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

WILLIAM J. ADCOCK,
Plaintiff,

v.

NANCY A. BERRYHIL,¹
Acting Commissioner of Social
Security,
Defendant.

Case No. EDCV 16-1222 SS

MEMORANDUM DECISION AND ORDER

I.

INTRODUCTION

William J. Adcock ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (the "Commissioner" or "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 Acting Commissioner Carolyn W. Colvin in this case. See 42 U.S.C. § 205(g).

1 Supplemental Security Income ("SSI") benefits. The parties
2 consented, pursuant to 28 U.S.C. § 636(c), to the jurisdiction of
3 the undersigned United States Magistrate Judge. (Dkt. Nos. 12-
4 13). For the reasons stated below, the Court AFFIRMS the
5 Commissioner's decision.

6
7 **II.**

8 **PROCEDURAL HISTORY**

9
10 On April 16, 2012, Plaintiff filed an application for
11 Disability Insurance Benefits ("DIB") and for Supplemental Security
12 Income ("SSI"). (Administrative Record ("AR") 828-40). Plaintiff
13 alleged that he became unable to work on December 7, 2011 due to
14 emphysema, chronic obstructive pulmonary disease ("COPD"), blood
15 clots in the lungs, pneumonia, and a fungal infection. (AR 834,
16 853). The Agency denied Plaintiff's application on August 7, 2012.
17 (AR 706-710). On May 8, 2013, the Agency denied Plaintiff's
18 application upon reconsideration. (AR 712-717). On July 2, 2013,
19 Plaintiff requested a hearing before an Administrative Law Judge
20 ("ALJ"). (AR 720-21). On June 30, 2014, ALJ Alan Markiewicz
21 conducted a hearing to review Plaintiff's claim. (AR 628-61). On
22 September 25, 2014, the ALJ found that Plaintiff was not disabled
23 under the Social Security Act. (AR 609-26). Plaintiff sought
24 review of the ALJ's decision before the Appeals Council. The
25 Appeals Council denied Plaintiff's application on April 8, 2016.
26 (AR 1-7). The ALJ's decision then became the final decision of
27 the Commissioner. Plaintiff commenced the instant action on June
28 9, 2016. (Dkt. No. 1).

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III.

FACTUAL BACKGROUND

Plaintiff was born on September 2, 1955. (AR 864). He was 56 years old as of the alleged disability onset date of December 7, 2011. He was 58 years old when he appeared before the ALJ. (AR 632). Plaintiff graduated from high school and completed one year of junior college. (AR 632). He previously worked as a sales clerk, hotel clerk, and security guard. (AR 880).

A. Plaintiff's Testimony

Plaintiff testified that he lives by himself at the Desert Lodge hotel. (AR 648). He stays there "for free" in exchange for doing "as much work to work off" the room as he can. (Id.). He stated that he mainly works at the front desk. (Id.). Specifically, Plaintiff checks people in and out of the hotel. (AR 650). He stands while working at the front desk. (Id.). Plaintiff also sits down to do paperwork. (Id.). He also cleans a "little bit", including wiping down the counter and sweeping the floor. (Id.). When he sweeps the floors, it usually takes about ten minutes. (Id.). He is short of breath once he is done sweeping. (Id.). Plaintiff testified that he typically tries to work from 8:30 to 10:30 in the morning. (AR 655). He then goes back to his room to rest. (Id.). He returns to the office if he is needed. (Id.). After he does what is needed, he will return to his room to rest. (Id.). Plaintiff stated that the longest amount of time that he can work is "maybe two hours" at a time. (Id.). He

1 testified that he tries to do this work as much as he can. (AR
2 648).

3
4 Plaintiff testified that his last full-time job consisted of
5 light maintenance, cleaning, and front desk work at the Palm Grove
6 hotel. (AR 633). He stopped working in February of 2012 when he
7 came down with pneumonia and blood clots. (Id.). Plaintiff
8 testified that he worked at the Palm Grove hotel for approximately
9 four years. (AR 633). Before that, he worked in retail at an
10 adult bookstore called Perez Images for almost nine years. (AR
11 634).

12
13 Plaintiff testified that the main reason he stopped working
14 was because of his COPD. (AR 637-638). He stated that when he
15 tries to do work he has to take breaks due to his breathing. (Id.).
16 Plaintiff testified that he can only walk about 50 or 60 feet
17 without stopping to rest. (AR 644-645). He testified that he can
18 do "minimal standing." (AR 645). He can stand for about five
19 minutes without moving if he has to. (AR 649-650). He further
20 testified that he can sit for "maybe two hours" at a time. (AR
21 646-646). Plaintiff testified that he began using a walker the
22 month before the hearing. (AR 647).

23
24 Plaintiff stated that he has had issues with depression since
25 his health began to decline. (AR 647). He testified that he has
26 not recently taken any medicines to help with his depression.
27 (Id.). He testified that in the past he was seeing a psychiatrist
28 and was on a "depression pill." (Id.). He stated that he started

1 feeling better but stopped taking the medicine after about six
2 months because he did not like it. (AR 647-648).

3
4 Plaintiff testified that his driver's license expired a few
5 years back. (AR 649). He stated that he takes the Sun bus for
6 transportation. (Id.).

7
8 **B. Consultative Examiner, Kara Cross, Ph.D., ABFE, ABPS**

9
10 On April 6, 2013, consultative examiner Dr. Kara Cross, Ph.D.
11 in Clinical Psychology, performed a Complete Mental Evaluation of
12 Plaintiff. (AR 993-98). Dr. Cross noted that there were no
13 psychiatric records for review. (AR 993).

14
15 Under "Chief Complaints," Dr. Cross commented that Plaintiff
16 stated that he "has COPD and trouble concentrating. He state[d]
17 that he feels anxious about his health. He spends a lot of time
18 thinking 'oh what if.'" (AR 993).

19
20 Under "History of Present Illness," Dr. Cross noted that
21 Plaintiff "had outpatient counseling services back in 1989. He
22 went for two weeks and stopped. He states that he was hospitalized
23 in 1989 for wanting to kill himself. He was in the hospital for
24 two solid weeks. [Plaintiff] reports that he no longer feels
25 suicidal and does not feel homicidal." (AR 994).

26
27 Under "Habits," Dr. Cross noted that Plaintiff "used to smoke
28 pot back in 1970s. He used to drink alcohol at parties but does

1 not use either anymore." (AR 994). Under "Legal History," Dr.
2 Cross commented that Plaintiff "was arrested once for shoplifting
3 and spent one and a half days in jail." (Id.). Under "Employment
4 History," Dr. Cross noted that Plaintiff worked in retail for nine
5 years and "last worked in 2009. He stated that he was laid off."
6 (Id.).

7
8 Dr. Cross noted that Plaintiff is able to pay bills and can
9 handle cash appropriately. (AR 995). He is able to go out alone.
10 (Id.). Plaintiff's relationships with family and friends are good.
11 (Id.). Plaintiff can focus attention. (Id.). Plaintiff has no
12 difficulty completing household tasks. (Id.). Plaintiff has no
13 difficulty making his decisions. (Id.). Dr. Cross noted that, on
14 a daily basis, Plaintiff

15
16 can dress and bathe, cook, clean, run errands, and go
17 shopping. He maintains his own residence as far as
18 cleanliness is concerned. He cleans rooms for his room
19 and board. He states that he is living in a hotel and
20 is cleaning rooms in exchange for a place to live and
21 food to eat. He states that he can do light cleaning in
22 these rooms but cannot do the heavy cleaning. He feels
23 very sad and depressed over his deteriorating health and
24 stamina.

25 (AR 995).

26 Under "Thought Processes," Dr. Cross noted that Plaintiff was
27 coherent and organized. (AR 996). Under "Thought Content," Dr.
28 Cross stated that Plaintiff was relevant and non-delusional.
(Id.). Dr. Cross further commented that there "is no bizarre or

1 psychotic thought content. There is no suicidal, homicidal or
2 paranoid ideation during the interview. [Plaintiff] denies recent
3 auditory or visual hallucinations. [Plaintiff] does not appear to
4 be responding to internal stimuli during the interview." (Id.).

5
6 Under "Mood and Affect," Dr. Cross commented that "[m]ood is
7 somewhat sad and affect is a little tearful and congruent with
8 thought content. [Plaintiff] is tearful. [Plaintiff] is anxious.
9 [Plaintiff] denies any feeling of hopelessness, helplessness or
10 worthlessness." (Id.).

11
12 Under "Speech," Dr. Cross stated that speech was "normally
13 and clearly articulated, without stammering, dysarthria,
14 neologisms, tangentiality, circumstantiality or loosened, unusual
15 or blocked associations." (Id.).

16
17 Dr. Cross further noted that Plaintiff was alert and oriented
18 to time, place, person, and purpose. (Id.). Dr. Cross stated that
19 Plaintiff was able to repeat four digits forward and backward.
20 (Id.). Plaintiff was able to recall three items immediately and
21 after five minutes. (Id.). Plaintiff was able to recall who George
22 Washington was and a school day attended as a child. (Id.).

23
24 Under "Concentration and Calculation," Dr. Cross stated that
25 Plaintiff "could not perform serial threes. [Plaintiff] knew that
26 4 dollars plus 5 dollars is 9 dollars. [Plaintiff] was not able
27 to do alpha numeric reasoning. [Plaintiff] was able to follow []
28 conversation [with Dr. Cross] well." (Id.). Later, she commented

1 that Plaintiff could do serial threes but not serial sevens. (AR
2 997). Plaintiff could say the months of the year. (Id.).

3
4 Dr. Cross noted that she asked Plaintiff how an airplane and
5 helicopter are the same. (Id.). He responded, "[t]hey are up in
6 the sky and they fly around." (Id.). However, he did not know
7 how "up" and "south" are the same. (Id.).

8
9 Dr. Cross commented that Plaintiff's insight and judgement
10 appeared to be intact regarding his current situation. (Id.).
11 Dr. Cross diagnosed Plaintiff with Dysthymia and a general anxiety
12 disorder. (Id.). Dr. Cross gave Plaintiff a Global Assessment
13 Functioning ("GAF") score of 60.2 (Id.). Under "Prognosis," Dr.
14 Cross stated that "[f]rom a psychiatric standpoint, [Plaintiff's]
15 condition is deemed fair." (Id.).

16
17 Under "Functional Assessment," Dr. Cross stated that, based
18 on her examination, Plaintiff is able "to understand, remember,
19 and carry out simple one or two-step job instructions ... [u]nable
20 to do detailed and complex instructions." (Id.). She noted that
21 he has mild impairments relating and interacting with co-workers
22 and the public. (AR 998). She further noted that he has mild
23 impairments maintaining concentration and attention, persistence
24 and pace. (Id.). She also stated that he has mild impairments
25 maintaining regular attendance in the work place and performing

26
27 ² A GAF score of 51-60 reflects moderate symptoms or moderate
28 difficulty in social or occupational functioning. *Diagnostic and
Statistical Manual of Mental Disorders* 34 (4th ed. Text Rev. 2000).

1 work activities on a consistent basis. (Id.). She noted that he
2 is unimpaired in his ability to associate with day-to-day work, to
3 accept instructions from supervisors, and to perform work
4 activities without special or additional supervision. (Id.).
5

6 **C. State Agency Physician, Gina Rivera-Miya, M.D.**
7

8 On March 8, 2013, Dr. G. Rivera-Miya, M.D., reviewed
9 Plaintiff's record at the reconsideration stage. (AR 697-703).
10 Dr. Rivera-Miya listed Plaintiff's diagnoses as chronic pulmonary
11 insufficiency, COPD, affective disorder, and anxiety disorder. (AR
12 697). Dr. Rivera-Miya agreed with a recommendation by disability
13 adjudicator/examiner V. Casison. (Id.). Casison stated that
14 Plaintiff did not assert psychological impairments at the initial
15 application level. (Id.). However, Casison noted that Plaintiff
16 later alleged anxiety and depression regarding his health and
17 stamina. (Id.).
18

19 Casison noted that Plaintiff had mild limitations from his
20 mental health conditions. (Id.). Casison noted that Plaintiff's
21 activities of daily living were adequate with no limitations in
22 social functioning. (Id.) Casison commented that Plaintiff is
23 not taking any psychological medications. (Id.). Casison
24 concluded that these findings suggest Plaintiff's mental health
25 conditions are not severe. (Id.).
26

27 Dr. Rivera-Miya commented that the "evidence does not support
28 ongoing severe psych limitations. Benign findings on exam and

1 [activities of daily living] are functional. No recent psych tx.
2 Psych is nonsevere." (Id.) (emphasis in original). Dr. Rivera-
3 Miya determined that Plaintiff had no restriction in activities of
4 daily living and maintaining social functioning, but he had mild
5 difficulties in maintaining concentration, persistence or pace and
6 one or two episodes of decompensation. (Id.).
7

8 Dr. Rivera-Miya determined that Dr. Cross's opinion about
9 Plaintiff's limitations was more restrictive than her own. (AR
10 701) Dr. Rivera-Miya noted that Dr. Cross's opinion "contains
11 inconsistencies, rendering it less persuasive." (Id.). She stated
12 that "[t]he opinion is without substantial support from other
13 evidence of record, which renders it less persuasive." (Id.). She
14 also commented that Dr. Cross's opinion "is an overestimate of the
15 severity of the individual's restrictions/limitations and based
16 only on a snapshot of the individual's functioning." (Id.).
17

18 **D. Vocational Expert Testimony**

19

20 Vocational Expert ("VE") Sandra Fioretti testified at
21 Plaintiff's hearing before the ALJ. (AR 656-659). The VE testified
22 that she would classify Plaintiff's previous work as a hotel clerk
23 as light³, semiskilled. (AR 656). She testified that his previous
24

25 ³ "Light work. Light work involves lifting no more than 20 pounds
26 at a time with frequent lifting or carrying of objects weighing up
27 to 10 pounds. Even though the weight lifted may be very little, a
28 job is in this category when it requires a good deal of walking or
standing, or when it involves sitting most of the time with some
pushing and pulling of arm or leg controls. To be considered capable
of performing a full or wide range of light work, you must have

1 work cleaning at the hotel classified as light, unskilled work.
2 (AR 657). She stated that his previous work as a sales clerk
3 classified as light, semiskilled. (Id.).
4

5 The ALJ asked the VE to consider a series of factors in
6 creating three hypotheticals for determining Plaintiff's ability
7 to work. The ALJ's first hypothetical included an individual the
8 same age and with the same education and work experience as
9 Plaintiff. (AR 657). The hypothetical included an individual with
10 certain postural and environmental limitations. (AR 657-658). The
11 VE testified that an individual with the described limitations
12 could perform work as a sales clerk or hotel clerk as it's done in
13 the national economy. (AR 658). However, the VE testified, the
14 individual could not perform the work as Plaintiff previously
15 performed it because they could not clean with the described
16 limitations. (Id.)
17

18 The ALJ's second hypothetical included all the limitations
19 described in the first hypothetical, however the individual was
20 further limited to simple, repetitive tasks. (Id.). The VE
21 testified that an individual with these hypothetical limitations
22 could not do Plaintiff's past work or work as a sales clerk or
23 hotel clerk. (Id.).
24

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27 the ability to do substantially all of these activities. If someone
28 can do light work, we determine that he or she can also do sedentary
work, unless there are additional limiting factors such as loss of
fine dexterity or inability to sit for long periods of time."
20 C.F.R. § 404.1567 (b).

1 The ALJ's third hypothetical included an individual with more
2 restrictive postural limitations than the first two hypotheticals.
3 (AR 659). The VE testified that this hypothetical individual could
4 not do any of Plaintiff's past work. (Id.).

5
6 **IV.**

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

8
9 To qualify for disability benefits, a claimant must
10 demonstrate a medically determinable physical or mental impairment
11 that prevents her from engaging in substantial gainful activity
12 and that is expected to result in death or to last for a continuous
13 period of at least twelve months. Reddick v. Chater, 157 F.3d 715,
14 721 (9th Cir. 1998) (citing 42 U.S.C. § 423(d)(1)(A)). The
15 impairment must render the claimant incapable of performing the
16 work she previously performed and incapable of performing any other
17 substantial gainful employment that exists in the national economy.
18 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42
19 U.S.C. § 423(d)(2)(A)).

20
21 To decide if a claimant is entitled to benefits, an ALJ
22 conducts a five-step inquiry:

- 23
24 (1) Is the claimant presently engaged in substantial
25 gainful activity? If so, the claimant is found not
26 disabled. If not, proceed to step two.
- 27 (2) Is the claimant's impairment severe? If not, the
28 claimant is found not disabled. If so, proceed to
step three.

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

6 (4) Is the claimant capable of performing his past
7 work? If so, the claimant is found not disabled.
8 If not, proceed to step five.

9 (5) Is the claimant able to do any other work? If not,
10 the claimant is found disabled. If so, the claimant
11 is found not disabled.

12
13 See 20 C.F.R. §§ 404.1520, 416.920; see also Bustamante v.
14 Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citations
15 omitted).

16 In between steps three and four, the ALJ must determine the
17 claimant's residual functional capacity ("RFC"). 20 CFR
18 416.920(e). To determine the claimant's RFC, the ALJ must consider
19 all of the claimant's impairments, including impairments that are
20 not severe. 20 CFR § 416.1545(a)(2).

21 The claimant has the burden of proof at steps one through
22 four, and the Commissioner has the burden of proof at step five.
23 Bustamante, 262 F.3d at 953-54. "Additionally, the ALJ has an
24 affirmative duty to assist the claimant in developing the record
25 at every step of the inquiry." Id. at 954. If, at step four, the
26 claimant meets her burden of establishing an inability to perform
27 past work, the Commissioner must show that the claimant can perform
28 some other work that exists in "significant numbers" in the
national economy, taking into account the claimant's RFC, age,
education, and work experience. Tackett, 180 F.3d at 1098, 1100;

1 Reddick, 157 F.3d at 721; 20 C.F.R. §§ 404.1520(g)(1),
2 416.920(g)(1). The Commissioner may do so by the testimony of a
3 vocational expert or by reference to the Medical-Vocational
4 Guidelines appearing in 20 C.F.R. Part 404, Subpart P, Appendix 2
5 (commonly known as "the Grids"). Osenbrock v. Apfel, 240 F.3d
6 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
7 (strength-related) and non-exertional limitations, the Grids are
8 inapplicable and the ALJ must take the testimony of a vocational
9 expert. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) (citing
10 Burkhart v. Bowen, 856 F.2d 1335, 1340 (9th Cir. 1988)).

11
12 **V.**

13 **THE ALJ'S DECISION**

14
15 The ALJ employed the five-step sequential evaluation process
16 and concluded that Plaintiff is not disabled within the meaning of
17 the Social Security Act. (AR 622). At step one, the ALJ observed
18 that Plaintiff met the insured status requirements of the Social
19 Security Act through March 31, 2014, and that Plaintiff had not
20 engaged in substantial gainful activity since December 7, 2011,
21 the alleged disability onset date. (AR 614). At step two, the
22 ALJ found that Plaintiff's severe impairments were COPD with a
23 history of pulmonary emboli and cellulitis of the left ankle. (AR
24 615). The ALJ found that Plaintiff's medically determinable mental
25 impairment of dysthymia was not severe. (Id.).

26
27 In making this finding, the ALJ considered four broad
28 functional areas set out in the disability regulations for

1 evaluating mental disorders and in section 12.00C of the Listing
2 of Impairments, known as the "paragraph B" criteria. See 20 C.F.R.,
3 Part 404, Subpart P, Appendix 1. The "paragraph B" criteria
4 include a claimant's daily activities; social functioning;
5 concentration, persistence, or pace; and episodes of
6 decompensation. (AR 615-16).

7
8 The ALJ found that Plaintiff did not meet any of the "paragraph
9 B" criteria. (AR 615-16). The ALJ determined that "[Plaintiff]
10 has no limitation [regarding his daily activities]," because he
11 lives alone and "is able to maintain his grooming and hygiene, take
12 public transportation, manage his finances, cook, shop, run
13 errands, and perform household chores." (AR 615). Moreover,
14 Plaintiff testified that "he is able to assist with simple chores
15 and paper work at a hotel." (Id.).

16
17 The ALJ found that Plaintiff has no limitation in the area of
18 social functioning. (Id.). The ALJ observed that Plaintiff
19 "reported that his relationships with family and friends are good
20 and that he is able to go out alone." (Id.). The ALJ found that
21 Plaintiff has a mild limitation in the area of concentration,
22 persistence, and pace. (Id.). Specifically, the ALJ found that
23 "[d]espite [Plaintiff's] complaints of poor concentration, he
24 admitted that he is able to focus attention." (AR 615). Moreover,
25 the ALJ noted that a "mental status examination revealed he was
26 alert and oriented to time, place, person, and purpose; able to
27 repeat four digits forward and backward; he was able to recall
28 three items immediately and after five minutes; he was able to

1 perform simple math; he was able to perform serial threes; and he
2 was able to follow a conversation." (AR 615-16). However,
3 Plaintiff was unable to perform serial sevens or do alpha-numeric
4 reasoning. (AR 616). Accordingly, the ALJ found that Plaintiff
5 has mild limitations in this functional area.

6
7 Lastly, the ALJ found that Plaintiff had experienced no
8 episodes of decompensation of extended duration. (Id.). Thus,
9 the ALJ determined that, because Plaintiff's medically determinable
10 mental impairment causes no more than "mild" limitations in any of
11 the first three functional areas and "no" episodes of
12 decompensation of extended duration in the fourth area, it is non-
13 severe. (Id.). The ALJ also noted that, despite Plaintiff's
14 complaints of poor concentration, he "has not received any
15 specialized mental health treatment since 1989." (Id.).

16
17 In making this determination, the ALJ gave "little weight" to
18 Dr. Cross's opinion. (Id.). The ALJ reasoned that Dr. Cross's
19 opinion was based on a one-time examination of Plaintiff rather
20 than on a longitudinal treatment history. (Id.) Additionally,
21 the minimal objective findings from Dr. Cross's examination were
22 not consistent with her own opinion. (Id.). The ALJ also noted
23 that Dr. Cross's opinion was inconsistent with the objective
24 medical evidence and the record as a whole, "which revealed that
25 [Plaintiff] has not sought specialized mental health treatment
26 since 1989." (Id.).

1 By contrast, the ALJ gave "significant weight" to the opinion
2 of the State agency psychological consultant that Plaintiff has no
3 severe mental impairment. (Id.). The ALJ reasoned that the State
4 agency consultant's opinion was "reasonable and consistent with
5 the objective medical evidence." (Id.). The ALJ commented that
6 there were "minimal clinical findings to support the degree of
7 limitation alleged by the [plaintiff]." (Id.). Moreover, the
8 consultant's "determination is consistent with the lack of any
9 regular mental health treatment." (Id.).
10

11 At step three, the ALJ found that Plaintiff does not have an
12 impairment or combination of impairments that meets or medically
13 equals one of the listed impairments in 20 C.F.R. Part 404, Subpart
14 Part P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526,
15 416.920(d), 416.925-26). (AR 617).
16

17 The ALJ then found that Plaintiff had the following RFC:
18

19 [C]laimant has the residual functional capacity to
20 perform light work as defined in 20 CFR 404.1567(b) and
21 416.967(b) except he can lift and/or carry 20 pounds
22 occasionally and 10 pounds frequently; he can stand
23 and/or walk for six hours in an eight-hour workday with
24 customary breaks; he is precluded from climbing ladders,
ropes, or scaffolds; he can occasionally climb ramps and
stairs, balance, stoop, kneel, crouch, and crawl; and he
should avoid even moderate exposure to fumes, odors,
dusts, gases, and poor ventilation.

25
26 (AR 617).
27
28

1 In arriving at his conclusion, the ALJ found that Plaintiff's
2 testimony regarding the intensity, persistence, and limiting effect
3 of his symptoms was "less than fully credible." (AR 619). The ALJ
4 stated that: (1) Plaintiff's daily activities and interactions
5 undermined his allegations of disabling functional limitations; (2)
6 Plaintiff failed to follow treatment recommendations; (3) Plaintiff
7 was not taking medications for his respiratory conditions and
8 denied seeing a doctor in recent months; (4) although Plaintiff
9 alleges difficulty concentrating, Plaintiff did not exhibit
10 difficulty concentrating while at the hearing; (5) Plaintiff was
11 jailed for committing a crime of moral turpitude, which placed
12 doubt on the veracity of his allegations; (6) Plaintiff made
13 inconsistent statements regarding matters relevant to disability;
14 and (7) the record does not list restrictions recommended by a
15 treating physician. (AR 619-20).

16
17 The ALJ noted, "[a]lthough the medical evidence of record
18 reveals that the [plaintiff] has a history of alcohol and cannabis
19 abuse, there is no credible evidence that this abuse prevented him
20 from being able to perform work activities on a regular and
21 continuing basis." (AR 620). The ALJ concluded that Plaintiff's
22 alcohol abuse was not a contributing factor material to the issue
23 of disability. (Id.).

24
25 At step four, the ALJ determined that Plaintiff could perform
26 his past relevant work as a sales clerk and hotel clerk. (AR 621).
27 Therefore, the ALJ concluded, Plaintiff is not disabled, as defined
28

1 by the Social Security Act (20 C.F.R. §§ 404.1520(f) and
2 416.920(f)). (AR 621-22).

3
4
5 **VI.**

6 **STANDARD OF REVIEW**

7
8 Under 42 U.S.C. § 405(g), a district court may review the
9 Commissioner's decision to deny benefits. "The court may set aside
10 the Commissioner's decision when the ALJ's findings are based on
11 legal error or are not supported by substantial evidence in the
12 record as a whole." Auckland v. Massanari, 257 F.3d 1033, 1035
13 (9th Cir. 2001) (citing Tackett, 180 F. 3d at 1097); Smolen v.
14 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing Fair v. Bowen,
15 885 F.2d 597, 601 (9th Cir. 1989)).

16
17 "Substantial evidence is more than a scintilla, but less than
18 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.
19 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant
20 evidence which a reasonable person might accept as adequate to
21 support a conclusion." Id. (citing Jamerson, 112 F.3d at 1066;
22 Smolen, 80 F.3d at 1279). To determine whether substantial evidence
23 supports a finding, the court must "'consider the record as a
24 whole, weighing both evidence that supports and evidence that
25 detracts from the [Commissioner's] conclusion.'" Auckland, 257
26 F.3d at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.
27 1993)). If the evidence can reasonably support either affirming
28 or reversing that conclusion, the court may not substitute its

1 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-21
2 (citing Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453,
3 1457 (9th Cir. 1995)).

4
5 **VII.**

6 **DISCUSSION**

7
8 Plaintiff contends that the ALJ erred in rejecting
9 consultative examiner Dr. Cross's opinion. (Memorandum in Support
10 of Plaintiff's Complaint ("Pl. MSO") at 5-11).

11
12 The Court disagrees. The record demonstrates that the ALJ
13 gave proper weight to Dr. Cross's opinion. Accordingly, for the
14 reasons discussed below, the Court finds that the ALJ's decision
15 must be AFFIRMED.

16
17 **A. The ALJ's Findings Regarding Plaintiff's Alleged Mental**
18 **Impairment Do Not Require Remand**

19
20 As a threshold matter, the ALJ's finding that Plaintiff's
21 mental impairment is non-severe does not warrant remand. Plaintiff
22 fails to directly raise this issue in his Memorandum in Support of
23 the Complaint. Rather, Plaintiff's only claim is that "[w]here
24 the ALJ fails to give specific and legitimate reasons for rejecting
25 the opinions of the consultative psychologist, the court should
26 reverse and remand." (Pl. MSO at 5).

1 Thus, any argument that the ALJ erred in finding Plaintiff's
2 alleged mental impairment non-severe is waived for failure to
3 properly raise the issue. See Edlund v. Massanari, 253 F.3d 1152,
4 1158 (9th Cir. 2001), as amended on reh'g (Aug. 9, 2001) (finding
5 that claims raised by Appellant for the first time on appeal—
6 including challenges to the ALJ's rejection of subjective testimony
7 and conclusory Step 3 equivalence finding—were waived); see also
8 Hilfinger-Dowell ex rel. Dowell v. Astrue, 232 F. App'x 744, 746
9 (9th Cir. 2007) (finding that Appellant waived arguments regarding
10 ALJ's credibility determinations and residual functional capacity
11 assessment by failing to raise them in the district court).

12
13 Even had Plaintiff raised this issue, the ALJ did not err in
14 finding Plaintiff's mental impairment to be non-severe. Plaintiff
15 testified that he currently performs hotel work in exchange for a
16 place to stay. (AR 648). Specifically, Plaintiff testified that
17 he mainly works at the front desk, checking people in and out.
18 (Id.). He also does paperwork. (Id.). He also does a little bit
19 of cleaning, including wiping down the counters and sweeping.
20 (Id.). Plaintiff testified that he returns to the office from his
21 room when his employer needs him. (AR 655).

22
23 Thus, findings of both the VE and ALJ that Plaintiff has the
24 mental capacity to perform his past work at a hotel are supported
25 by substantial evidence in the record. Clearly, Plaintiff's
26 alleged psychological impairments do not prevent him from
27 functioning in an employment setting. He is able to perform work
28 and interact with a supervisory figure. Additionally, results from

1 Plaintiff's consultative examination indicate that he can focus
2 attention. (AR 995). Plaintiff has no difficulty making
3 decisions. (Id.). Results also indicate that Plaintiff is
4 unimpaired in his ability to associate with day-to-day work, to
5 accept instructions from supervisors, and to perform work
6 activities without special or additional supervision. (AR 998).

7
8 As the ALJ stated:

9
10 Despite his impairments, the [plaintiff] has
11 engaged in a somewhat normal level of daily activity
12 and interaction. He admitted activities of daily
13 living, including maintaining his grooming and
14 hygiene, taking public transportation, managing his
15 finances, cooking, running errands, shopping,
16 performing household chores, and assist[ing] with
17 simple chores and paperwork at a hotel. [] Some
18 of the physical and mental abilities and social
19 interactions required to perform these activities
20 are the same as those necessary for obtaining and
21 maintaining employment.

22 (AR 619).

23 Accordingly, the evidence would support a finding of a non-
24 severe impairment at step-two. While Plaintiff currently works
25 part-time at the hotel where he stays, none of his alleged
26 limitations, even if accepted as true, necessarily prevent him from
27 working full-time in the same position.
28

1 **B. The ALJ Provided Specific And Legitimate Reasons For Rejecting**
2 **Dr. Cross's Opinion**

3
4 There are, in general, three types of medical opinions in
5 social security cases: the opinions of (1) treating physicians
6 who examine and treat, (2) examining physicians who examine but do
7 not treat, and (3) non-examining physicians who neither examine
8 nor treat. Valentine v. Comm'r, Soc. Sec. Admin., 574 F.3d 685,
9 692 (9th Cir. 2009). Treating physicians are given the greatest
10 weight because they are "employed to cure and [have] a greater
11 opportunity to know and observe the patient as an individual."
12 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989); Connett v.
13 Barnhart, 340 F.3d 871, 874 (9th Cir. 2003). Accordingly, where a
14 treating physician's opinion is refuted by another doctor, the ALJ
15 may not reject this opinion without providing specific and
16 legitimate reasons supported by substantial evidence in the record.
17 Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1996) (ALJ must
18 provide clear and convincing reasons for rejecting an unrefuted
19 treating physician's opinions); see also Ryan v. Comm'r of Soc.
20 Sec., 528 F.3d 1194, 1198 (9th Cir. 2008).

21
22 Similarly, the Commissioner may reject the controverted
23 opinion of an examining consultative physician only for "specific
24 and legitimate reasons that are supported by substantial evidence."
25 Carmickle v. Comm'r of Social Sec. Admin., 533 F.3d 1155, 1164 (9th
26 Cir. 2008) (quoting Lester, 81 F.3d at 830-31). The opinion of a
27 non-examining, non-treating physician does not constitute
28 substantial evidence that justifies rejecting the opinion of either

1 an examining or a treating physician unless it is consistent with
2 and supported by other evidence in record. Lester, 81 F.3d at 831;
3 Morgan v. Comm'r of Soc. Sec., 169 F.3d 595, 600-01 (9th Cir.
4 1998); § 404 .1527(c)(4) ("Generally, the more consistent an
5 opinion is with the record as a whole, the more weight we will give
6 to that opinion.")

7
8 Plaintiff contends that the ALJ failed to provide specific
9 and legitimate reasons to reject the opinion of consultative
10 examining psychologist, Dr. Cross, in favor of the State agency
11 physician's opinion. (Pl. MSO at 5).

12
13 Specifically, Plaintiff asserts that (1) the ALJ may not
14 reject Dr. Cross's opinion solely because it was based on a one-
15 time encounter, rather than a longitudinal treatment history; (2)
16 the ALJ incorrectly found that the minimal objective findings from
17 Dr. Cross's examination were not consistent with her opinion; (3)
18 the ALJ may not reject Dr. Cross's opinion on the basis that
19 Plaintiff has not had specialized treatment since 1989 because "it
20 is common knowledge that depression is one of the most
21 underreported illnesses in the country because those afflicted
22 often do not recognize that their conditions reflects a potentially
23 serious mental illness"; and (4) the "summary of the opinions of
24 Dr. Rivera-Miya included the inability to complete serial threes,
25 sevens, or do alphanumeric reasoning, or his inability to know the
26 difference of 'up' and 'south'." (Pl. MSO at 8-10).

1 This Court disagrees and finds that the ALJ provided specific
2 and legitimate reasons for rejecting Dr. Cross's opinion.

3
4 **1. One Time Examination**

5
6 Plaintiff argues that the ALJ improperly rejected Dr. Cross's
7 opinion because it was based on a one-time examination rather than
8 a longitudinal treatment history. Plaintiff argues that this "does
9 not provide a basis for rejecting the examining physician's
10 opinion." (Pl. MSO at 8).

11
12 Plaintiff's characterization lacks context. The ALJ stated
13 that he afforded "little weight" to Dr. Cross's opinion. (AR 616).
14 In so doing, the ALJ considered Dr. Cross's brief examining
15 relationship as one of several factors. The other factors included
16 (1) the fact that the minimal objective findings from Dr. Cross's
17 examination were inconsistent with her ultimate opinion of
18 disability and (2) the fact that her opinion was inconsistent with
19 objective medical evidence and the record as a whole.

20
21 Moreover, it is entirely appropriate for the ALJ to consider
22 the length of the physician-patient relationship in determining
23 how much weight to afford a physician's opinion. The Regulations
24 specifically enumerate length of relationship as one reason why
25 treating physicians are generally afforded greater weight than
26 consultative examiners. 20 C.F.R. § 404.1527 ("Generally, we give
27 more weight to medical opinions from your treating sources, since
28 these sources are likely to be ... able to provide a detailed,

1 longitudinal picture of your medical impairment(s) ... that cannot
2 be obtained from the objective medical findings alone or from
3 reports of individual examinations, such as consultative
4 examinations ... ").

5
6 Thus, the fact that Dr. Cross saw Plaintiff once is a
7 reasonable factor to consider in conjunction with others when
8 affording his opinion little weight.

9
10 **2. Minimal Objective Findings**

11
12 Plaintiff argues that the ALJ was erroneous in his
13 determination that the minimal objective findings from Dr. Cross's
14 examination conflicted with her ultimate opinion. (Pl. MSO at 8).
15 Plaintiff argues, rather, that the objective findings support Dr.
16 Cross's opinion. (Id.). Plaintiff bolsters his argument with the
17 fact that he did not know how "up" and "south" were the same during
18 the examination. (Id.). He similarly relies on the fact that he
19 could not do alpha numeric reasoning. (Id.).

20
21 Plaintiff also points to Dr. Cross's finding that he was
22 unable to perform serial threes⁴ and sevens and states that the
23 "fact that Social Security in evaluating mental listings regarding
24 *concentration, persistence or pace* refers to the ability to sustain
25 focused attention and concentration sufficiently long to permit
26 the timely and appropriate completion of tasks commonly found in

27 _____
28 ⁴ Dr. Cross initially notes that Plaintiff could not perform
serial threes (AR 996), but later notes that he could. (AR 997).

1 work settings utilizes the serials three and seven tests to
2 evaluate a claimant lead to one reasonable conclusion - a severe
3 mental impairment exists." (Pl. MSO at 8-9).

4
5 As a threshold matter, it was entirely appropriate for the
6 ALJ to consider lack of supporting objective evidence in affording
7 little weight to Dr. Cross's opinion. Moreover, the ALJ considered
8 the objective findings noted by Plaintiff, stating that the "mental
9 status examination revealed ... [that Plaintiff] was unable to do
10 alphanumeric reasoning or serial sevens." (AR 616). However, the
11 ALJ balanced these findings with the remainder of the objective
12 evidence from Dr. Cross's examination, stating that "[o]therwise,
13 the findings were within normal limits." (AR 616). The ALJ
14 concluded that "the minimal objective findings from [Dr. Cross's]
15 examination ... are not consistent with her opinion." (Id.).

16
17 Thus, the ALJ appropriately afforded little weight to Dr.
18 Cross's opinion based on the fact that certain of her conclusions
19 contradicted the majority of her objective evidence.

20
21 **3. No Specialized Mental Health Treatment**

22
23 Plaintiff argues that it was error for the ALJ to give little
24 weight to Dr. Cross's opinion based on the fact that Plaintiff has
25 not had specialized mental health treatment since 1989. (Pl. MSO
26 at 9). Plaintiff asserts that the "lack of mental health treatment
27 does not mean [Plaintiff] does not have a mental illness." (Id.).
28 However, conservative treatment can diminish a plaintiff's

1 credibility regarding the severity of an impairment. See Parra
2 v. Astrue, 481 F.3d 742, 750–51 (9th Cir. 2007); see also Meanel
3 v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (Claimant's "claim
4 that she experienced pain approaching the highest level imaginable
5 was inconsistent with the 'minimal, conservative treatment' that
6 she received."); Johnson v. Shalala, 60 F.3d 1428, 1434 (9th
7 Cir.1995) (ALJ properly concluded claimant's excess pain testimony
8 was not credible because, among other reasons, claimant's treating
9 physician prescribed only conservative treatment, "suggesting a
10 lower level of both pain and functional limitation").

11
12 Plaintiff's specialized treatment in 1989 indicates that, at
13 a minimum, he should have been aware of specialized treatment
14 opportunities and how to gain access to them. Moreover, the ALJ
15 considered the fact that Plaintiff did not have financial barriers
16 to obtaining appropriate medical care. The ALJ noted that "there
17 is no evidence that [Plaintiff] could not have obtained low cost
18 or no cost medical care as necessary". (AR 619). "[A] treating
19 physician noted that since [Plaintiff] was able to find cigarettes
20 and alcohol, there was no reason why he should not be able to
21 afford [treatment]." (AR 620). Thus, the ALJ reasonably concluded
22 that Plaintiff could financially access the treatment he needed
23 for his alleged impairments. Plaintiff's failure to seek mental-
24 health treatment that was commensurate with his complaints
25 constitutes objective evidence of conservative care. The ALJ
26 reasonably concluded that such evidence contradicts Dr. Cross's
27 opinion.

1 Plaintiff contends that depression is one of the most
2 underreported illnesses in the country because those afflicted
3 often do not recognize that their condition reflects a potentially
4 serious mental illness. (Pl. MSO. at 9-10). Thus, he argues, the
5 fact that he did not seek treatment is not a substantial basis for
6 rejecting Dr. Cross's assessment. (Id.).

7
8 A review of the record suggests that Plaintiff's own testimony
9 belies this argument. Plaintiff testified that he has had issues
10 with depression since his health began to decline. (AR 647).
11 However, he testified that he has not recently taken any medicine
12 to help with this depression. (Id.). He testified that in the
13 past he was seeing a psychiatrist and was on a "depression pill."
14 (Id.). He stated that he started feeling better but stopped taking
15 the medicine after about six months because he did not like it.
16 (AR 647-648). Thus, Plaintiff admitted having access to medication
17 that he knew could alleviate his alleged depression. However, he
18 consciously elected not to take it.

19
20 Though Plaintiff contends that under Nguyen v. Chater, 100
21 F.3d 1462 (9th Cir.1996), his treatment and medication history
22 should not be construed against him, Nguyen is distinguishable. In
23 Nguyen, the ALJ discounted evidence of depression because a
24 claimant failed to seek treatment for any mental disorder "until
25 late in the day," and the Ninth Circuit found it to be unreasonable
26 "to chastise one with a mental impairment for the exercise of poor
27 judgment in seeking rehabilitation." 100 F.3d at 1465. Here,
28 Plaintiff sought treatment in the past but discontinued recommended

1 medications. Plaintiff's discontinuation of care reasonably
2 suggests that his symptoms were not as severe as alleged. Moreover,
3 the record does not afford any compelling reason to view
4 Plaintiff's departures from prescribed treatment as part of his
5 alleged underlying mental afflictions.

6
7 Thus, the record demonstrates that Plaintiff knowingly
8 shunned treatment opportunities for an allegedly debilitating
9 condition. The ALJ reasonably concluded that Plaintiff's failure
10 to seek mental health treatment contradicts Dr. Cross's opinion.
11 Because the ALJ's conclusion here was reasonable, the Court should
12 not disturb it. See Morgan v. Comm'r of Social Sec. Admin., 169
13 F.3d 595, 599 (9th Cir.1999) ("Where the evidence is susceptible
14 to more than one rational interpretation, it is the ALJ's
15 conclusion that must be upheld.").

16 17 **4. Non-examining physician**

18
19 Plaintiff argues that the ALJ "gave more weight to the
20 opinions of Dr. Rivera-Miya ... [and that] [t]he summary of [these
21 opinions] included the inability to complete serial threes, sevens,
22 or do alphanumeric reasoning, or his inability to know the
23 difference of 'up' and 'south.'" (Pl. MSO at 10). Plaintiff
24 appears to argue that, because Dr. Rivera-Miya acknowledged these
25 results from Dr. Cross's examination, the ALJ should have found
26 Plaintiff disabled when affording her opinion more weight.

1 Plaintiff's argument lacks merit. After considering and
2 balancing Plaintiff's record, including the minimal evidence that
3 supported his allegations, Dr. Rivera-Miya's ultimate opinion was
4 that Plaintiff is not disabled. It was reasonable for the ALJ to
5 afford greater weight to Dr. Rivera-Miya's ultimate opinion. Dr.
6 Rivera-Miya's opinion was consistent with the majority of the
7 objective medical evidence.

8
9 The opinion of a non-examining physician "cannot by itself
10 constitute substantial evidence that justifies the rejection of
11 the opinion of either an examining or a treating physician."
12 Lester, 81 F.3d at 831. However, opinions of non-examining
13 physicians may serve as substantial evidence when the opinions are
14 consistent with independent clinical findings or other evidence in
15 the record of a Social Security proceeding. Thomas v. Barnhart,
16 278 F.3d 947 (9th Cir. 2002). See also § 404.1527(c)(4)
17 ("Generally, the more consistent an opinion is with the record as
18 a whole, the more weight we will give to that opinion.")

19
20 As the ALJ noted, Dr. Rivera Miya's opinion is "reasonable
21 and consistent with the objective medical evidence. There are
22 minimal clinical findings to support the degree of limitations
23 alleged by the [plaintiff]. Moreover, [Dr. Rivera Miya's]
24 determination is consistent with the lack of any regular mental
25 health treatment." (AR 616).

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VIII.
CONCLUSION

Accordingly, IT IS ORDERED that judgment be entered AFFIRMING the decision of the Commissioner and dismissing this action with prejudice. IT FURTHER IS ORDERED that the Clerk of the Court shall serve copies of this Order and the Judgment on counsel for both parties.

DATED: June 6, 2017

/s/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE

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