

1 years of age requires three findings: (1) the claimant must not be
2 performing substantial gainful work, 20 C.F.R. § 416.924(b); (2) the
3 claimant's impairment, or combination of impairments, must be severe,
4 20 C.F.R. § 416.924(c); and (3) the claimant's impairment must meet,
5 or be medically or functionally equal to, a listed impairment found
6 in 20 C.F.R. Part 404, Subpart P, App. 1. When the claimant's
7 impairment(s) does not meet or equal an impairment(s) in the Listing,
8 or does not meet the durational requirement, the claimant is
9 determined not to be disabled. 20 C.F.R. § 416.924(d).

10 On November 29, 2005, Plaintiff's application was denied at the
11 initial stage of the administrative process. (AR at 14). A de novo
12 hearing was held on April 12, 2007, before Administrative Law Judge
13 ("ALJ") William C. Thompson, Jr. (AR at 203-230). Plaintiff,
14 unrepresented by counsel, testified at the hearing, as did Plaintiff's
15 mother, Brenda Cain. (Id.) On July 3, 2007, the ALJ issued an
16 unfavorable decision, denying SSI benefits. (AR at 14-20). The ALJ
17 found that Plaintiff's learning disorder is a medically determinable
18 impairment. (AR at 17). However, the ALJ found that Plaintiff did not
19 have a "severe" impairment within the meaning of the Social Security
20 regulations. (AR at 17); see 20 C.F.R. § 416.924(c). The ALJ concluded
21 that Plaintiff was not disabled, as defined in the Social Security
22 Act, at any time from May 9, 2005 through the date of the decision.
23 (AR at 20). The Appeals Council denied Plaintiff's request for review
24 on November 20, 2007. (AR at 158-161).

25 Plaintiff timely commenced this action for judicial review.
26 Plaintiff alleges that the ALJ erred as follows: (1) by improperly
27 rejecting the opinion of Plaintiff's treating physician; (2) by
28 failing to properly consider the results of Plaintiff's individualized

1 education plan ("IEP"); (3) by failing to properly consider the
2 severity of Plaintiff's mental impairment; (4) by failing to properly
3 consider the lay witness statements of Plaintiff's mother; (5) by
4 failing to fully develop the record; and (6) by failing to properly
5 consider the type, dosage and side effects of Plaintiff's medication.
6 (Joint Stip. at 3.) Plaintiff asks this Court to order an award of
7 benefits, or, in the alternative, to remand for a new administrative
8 hearing. (Joint Stip. at 19.)

9

10 **II. Standard of Review**

11 The Court must uphold the Social Security Administration's
12 disability determination unless it is not supported by substantial
13 evidence or is based on legal error. *Ryan v. Comm'r of Soc. Sec.*, 528
14 F.3d 1194, 1198 (9th Cir. 2008)(citing *Stout v. Comm'r of Soc. Sec.*
15 *Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006)). Substantial evidence
16 means more than a scintilla, but less than a preponderance; it is
17 evidence that a reasonable person might accept as adequate to support
18 a conclusion. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir.
19 2007)(citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir.
20 2006)). To determine whether substantial evidence supports a finding,
21 the reviewing court "must review the administrative record as a whole,
22 weighing both the evidence that supports and the evidence that
23 detracts from the Commissioner's conclusion." *Reddick v. Chater*, 157
24 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support either
25 affirming or reversing the ALJ's conclusion," the reviewing court "may
26 not substitute [its] judgment for that of the ALJ." *Robbins*, 466 F.3d
27 at 882.

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1 **III. Discussion and Analysis**

2 **A. The ALJ Properly Considered Dr. Ross's Mental Status**
3 **Examination**

4 Plaintiff asserts that the ALJ did not give sufficient weight to
5 Dr. Craig Ross's mental examination report. (Joint Stp. at 3). On
6 March 17, 2005, Plaintiff was involuntarily hospitalized for an acute
7 psychiatric episode, which included auditory hallucinations, delusions
8 and suicidal thoughts. (AR at 153). During his four-day stay at the
9 hospital, Plaintiff's treating physician was Dr. Ross. (AR at 153).
10 Dr. Ross diagnosed Plaintiff with major depressive disorder, single
11 episode, severe with psychotic features, as well as substance abuse
12 of alcohol and marijuana. (AR at 154). Plaintiff was discharged from
13 the hospital on March 21, 2005. (AR at 170). Dr. Ross noted that
14 Plaintiff's prognosis was "fair" and that Plaintiff's condition on
15 discharge was "improved." (AR at 155). Follow-up treatment was
16 recommended on an outpatient basis, but Dr. Ross did not provide any
17 further treatment to Plaintiff after he was released from the
18 hospital. (AR at 155).

19 The Court finds that the ALJ properly considered Plaintiff's
20 March 2005 hospitalization report. The ALJ noted that Plaintiff was
21 "involuntarily hospitalized in March 2005 after reporting auditory
22 hallucinations and threatening to harm himself." (AR at 18). The ALJ
23 specifically cited to the hospitalization report, which found that
24 Plaintiff "did not have any prior mental health treatment," that "drug
25 screening revealed the presence of marijuana and alcohol," and that
26 Plaintiff had been "released from jail two weeks earlier on charges
27 of grand theft auto." (Id.).

28 Plaintiff further contends that Dr. Ross was Plaintiff's treating

1 physician, and therefore greater weight should have been given to Dr.
2 Ross's opinion than to the consulting and reviewing physicians'
3 reports (Joint Stip. at 3-4). The Commissioner argues that Dr. Ross
4 should not be considered a treating physician because he only treated
5 Plaintiff for four days in March 2005 for a single, acute psychotic
6 episode. (Joint Stip. at 4-5).

7 The ALJ gave proper weight to Dr. Ross's medical report. The
8 ALJ should generally accord greater probative weight to a treating
9 physician's opinion than to opinions from non-treating sources. See
10 20 C.F.R. § 404.1527(d)(2). The ALJ must give specific and legitimate
11 reasons for rejecting a treating physician's opinion in favor of a
12 non-treating physician's contradictory opinion. *Orn v. Astrue*, 495
13 F.3d 625 (9th Cir. 2007); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
14 1996). However, the ALJ need not accept the opinion of any medical
15 source, including a treating medical source, "if that opinion is
16 brief, conclusory, and inadequately supported by clinical findings."
17 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); accord
18 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The factors
19 to be considered by the adjudicator in determining the weight to give
20 a medical opinion include: "[l]ength of the treatment relationship and
21 the frequency of examination" by the treating physician; and the
22 "nature and extent of the treatment relationship" between the patient
23 and the treating physician. 20 C.F.R. §§ 404.1527(d)(2)(i)-(ii),
24 416.927(d)(2)(i)-(ii); *Orn*, 495 F.3d at 631-33.

25 Applying these factors, it was reasonable for the ALJ not to
26 accord conclusive weight to Dr. Ross's medical opinion. See 20 C.F.R.
27 §§ 404.1527(d)(2)(i)-(ii), 416.927(d)(2)(i)-(ii). Dr. Ross only
28 treated Plaintiff for four days during a single, acute psychotic

1 episode. Dr. Ross had no previous treating relationship with Plaintiff
2 as Plaintiff had no past psychiatric history. Further, Dr. Ross did
3 not provide any follow-up care, but rather advised Plaintiff to seek
4 outpatient services after discharge from the hospital. Given these
5 facts, it was reasonable for the ALJ not to consider Dr. Ross a
6 treating physician, and therefore not to give his opinion conclusive
7 weight. Therefore, no relief is warranted on this issue.

8 **B. The ALJ Properly Considered the Results of the**
9 **Individualized Education Plan**

10 Plaintiff contends that the ALJ improperly disregarded an October
11 31, 2006 IEP assessment of Plaintiff, which was completed by the
12 Moreno Valley Unified School District. (Joint Stp. at 6-7). The IEP
13 was developed by a school administrator, a special education teacher
14 and a school psychologist, in conjunction with Plaintiff and his
15 mother. (AR at 141). The IEP indicated that Plaintiff "performs poorly
16 in school and is well below his grade level." (Joint Stp. at 6).
17 Plaintiff argues that the IEP should be considered to be the objective
18 opinion of a treating physician because it was prepared in part by the
19 "school psychiatrist,"¹ and therefore should have been given
20 significant weight in determining the severity of Plaintiff's
21 impairment. The Commissioner contends that, because the IEP is not
22 a formal medical opinion, the ALJ properly gave the IEP relatively
23 little probative weight.

24 The Court finds that the ALJ assigned appropriate weight to the
25 October 31, 2006 IEP. First, the ALJ acknowledged that Plaintiff has
26 a learning disability (AR at 18) and has had poor performance and

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28 ¹ Plaintiff misidentifies the school psychologist, Brad Rice, as
a "school psychiatrist." (AR at 141).

1 behavioral problems at school (AR at 18-19). The ALJ considered the
2 IEP as relevant factual evidence that Plaintiff displayed
3 "inappropriate behavior at school." (AR at 19). Because the IEP was
4 an educational report, prepared by the school district to assess
5 Plaintiff's school performance, the ALJ properly did not give it the
6 same weight as a medical opinion. See 20 C.F.R. § 416.927(a)(2)
7 ("Medical opinions are statements from physicians and psychologists
8 or other acceptable medical sources that reflect judgments about the
9 nature and severity of [a claimant's] impairment(s), including [the
10 claimant's] symptoms, diagnosis and prognosis, what [the claimant] can
11 still do despite impairment(s), and [the claimant's] physical or
12 mental restrictions."). Therefore, despite Plaintiff's contentions,
13 the IEP was not a valid medical opinion, nor was the school
14 psychologist a treating physician for purposes of determining whether
15 Plaintiff is disabled under the Social Security regulations.

16 Further, the ALJ permissibly considered other evidence that
17 contradicted Plaintiff's claim of a severe disability. See *Andrews v.*
18 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995) ("The ALJ is responsible
19 for determining credibility, resolving conflicts in medical testimony,
20 and for resolving ambiguities.") For example, the ALJ cited a school
21 evaluation conducted on May 31, 2005, which found that Plaintiff was
22 a "likable student who was able to follow instructions," and also that
23 Plaintiff was "independent in all areas of personal hygiene and
24 grooming and [could] express his ideas clearly and age appropriately."
25 (AR at 18, 50-51). The ALJ also considered a Social Security
26 Administration Teacher Questionnaire, completed on June 7, 2005, in
27 which Plaintiff's ninth grade teacher reported that Plaintiff "did not
28 complete/attempt most assignments due to preoccupation with fatigue,

1 anger or appearing to be 'high'". (AR at 18, 67-73)

2 The ALJ also cited the psychiatric evaluation by the consulting
3 psychiatrist, Dr. Khang Nguyen, which contradicted Plaintiff's claim
4 that his mental impairments and learning disability were severe. (AR
5 19, 175-179). When Dr. Nguyen examined Plaintiff on September 23,
6 2005, he found that Plaintiff did not "show any abnormal, bizarre or
7 psychotic behavior." (AR at 176). Dr. Nguyen further determined that
8 Plaintiff's "affect is appropriate and unremarkable...he has no
9 suicidal or homicidal ideation...[and] no looseness of association...,
10 paranoid ideation, delusions, [or] auditory or visual hallucinations."
11 (AR at 177). See *Orn*, 495 F.3d at 632 ("[W]hen an examining physician
12 provides independent clinical findings that differ from the findings
13 of the treating physician, such findings are substantial evidence.").

14 As set forth above, the ALJ's decision to accord relatively
15 little weight to the IEC was substantially supported by the evidence
16 and not contrary to governing legal standards.

17 **C. The ALJ's Determination that Plaintiff Did Not Have a**
18 **Severe Mental Impairment Was Substantially Supported**

19 Plaintiff claims the ALJ erred by finding that Plaintiff's
20 alleged mental disorder did not constitute a severe impairment.
21 (Joint Stp. at 9). Plaintiff contends that the March 2005
22 hospitalization report by Dr. Ross and the October 31, 2006 IEP
23 establish that Plaintiff has a severe mental impairment. (Id.) The
24 Commissioner contends that the ALJ properly determined that
25 Plaintiff's mental impairment was not severe by relying on the reports
26 of the consulting and reviewing physicians, as well as other factual
27 evidence. (Joint Stp. at 11-12).

28 A claimant for disability benefits has the burden of producing

1 evidence to demonstrate that he or she was disabled within the
2 relevant time period. *Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir.
3 1995). The existence of a severe impairment is demonstrated when the
4 evidence establishes more than a minimal effect on an individual's
5 ability to do basic work activities. *Smolen v. Chater*, 80 F.3d 1273,
6 1290 (9th Cir. 1996); 20 C.F.R. §§ 404.1521(a), 416.921(a).² As
7 detailed above, the ALJ reasonably accorded little weight to Dr.
8 Ross's March 2005 report and the October 31, 2006 IEP, and instead
9 adopted the opinion of Dr. Nguyen, who determined that Plaintiff's
10 mental impairment was not severe. Further, the ALJ properly considered
11 other evidence which contradicted Plaintiff's claim that he has a
12 severe mental impairment, such as the assessment of the reviewing
13 State Agency psychiatrist Dr. Williams (AR at 20-21, 175-184), and
14 various other psychological and education assessments (AR at 19, 36,
15 37, 51, 117, 177). In addition, Plaintiff testified at the
16 administrative hearing that he was not seeing a doctor or taking
17 medication (AR 227), and his mother testified that he had not been
18 taking any medication for at least seven months (AR 215).

19 Plaintiff has not met his burden of producing evidence to show
20 that he suffers from a severe mental impairment, rather than a
21 behavioral problem. As set forth above, the ALJ's finding that
22 Plaintiff did not have a severe mental impairment was substantially
23 supported and not contrary to governing legal standards. Therefore,
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25 ² The regulations define "basic work activities" as "the abilities
26 and aptitudes necessary to do most jobs", which include physical
27 functions such as walking, standing, sitting, pushing, carrying;
28 capacities for seeing, hearing and speaking; understanding and
remembering simple instructions; responding appropriately in a work
setting; and dealing with changes in a work setting. 20 C.F.R. §
404.1521(b).

1 no relief is warranted on this issue.

2 **D. The ALJ Gave Proper Weight to a Report Completed by**
3 **Plaintiff's Mother**

4 Plaintiff contends that the ALJ improperly rejected a report by
5 Plaintiff's mother as not being credible. (Joint Stp. at 13-14). On
6 December 15, 2005, Plaintiff's mother completed a "Disability Report -
7 Appeal" form, claiming that Plaintiff's mental impairment had worsened
8 since initially filing for SSI benefits on May 9, 2005. (AR at 74-80).
9 Plaintiff's mother, as a non-medical source, is a lay witness who can
10 provide testimony about Plaintiff's symptoms and limitations. See
11 *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). "Lay testimony
12 as to a claimant's symptoms is competent evidence that an ALJ must
13 take into account, unless he or she expressly determines to disregard
14 such testimony and gives reasons germane to each witness for doing
15 so." *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (emphasis
16 added); see also *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir.
17 1993). Appropriate reasons to reject the testimony of a family member
18 include testimony unsupported by the medical record or other evidence
19 and inconsistent testimony. *Lewis*, 236 F.3d at 512; *Dodrill*, 12 F.3d
20 at 918-19. Unlike lay testimony, there is no controlling precedent
21 requiring an ALJ to explicitly address written statements, such as the
22 "Disability Report - Appeal" form in this case. Indeed, it is clear
23 that an ALJ is not required to discuss all evidence in the record in
24 detail. *Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003).

25 In giving little weight to Plaintiff's mother's written
26 statements about the severity of Plaintiff's alleged mental
27 impairment, the ALJ noted his reasons as follows:

28 On December 15, 2005 Ms. Cain indicated in a statement to the

1 Administration that the claimant was having auditory
2 hallucinations, disorientation, and delusions (Exhibit 6E).
3 She claimed that she had to care for all of his personal needs
4 because he was weak and confused, and that he was having
5 hallucinations on a daily basis. She claimed he had no
6 activities because he could not get along with his own family,
7 and that he stayed in his room most of the day. I give minimal
8 weight to this evidence. I note that the claimant's mother
9 appears to exaggerate the claimant's symptoms. While she
10 alleged that he continued to experience hallucinations and was
11 unable to perform self care, the school records dated less
12 than two months earlier indicate he was independent in health
13 care and no mention is made of psychosis (Exhibit 11E). I
14 further note that the claimant currently lives with Ms. Cain,
15 and thus Ms. Cain stands to gain financially should the
16 claimant be found disabled. Finally, given the close
17 relationship, it is possible that Ms. Cain was influenced by
18 her desire to help the claimant. (AR at 19-20).

19 The Court finds that it was improper for the ALJ to discredit the
20 report on the ground that Plaintiff's mother "stands to gain
21 financially should the [Plaintiff] be found disabled." (AR at 20).
22 While some courts have held that an ALJ may consider a witness'
23 financial interest in the award of benefits in evaluating their
24 credibility,³ the Ninth Circuit has consistently held that bias cannot
25 be presumed from a familial relationship. *See, e.g., Regennitter v.*
26 *Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1298 (9th Cir. 1999). This

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28 ³ *See Buckner v. Apfel*, 213 F.3d 1006, 1013 (8th Cir. 2000);
Rautio v. Bowen, 862 F.2d 176, 180 (8th Cir. 1988).

1 is because a personal relationship is a necessity for lay witness
2 testimony since it is provided by people "in a position to observe a
3 claimant's symptoms and daily activities." *Dodrill*, 12 F.3d at 918.
4 The ALJ's reasoning that witnesses who live with or support a
5 plaintiff are not credible for reasons of bias cannot be considered
6 legally proper, since the same rationale could be used to reject lay
7 witness testimony in almost every case.

8 Although the ALJ improperly rejected the report on the basis of
9 Plaintiff's mother's alleged financial interest in Plaintiff's
10 obtaining SSI benefits, the ALJ also provided legitimate reasons for
11 his credibility determination. First, the ALJ pointed out
12 inconsistencies between Plaintiff's mother's report and the evidence
13 in the record. (AR 19). For example, in December 2005, Plaintiff's
14 mother claimed that Plaintiff was experiencing auditory
15 hallucinations, disorientation, and delusions, and that she had to
16 take care of all of his personal needs. (AR at 19, 74-80). The ALJ
17 noted that, according to a report created only two months prior, in
18 October 2005, Plaintiff was "independent in health care and no mention
19 is made of psychosis." (AR at 19-20, 99). Second, the claims made in
20 the report were not supported by the medical record. Just three months
21 before the report, the consulting psychiatrist observed none of the
22 psychotic symptoms which Plaintiff's mother claimed that Plaintiff
23 displayed, nor found any evidence of psychosis. (AR 19, 175-178).

24 Where one of the ALJ's several reasons supporting an adverse
25 credibility finding is invalid, the Court applies a harmless error
26 standard. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155,
27 1162 (9th Cir. 2008) (citing *Batson v. Comm'r of Soc. Sec. Admin.*, 359
28 F.3d 1190, 1195-1197 (9th Cir. 2004)). As long as there remains

1 "substantial evidence supporting the ALJ's conclusions on ...
2 credibility" and the error "does not negate the validity of the ALJ's
3 ultimate [credibility] conclusion," the error is deemed harmless and
4 does not warrant reversal. *Id.* at 1197; see also *Stout v. Comm'r of*
5 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006)(defining
6 harmless error as such error that is "irrelevant to the ALJ's ultimate
7 disability conclusion"). Here, because the ALJ provided specific,
8 legitimate reasons for discrediting the report, any error in
9 improperly considering her supposed financial interest as Plaintiff's
10 mother was harmless. Furthermore, as noted above, because this was
11 a written report, not oral testimony, the ALJ was not even required
12 to address it at all. Therefore, relief is not warranted on this
13 issue.

14 **E. The ALJ Properly Developed the Record**

15 Plaintiff claims that the ALJ failed to properly develop the
16 record because a psychological report dated March 25, 2005 is not
17 included in the administrative record. (Joint Stp. At 15-16).
18 However, the March 25, 2005 report to which Plaintiff refers is in
19 fact included in the record (AR at 34-37). Therefore, no relief is
20 warranted on this issue.

21 **F. The ALJ Properly Considered the Type, Dosage,**
22 **Effectiveness and Side Effects of Plaintiff's Medication**

23 Plaintiff contends that the ALJ failed to properly consider the
24 side effects of his medication in reaching the disability
25 determination. (Joint Stip. at 17.) In the "Disability Report -
26 Appeal" form filed on December 15, 2005, Plaintiff claimed the
27 following side effects from his medication: the Wellbutrin caused
28 "tremors" and the Risperdal caused "anxiety." (AR at 77).

1 However, except for Plaintiff's comments on this single form,
2 Plaintiff's records contain no mention whatsoever of side effects
3 from any medication. In fact, Plaintiff's claims regarding the side
4 effects of Wellbutrin and Risperdal are contradicted in his initial
5 application for SSI benefits on May 9, 2005, in which Plaintiff
6 reported that he experienced no side effects. (AR at 43). Also,
7 during the consultative examination conducted on September 23, 2005,
8 Plaintiff told Dr. Nguyen that the Wellbutrin and Risperdal "calmed
9 him down" and also helped him sleep and concentrate. (AR at 176).
10 More recently, Plaintiff and his mother both testified at the
11 administrative hearing, held on April 12, 2007, that Plaintiff had
12 not been taking any medication for at least seven months prior to
13 the date of the hearing. (AR at 215, 227). Given the lack of
14 evidence of Plaintiff's alleged side effects, as well as conflicting
15 evidence showing no adverse reactions, the ALJ properly considered
16 the side effects of Plaintiff's medication. Thus, no relief is
17 warranted on this issue.

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19 **V. Conclusion**

20 For the reasons stated above, the decision of the Social
21 Security Commissioner is **AFFIRMED**.

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23 Dated: October 9, 2008

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Marc L. Goldman
United States Magistrate Judge