§ 404.1545(a)(3), 404.1546(c);
10 *see Robbins*, 466 F.3d at 883 (citing Soc. Sec. Ruling 96-8p (July 2, 1996), 1996
11 WL 374184, at *5). In doing so, the ALJ may consider any statements provided by
12 medical sources, including statements that are not based on formal medical
13 examinations. *See* 20 CFR §§ 404.1513(a), 404.1545(a)(3). An ALJ's
14 determination of a claimant's RFC must be affirmed "if the ALJ applied the proper
15 legal standard and his decision is supported by substantial evidence." *Bayliss*, 427
16 F.3d at 1217; *accord Morgan*, 169 F.3d at 599.

17 **b. Discussion**

18 In determining Plaintiff's RFC, the ALJ "considered all symptoms and the
19 extent to which these symptoms can reasonably be accepted as consistent with the
20 objective medical evidence and other evidence . . . [and] also considered opinion
21 evidence" in accordance with social security regulations. (AR 22.)

22 The ALJ gave "great weight" to the opinions of the state agency medical
23 consultants, finding that their opinions were consistent with objective findings and
24 Plaintiff's statements about his ability to perform daily activities. (AR 25.) Dr.
25 Wong found that Plaintiff did not have a severe physical impairment, and Dr. Ikawa
26 opined that Plaintiff had mild to moderate non-exertional limitations and could
27 perform simple, repetitive tasks. (*Id.*; *see* AR 115, 117, 119-20.) The ALJ again
28 gave "great weight" to the psychiatric examining physician, who found that

1 Plaintiff was psychiatrically stable and did not require any functional restrictions.
2 (AR 25-26; *see* 346-47.) The ALJ also considered the internal medicine examining
3 physician’s lack of findings in determining the severity and effects of Plaintiff’s
4 alleged impairments. (AR 26.) As previously discussed, the ALJ properly
5 considered and weighed the opinion evidence (*see supra* § IV(A)(1)), and the ALJ
6 was permitted to rely upon these opinions in assessing Plaintiff’s RFC. *See*
7 *Magallanes*, 881 F.2d at 752 (“[T]he reports of consultative physicians called in by
8 the Secretary may serve as substantial evidence.”); *Andrews v. Shalala*, 53 F.3d
9 1035, 1041 (9th Cir. 1995) (stating that the opinion of a non-treating, examining
10 physician that is based on independent clinical findings “may itself be substantial
11 evidence”).

12 Consistent with the opinion evidence, the ALJ assessed that Plaintiff could
13 perform simple, routine, and repetitive tasks, not at a production rate pace, with no
14 more than occasional contact with coworkers and supervisors and no interaction
15 with the general public. (AR 22.) The ALJ imposed no physical exertional
16 limitations. (*Id.*)

17 Plaintiff contends that the RFC is not supported by substantial evidence
18 because the ALJ did not properly assess the record with respect to his treating
19 physician’s opinion. (JS 9.) Plaintiff does not identify what opinion was
20 improperly assessed. To the extent that Plaintiff identifies a diagnosis of
21 schizophrenia that “received little consideration by the ALJ” and was not
22 incorporated in the RFC assessment (JS 7), a “diagnosis alone is insufficient for
23 finding a ‘severe’ impairment.” *See Febach v. Colvin*, 580 F. App’x 530, 531 (9th
24 Cir. 2014). Although the ALJ must consider limitations imposed by all
25 impairments, including non-severe impairments, *see* SSR 96–8p, 1996 WL 374184,
26 at *5 (S.S.A. July 2, 1996), Plaintiff does not identify any functional limitations that
27 were suggested by the diagnosing psychiatrist yet ignored by the ALJ. Dr. Robert
28 Barker described Plaintiff’s statements and history before observing that Plaintiff

1 was casually and cleanly dressed with normal speech, euthymic mood, and
2 appropriate affect. (AR 354-55.) Aside from his diagnosis of schizophrenia and his
3 advisement that recurrences of Plaintiff’s problems “are not likely to be due to
4 problems in the external world,” and would be best treated with medication, Dr.
5 Barker provided no further opinion for the ALJ’s consideration. (*See id.*)

6 In sum, the Court finds that the ALJ’s RFC assessment is supported by
7 substantial evidence. *See Arrieta v. Astrue*, 301 F. App’x 713, 715 (9th Cir. 2008)
8 (finding that substantial evidence supported the RFC determination when the ALJ
9 properly evaluated the opinion evidence and relied on supporting medical reports
10 and testimony).

11 **2. The ALJ Properly Relied On The VE’s Testimony To Find** 12 **That Plaintiff Can Perform Other Work**

13 Plaintiff argues that the ALJ’s finding that Plaintiff could perform a
14 significant number of jobs is not supported by substantial evidence and fails to
15 consider Plaintiff’s impairments. (JS 29.) The Commissioner contends that the
16 ALJ properly relied on the VE’s testimony because the ALJ posed a hypothetical to
17 the VE that encompassed all of Plaintiff’s limitations. (JS 31-32.)

18 **a. Applicable Legal Standard**

19 At step five, it is the Commissioner’s burden to establish that, considering the
20 RFC, the claimant can perform other work. *Embrey*, 849 F.2d at 422. To make this
21 showing, the ALJ may rely on the testimony of a vocational expert. *Tackett v.*
22 *Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). The ALJ may pose hypothetical
23 questions to the VE to establish (1) what jobs, if any, the claimant can do, and (2)
24 the availability of those jobs in the national economy. *Id.* at 1101. These
25 hypotheticals must depict the claimant’s disability in a manner that is “accurate,
26 detailed, and supported by the medical record” and “set[s] out all of the claimant’s
27 impairments.” *Id.* (citing *Gamer v. Sec’y of Health and Human Servs.*, 815 F.2d
28 1275, 1279-80 (9th Cir. 1987)). The VE’s testimony “is valuable only to the extent

1 that it is supported by medical evidence.” *Sample*, 694 F.2d at 644. “If a [VE]’s
2 hypothetical does not reflect all the claimant’s limitations, then the expert’s
3 testimony has no evidentiary value to support a finding that the claimant can
4 perform jobs in the national economy.” *Hill v. Astrue*, 698 F.3d 1153, 1162 (9th
5 Cir. 2012) (quoting *Matthews v. Shalala*, 10 F.3d 678, 681 (9th Cir. 1993)).

6 **b. Discussion**

7 At the hearing, the ALJ first asked the VE to consider a hypothetical
8 individual with the same education and work background as Plaintiff, who could
9 also perform the following: occasionally lift and carry 50 pounds; frequently lift
10 and carry 25 pounds; sit, stand, or walk for six hours in a work day; push and pull
11 as much as he can lift and carry; and frequently stoop, kneel, crouch, and crawl.
12 (AR 81-82.) The VE testified that such an individual could perform Plaintiff’s past
13 job as a telephone solicitor. (AR 82.) When the ALJ added the limitation of
14 “simple, routine, and repetitive tasks with only occasional interaction with the
15 public,” the VE stated that Plaintiff’s past job would not be available, but such an
16 individual could perform the jobs of hand packager, laundry worker, or industrial
17 cleaner. (AR 82-83.)

18 The ALJ then posed the following hypothetical to the VE:

19 And I’m just going to—the same exertional levels, so just following
20 up on the hypothetical I asked, but now, reducing the mental
21 limitations to simple, routine, and repetitive tasks, but not at a
22 production rate pace, so that, for example, no assembly line work.
23 Just occasional interaction with supervisors and coworkers, and no
24 interaction with the general public.

25 (AR 83.) The VE testified that a person with those limitations could not perform
26 Plaintiff’s past work. (*Id.*) The VE then indicated that a person with those
27 restrictions could still do the jobs that the VE identified in response to the prior
28

1 hypothetical.³ (AR 83-84.)

2 Plaintiff contends that the hypotheticals were deficient because they failed to
3 reflect the nature and scope of Plaintiff’s limitations. (JS 29.) Plaintiff also notes
4 that when his attorney posed a hypothetical that considered a claimant who would
5 be off-task over twenty percent of the time, the VE stated that there would be no
6 jobs available. (*Id.*; see AR 84-85.) However, “[t]he ALJ is not bound to accept as
7 true the restrictions presented in a hypothetical question propounded by a
8 claimant’s counsel.” *Magallanes*, 881 F.2d at 756 (citing *Martinez v. Heckler*, 807
9 F.2d 771, 773 (9th Cir. 1986)). When a claimant’s counsel poses a hypothetical
10 that is more restrictive than the ALJ’s hypothetical, the ALJ is “free to accept or
11 reject those restrictions” based on the ALJ’s evaluation of the evidence. *Martinez*,
12 807 F.2d at 774. As discussed above, the ALJ’s RFC determination—which
13 omitted the additional limitations presented by Plaintiff’s counsel—is supported by
14 substantial evidence. The ALJ posed a hypothetical containing limitations that
15 were identical to the limitations found in Plaintiff’s RFC. Consequently, the
16 limitations in the hypothetical are also supported by substantial evidence.

17 By posing a hypothetical with limitations supported by substantial evidence,
18 the ALJ did not err in excluding additional restrictions. See *Stubbs-Danielson v.*
19 *Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008) (finding that, because the ALJ’s
20 RFC assessment was proper and complete, the ALJ’s hypothetical based on the
21 RFC was also proper and complete); *Sample*, 694 F.2d at 644 (“[T]he limitation of
22 evidence contained in the hypothetical at issue would be objectionable only if the
23 assumed facts could not be supported by the record.”); *Osenbrock v. Apfel*, 240
24 F.3d 1157, 1164 (9th Cir. 2001) (finding that an ALJ did not err in failing to

25 ³ The VE stated, “The ultimate jobs I testified to in hypothetical number one would
26 still fit.” (AR 84.) Because the VE did not identify other jobs in response to the
27 first hypothetical, and he instead testified that such an individual could perform
28 Plaintiff’s past work, the Court presumes that here the VE was referring to the
second, not first, hypothetical.

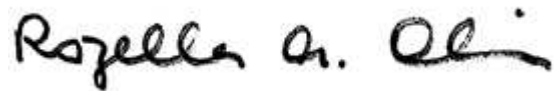
1 include alleged impairments in a hypothetical when the claimant failed to present
2 evidence to support those impairments). Accordingly, the ALJ properly relied on
3 the VE's testimony to determine that Plaintiff was capable of performing other
4 work. *See Bayliss*, 427 F.3d at 1217 (finding that an ALJ properly relied on a VE's
5 testimony in response to a hypothetical that "contained all of the limitations that the
6 ALJ found credible and supported by substantial evidence in the record");
7 *Sampson v. Astrue*, 441 F. App'x 545, 547 (9th Cir. 2011) ("Because the ALJ's
8 hypothetical to the [VE] encompassed the RFC and the VE identified available jobs
9 in the national and local economy, the ALJ's finding of no disability was supported
10 by substantial evidence.").

11 **V. CONCLUSION**

12 IT IS ORDERED that Judgment shall be entered AFFIRMING the decision
13 of the Commissioner denying benefits.

14 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
15 Order and the Judgment on counsel for both parties.

16
17
18 DATED: March 23, 2018



19 ROZELLA A. OLIVER
20 UNITED STATES MAGISTRATE JUDGE

21
22 **NOTICE**

23 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,
24 LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.**