



1 **I. BACKGROUND**

2 Plaintiff protectively filed applications for DIB and SSI on March 10, 2017,  
3 alleging disability beginning on January 8, 2015. Transcript (“Tr.”) 11, 183-201.<sup>2</sup>  
4 Following a denial of benefits, Plaintiff requested a hearing before an  
5 administrative law judge (“ALJ”) and, on July 1, 2019, ALJ Janice E. Barnes-  
6 Williams determined that Plaintiff was not disabled. Tr. 11-22. Plaintiff sought  
7 review of the ALJ’s decision with the Appeals Council, however, review was  
8 denied on April 30, 2020. Tr. 3-6. This appeal followed.

9 **II. STANDARD OF REVIEW**

10 The reviewing court shall affirm the Commissioner’s decision if the decision  
11 is based on correct legal standards and the legal findings are supported by  
12 substantial evidence in the record. 42 U.S.C. § 405(g); Batson v. Comm’r Soc.  
13 Sec. Admin., 359 F.3d 1190, 1193 (9th Cir. 2004). Substantial evidence is “more  
14 than a mere scintilla. It means such relevant evidence as a reasonable mind might  
15 accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389,  
16 401 (1971) (citation and internal quotation marks omitted). In reviewing the  
17 Commissioner’s alleged errors, this Court must weigh “both the evidence that  
18 supports and detracts from the [Commissioner’s] conclusions.” Martinez v.  
19 Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

20 “When evidence reasonably supports either confirming or reversing the  
21 ALJ’s decision, [the Court] may not substitute [its] judgment for that of the ALJ.”  
22 Ghanim v. Colvin, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting Batson, 359 F.3d  
23 at 1196); see also Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002) (“If the  
24 ALJ’s credibility finding is supported by substantial evidence in the record, [the  
25 Court] may not engage in second-guessing.”) (citation omitted). A reviewing  
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27 <sup>2</sup> A certified copy of the Administrative Record was filed on January 26, 2021. Electronic Case  
28 Filing Number (“ECF No.”) 16. Citations will be made to the Administrative Record or  
Transcript page number rather than the ECF page number.

1 court, however, “cannot affirm the decision of an agency on a ground that the  
2 agency did not invoke in making its decision.” Stout v. Comm’r Soc. Sec. Admin.,  
3 454 F.3d 1050, 1054 (9th Cir. 2006) (citation omitted). Finally, a court may not  
4 reverse an ALJ’s decision if the error is harmless. Burch v. Barnhart, 400 F.3d  
5 676, 679 (9th Cir. 2005) (citation omitted). “[T]he burden of showing that an error  
6 is harmful normally falls upon the party attacking the agency’s determination.”  
7 Shinseki v. Sanders, 556 U.S. 396, 409 (2009).

### 8 III. DISCUSSION

#### 9 A. Establishing Disability Under The Act

10 To establish whether a claimant is disabled under the Act, it must be shown  
11 that:

12 (a) the claimant suffers from a medically determinable physical or  
13 mental impairment that can be expected to result in death or that has  
14 lasted or can be expected to last for a continuous period of not less than  
15 twelve months; and

16 (b) the impairment renders the claimant incapable of performing the  
17 work that the claimant previously performed and incapable of  
18 performing any other substantial gainful employment that exists in the  
19 national economy.

20 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C.  
21 § 423(d)(2)(A)). “If a claimant meets both requirements, he or she is ‘disabled.’”  
22 Id.

23 The ALJ employs a five-step sequential evaluation process to determine  
24 whether a claimant is disabled within the meaning of the Act. Bowen v. Yuckert,  
25 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520(a), 416.920(a). Each step is  
26 potentially dispositive and “if a claimant is found to be ‘disabled’ or ‘not-disabled’  
27 at any step in the sequence, there is no need to consider subsequent steps.”  
28 Tackett, 180 F.3d at 1098; 20 C.F.R. §§ 404.1520, 416.920. The claimant carries

1 the burden of proof at steps one through four, and the Commissioner carries the  
2 burden of proof at step five. Tackett, 180 F.3d at 1098.

3 The five steps are:

4 Step 1. Is the claimant presently working in a substantially  
5 gainful activity [(“SGA”)]? If so, then the claimant is “not disabled”  
6 within the meaning of the [] Act and is not entitled to [DIB or SSI]. If  
7 the claimant is not working in a [SGA], then the claimant’s case cannot  
8 be resolved at step one and the evaluation proceeds to step two. See 20  
9 C.F.R. § 404.1520(b).[<sup>3</sup>]

10 Step 2. Is the claimant’s impairment severe? If not, then the  
11 claimant is “not disabled” and is not entitled to [DIB or SSI]. If the  
12 claimant’s impairment is severe, then the claimant’s case cannot be  
13 resolved at step two and the evaluation proceeds to step three. See 20  
14 C.F.R. § 404.1520(c).

15 Step 3. Does the impairment “meet or equal” one of a list of  
16 specific impairments described in the regulations? If so, the claimant  
17 is “disabled” and therefore entitled to [DIB or SSI]. If the claimant’s  
18 impairment neither meets nor equals one of the impairments listed in  
19 the regulations, then the claimant’s case cannot be resolved at step three  
20 and the evaluation proceeds to step four. See 20 C.F.R. § 404.1520(d).

21 Step 4. Is the claimant able to do any work that he or she has  
22 done in the past? If so, then the claimant is “not disabled” and is not  
23 entitled to [DIB or SSI]. If the claimant cannot do any work he or she  
24 did in the past, then the claimant’s case cannot be resolved at step four  
25 and the evaluation proceeds to the fifth and final step. See 20 C.F.R.  
26 § 404.1520(e).

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<sup>3</sup> The Court has also considered the parallel regulations set forth in 20 C.F.R. § 416.920 et seq.,  
when analyzing the ALJ’s denial of Plaintiff’s SSI application.

1           Step 5. Is the claimant able to do any other work? If not, then  
2 the claimant is “disabled” and therefore entitled to [DIB or SSI]. See  
3 20 C.F.R. § 404.1520(f)(1). If the claimant is able to do other work,  
4 then the Commissioner must establish that there are a significant  
5 number of jobs in the national economy that claimant can do. There  
6 are two ways for the Commissioner to meet the burden of showing that  
7 there is other work in “significant numbers” in the national economy  
8 that claimant can do: (1) by the testimony of a vocational expert  
9 [(“VE”)], or (2) by reference to the Medical-Vocational Guidelines at  
10 20 C.F.R. pt. 404, subpt. P, app. 2. If the Commissioner meets this  
11 burden, the claimant is “not disabled” and therefore not entitled to [DIB  
12 or SSI]. See 20 C.F.R. §§ 404.1520(f), 404.1562. If the Commissioner  
13 cannot meet this burden, then the claimant is “disabled” and therefore  
14 entitled to [DIB or SSI]. See id.

15 Id. at 1098-99.

16           **B. Summary Of ALJ’s Findings**

17           The ALJ determined that “[Plaintiff] met the insured status requirements of  
18 the . . . Act through December 31, 2017.” Tr. 13. The ALJ then found at step one,  
19 that “[Plaintiff] has not engaged in [SGA] since January 8, 2015, the alleged onset  
20 date (20 C.F.R. 404.1571 et seq. and 416.971 et seq.)” Id. At step two, the ALJ  
21 found that “[Plaintiff] has the following severe impairments: lumbar degenerative  
22 disc disease, thoracic degenerative disc disease, obesity, bilateral hand and wrist  
23 arthritis, and major depressive disorder with anxiety (20 CFR 404.1520(c) and  
24 416.920(c)).” Id. At step three, the ALJ found that “[Plaintiff] does not have an  
25 impairment or combination of impairments that meets or medically equals the  
26 severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix  
27 1 (20 CFR 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926).”  
28 Tr. 14.

1 In preparation for step four, the ALJ found that Plaintiff has the residual  
2 functional capacity (“RFC”) to:

3 lift and carry up to 50 pounds occasionally and up to 25 pounds  
4 frequently. He can stand and/or walk for up to 6 hours and sit for up to  
5 6 hours in an 8-hour workday. He can frequently handle and finger  
6 with the left hand. He should avoid extreme cold, excessive vibration  
7 and unprotected heights. He can perform simple, routine, and repetitive  
8 tasks, which may require detailed instructions but do not involve  
9 complex tasks.

10 Tr. 16. The ALJ then found, at step four, that “[Plaintiff] is unable to perform any  
11 past relevant work (20 CFR 404.1565 and 416.965).” Tr. 21.

12 In preparation for step five, the ALJ noted that “[Plaintiff] was born on  
13 December 28, 1958, and was 56 years old, which is defined as an individual of  
14 advanced age, on the date the alleged disability onset date (20 CFR 404.1563 and  
15 416.963).” Id. The ALJ added that “[i]n December 2018, [Plaintiff] changed age  
16 categories to closely approaching retirement age.” Id.

17 The ALJ observed that “[Plaintiff] has at least a high school education and is  
18 able to communicate in English (20 CFR 404.1564 and 416.964).” Id. The ALJ  
19 then added that “[t]ransferability of job skills is not material to the determination of  
20 disability because using the Medical-Vocational Rules as a framework supports a  
21 finding that [Plaintiff] is ‘not disabled,’ whether or not [Plaintiff] has transferable  
22 job skills (See SSR 82-41 and 20 CFR Part 404, Subpart P, Appendix 2).” Id.

23 At step five, the ALJ found that “[c]onsidering [Plaintiff’s] age, education,  
24 work experience, and [RFC], there are jobs that exist in significant numbers in the  
25 national economy that [Plaintiff] can perform (20 CFR 404.1569, 404.1569a,  
26 416.969, and 416.969a).” Id. Specifically, the ALJ found that Plaintiff could  
27 perform the “medium” occupations of “counter supply worker” as defined in the  
28 Dictionary of Occupational Titles (“DOT”) at DOT 319.687-010, “tumbler

1 operator” at DOT 369.685.034, and laundry worker at DOT 361.684-014. Tr. 22.  
2 The ALJ based their decision that Plaintiff could perform the aforementioned  
3 occupations “on the testimony of the [VE]” from the administrative hearing, after  
4 “determin[ing] that the [VE’s] testimony [wa]s consistent with the information  
5 contained in the [DOT] and the Selected Characteristics of Occupations  
6 [(“SCO”).” Id.

7 After finding that “[Plaintiff] is capable of making a successful adjustment  
8 to other work that exists in significant numbers in the national economy,” the ALJ  
9 concluded that “[a] finding of not disabled is . . . appropriate under the framework  
10 of the above-cited rule.” Id. (internal quotation marks omitted). The ALJ,  
11 therefore, found that Plaintiff “has not been under a disability, as defined in the . . .  
12 Act, from January 8, 2015, through the date of this decision (20 CFR 404.1520(g)  
13 and 416.920(g)).” Id.

14 **C. Issue Presented**

15 In this appeal, Plaintiff raises one issue, whether the ALJ properly  
16 considered the examining opinion of Ernest A. Bagner III, M.D. (“Dr. Bagner”).  
17 ECF No. 19, Joint Stip. at 5.

18 **D. Court’s Consideration Of Issue**

19 **1. Parties’ Arguments**

20 Plaintiff argues that “[t]he ALJ impermissibly rejected Dr. Bagner’s  
21 examining opinion.” Id. Specifically, Plaintiff argues that although the ALJ stated  
22 they gave ““significant weight”” to Dr. Bagner’s opinion, the ALJ nevertheless  
23 “rejected Dr. Bagner’s opinion that [Plaintiff] had a moderate limitation in dealing  
24 with the public, co-worker[’s], and supervisors and in the ability to respond to work  
25 pressure in a usual work setting” by giving ““greater weight”” to the opinion of  
26 Heather Bradley, Ph.D. (“Dr. Bradley”), that omitted these limitations. Id. at 6  
27 (quoting Tr. 19, citing Tr. 381). Plaintiff explains that the ALJ gave Dr. Bradley’s  
28 non-examining opinion greater weight because Dr. Bradley “had the ‘opportunity

1 to review records not available to Dr. Bagner[ ]” but, Plaintiff argues, “[t]his  
2 statement is not supported by the record” because “[t]he only medical evidence of  
3 record (MER) reviewed by Dr. Bradley was Dr. Bagner’s assessment.” Id. at 7  
4 (quoting Tr. 19). Plaintiff adds that Dr. Bradley “did not indicate that she reviewed  
5 medical records not contemplated by Dr. Bagner” and instead, Plaintiff notes that  
6 Dr. Bradley indicated only that “the record did not reveal ‘compelling evidence in  
7 the MER to suggest significant limitations in social functioning attributable to the  
8 mental impairment.’” Id. (quoting Tr. 100). Plaintiff, therefore, argues that “the  
9 ALJ rejected Dr. Bagner’s examining opinion with no more than the opinion of a  
10 nonexamining opinion” and that “without more, Dr. Bradley’s opinion alone is not  
11 substantial evidence” to reject Dr. Bagner’s opinion. Id. (citation omitted).  
12 Plaintiff adds that “there is absolutely no explanation as to why Dr. Bagner’s  
13 opinion regarding work-pressure was not adopted or considered.” Id. at 8 (citation  
14 omitted).

15         Consequently, Plaintiff argues that “the ALJ did not provide specific and  
16 legitimate reasons for rejecting significant limitations found by Dr. Bagner [and]  
17 [a]s a result, the ALJ’s decision is not based on substantial evidence and free from  
18 legal error.” Id. (citations omitted).

19         Defendant responds that “the ALJ fully explained [their] rejection of Dr.  
20 Bagner’s moderate findings” and “[b]ecause substantial evidence supports the  
21 ALJ’s RFC finding, Plaintiff’s argument fails.” Id. at 9 (citing Tr. 15-16, 19).  
22 Defendant asserts that “the ALJ fully explained [their] partial rejection of certain  
23 aspects of Dr. Bagner’s opinion, based on both Dr. Bradley’s better supported  
24 opinion and on other significant evidence in the record.” Id. at 11 (citing Tr. 15-  
25 16, 19). Defendant argues that “Plaintiff fails to acknowledge the ALJ’s thorough  
26 discussion of [their] reasoning in rejecting these limitations, based both on Dr.  
27 Bradley’s opinion and on the record as whole.” Id.

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1 Defendant asserts that “[w]ith respect to Plaintiff’s ability to interact with  
2 others,” “[t]he ALJ expressly noted that Dr. Bagner found that Plaintiff had  
3 moderate limitations in interacting with others, but explained that ‘the overall  
4 record is more consistent with a mild limitation.’” Id. (quoting and citing Tr. 15).  
5 Defendant adds that “[t]he ALJ also specifically addressed Dr. Bagner’s finding of  
6 moderate limitations in [Plaintiff’s] ability to adapt to workplace pressures[,] . . .  
7 but found that the record did not support limitation in Plaintiff’s ability to adapt or  
8 manage himself.” Id. at 12 (citing Tr. 16).

9 Defendant also argues that the ALJ’s finding that Dr. Bradley’s opinion was  
10 entitled to greater weight than Dr. Bagner’s opinion “because Dr. Bradley ‘had the  
11 opportunity to review records not available to Dr. Bagner[.]’” was not erroneous  
12 because Plaintiff’s argument to the contrary “fails to acknowledge the ALJ’s full  
13 explanation of how Dr. Bagner’s moderate findings were unsupported by and  
14 inconsistent with the record.” Id. Defendant adds that “Dr. Bradley was able to  
15 review any medical records submitted by Plaintiff” and “to the extent Dr. Bradley  
16 did not have mental health treatment records to review, it was because Plaintiff  
17 was not receiving mental health treatment” and “[i]nstead of undermining the  
18 ALJ’s rejection of Dr. Bagner’s moderate findings, this fact supports the ALJ’s  
19 conclusion.” Id. Consequently, Defendant argues that “[a]ny error in the ALJ  
20 stating that Dr. Bradley reviewed additional medical records would be harmless at  
21 best.” Id. (citation omitted).

22 Defendant concludes by arguing that “the ALJ’s RFC finding is supported  
23 by substantial evidence and free from legal error” and that “the Court should affirm  
24 because the ALJ’s weighing of the medical evidence was reasonable and supported  
25 by substantial evidence.” Id. at 13.

## 26 2. Dr. Bagner’s Opinion

27 On June 26, 2017, Dr. Bagner performed a psychiatric consultative  
28 examination (“CE”) of Plaintiff and opined, in pertinent part, that Plaintiff had

1 “moderate” limitations in his ability to “follow detailed instructions[,]” “interact  
2 appropriately with the public, co-workers and supervisors[,]” and “respond to work  
3 pressure in a usual work setting.” Tr. 381. Dr. Bagner also opined that Plaintiff  
4 had “mild” limitations in his ability to “follow simple, oral and written  
5 instructions[,]” “comply with job rules such as safety and attendance[,]” “respond  
6 to changes in a routine setting[,]” and perform “daily activities.” Id. Dr. Bagner  
7 added that “[f]rom a psychiatric point of view, prognosis is poor without proper  
8 treatment.” Id. Dr. Bagner assessed that Plaintiff had a “[p]roblem related to  
9 social environment[,]” an “[o]ccupational problem[,]” a “[h]ousing problem[,]” an  
10 “[e]conomic problem[,]” and a “[h]ealth problem.” Id.

11 In reaching his opinions, Dr. Bagner diagnosed Plaintiff with major  
12 depressive disorder with anxiety and noted, in pertinent part, that Plaintiff was  
13 “currently homeless” at the time of the evaluation. Tr. 379-80. Dr. Bagner added  
14 that Plaintiff had received psychiatric outpatient treatment in August 2016 for one  
15 week and that Plaintiff “describe[d] his relationship with family and friends as  
16 poor.” Tr. 379. Dr. Bagner also noted that Plaintiff was “tearful” during the  
17 examination, his speech was “soft in tone[,]” his “volume was soft[,]” Plaintiff  
18 “was emotional[,]” his “mood was depressed an anxious[,]” Plaintiff could recall  
19 only “1 out of 3 objects in 5 minutes[,]” “[h]e was not able to spell the word  
20 ‘music’ forward and backward[,]” and “[w]hen asked what the meaning of the  
21 proverb ‘don’t judge a book by its cover,’ [Plaintiff] stated ‘I don’t know.’” Tr.  
22 380. Finally, Dr. Bagner observed that Plaintiff was a “fair historian” during the  
23 evaluation. Tr. 378.

### 24 3. Dr. Bradley’s Opinion

25 On July 31, 2017, Dr. Bradley prepared a Disability Determination and  
26 Explanation (“DDE”), in which she concluded that Plaintiff was not disabled. See  
27 Tr. 91-103 (DDE for Plaintiff’s DIB claim); Tr. 105-17 (DDE for Plaintiff’s SSI  
28 claim). In so concluding, Dr. Bradley first noted that with respect to Plaintiff’s

1 mental limitations, Plaintiff had problems with memory, “depressive, bipolar and  
2 related disorders[,]” anxiety, “[s]ustained concentration and persistence  
3 limitations[,]” and “[s]ocial interaction limitations.” Tr. 95, 97, 110-12.

4 Dr. Bradley next noted that, with respect to the medical evidence she  
5 reviewed relating to Plaintiff’s mental impairments when preparing her DDE, she  
6 reviewed only the CE findings of Dr. Bagner from June 26, 2017, Tr. 92-93, 98,  
7 106-07, 112, and explained that “evidence that may have been available from  
8 [Plaintiff’s] medical source(s) cannot be obtained[,]” Tr. 95, 109.

9 Dr. Bradley then made several observations with respect to Plaintiff’s CE  
10 with Dr. Bagner in June 2017. Dr. Bradley observed that Dr. Bagner noted that  
11 Plaintiff was “overall independent able” in terms of Plaintiff’s activities of daily  
12 living (“ADLs”). Tr. 95, 110. Dr. Bradley also observed that Plaintiff’s  
13 “[p]resentation and social interaction with the examiner during [the] mental CE  
14 was adequate” and that the “objective [mental status examination (“MSE”)] did not  
15 reveal any evidence of significant dysfunction in orientation, communication,  
16 perception, or thought.” Tr. 96-97, 111. Dr. Bradley added that Plaintiff’s  
17 “[m]emory and concentration were below expectations but not significantly  
18 impaired.” Id.

19 Dr. Bradley opined that Dr. Bagner’s medical source statement (“MSS”) was  
20 “too restrictive [and] not supporte[d] w[ith the] overall [evidence of record  
21 (“EOR”)] [in Plaintiff’s] file.” Id. Dr. Bradley also found, however, that Dr.  
22 Bagner’s medical source opinion (“MSO”) “of mild to moderate limitations is  
23 supported by/consistent with [Plaintiff’s] MSE performance.” Tr. 97, 111.

24 Based on her review of Plaintiff’s mental health EOR, which again included  
25 only Dr. Bagner’s opinion, Dr. Bradley opined that Plaintiff’s mental health  
26 problems caused:

- 27 • “mild” limitations in Plaintiff’s ability to remember or apply information  
28 and to interact with others;

- 1           • “moderate” limitations in his ability to concentrate, persist, or maintain  
2           pace; and  
3           • “no” limitations in Plaintiff’s ability to manage himself.

4 Tr. 96, 110 (capitalization normalized).

5           Dr. Bradley then elaborated that, with respect to Plaintiff’s “sustained  
6 concentration and persistence limitations[,]” Plaintiff would be “[m]oderately  
7 limited” in his ability to:

- 8           • “carry out detailed instructions”;  
9           • “maintain attention and concentration for extended periods”; and  
10          • “complete a normal workday and workweek without interruptions from  
11          psychologically based symptoms and to perform at a consistent pace  
12          without an unreasonable number and length of rest periods.”

13 Tr. 100, 114.

14          Dr. Bradley opined, however, that Plaintiff was “[n]ot significantly limited”  
15 in his ability to:

- 16          • “carry out very short and simple instructions”;  
17          • “perform activities within a schedule, maintain regular attendance, and be  
18          punctual within customary tolerances”;  
19          • “sustain an ordinary routine without special supervision”;  
20          • “work in coordination with or in proximity to others without being  
21          distracted by them”; and  
22          • “make simple work-related decisions.”

23 Id.

24          Dr. Bradley explained that Plaintiff’s “capacity to attend and persist for 2-  
25 hour intervals while accomplishing job tasks consisting of straightforward,  
26 recurring, and uniform steps is not seriously limited by the presence of the mental  
27 impairment.” Id. Dr. Bradley added, “[h]owever, [that] the signs/symptoms of the  
28 mental impairment could cause [Plaintiff] to have difficulty maintaining levels of

1 concentration and productivity for skilled work, particularly in work environments  
2 requiring multitasking under pressure.” Tr. 100, 114-15. Dr. Bradley opined that  
3 Plaintiff would have “[n]o” social interaction limitations” because “[t]here is no  
4 compelling evidence in the MER to suggest significant limitations in social  
5 functioning attributable to the mental impairment.” Tr. 100, 115.

6 Dr. Bradley then elaborated that with respect to Plaintiff’s “adaptation  
7 limitations[,]” Plaintiff would be “[m]oderately limited” in his ability to “respond  
8 appropriately to changes in the work setting.” Tr. 101, 115.

9 Dr. Bradley opined, however, that Plaintiff was “[n]ot significantly limited”  
10 in his ability to:

- 11 • “be aware of normal hazards and take appropriate precautions”;
- 12 • “travel in unfamiliar places or use public transportation”; and
- 13 • “set realistic goals or make plans independently of others.”

14 Id. Dr. Bradley explained that “[t]here is no compelling evidence to suggest that  
15 [Plaintiff’s] capacity to appreciate/adhere to occupational safety guidelines, secure  
16 transportation to a jobsite, or do basic planning for work activities is especially  
17 limited by mental impairment.” Id. Dr. Bradley added, however, that Plaintiff’s  
18 “capacity to adjust effectively to abrupt changes in the work schedule/process is  
19 likely limited by the mental impairments.” Id.

20 Dr. Bradley concluded her DDE by opining that “[o]verall MER and  
21 functional evidence indicates that [Plaintiff’s] mental impairments appear to  
22 impose some work related limitations, but do not preclude all work. [Plaintiff] is  
23 able to meet the mental demands of a simple vocation on a sustained basis, despite  
24 the limitations resulting from any impairment.” Id.

#### 25 4. The ALJ’s Consideration Of Relevant Medical Opinions

##### 26 a. The ALJ’s Consideration Of Dr. Bradley’s Opinion

27 The ALJ observed that Dr. Bradley “opined that [Plaintiff] had a moderate  
28 limitation in the ability to concentrate persist and maintain pace but retained the

1 ability to perform simple tasks on a sustained basis.” Tr. 19 (citations omitted).  
2 The ALJ gave Dr. Bradley’s opinion “significant weight” because “Dr. Bradley  
3 had the opportunity to review [Plaintiff’s] statements and medical records” and  
4 because “her findings are supported by the examination and opinion by the [CE] as  
5 well as [Plaintiff’s] [ADLs].” Id. (citations omitted).

6 b. The ALJ’s Consideration Of Dr. Bagner’s Opinion

7 The ALJ observed that Dr. Bagner “opined that [Plaintiff] could perform  
8 simple instructions with mild limitations and detailed instructions with moderate  
9 limitations, interact with others with a moderate limitation, comply with attendance  
10 with a mild limitation[], respond to changes with a mild limitation[], and respond  
11 to work pressure with a moderate limitation.” Id. (citation omitted). The ALJ gave  
12 Dr. Bagner’s opinion “significant weight” because it was “supported by his  
13 examination of [Plaintiff] and [Plaintiff’s] difficulty concentrating.” Id. (citation  
14 omitted). The ALJ added that Dr. Bagner’s “opinion is considered in context with  
15 the remaining records and where his opinion varies from Dr. Bradley, Dr.  
16 Bradley’s opinion is given greater weight as she had the opportunity to review  
17 records not available to Dr. Bagner.” Id.

18 **5. Standard To Review The ALJ’s Analysis Of Medical**  
19 **Opinions**

20 There are three types of medical opinions in Social Security cases: those  
21 from treating physicians, examining physicians, and non-examining physicians.  
22 Valentine v. Comm’r Soc. Sec. Admin., 574 F.3d 685, 692 (9th Cir. 2009) (citation  
23 omitted). “The medical opinion of a claimant’s treating physician is given  
24 ‘controlling weight’ so long as it ‘is well-supported by medically acceptable  
25 clinical and laboratory diagnostic techniques and is not inconsistent with the other  
26 substantial evidence in [the claimant’s] case record.” Trevizo v. Berryhill, 871  
27 F.3d 664, 675 (9th Cir. 2017) (quoting 20 C.F.R. § 404.1527(c)(2)). “When a  
28 treating physician’s opinion is not controlling, it is weighted according to factors

1 such as the length of the treatment relationship and the frequency of examination,  
2 the nature and extent of the treatment relationship, supportability, consistency with  
3 the record, and specialization of the physician.” Id. (citing 20 C.F.R.  
4 § 404.1527(c)(2)–(6)).

5 “To reject [the] uncontradicted opinion of a treating or examining doctor,  
6 an ALJ must state clear and convincing reasons that are supported by substantial  
7 evidence.” Id. (quoting Ryan v. Comm’r Soc. Sec. Admin., 528 F.3d 1194, 1198  
8 (9th Cir. 2008)). “This is not an easy requirement to meet: ‘the clear and  
9 convincing standard is the most demanding required in Social Security cases.’”  
10 Garrison v. Colvin, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting Moore v. Comm’r  
11 Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002)).

12 “If a treating or examining doctor’s opinion is contradicted by another  
13 doctor’s opinion, an ALJ may only reject it by providing specific and legitimate  
14 reasons that are supported by substantial evidence.” Trevizo, 871 F.3d at 675  
15 (quoting Ryan, 528 F.3d at 1198). “This is so because, even when contradicted, a  
16 treating or examining physician’s opinion is still owed deference and will often be  
17 ‘entitled to the greatest weight . . . even if it does not meet the test for controlling  
18 weight.’” Garrison, 759 F.3d at 1012 (quoting Orn v. Astrue, 495 F.3d 625, 633  
19 (9th Cir. 2007)). “The ALJ can meet this burden by setting out a detailed and  
20 thorough summary of the facts and conflicting clinical evidence, stating his  
21 interpretation thereof, and making findings.” Trevizo, 871 F.3d at 675 (quoting  
22 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)).

## 23 **6. The ALJ’s Decision Is Not Supported By Substantial** 24 **Evidence**

25 As an initial matter, the Court observes that Dr. Bagner’s opinion is  
26 contradicted by Dr. Bradley’s opinion. Specifically, Dr. Bagner opined that  
27 Plaintiff had moderate limitations in his ability to “interact appropriately with the  
28 public, co-workers and supervisors[,]” Tr. 381, whereas Dr. Bradley opined at one

1 point that Plaintiff would have only “mild” limitations in his ability to “interact  
2 with others,” Tr. 100, 114, and, at another point, that Plaintiff would have “[n]o”  
3 social interaction limitations[,]” Tr. 100, 115. Moreover, Dr. Bagner opined that  
4 Plaintiff would have moderate limitations in his ability to “respond to work  
5 pressure in a usual work setting[,]” Tr. 381, whereas Dr. Bradley opined that  
6 Plaintiff would merely “have difficulty maintaining levels of concentration and  
7 productivity” in a “skilled work[ing]” environment only and “particularly in work  
8 environments requiring multitasking under pressure[,]” Tr. 100, 114-15. Finally,  
9 as noted previously, although Dr. Bradley found that Dr. Bagner’s MSO “of mild  
10 to moderate limitations is supported by/consistent with [Plaintiff’s] MSE  
11 performance[,]” Tr. 97, 111, Dr. Bradley also opined that Dr. Bagner’s MSS was  
12 “too restrictive [and] not supporte[d] w[ith the] overall EOR [in Plaintiff’s] file[,]”  
13 id. Although these two findings appear somewhat contradictory to one another, the  
14 latter finding—that Dr. Bagner’s MSS was too restrictive and not supported by the  
15 record—is in direct odds with Dr. Bradley’s findings.

16 Therefore, because Dr. Bagner’s opinion is contradicted by Dr. Bradley’s  
17 opinion, the ALJ was required to provide specific and legitimate reasons for  
18 rejecting Dr. Bagner’s contradicted opinion. See Trevizo, 871 F.3d at 675. The  
19 Court finds that the ALJ’s reasons for rejecting Dr. Bagner’s opinion fails to meet  
20 this standard and that remand for further proceedings is necessary for the following  
21 reasons.

22 First, as discussed previously, the ALJ found that where Dr. Bagner’s  
23 opinion “varies from Dr. Bradley, Dr. Bradley’s opinion is given greater weight as  
24 [Dr. Bradley] had **the opportunity to review** records not available to Dr. Bagner.”  
25 Tr. 19 (emphasis added). Dr. Bradley, however, indicated that, with respect to  
26 Plaintiff’s mental health medical records, she reviewed only the CE findings of Dr.  
27 Bagner, Tr. 92-93, 98, 106-07, 112, and explained that “evidence that may have  
28



1 been available from [Plaintiff’s] medical source(s) cannot be obtained[,]” Tr. 95,  
2 109.

3 Thus, Dr. Bradley based her reviewing opinion on Dr. Bagner’s examining  
4 opinion and the ALJ gave Dr. Bradley’s opinion greater weight because—even  
5 though Dr. Bradley did not do so—Dr. Bradley had the **opportunity** to review  
6 other records. See Tr. 19. It is unclear how the mere opportunity to review  
7 records, without actually reviewing them, gave Dr. Bradley greater insight into  
8 Plaintiff’s mental health limitations than Dr. Bagner, who actually examined  
9 Plaintiff and whose opinion Dr. Bradley’s opinion was based off of. It is also  
10 unclear how Dr. Bradley found the limitations Dr. Bagner assessed to be consistent  
11 with Plaintiff’s examination performance, but inconsistent with the overall  
12 evidence in Plaintiff’s file when, again, the only medical opinion relating to  
13 Plaintiff’s mental health limitations Dr. Bradley reviewed was Dr. Bagner’s CE  
14 report.

15 Accordingly, the Court finds that Dr. Bradley’s opportunity to review other  
16 records, when Dr. Bradley’s own report indicates that she did not actually review  
17 any additional records, was not a specific and legitimate reason to reject portions  
18 of Dr. Bagner’s examining opinion.

19 Second, the ALJ noted that Dr. Bagner’s “opinion is considered in context  
20 with the remaining records.” Tr. 19. Consequently, the Court reviewed the  
21 remaining records discussed by the ALJ and found that the ALJ appears to have  
22 rejected specific portions of Dr. Bagner’s opinion when assessing Plaintiff’s  
23 mental RFC (“MRFC”). The Court finds that the ALJ’s reasons for rejecting  
24 portions of Dr. Bagner’s opinion when assessing Plaintiff’s MRFC were also not  
25 supported by substantial evidence in the record.

26 For example, the ALJ rejected Dr. Bagner’s opinion that Plaintiff would  
27 have “moderate limitations responding to workplace pressure[,]” because “the  
28

1 record does not support limitations in this category.” Tr. 18. The ALJ explained  
2 that no limitations were supported in this category because:

- 3 • Plaintiff “has adapted to changes in his living situation from living in an  
4 apartment to living with friends”;
- 5 • Plaintiff “has adapted without the need for emergency intervention,  
6 hospitalizations, or regular treatment by a specialist”;
- 7 • Plaintiff “does not require medication for treatment of his mental health”;
- 8 • “[t]he record supports that his mental health remains stable despite  
9 stressful and changing circumstances”;
- 10 • “Dr. Bradley opined [Plaintiff] had no limitations in this category”; and
- 11 • “Dr. Bradley’s opinion is most consistent with the record.”

12 Id. (citations omitted). The Court addresses each of the ALJ’s above noted reason  
13 in turn.

14 With respect to the ALJ’s finding that Plaintiff “has adapted to changes in  
15 his living situation from living in an apartment to living with friends[,]” id. (citing  
16 generally to Plaintiff’s “[h]earing testimony”), a review of Plaintiff’s hearing  
17 testimony reveals that Plaintiff testified that his address of record is “more of a  
18 mailing address. [He’s] really staying at different places[,]” Tr. 83. Further, Dr.  
19 Bagner noted in his medical report that Plaintiff was “currently homeless” at the  
20 time of the examination. Tr. 379. Thus, the ALJ found that Plaintiff would have  
21 no limitations in responding to workplace pressure, in part, because of Plaintiff’s  
22 ability to adapt to his living situation, when evidence in the record that the ALJ  
23 failed to acknowledge or discuss reveals that Plaintiff was homeless at times and  
24 merely used his friend’s address as a mailing address at other times. As such, the  
25 ALJ’s rejection of Dr. Bagner’s opinion that Plaintiff had moderate limitations  
26 responding to workplace pressure ignored evidence of Plaintiff’s apparent  
27 struggles to find stable living arrangements during the relevant time period when  
28 making this finding. See Holohan v. Massanari, 246 F.3d 1195, 1207-08 (9th Cir.

1 2001) (holding an ALJ cannot selectively rely on some entries in plaintiff’s records  
2 while ignoring others).

3       Next, with respect to the ALJ’s rejection of Dr. Bagner’s opinion because  
4 Plaintiff managed his mental health impairments without treatment or medication,  
5 the ALJ’s rejection ignores Plaintiff’s testimony that he “want[s] to get treatment,  
6 but [he’s] just so—sometimes so depressed, [he] can’t leave the house. It’s just  
7 hard for—it’s just difficult for him.” Tr. 79. The ALJ’s failure to consider  
8 Plaintiff’s statement that Plaintiff had not received treatment for his mental health  
9 because his symptoms prevented him from doing so undercuts the ALJ’s finding.<sup>4</sup>  
10 See Holohan, 246 F.3d at 1207-08; see also Orn, 495 F.3d at 638 (“an  
11 ‘unexplained, or inadequately explained, failure to seek treatment’ may be the  
12 basis for an adverse credibility finding unless one of a ‘number of good reasons for  
13 not doing so’ applies.” (quoting Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989));  
14 see also id. (an “‘adjudicator must not draw any inferences about an individual’s  
15 symptoms and their functional effects from a failure to seek or pursue regular  
16 medical treatment without first considering any explanations that the individual  
17 may provide . . . that may explain infrequent or irregular medical visits or failure to  
18 seek medical treatment’” (quoting S.S.R. 96–7p at 7–8)).

19       Additionally, and relatedly, the Court observes that Plaintiff submitted  
20 medical records to the Appeals Council after the ALJ’s decision was rendered.  
21 Those medical records were apparently dated June 25, 2019—which is before the  
22 ALJ rendered her decision and, thus, was during the relevant time period—and  
23 indicate that Plaintiff “is currently taking psychotropic medications[,]” was  
24 “currently seeking” mental health services, and had a “significant impairment in  
25

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26 <sup>4</sup> The Court notes that the ALJ observed Plaintiff’s testimony that Plaintiff has trouble leaving  
27 the house generally. See Tr. 17 (the ALJ noting that Plaintiff “testified to crying often, having  
28 trouble leaving the house . . .”). However, the ALJ failed to acknowledge Plaintiff’s additional  
testimony that Plaintiff’s difficulty leaving the house is why Plaintiff did not receive mental  
health treatment at times when he would have otherwise liked to receive such treatment.

1 life functioning” due to Plaintiff’s mental health impairments at the time the report  
2 was written. Tr. 35, 39. The Appeals Council found that “this evidence does not  
3 show a reasonable probability that it would change the outcome of the decision”  
4 and so it “did not consider and exhibit the evidence.” Tr. 2. Because this evidence  
5 was not before the ALJ, the Court does not remand as to this evidence. However,  
6 because this evidence is now part of the record and appears contrary to the ALJ’s  
7 finding that Plaintiff did not require treatment or medication for his mental health  
8 impairments and his mental health remains stable despite stressful changing  
9 circumstances, on remand, the ALJ shall explain whether this evidence is material  
10 to the ALJ’s analysis in light of the evidence that the ALJ did not consider.

11 With respect to the ALJ’s rejection of Dr. Bagner’s opinion that Plaintiff has  
12 a moderate limitation in his ability to “respond to workplace pressure[,]” Tr. 381,  
13 because “Dr. Bradley opined [Plaintiff] had no limitations in this category[,]” Tr.  
14 17 (citing Tr. 96, 110), the ALJ’s finding appears to be unsupported by the record  
15 because an inspection of Dr. Bradley’s opinion that the ALJ cited reveals that Dr.  
16 Bradley opined only that Plaintiff would have no limitations in “[a]dapt[ing] or  
17 manag[ing] oneself.” Tr. 96, 110. Thus, the ALJ appears to have rejected Dr.  
18 Bagner’s opinion that Plaintiff is moderately limited in his ability to respond to  
19 workplace pressure because Dr. Bradley opined that Plaintiff would have no  
20 limitations in his ability managing himself, and these two types of limitations do  
21 not appear to be the same.

22 Moreover, even if these two sections of the doctors’ opinions were  
23 discussing the same thing, and Dr. Bradley was opining that Plaintiff’s ability to  
24 adapt and manage himself with no limitations meant that Plaintiff could also  
25 respond to workplace pressure without limitation, such an interpretation of this  
26 portion of Dr. Bradley’s opinion would appear to render Dr. Bradley’s opinion  
27 internally inconsistent. Specifically, as discussed above, Dr. Bradley also opined  
28 that Plaintiff would “have difficulty maintaining levels of concentration and

