

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ARMANDO BARRERA AGUILAR,
Plaintiff,

v.

NANCY A. BERRYHILL,¹
Acting Commissioner of the
Social Security Administration,
Defendant.

No. CV 16-7565 SS

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

Armando Barrera Aguilar ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration (the "Commissioner" or the "Agency") denying his application for Disability Insurance Benefits ("DIB") and

¹ Nancy A. Berryhill is now the Acting Commissioner of Social Security and is substituted for former Acting Commissioner Carolyn W. Colvin in this case. See Fed. R. Civ. P. 25(d).

1 Supplemental Security Income ("SSI"). The parties consented,
2 pursuant to 28 U.S.C. § 636(c), to the jurisdiction of the
3 undersigned United States Magistrate Judge. (Dkt. Nos. 11-12).
4 For the reasons stated below, the decision of the Commissioner is
5 REVERSED and this case is REMANDED for further administrative
6 proceedings consistent with this decision.
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10 **II.**

11 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

12 To qualify for disability benefits, a claimant must
13 demonstrate a medically determinable physical or mental
14 impairment that prevents him from engaging in substantial gainful
15 activity and that is expected to result in death or to last for a
16 continuous period of at least twelve months. Reddick v. Chater,
17 157 F.3d 715, 721 (9th Cir. 1998) (citing 42 U.S.C.
18 § 423(d)(1)(A)). The impairment must render the claimant
19 incapable of performing the work he previously performed and
20 incapable of performing any other substantial gainful employment
21 that exists in the national economy. Tackett v. Apfel, 180 F.3d
22 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).
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1 To decide if a claimant is entitled to benefits, an ALJ
2 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920.

3 The steps are:

4
5 (1) Is the claimant presently engaged in substantial
6 gainful activity? If so, the claimant is found
7 not disabled. If not, proceed to step two.

8
9 (2) Is the claimant's impairment severe? If not, the
10 claimant is found not disabled. If so, proceed
11 to step three.

12
13 (3) Does the claimant's impairment meet or equal one
14 of the specific impairments described in 20
15 C.F.R. Part 404, Subpart P, Appendix 1? If so,
16 the claimant is found disabled. If not, proceed
17 to step four.

18
19 (4) Is the claimant capable of performing his past
20 work? If so, the claimant is found not disabled.
21 If not, proceed to step five.

22
23 (5) Is the claimant able to do any other work? If
24 not, the claimant is found disabled. If so, the
25 claimant is found not disabled.
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1 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,
2 262 F.3d 949, 953-54 (9th Cir. 2001) (citations omitted); 20
3 C.F.R. §§ 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).
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5 The claimant has the burden of proof at steps one through
6 four, and the Commissioner has the burden of proof at step five.
7 Bustamante, 262 F.3d at 953-54. Additionally, the ALJ has an
8 affirmative duty to assist the claimant in developing the record
9 at every step of the inquiry. Id. at 954. If, at step four, the
10 claimant meets his burden of establishing an inability to perform
11 past work, the Commissioner must show that the claimant can
12 perform some other work that exists in "significant numbers" in
13 the national economy, taking into account the claimant's residual
14 functional capacity ("RFC"), age, education, and work experience.
15 Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20
16 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may do
17 so by the testimony of a vocational expert or by reference to the
18 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404,
19 Subpart P, Appendix 2 (commonly known as "the Grids"). Osenbrock
20 v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant
21 has both exertional (strength-related) and non-exertional
22 limitations, the Grids are inapplicable and the ALJ must take the
23 testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864,
24 869 (9th Cir. 2000) (citing Burkhart v. Bowen, 856 F.2d 1335,
25 1340 (9th Cir. 1988)).
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III.

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THE ALJ'S DECISION

The ALJ employed the five-step sequential evaluation process in evaluating Plaintiff's case. At step one, the ALJ found that Plaintiff met the insured status requirements of the Act through June 30, 2011, and had not engaged in substantial gainful activity since October 30, 2008, his alleged onset date. (Certified Administrative Record ("AR") 31). At step two, the ALJ found that Plaintiff had the following severe impairments: a history of musculoligamentous strain of the lumbar spine, mild to moderate lumbosacral disc disease, mild degenerative disc disease of the cervical spine, mild degenerative disc disease of the thoracic spine, a history of right inguinal hernia, status post hernia repair, depressive disorder and anxiety disorder, not otherwise specified. (AR 32).

At step three, the ALJ found that Plaintiff did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 36).

The ALJ then found that Plaintiff had the following residual functioning capacity ("RFC"):

[Plaintiff] can lift and/or carry fifty pounds occasionally, twenty-five pounds frequently, stand and/or walk six hours and sit six hours in an eight-hour workday. [Plaintiff] can frequently climb ramps, stairs, ladders, ropes and scaffolds, balance, stoop, kneel, crouch and crawl. [Plaintiff] is limited to the performance of simple repetitive tasks. [Plaintiff] can

1 have occasional supervision and he can occasionally
2 accept instructions and/or criticism from supervisors.
3 He can have occasional contact with coworkers and
4 incidental contact with the public. [Plaintiff] can have
5 occasional changes to a routine work setting.

6 (AR 37).

7 At step four, the ALJ determined that Plaintiff is unable to
8 perform any past relevant work. (AR 42). At step five, the ALJ
9 found that, considering Plaintiff's age, education, work
10 experience, and RFC, there are jobs that exist in significant
11 numbers in the national economy that the Plaintiff can perform.
12 (AR 43).

13 IV.

14 STANDARD OF REVIEW

15 Under 42 U.S.C. § 405(g), a district court may review the
16 Commissioner's decision to deny benefits. The court may set
17 aside the Commissioner's decision when the ALJ's findings are
18 based on legal error or are not supported by "substantial
19 evidence" in the record as a whole. Aukland v. Massanari, 257
20 F.3d 1033, 1035 (9th Cir. 2001) (citing Tackett, 180 F.3d at
21 1097); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)
22 (citing Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989)).

23 "Substantial evidence is more than a scintilla, but less
24 than a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson
25 v. Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
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1 evidence which a reasonable person might accept as adequate to
2 support a conclusion.” Id. (citing Jamerson, 112 F.3d at 1066;
3 Smolen, 80 F.3d at 1279). To determine whether substantial
4 evidence supports a finding, the court must “consider the record
5 as a whole, weighing both evidence that supports and evidence
6 that detracts from the [Commissioner’s] conclusion.” Aukland,
7 257 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th
8 Cir. 1993)). If the evidence can reasonably support either
9 affirming or reversing that conclusion, the court may not
10 substitute its judgment for that of the Commissioner. Reddick,
11 157 F.3d at 720-21 (citing Flaten v. Sec’y, 44 F.3d 1453, 1457
12 (9th Cir. 1995)).

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15 **V.**

16 **DISCUSSION**

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18 **A. The ALJ Failed To Provide Specific And Legitimate Reasons**
19 **For Rejecting Dr. Fierro’s Opinion**

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21 Plaintiff contends that the ALJ failed to give reasons
22 supported by substantial evidence for rejecting the opinion of
23 Plaintiff’s treating psychologist, Dr. Arturo Fierro, Ph.D. (Pl.
24 MSO at 4). The Court agrees.

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26 When a treating or examining physician's opinion is not
27 contradicted by another physician, it may be rejected only for
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1 "clear and convincing" reasons. Lester v. Chater, 81 F.3d 821,
2 830 (9th Cir. 1995). When a treating or examining physician's
3 opinion is contradicted by another doctor, as is the case here,
4 it may only be rejected if the ALJ provides "specific and
5 legitimate" reasons supported by substantial evidence in the
6 record. Id. at 830-31; see also Ryan v. Comm'r of Soc. Sec., 528
7 F.3d 1194, 1198 (9th Cir. 2008). The ALJ can meet this burden by
8 setting forth a detailed and thorough summary of the facts and
9 conflicting clinical evidence. Magallanes v. Bowen, 881 F.2d
10 747, 751 (9th Cir. 1989).

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13 Dr. Fierro is a Ph.D. licensed clinical psychologist who
14 treated Plaintiff weekly beginning in April of 2014. (AR 1117).
15 On March 15, 2016, Dr. Fierro listed his diagnostic impression of
16 Plaintiff as: (1) Major Depressive Disorder severe with Psychotic
17 Features, Recurrent; and (2) Schizotypal Personality Disorder.
18 (AR 1120). He noted that "[d]espite [Plaintiff's] efforts to
19 maintain stability both as so far as medications and psychiatric
20 treatment this patient does not appear able to return to more
21 gainful and stable living. His psychiatric and physical
22 functional impairments now appear chronically disabling." (Id.).

23
24 The ALJ gave little weight to Dr. Fierro's opinion after
25 determining that: (1) Dr. Fierro's opinion was not supported by
26 his own records; (2) despite the severity of the evaluations, Dr.
27 Fierro did not seek to hospitalize Plaintiff or make a referral
28 to "an actual psychiatrist"; (3) Dr. Fierro's assessments suggest

1 greater limitations than Plaintiff alleges and is contradicted by
2 Plaintiff's daily activities; and (4) while Dr. Fierro offered
3 the impression of psychotic features and schizotypal personality
4 disorder, there is no evidence that the Plaintiff was prescribed
5 medication for psychotic symptoms. (AR 39-40).

6
7 **1. Dr. Fierro's Records**

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9 The ALJ argues that Dr. Fierro's opinion is not supported by
10 his own records. (AR 39). The ALJ further argues that the
11 progress notes, specifically those regarding Plaintiff's current
12 level of functioning, "appear primarily to be reiterations of the
13 claimant's complaints." (Id.).

14
15 The ALJ improperly rejected Dr. Fierro's opinion. First,
16 the ALJ found that Dr. Fierro's progress notes are inconsistent
17 because they "indicate a waxing and waning." (AR 41). The ALJ
18 also notes that medical records indicate that Plaintiff
19 experienced "ups and downs." (AR 39). However, "waxing" and
20 "waning" do not necessarily contradict the existence of extreme
21 mental limitations. Experiencing some "ups" and "fair days" does
22 not preclude the possibility of such mental limitations, either.
23 Therefore, these do not constitute specific and legitimate
24 reasons for rejecting Dr. Fierro's opinion.

25
26 Additionally, while Dr. Fierro does not appear to have
27 conducted significant diagnostic testing, his opinion does not
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1 seem to rely exclusively on Plaintiff's subjective symptoms. For
2 example, Dr. Fierro's April 23, 2014 assessment includes clinical
3 observations regarding Plaintiff's appearance, attitude,
4 psychomotor activity, speech, mood and affect, among others. (AR
5 1051). Likewise, his March 2016 report states that Plaintiff's
6 "intellectual functioning and sensorium was established through
7 the mental status examination, which displays episodes of poor
8 memory and memory deficits for recent and remote recall, and poor
9 concentration." (AR 1118).

11 **2. Hospitalization**

12
13 The ALJ rejects Dr. Fierro's opinion because, despite the
14 severity indicated in his evaluations, Dr. Fierro did not seek to
15 hospitalize Plaintiff or make a referral to an "actual
16 psychiatrist". (AR 39). First, Dr. Fierro's assessment of
17 Plaintiff's symptoms is not inconsistent with a lack of
18 hospitalizations. Not every individual with debilitating mental
19 illness requires hospitalizations, nor are hospitalizations
20 appropriate in all instances.

21
22 Second, Dr. Fierro's decision not to refer Plaintiff to an
23 "actual psychiatrist" does not justify rejecting his professional
24 opinion without knowing and evaluating his reasons. The ALJ's
25 rejection of Dr. Fierro's opinion on this basis is improper. See
26 Smolen, 80 F.3d at 1288 ("If the ALJ thought he needed to know
27 the basis of [a doctor's] opinions in order to evaluate them, he
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1 had a duty to conduct an appropriate inquiry, for example, by
2 subpoenaing the physicians or submitting further questions to
3 them" or by "continuing the hearing to augment the
4 record") (citation omitted); see also Tonapetyan v. Halter, 242
5 F.3d 1144, 1150 (9th Cir. 2001) (the ALJ's duty to develop the
6 record is triggered when there is "ambiguous evidence" or when
7 "the record is inadequate to allow for proper evaluation of the
8 evidence"); Brown v. Heckler, 713 F.2d 441, 441 (9th Cir.
9 1983) ("In Social Security cases the ALJ has a special duty to
10 fully and fairly develop the record and to assure that the
11 claimant's interests are considered[,]" even when the claimant is
12 represented by counsel).

13
14 On remand, the ALJ should develop the record to address any
15 ambiguity in the medical evidence.

16 17 **3. Daily Activities**

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19 The ALJ contends that Dr. Fierro's assessments suggest
20 greater limitations than Plaintiff alleges and are contradicted
21 by Plaintiff's daily activities. (AR 40). Plaintiff contends
22 that the "fact that [Plaintiff] can take public transportation;
23 goes to eat; takes care of his personal needs - does not mean
24 that Dr. Fierro's opinion is inconsistent." (Pl. MSO at 8). The
25 Court agrees.
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1 Evidence regarding Plaintiff's daily activities does not
2 contradict Dr. Fierro's opinion that he has "extreme" limitations
3 in most areas of mental functioning. A plaintiff does not need
4 to be completely incapacitated to be disabled. Fair, 885 F.2d at
5 603; Cooper v. Bowen, 815 F.2d 557, 561 (9th Cir. 1987)
6 ("Disability does not mean that a claimant must vegetate in a
7 dark room excluded from all forms of human and social activity.")
8 (citation and quotations omitted); Reddick, 157 F.3d at 722
9 ("disability claimants should not be penalized for attempting to
10 lead normal lives in the face of their limitations.").

11
12 Instead, a plaintiff's daily activities are inconsistent
13 with claimed disability where the plaintiff is able to spend a
14 substantial part of the day engaged in activities that are
15 transferable to a work setting. Fair, 885 F.2d at 603. Here,
16 the record does not show that Plaintiff's limited daily
17 activities meet this requirement. The ALJ identified the fact
18 that Plaintiff goes to church, feels hopeful due to spiritual
19 support, is able to take public transportation, is able to care
20 for personal needs, eats at fast food restaurants, goes to the
21 park, and drives a motor vehicle as evidence contradicting Dr.
22 Fierro's opinion of "extreme" mental limitations. (AR 40).
23 These activities are not inconsistent with extreme mental
24 limitations. Moreover, these activities do not demonstrate that
25 Plaintiff is able to spend a substantial part of his day engaged
26 in activities that are transferrable to a work setting.
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1 The ALJ therefore improperly relied upon Plaintiff's daily
2 activities as a basis for rejecting Dr. Fierro's opinion. See
3 Gallant v. Heckler, 753 F.2d 1450, 1453-55 (9th Cir. 1984)
4 ("Gallant") (fact that claimant could cook for himself and family
5 members as well as wash dishes did not preclude a finding that
6 claimant was disabled due to constant back and leg pain). Remand
7 is required.

8 9 **4. No Medication For Psychotic Symptoms**

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11 The ALJ stated that, while Dr. Fierro offered the impression
12 of psychotic features and schizotypic personality disorder, there
13 is no evidence that Plaintiff is prescribed medication for these
14 symptoms. (AR 40). Plaintiff contends that the ALJ found that
15 because Dr. Fierro did not prescribe medication, Dr. Fierro's
16 opinion lacks substantial evidence. (Pl. MSO at 8).

17
18 As a licensed psychologist, Dr. Fierro is likely unable to
19 prescribe any medications to Plaintiff.² However, Dr. Fierro is
20 still a specialist, and the Social Security Agency gives more
21 "weight to the opinion of a specialist about medical issues
22 related to his or her area of specialty than to the opinion of a
23 source who is not a specialist." 20 C.F.R. § 404.1527(c)(5).
24 While Plaintiff's primary care physicians opted to prescribe
25 Zoloft and Elavil to Plaintiff, Dr. Fierro, as a psychologist,
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27 ² California psychologists cannot legally prescribe
28 medication.
See <http://www.psychology.ca.gov/consumers/medicate.shtml>.

1 was not permitted to prescribe medication. Moreover, Dr. Fierro
2 could not direct them to prescribe certain medications to
3 Plaintiff. Thus, Dr. Fierro could not prescribe medication
4 himself and did not have control over what other doctors chose to
5 prescribe. Again, remand is required.
6

7 **B. The ALJ Failed To Properly Consider The Consultative**
8 **Examiner's Limitations When Creating The RFC**

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10 "A claimant's residual functional capacity is what he can
11 still do despite his physical, mental, nonexertional, and other
12 limitations." Cooper v. Sullivan, 880 F.2d 1152, 1155 n. 5 (9th
13 Cir. 1989) (citing 20 C.F.R. § 404.1545). An RFC assessment
14 requires the ALJ to consider a claimant's impairments and any
15 related symptoms that may "cause physical and mental limitations
16 that affect what [he] can do in a work setting." 20 C.F.R. §§
17 404.1545(a)(1), 416. 945(a)(1). In determining a claimant's RFC,
18 the ALJ considers all relevant evidence, including residual
19 functional capacity assessments made by consultative examiners,
20 State Agency physicians and medical experts. 20 C.F.R. §§
21 404.1545(a)(3), 416. 945(a)(3). See also 20 C.F.R. §§
22 404.1513(c), 416. 913(c).
23

24 Following a December 2, 2013 examination of Plaintiff,
25 consultative examining psychiatrist Dr. Rama Nadella opined on a
26 series of limitations. (AR 841-845). In issuing his RFC
27 finding, the ALJ stated that he gave "greatest weight to the
28 opinion of the State Agency medical consultants and the reviewing

1 psychologist [], to find that the claimant is limited to the
2 range of unskilled work described in [the RFC]. Inasmuch as Dr.
3 Nadella's opinion is consistent with those of the State Agency
4 medical consultants, I give it limited weight." (AR 39). The
5 ALJ included four limitations similar to those proposed by Dr.
6 Nadella. However, he did not include two of Dr. Nadella's
7 limitations stating that Plaintiff is moderately limited in
8 performing work activities on a consistent basis and in the
9 ability to deal with the usual stressors encountered in
10 competitive work.

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12
13 Plaintiff contends that the ALJ never assessed any weight to
14 Dr. Nadella's opinion. (Pl. MSO at 11). Plaintiff argues that
15 it can be inferred that the ALJ gave great weight to Dr.
16 Nadella's opinion by the "similarities of Dr. Nadella's opinion
17 to the ALJ's assessed residual functional capacity." (Id.).
18 But, Plaintiff argues, the ALJ failed to assess two of Dr.
19 Nadella's proposed limitations in the RFC. (Pl. MSO at 12).
20 Therefore, Plaintiff claims, the ALJ failed to fulfill the
21 requirement that he review the record as a whole. (Id.).

22
23 Defendant counters that the ALJ did assess weight to Dr.
24 Nadella's opinion. Specifically, the ALJ assigned Dr. Nadella's
25 opinion "limited weight" before moving forward in determining an
26 appropriate RFC. (Def. MSO at 9). Defendant also argues that
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1 the ALJ "properly reviewed the record as a whole and articulated
2 a concrete RFC". (Id.).

3
4 The ALJ excluded two of Dr. Nadella's proposed limitations.
5 Accordingly, the ALJ erred by not providing specific and
6 legitimate reasons, supported by substantial evidence, for
7 implicitly rejecting portions of Dr. Nadella's opinion. See
8 Jackson v. Colvin, 2014 WL 562240, at *2 (C.D. Cal. Feb. 11,
9 2014) (finding ALJ erred in failing to explain why RFC assessment
10 did not adopt certain moderate limitations opined by the
11 consultative examining psychiatrist); Jackson v. Colvin, 2013 WL
12 1873148, at *5 (C.D. Cal. May 2, 2013) (finding ALJ erred in
13 failing to proffer any reason for not explaining the rejection of
14 consultative psychiatrist's opinion that claimant would have mild
15 to moderate limitations with respect to handling normal stresses
16 at work); see also SSR 85-15, 1985 WL 56857, at *5-6 (Jan. 1,
17 1985) (emphasizing that mentally impaired people often "have
18 difficulty accommodating to the demands of work and work-like
19 settings" and thus "[a]ny impairment-related limitations created
20 by an individual's response to demands of work ... must be
21 reflected in the RFC assessment").

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24 On remand, the ALJ must properly assess Dr. Nadella's
25 opinion and provide specific and legitimate reasons for rejecting
26 any portion of that opinion.

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VI.
CONCLUSION

Accordingly, IT IS ORDERED that Judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further proceedings consistent with this decision. IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order and the Judgment on counsel for both parties.

DATED: August 1, 2017

/s/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

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