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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

GARY B. MARTINEZ,

Plaintiff

v.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

Defendant.

Case No. 2:17-cv-05649-GJS

**MEMORANDUM OPINION AND  
ORDER**

**I. PROCEDURAL HISTORY**

Plaintiff filed a complaint seeking review of the decision of the Commissioner of Social Security denying his application for Disability Insurance Benefits (“DIB”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 9 and 20] and briefs addressing disputed issues in the case [Dkt. 13 (“Pl. Br.”), Dkt. 18 (“Def. Br.”), and Dkt. 19 (“Pl. Rep.”).] The Court has taken the parties’ briefing under submission without oral argument. For the reasons discussed below, the Court finds that this matter should be remanded.

**II. ADMINISTRATIVE DECISION UNDER REVIEW**

In October 2013, Plaintiff filed an application for DIB, alleging disability beginning on May 22, 2013. [Dkt. 12, Administrative Record (“AR”) 27, 173-74.]

1 After Plaintiff's application was denied at the initial level of review, Plaintiff  
2 requested a hearing. [AR 27, 119-24.] A hearing was held before Administrative  
3 Law Judge James P. Nguyen ("the ALJ") on November 2, 2015. [AR 50-103.] On  
4 January 21, 2016, the ALJ issued an unfavorable decision. [AR 27-37.]

5 The ALJ applied the five-step sequential evaluation process to find Plaintiff  
6 not disabled. *See* 20 C.F.R. § 404.1520(b)-(g)(1). At step one, the ALJ found  
7 Plaintiff had not engaged in substantial gainful activity since his alleged onset date.  
8 [AR 29.] At step two, the ALJ found that Plaintiff suffered from the severe  
9 impairments of cervical and lumbar strain/sprain, obesity, schizoaffective disorder  
10 depressed type, generalized anxiety disorder, panic disorder without agoraphobia,  
11 major depressive disorder with psychosis, schizophrenia, and psychotic disorder.  
12 [*Id.*] At step three, the ALJ determined that Plaintiff did not have an impairment or  
13 combination of impairments that meets or medically equals the severity of one of  
14 the impairments listed in Appendix I of the Regulations, ("the Listings"). [AR 30];  
15 *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1. Next, the ALJ found that Plaintiff had the  
16 residual functional capacity ("RFC") to perform a range of light work (20 C.F.R. §  
17 404.1567(b)), including the ability to understand, remember and carry out simple  
18 job instructions and maintain attention and concentration to perform simple, routine,  
19 and repetitive tasks. [AR 30.] The ALJ also found that Plaintiff could work in  
20 environments with occasional changes to the work setting and occasional work-  
21 related decision making, interact with the general public occasionally, and climb  
22 ramps and stairs, balance, stoop, kneel, crouch, crawl, and interact with coworkers  
23 and supervisors frequently, but Plaintiff was precluded from climbing ladders,  
24 ropes, and scaffolds and working at unprotected heights. [AR 30.] At step four, the  
25 ALJ found that Plaintiff was not able to perform his past relevant work. [AR 35-  
26 36.] At step five, the ALJ determined that Plaintiff could perform jobs existing in  
27 significant numbers in the national economy, including representative occupations  
28 such as stock checker, garment folder, and marker. [AR 36.]

1 The Appeals Council denied review of the ALJ's decision on June 1, 2017.  
2 [AR 1-4.] This action followed.

3 Plaintiff raises the following issues challenging the ALJ's findings and  
4 determination of non-disability:

- 5 1. The ALJ failed to properly weigh the medical evidence and failed to  
6 properly determine Plaintiff's RFC.
- 7 2. The ALJ failed to properly evaluate Plaintiff's subjective symptom  
8 testimony.
- 9 3. The ALJ presented a flawed hypothetical to the vocational expert.
- 10 4. The Appeals Council failed to properly consider new evidence.

11 [Pl. Br. at 1-18; Pl. Rep. at 1-2.] Plaintiff requests reversal and remand for payment  
12 of benefits or, in the alternative, remand for further administrative proceedings. [Pl.  
13 Br. at 18; Pl. Rep. at 2.]

14 The Commissioner asserts that the ALJ's decision should be affirmed, or in  
15 the alternative, remanded for further development of the record. [Def. Br. at 15-16.]

### 16 III. GOVERNING STANDARD

17 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's decision to  
18 determine if: (1) the Commissioner's findings are supported by substantial evidence;  
19 and (2) the Commissioner used correct legal standards. *See Carmickle v. Comm'r*  
20 *Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm'r Soc. Sec.*  
21 *Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial evidence is more than a  
22 mere scintilla but less than a preponderance; it is such relevant evidence as a  
23 reasonable mind might accept as adequate to support a conclusion." *Gutierrez v.*  
24 *Comm'r of Soc. Sec.*, 740 F.3d 519, 522-23 (9th Cir. 2014) (internal quotation marks  
25 and citations omitted).

26 The Court will uphold the Commissioner's decision when the evidence is  
27 susceptible to more than one rational interpretation. *Molina v. Astrue*, 674 F.3d  
28 1104, 1110-11 (9th Cir. 2012). However, the Court may review only the reasons

1 stated by the ALJ in his decision “and may not affirm the ALJ on a ground upon  
2 which he did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The  
3 Court will not reverse the Commissioner’s decision if it is based on harmless error,  
4 which exists if the error is “inconsequential to the ultimate nondisability  
5 determination, or that, despite the legal error, the agency’s path may reasonably be  
6 discerned.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (internal  
7 quotation marks and citations omitted).

#### 8 IV. DISCUSSION

9 In one of his claims of error, Plaintiff contends that the ALJ failed to provide  
10 sufficient reasons for rejecting his testimony concerning his symptoms and work-  
11 related limitations. [Pl. Br. 10-13.]

12 Once a disability claimant produces evidence of an underlying physical or  
13 mental impairment that could reasonably be expected to produce the symptoms  
14 alleged and there is no affirmative evidence of malingering, the ALJ must offer  
15 “specific, clear and convincing reasons” to reject the claimant’s testimony  
16 concerning the severity of his or her symptoms. *Trevizo v. Berryhill*, 871 F.3d 664,  
17 678-79 (9th Cir. 2017) (citation omitted); *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th  
18 Cir. 1996). The ALJ must specifically identify the testimony that is being rejected  
19 and discuss the evidence that undermines that testimony. *See Treichler v. Comm’r,*  
20 *Soc. Sec. Admin.*, 775 F.3d 1090, 1102-03 (9th Cir. 2014); *Reddick v. Chater*, 157  
21 F.3d 715, 722 (9th Cir. 1998); *see also Trevizo*, 871 F.3d at 679, n.5 (clarifying that  
22 “assessments of an individual’s testimony by an ALJ are designed to ‘evaluate the  
23 intensity and persistence of a claimant’s symptoms . . . ,’ and not to delve into wide-  
24 ranging scrutiny of the claimant’s character and apparent truthfulness”) (quoting  
25 Social Security Ruling 16-3p). If the ALJ’s assessment of the claimant’s testimony  
26 is reasonable and is supported by substantial evidence, it is not the Court’s role to  
27 “second-guess” it. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

28 In May 2013, Plaintiff was involuntarily hospitalized for three days, due to

1 auditory hallucinations, paranoia, and suicidal thoughts. [AR 33, 333-34.] Plaintiff  
2 was diagnosed with psychotic disorder NOS and was prescribed medication  
3 (Zyprexa) to treat his symptoms. [AR 334.]

4 In November 2013, Plaintiff reported in an exertion questionnaire that he  
5 suffers from schizophrenia associated with significant symptoms and limitations.  
6 [AR 222-24.] Plaintiff described problems with cognition, focus and concentration,  
7 memory, thought blocks, anxiety, paranoia, racing thoughts, nausea, fatigue, and  
8 tiredness. [AR 222-24.] Plaintiff also indicated he has trouble waking up in the  
9 morning, communicating with others, and finishing tasks. [AR 224.]

10 In April 2014, Plaintiff filed a request for reconsideration indicating that he  
11 was unable to perform simple jobs, because he has difficulty focusing and  
12 concentrating, has difficulty waking up some mornings, and experiences stress-  
13 induced symptoms such as hallucinations, delusions, and anxiety tremors. [AR 237-  
14 40.] Plaintiff stated that his medication helps to reduce his symptoms, but it does  
15 not eliminate them. [AR 237.]

16 At his hearing in November 2015, Plaintiff described ongoing problems with  
17 memory, focus, racing thoughts, disordered thinking, thought blocks, anxiety,  
18 depression, stress, fatigue, communication, repetitive thoughts, and audio  
19 hallucinations. [AR 56, 58, 60-65, 70, 73, 89-93.] Plaintiff testified that he has  
20 good days and bad days, but his symptoms intensify with fatigue and lack of sleep.  
21 [AR 87, 93.] Plaintiff explained that while medication (Zyprexa) helps his  
22 condition, his symptoms are only 60 to 70 percent controlled. [AR 65, 67-68, 89-  
23 93.]

24 The ALJ found Plaintiff's medically determinable impairments could  
25 reasonably be expected to cause some of Plaintiff's alleged symptoms and  
26 limitations, but the medical record did not support the severity of Plaintiff's alleged  
27 symptoms and limitations beyond those set forth in Plaintiff's RFC assessment.  
28 [AR 30-31, 35.] In support of this adverse determination, the ALJ asserted: (1)

1 “[t]he overall treatment notes reflect improvement and mental stability with proper  
2 medication adherence,” and (2) Plaintiff’s “self-reported activities of daily living are  
3 inconsistent with his allegations of disability.” [AR 31-35.]

4 **A. Treatment Records**

5 An ALJ may discount a claimant’s testimony when it contradicts evidence in  
6 the medical record. *See Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995).  
7 However, when a claimant presents mental health issues, “it is error to reject [his]  
8 testimony merely because symptoms wax and wane in the course of treatment.” *See*  
9 *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014). “Cycles of improvement  
10 and debilitating symptoms are a common occurrence, and in such circumstances it is  
11 error for an ALJ to pick out a few isolated instances of improvement over a period  
12 of months or years and to treat them as a basis for concluding a claimant is capable  
13 of working.” *Id.* To satisfy the clear and convincing standard, an ALJ must explain  
14 how periods of temporary well-being or specific examples of improvement “*in fact*  
15 constitute examples of a broader development” in the course of a claimant’s mental  
16 health treatment. *Id.* at 1018 (emphasis in original); *Ghanim v. Colvin*, 763 F.3d  
17 1154, 1164 (9th Cir. 2014) (a claimant’s “treatment records must be viewed in light  
18 of the overall diagnostic record”).

19 Here, the ALJ relied on some of Plaintiff’s treatment notes from Advances  
20 and Breakthroughs in Mental Health (“Advances”) and Pacifico Clinic El Camino  
21 (“Pacifico”) to show that Plaintiff’s mental condition had improved or was stable  
22 with the use of medication. [AR 31-33, 35, 373-74, 381, 466, 469, 474, 542, 551-  
23 52, 595, 612-13, 616-17.] However, when read as a whole, Plaintiff’s treatment  
24 records do not undermine his testimony. Although the ALJ identified isolated  
25 instances of improvement, the records from Advances and Pacifico show that  
26 Plaintiff continued to suffer from significant symptoms and limitations. *See*  
27 *Garrison*, 759 F.3d at 1017 (“Reports of improvement in the context of mental  
28 health issues must be interpreted with an understanding of the patient’s overall well-

1 being and the nature of her symptoms.”); *see also Punzio v. Astrue*, 630 F.3d 704,  
2 710 (9th Cir. 2011) (“[A] person who suffers from a mental illness will have better  
3 days and worse days, so a snapshot of any single moment says little about her  
4 overall condition.”); *Delegans v. Colvin*, 584 Fed. App’x 328, 330-31 (9th Cir.  
5 2014) (“An ALJ may not single out moments of good health to discredit a claimant,  
6 especially in cases involving mental impairments, which often present  
7 episodically.”). For example, the ALJ cited to three of Plaintiff’s treatment records  
8 from Advances, which indicated that Plaintiff had gone to the movies and played  
9 basketball with friends in August 2013, continued to improve on medication and felt  
10 generally better in September 2013, and had increased activities of daily living and  
11 markedly reduced thought blocking in October 2013. [AR 31, 373-74, 381.]  
12 However, other treatment records from Advances that were not cited by the ALJ  
13 indicate that Plaintiff suffered ongoing mental problems that never fully resolved  
14 with medication. [AR 65, 67-68, 89-93.] Notably, in July 2013, Plaintiff reported  
15 that he had a breakdown, was feeling anxious and sad, and had brief thoughts of  
16 hurting someone he loved. [AR 420.] In September 2013, Plaintiff was having  
17 difficulty expressing his thoughts into speech. [AR 403.] And in October 2013,  
18 Plaintiff was sad, anxious, depressed and experiencing thoughts of suicide. [AR  
19 384, 391.] Similarly, the treatment records from Pacifico suggest periods of  
20 temporary well-being rather than examples of “broader development” or overall  
21 improvement. *See Garrison*, 759 F.3d at 1018; [AR 32-33, 466, 469, 474, 542, 551-  
22 52, 595, 612-13, 616-17.] Pacifico records from December 2014 through July 2015  
23 that were not cited by the ALJ reveal that Plaintiff suffered from depression, sad  
24 moods, anxiety, feelings of worthlessness, restlessness, difficulty concentrating and  
25 focusing on tasks, suicidal ideation, paranoid delusions, audio hallucinations,  
26 communication problems, forgetfulness, poor sleep, and repetitive, disordered,  
27 distorted, racing, and random thoughts. [AR 539, 542, 547, 560, 562, 568, 572,  
28 582-84, 586.] Further, in July 2015, Plaintiff’s treating psychiatrist at Pacifico

1 assessed Plaintiff with numerous moderate and moderate-to-marked limitations in  
2 mental functioning. [AR 512-16.] Thus, despite some signs of improvement with  
3 medication, the treatment records show that Plaintiff continued to frequently  
4 experience significant symptoms from his mental impairments.

5 As the treatment records on which the ALJ relied are not indicative of  
6 Plaintiff's overall mental condition, they do not provide a specific, clear, and  
7 convincing basis for discounting Plaintiff's testimony. *See Garrison*, 759 F.3d at  
8 1018; *Ghanim*, 763 F.3d at 1164.

### 9 **B. Daily Activities**

10 The ALJ found that Plaintiff's testimony was inconsistent with his self-  
11 reported daily activities, which included driving, bathing, getting dressed,  
12 performing household chores, shopping, cooking, paying bills, handling cash, going  
13 out, reading, watching movies, swimming, playing basketball, and using a computer.  
14 [AR 35.] The ALJ also noted that Plaintiff volunteers at a hospital once a week,  
15 occasionally goes door to door with members from his church to talk to people  
16 about his faith, and exercises regularly by walking on a treadmill, riding a stationary  
17 bike, or walking outside for two to three miles. [AR 35.] Plaintiff's admitted  
18 activities do not justify rejection of Plaintiff's testimony.

19 First, the ALJ's general statement about Plaintiff's activities fails to specify  
20 which of Plaintiff's daily activities conflict with which aspects of his testimony. *See*  
21 *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014). Merely generally  
22 referencing Plaintiff's daily activities was insufficient to establish a conflict with  
23 Plaintiff's testimony. *See Orn*, 495 F.3d at 639; *Lester*, 81 F.3d at 834 ("General  
24 findings are insufficient; rather, the ALJ must identify what testimony is not  
25 credible and what evidence undermines the claimant's complaints.").

26 Second, the ALJ mischaracterized Plaintiff's statements regarding several of  
27 his activities. For example, although Plaintiff is able to drive, Plaintiff testified that  
28 he has not driven since he got sick, as his doctors advised him not to drive. [AR 35,



1 56.] And, while Plaintiff volunteers at a hospital for about four hours a week, he  
2 testified that he experiences thought blocks, which make it difficult to stay focused  
3 on tasks, answer questions over the phone, and communicate with people. [AR 60-  
4 62, 80.] Plaintiff also testified that he does not have to perform tasks if he thinks  
5 they are too difficult and he can cancel his volunteer work at the hospital if he feels  
6 tired or needs to sleep. [AR 62, 76.] Finally, although Plaintiff testified that he goes  
7 door to door with members from his church for about two hours a week, he also  
8 stated that he feels anxious and does not enjoy the activity, because he has trouble  
9 remembering the presentations and difficulty talking to people. [AR 62-63, 70.]  
10 Thus, the ALJ failed to address a number of limiting factors when recounting some  
11 of Plaintiff's activities.

12 Third, the record does not show that Plaintiff's daily activities, as he  
13 described them, are inconsistent with his testimony about his mental impairments  
14 and limitations. [AR 35.] "[D]isability claimants should not be penalized for  
15 attempting to lead normal lives in the face of their limitations." *Reddick*, 157 F.3d  
16 at 722 (holding that "[o]nly if the level of activity were inconsistent with [a  
17 claimant's] claimed limitations would these activities have any bearing on [the  
18 claimant's] credibility") (citations omitted). Plaintiff's activities such as bathing,  
19 dressing, performing some household chores, shopping, cooking, paying bills,  
20 handling cash, going out alone, reading, watching movies, swimming, playing  
21 basketball, using computers, exercising daily, and volunteering are not necessarily  
22 inconsistent with the mental health symptoms and limitations Plaintiff described in  
23 his testimony, such as hearing voices, having difficulty focusing, needing to sleep  
24 12 to 14 hours a day, and suffering from thought blocks, racing thoughts, memory  
25 problems, repetitive thoughts, and fatigue. [AR 35, 55, 58, 60-64, 80-85, 90-93];  
26 *see Garrison*, 759 F.3d at 1016 (warning that ALJs must be cautious in concluding  
27 that daily activities are inconsistent with a claimant's testimony, "because  
28 impairments that would unquestionably preclude work and all the pressures of a

1 workplace environment will often be consistent with doing more than merely resting  
2 in bed all day”); *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012) (“The critical  
3 differences between activities of daily living and activities in a full-time job are that  
4 a person has more flexibility in scheduling the former than the latter, can get help  
5 from other persons . . . , and is not held to a minimum standard of performance, as  
6 she would be by an employer.”). Thus, the ALJ erred in concluding that Plaintiff’s  
7 testimony was undermined by his daily activities.

8 In sum, the ALJ did not offer specific, clear, and convincing reasons for  
9 discounting Plaintiff’s testimony concerning his mental impairments and limitations.

## 10 V. CONCLUSION

11 When the Court reverses an ALJ’s decision for error, the Court “ordinarily  
12 must remand to the agency for further proceedings.” *Leon v. Berryhill*, 880 F.3d  
13 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004)  
14 (“the proper course, except in rare circumstances, is to remand to the agency for  
15 additional investigation or explanation”); *Treichler*, 775 F.3d at 1099. But the Court  
16 does have discretion to make a direct award of benefits under the “credit-as-true”  
17 rule, which asks whether: “(1) the record has been fully developed and further  
18 administrative proceedings would serve no useful purpose; (2) the ALJ has failed to  
19 provide legally sufficient reasons for rejecting evidence, whether claimant testimony  
20 or medical opinion; and (3) if the improperly discredited evidence were credited as  
21 true, the ALJ would be required to find the claimant disabled on remand.”  
22 *Garrison*, 759 F.3d at 1020. Each part of this three-part standard must be satisfied  
23 for the Court to remand for an award of benefits, *id.*, and it is only the “unusual  
24 case” that meets this standard, *Benecke*, 379 F.3d at 595. Moreover, if “an  
25 evaluation of the record as a whole creates serious doubt that a claimant is, in fact,  
26 disabled,” a court must remand for further proceedings “even though all conditions  
27 of the credit-as-true rule are satisfied.” *Garrison*, 759 F.3d at 1021; *see also Leon*,  
28 880 F.3d at 1045 (“an award under [the credit-as-true] rule is a rare exception, and

1 the rule was intended to deter ALJs from providing boilerplate rejections without  
2 analysis”); *Brown-Hunter*, 806 F.3d at 495 (“The touchstone for an award of  
3 benefits is the existence of a disability, not the agency’s legal error.”).

4 This case does not present one of the rare or unusual circumstances in which  
5 an order for the immediate award of benefits would be appropriate. The ALJ’s  
6 findings regarding Plaintiff’s subjective symptom testimony were inadequate, but  
7 Plaintiff’s entitlement to benefits remains unclear. Further administrative  
8 proceedings would be useful to allow the ALJ to fully evaluate the extent to which  
9 Plaintiff’s mental impairments limit his ability to work. *See Garrison*, 759 F.3d at  
10 1020; *Dominguez v. Colvin*, 808 F.3d 403, 407 (9th Cir. 2016) (remand for further  
11 proceedings is appropriate when the record is not “fully developed”). Therefore,  
12 remand for further administrative proceedings is warranted. On remand, the ALJ  
13 should conduct a review of the entire record in a manner that is consistent with the  
14 Court’s findings.<sup>1</sup>

15  
16 **IT IS SO ORDERED.**

17  
18 DATED: October 10, 2018

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20 \_\_\_\_\_  
21 GAIL J. STANDISH  
22 UNITED STATES MAGISTRATE JUDGE  
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26 \_\_\_\_\_  
27 <sup>1</sup> Because this matter is being remanded for further administrative proceedings  
28 and consideration of Plaintiff’s subjective symptom testimony, the Court declines to  
reach the remaining issues raised by Plaintiff. Nevertheless, the ALJ should  
consider Plaintiff’s additional contentions of error when evaluating the evidence on  
remand.