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

FRED TILLMON,

Plaintiff,

v.

NANCY A. BERRYHILL,<sup>1</sup>  
Acting Commissioner of the  
Social Security Administration,

Defendant.

Case No. EDCV 16-1760 SS

**MEMORANDUM DECISION AND ORDER**

**I.**

**INTRODUCTION**

Fred Tillmon ("Plaintiff") brings this action seeking to overturn the decision of the Commissioner of the Social Security Administration (the "Commissioner" or "Agency") denying his

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

1 application for Supplemental Security Income benefits ("SSI"). On  
2 August 17, 2016, Plaintiff filed a Complaint commencing the instant  
3 action. On January 4, 2017, Defendant filed an Answer along with  
4 the Administrative Record ("AR"). On February 13, 2017, Plaintiff  
5 filed a memorandum in support of the Complaint ("P. Mem."). On  
6 March 20, 2017, Defendant filed a memorandum in support of the  
7 Answer ("D. Mem."). The parties consented, pursuant to 28 U.S.C.  
8 § 636(c), to the jurisdiction of the undersigned United States  
9 Magistrate Judge. For the reasons stated below, the Court AFFIRMS  
10 the Commissioner's decision.

## 11 12 II.

### 13 PROCEDURAL HISTORY

14  
15 In 2010, Plaintiff filed a prior application for SSI. (AR  
16 12, 100). The Agency denied Plaintiff's application initially on  
17 July 21, 2010, and on reconsideration on October 26, 2010. (AR  
18 100). Plaintiff requested a hearing before an Administrative Law  
19 Judge ("ALJ"), and, on July 26, 2011, ALJ Teresa Hoskins Hart held  
20 a hearing to review Plaintiff's application. (AR 24-63).  
21 Plaintiff proceeded without counsel before ALJ Hart. (AR 24-35,  
22 100). Vocational expert ("VE") Troy Scott also testified at the  
23 hearing, as did Michael Bliss, Plaintiff's friend. (AR 24, 42).  
24 On March 26, 2012, ALJ Hart found that Plaintiff was not disabled  
25 under the Social Security Act (the "Act"). (AR 100-07). Plaintiff  
26 sought review of ALJ Hart's decision before the Appeals Council,  
27 which denied Plaintiff's request. (AR 111). The decision became  
28

1 the final decision of the Commissioner, (AR 111), and Plaintiff  
2 did not challenge the decision further. (See AR 93-94).

3  
4 Plaintiff filed the instant application for SSI on July 29,  
5 2013. (AR 12, 126). Plaintiff alleged a disability onset date of  
6 December 31, 2009. (AR 12, 114, 127). The Agency denied  
7 Plaintiff's application initially on October 31, 2013, and on  
8 reconsideration on January 16, 2014. (AR 141-45, 149-53).  
9 Plaintiff requested a hearing before an ALJ. (AR 155). On January  
10 5, 2015, ALJ Michael Radensky conducted a hearing to review  
11 Plaintiff's application. (AR 12, 64-96). Plaintiff, represented  
12 by Brandon Sanchez, testified before ALJ Radensky. (AR 12, 64).  
13 VE Corinne J. Porter also testified at the hearing. (AR 12, 64).  
14 On February 24, 2015, ALJ Radensky found that Plaintiff was not  
15 disabled under the Act. (AR 12-19). Plaintiff sought review of  
16 ALJ Radensky's decision before the Appeals Council, which denied  
17 review on July 25, 2016. (AR 1-3, 6). The ALJ's decision therefore  
18 became the final decision of the Commissioner. (AR 1). Plaintiff  
19 commenced the instant action on August 17, 2016. (Dkt. No. 1).

### 21 III.

#### 22 FACTUAL BACKGROUND

##### 23 24 **A. Background and ALJ Hearing Testimony**

25  
26 Plaintiff was born on August 7, 1960. (AR 244). He was 54  
27 years old when he appeared before ALJ Radensky. (AR 70). Plaintiff  
28 did not complete high school and does not have a GED, but he is

1 able to read and write "basic stuff." (AR 70-71). Plaintiff had  
2 last worked "six [or] seven years" earlier, helping a neighbor  
3 maintain yards as a "cleaner." (AR 67, 91). Plaintiff had not  
4 applied for any work more recently. (AR 68-69).

5  
6 There is some evidence in the record of a psychiatric  
7 commitment in 2012. (AR 360). The records indicate possible  
8 substance abuse and mental health issues. (AR 360-361). In  
9 addition, it appears that Plaintiff reported two episodes of  
10 custody, one in 2004 and one in 2008, and that he received mental  
11 health treatment in custody. (AR 360, 408). In later medical  
12 records, Plaintiff denied drug or alcohol use, but Plaintiff's  
13 treating physician mentioned in her notes that "[Plaintiff] smelled  
14 of ETOH [alcohol]." (AR 386).

15  
16 Plaintiff claimed that he had been diagnosed with paranoia,  
17 schizophrenia, bipolar disorder, and "mental depression." (AR 72).  
18 He claimed that he could not "see [him]self" around "too many"  
19 people because when his "mind goes bad" he believes that people  
20 are "out to get" him. (AR 72). Plaintiff claimed that he took  
21 medication for his impairments, although it made him nauseated and  
22 caused "shakes" over his whole body for ninety minutes at a time  
23 twice a week. (AR 74-75). Plaintiff also claimed that his  
24 medications made him tired and made it difficult to get out of bed.  
25 (AR 76). Plaintiff maintained that he also experienced suicidal  
26 thoughts and hallucinations. (AR 77, 79). Plaintiff testified  
27 that he was "fine" when he took his medication, provided he was  
28 "by [him]self." (AR 81).

1 At the time of the 2015 hearing, Plaintiff lived with his  
2 sister, niece, and great nephew. (AR 82). Plaintiff claimed that  
3 he cooks TV dinners and does laundry "every now and then." (AR  
4 83). Plaintiff claimed that he does not shop or drive and  
5 socializes only with his friend "Mike." (AR 84). Plaintiff takes  
6 the bus to appointments. (AR 84-85).

7  
8 Plaintiff's attorney asked VE Porter whether an individual  
9 with Plaintiff's "difficulties with maintaining social functions,  
10 pace and persistence and his inability to act appropriately with  
11 the public" could perform Plaintiff's past relevant work. (AR 94).  
12 VE Porter testified that Plaintiff could return to his past work  
13 as a cleaner, noting that public interaction "wouldn't be a  
14 factor." (AR 94). Plaintiff's attorney asked whether Plaintiff  
15 would be required to "interact[] with the public in the sense of  
16 whoever's house he's cleaning." (AR 94). VE Porter testified that  
17 she "got the impression [Plaintiff] was doing lawn work." (AR 94).  
18 Plaintiff stated, however, that he never performed any work inside  
19 the house while he worked as a cleaner. (AR 95).

20  
21 During the prior 2011 hearing before ALJ Hart, VE Scott  
22 testified that an individual with Plaintiff's vocational profile  
23 who was limited to the performance of "simple, repetitive tasks"  
24 with "limited social contact" would be able to perform Plaintiff's  
25 past work as a cleaner. (AR 58-60). VE Scott confirmed that the  
26 same individual could also return to Plaintiff's past relevant work  
27 if the individual also could not come into contact with the general  
28 public. (AR 60).

1 **B. Treating Psychiatrist Denise Persichino, D.O.**

2  
3 In July 2013, Plaintiff visited Dr. Denise Persichino, D.O.,  
4 complaining of a "real short" temper and depression and that his  
5 medication made him "very tired." (AR 384). Dr. Persichino  
6 observed that Plaintiff was "very talkative [and] energetic [and]  
7 hyperverbal" and continued his prescriptions. (AR 384).

8  
9 In August 2013, Plaintiff visited Dr. Persichino, complaining  
10 of depression with "5-6 good days" per month, anger, panic attacks,  
11 and visual and auditory hallucinations. (AR 382). Dr. Persichino  
12 recommended supportive psychotherapy and continued Plaintiff's  
13 prescriptions. (AR 382).

14  
15 On September 24, 2013, Dr. Persichino completed a Mental  
16 Disorder Questionnaire Form regarding Plaintiff's impairments. (AR  
17 408-12). Dr. Persichino observed that Plaintiff suffered from mood  
18 swings, depression, homicidal thoughts, suicidal thoughts, visual  
19 and auditory hallucinations, and anxiety. (AR 408, 410). Dr.  
20 Persichino also stated that Plaintiff would sometimes "lose time"  
21 and spend up to half an hour in an "almost catatonic" state. (AR  
22 410). Dr. Persichino stated that Plaintiff's mood swings and  
23 "racing thoughts" would affect his ability to concentrate and  
24 complete tasks in a "time efficient manner" and that he had  
25 "significant difficulty" with authority figures. (AR 411).

26  
27 In December 2013, Plaintiff visited Dr. Persichino, reporting  
28 anxiety, visual and auditory hallucinations, and depression. (AR

1 433). Dr. Persichino modified Plaintiff's medication regimen and  
2 prescribed supportive therapy. (AR 433).

3  
4 In January 2014, Plaintiff visited Dr. Persichino, reporting  
5 "improved" depression and that his hallucinations had been "good";  
6 Dr. Persichino noted that Plaintiff was "more talkative [and]  
7 upbeat [and] happy" and continued his medication regimen. (AR  
8 431).

9  
10 **C. State Agency Medical Consultants**

11  
12 On October 29, 2013, State Agency reviewing physician Dr. P.  
13 Ryan, M.D., reviewed Plaintiff's medical records and provided a  
14 medical assessment. (AR 117-22). Dr. Ryan stated that there had  
15 been "no material change" since ALJ Hart had found Plaintiff not  
16 disabled one year earlier. (AR 118). Dr. Ryan also stated that  
17 Plaintiff's allegations regarding the severity of his mental  
18 impairments were not supported by his treatment history, further  
19 noting that Plaintiff's condition "appear[ed] to get better during  
20 periods of compliance w/ treatment." (AR 120).

21  
22 On January 15, 2014, State Agency reviewing physician Dr.  
23 Joshua D. Schwartz, Ph.D., reviewed Plaintiff's medical records  
24 and provided a medical assessment. (AR 132-37). Dr. Schwartz  
25 opined that Plaintiff could carry out "simple one and two step  
26 tasks with adequate concentration, persistence and pace," but also  
27 stated that Plaintiff should have "no contact w/ the general  
28 public." (AR 137).

1 **D. Work History Report**

2  
3 In a September 2013 Work History Report, Plaintiff reported  
4 that he worked as a "laborer" in 2002 and in providing "assistance  
5 to [a] landscaper" in 2009. (AR 272). Plaintiff's duties as a  
6 "laborer" included cleaning garden tools and removing them from a  
7 truck. (AR 273). Plaintiff's duties in providing "assistance to  
8 [a] landscaper" involved "clean[ing] and stack[ing] tools" and  
9 using rakes, trimmers, and hedgers. (AR 274).

10  
11 **IV.**

12 **THE FIVE STEP SEQUENTIAL EVALUATION PROCESS**

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

25  
26  
27 <sup>2</sup> Substantial gainful activity means work that involves doing  
28 significant and productive physical or mental duties and is done  
for pay or profit. 20 C.F.R. §§ 404.1520, 416.910.



1 To decide if a claimant is entitled to benefits, an ALJ  
2 conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The  
3 steps are:

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

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

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

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

22  
23 (5) Is the claimant able to do any other work? If not,  
24 the claimant is found disabled. If so, the  
25 claimant is found not disabled.

1 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari,  
2 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); 20 C.F.R.  
3 §§ 404.1520(b)-404.1520(f) (1) & 416.920(b)-416.920(f) (1).

4  
5 The claimant has the burden of proof at steps one through four  
6 and the Commissioner has the burden of proof at step five.  
7 Bustamante, 262 F.3d at 953-54. If, at step four, the claimant  
8 meets his burden of establishing an inability to perform past work,  
9 the Commissioner must show that the claimant can perform some other  
10 work that exists in "significant numbers" in the national economy,  
11 taking into account the claimant's residual functional capacity  
12 ("RFC"), age, education, and work experience. Tackett, 180 F.3d  
13 at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R. §§  
14 404.1520(f) (1), 416.920(f) (1). The Commissioner may do so by the  
15 testimony of a vocational expert or by reference to the Medical-  
16 Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart P,  
17 Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel,  
18 240 F.3d 1157, 1162 (9th Cir. 2001) (citing Tackett). When a  
19 claimant has both exertional (strength-related) and nonexertional  
20 limitations, the Grids are inapplicable and the ALJ must take the  
21 testimony of a vocational expert. Moore v. Apfel, 216 F.3d 864,  
22 869 (9th Cir. 2000).

23  
24 **V.**

25 **THE ALJ'S DECISION**

26  
27 Preliminarily, ALJ Radensky observed that ALJ Hart previously  
28 found Plaintiff not disabled. (AR 12). As a result, ALJ Radensky

1 ruled that there was a "rebuttable presumption of continuing  
2 nondisability" with respect to the unadjudicated period. (AR 12).  
3 ALJ Radensky found that Plaintiff had not shown "changed  
4 circumstances" and therefore adopted the findings of ALJ Hart's  
5 decision. (AR 12).

6  
7 ALJ Radensky then applied the five-step process in Plaintiff's  
8 case. At step one, ALJ Radensky observed that Plaintiff had not  
9 engaged in substantial gainful activity since July 29, 2013, the  
10 application date. (AR 14). At step two, ALJ Radensky found that  
11 Plaintiff's severe impairments included psychotic disorder, not  
12 otherwise specified, and history of polysubstance abuse with  
13 physiological dependence. (AR 14). At step three, ALJ Radensky  
14 found that Plaintiff did not have an impairment or combination of  
15 impairments that meets or medically equals the severity of one of  
16 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1  
17 (20 C.F.R. §§ 404.1520(d), 404.1525 and 404.1526). (AR 15).

18  
19 ALJ Radensky then found that Plaintiff possessed the RFC to  
20 perform a full range of work at all exertional levels, with the  
21 nonexertional limitations that Plaintiff could perform "simple,  
22 repetitive tasks with limited social interactions" and was  
23 precluded from contact with the public. (AR 16). In evaluating  
24 Plaintiff's RFC, ALJ Radensky assigned "some weight" to Dr.  
25 Persichino's opinion and "great weight" to the opinions of State  
26 agency medical consultants. (AR 18).

1 At step four, ALJ Radensky determined that Plaintiff was  
2 capable of performing his past relevant work as a cleaner as  
3 actually and generally performed. (AR 18-19). ALJ Radensky  
4 therefore determined that Plaintiff was not disabled within the  
5 meaning of the Act. (AR 19).

6  
7 **VI.**

8 **STANDARD OF REVIEW**

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

18  
19 "Substantial evidence is more than a scintilla, but less than  
20 a preponderance." Reddick, 157 F.3d at 720 (citing Jamerson v.  
21 Chater, 112 F.3d 1064, 1066 (9th Cir. 1997)). It is "relevant  
22 evidence which a reasonable person might accept as adequate to  
23 support a conclusion." Id. (citing Jamerson, 112 F.3d at 1066;  
24 Smolen, 80 F.3d at 1279). To determine whether substantial  
25 evidence supports a finding, the court must "'consider the record  
26 as a whole, weighing both evidence that supports and evidence that  
27 detracts from the [Commissioner's] conclusion.'" Aukland, 257 F.3d  
28 at 1035 (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir.

1 1993)). If the evidence can reasonably support either affirming  
2 or reversing that conclusion, the court may not substitute its  
3 judgment for that of the Commissioner. Reddick, 157 F.3d at 720-  
4 21 (citing Flaten v. Sec'y, 44 F.3d 1453, 1457 (9th Cir. 1995)).

5  
6 **VII.**

7 **DISCUSSION**

8  
9 Plaintiff challenges ALJ Radensky's decision on two grounds.  
10 First, Plaintiff contends that ALJ Radensky failed to properly  
11 consider Dr. Persichino's opinion. (P. Mem. at 3-6). Second,  
12 Plaintiff contends that ALJ Radensky erred at step four by finding  
13 that he could perform his past relevant work as a cleaner. (P.  
14 Mem. at 6-9).

15  
16 The Court disagrees. ALJ Radensky afforded proper weight to  
17 Dr. Persichino's opinion and did not err by determining that  
18 Plaintiff could return to his past relevant work.<sup>3</sup> Accordingly,  
19

20  
21 <sup>3</sup> Defendant also argues that the Court should affirm the ALJ's  
22 decision because Plaintiff has failed to rebut the presumption of  
23 continuing nondisability or to challenge the ALJ's finding on this  
24 issue. (D. Mem. at 2-4 (stating that presumption of continuing  
25 nondisability should be applied and presenting other arguments "in  
26 the alternative")). Plaintiff argues that his claims should be  
27 considered "regardless of whether [Plaintiff] did not rebut the  
28 presumption of continuing nondisability." (P. Mem. at 2). The  
Court deems it appropriate to evaluate Plaintiff's proposed grounds  
for reversal, particularly as the Ninth Circuit has disapproved of  
applying the presumption of continuing nondisability where, as  
here, it appears that the claimant was unrepresented by counsel at  
the time of his prior claim. See Lester v. Chater, 81 F.3d 821,  
827-28 (9th Cir. 1995).

1 for the reasons discussed below, the Court finds that ALJ  
2 Radensky's decision must be AFFIRMED.

3  
4 **A. ALJ Radensky Provided Specific And Legitimate Reasons To**  
5 **Assign Dr. Persichino's Opinion "Some Weight"**

6  
7 Plaintiff contends that the ALJ failed to properly consider  
8 Dr. Persichino's opinion. (P. Mem. at 3-6). The Court disagrees  
9 and finds that the ALJ provided specific and legitimate reasons  
10 for assigning Dr. Persichino's opinion "some weight."

11  
12 Social Security regulations require the ALJ to consider all  
13 relevant medical evidence when determining whether a claimant is  
14 disabled. 20 C.F.R. §§ 404.1520(e), 404.1527(c), 416.927(c).  
15 Where the Agency finds that the treating physician's opinion about  
16 the nature and severity of the claimant's impairments is well-  
17 supported by accepted medical techniques and is not inconsistent  
18 with the other substantive evidence in the record, that opinion is  
19 ordinarily controlling. 20 C.F.R. § 404.1527(c)(2); Orn v. Astrue,  
20 495 F.3d 625, 631 (9th Cir. 2007).

21  
22 Nevertheless, the ALJ is also "responsible for determining  
23 credibility, resolving conflicts in medical testimony, and for  
24 resolving ambiguities." Andrews v. Shalala, 53 F.3d 1035, 1039  
25 (9th Cir. 1995); see also Tommasetti v. Astrue, 533 F.3d 1035, 1041  
26 (9th Cir. 2008) ("[T]he ALJ is the final arbiter with respect to  
27 resolving ambiguities in the medical evidence."). Findings of fact  
28 that are supported by substantial evidence are conclusive. 42

1 U.S.C. § 405(g); see also Key v. Heckler, 754 F.2d 1545, 1549 (9th  
2 Cir. 1985) (“Where the evidence as a whole can support either  
3 outcome, [the court] may not substitute [its] judgment for the  
4 ALJ’s.”); Ryan v. Comm’r, 528 F.3d 1194, 1198 (9th Cir. 2008)  
5 (“‘Where evidence is susceptible to more than one rational  
6 interpretation,’ the ALJ’s decision should be upheld.”) (quoting  
7 Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005)). An ALJ need  
8 not address every piece of evidence in the record, but only evidence  
9 that is significant or probative. See Howard ex rel. Wolff v.  
10 Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003).

11  
12 Furthermore, “[t]he treating physician’s opinion is not . . .  
13 necessarily conclusive as to either a physical condition or the  
14 ultimate issue of disability.” Magallanes v. Bowen, 881 F.2d 747,  
15 751 (9th Cir. 1989). The weight given a treating physician’s  
16 opinion depends on whether it is supported by sufficient medical  
17 data and whether it is consistent with other evidence in the record.  
18 See 20 C.F.R. § 404.1527. The ALJ may disregard the treating  
19 physician’s opinion whether or not that opinion is contradicted.  
20 Andrews, 53 F.3d at 1041 (citing Magallanes, 881 F.2d at 751). To  
21 reject the uncontroverted opinion of a claimant’s physician, the  
22 ALJ must present clear and convincing reasons for doing so.  
23 Andrews, 53 F.3d at 1041. Where the treating physician’s opinion  
24 is contradicted by other doctors, the Commissioner may reject the  
25 opinion by providing “specific and legitimate reasons” for doing  
26 so that are supported by substantial evidence in the record. See  
27 Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001).

1 ALJ Radensky cited specific and legitimate reasons supported  
2 by the record for giving "some weight" to Dr. Persichino's opinion.  
3 As ALJ Radensky noted, Plaintiff was able to complete various  
4 household tasks and answer questions during the hearing without  
5 difficulty. (AR 18). In affording "great weight" to the opinions  
6 of the State agency medical consultants, ALJ Radensky found that  
7 the consultants' opinions were "consistent with the objective  
8 medical evidence" and similarly noted that Plaintiff was able to  
9 cook, use public transportation, and handle money. (AR 18).  
10 Although Plaintiff is correct that he need not be "incapacitated"  
11 to be disabled, (P. Mem. at 5), ALJ Radensky was permitted to  
12 consider whether any restrictions assessed by Dr. Persichino were  
13 inconsistent with Plaintiff's demonstrated abilities. See Rollins,  
14 261 F.3d at 856. ALJ Radensky also properly considered whether  
15 Dr. Persichino's opinion was consistent with the record as a whole.  
16 20 C.F.R. § 404.1527. Accordingly, the ALJ provided specific and  
17 legitimate reasons for the weight he assigned to Dr. Persichino's  
18 opinions.

19  
20 Moreover, the Court observes that ALJ Radensky afforded Dr.  
21 Persichino's opinion "some weight," not "no weight" or "little  
22 weight." Dr. Persichino's opinion stated that Plaintiff's  
23 limitations would sometimes cause him to "lose time," affect his  
24 ability to concentrate and complete tasks in a "time efficient  
25 manner," and cause "significant difficulty" with authority figures.  
26 (AR 410-11). ALJ Radensky's RFC specifically limited Plaintiff to  
27 "simple repetitive tasks with limited social interactions" and no  
28 "contact with the general public." (AR 16). The RFC assessed by



1 ALJ Radensky therefore appears to account for many of the  
2 limitations observed by Dr. Persichino, consistent with ALJ  
3 Radensky assigning that opinion "some weight." (See AR 18  
4 (stating, after evaluating Dr. Persichino's opinion, that "the  
5 limitations assessed herein properly take into consideration  
6 [Plaintiff's] allegations and limitations found in the record")).  
7

8 The Court therefore disagrees with Plaintiff's contention that  
9 ALJ Radensky improperly evaluated Dr. Persichino's opinion and  
10 finds that ALJ Radensky provided specific and legitimate reasons  
11 for assigning it "some weight."  
12

13 **B. ALJ Radensky Did Not Err In Determining That Plaintiff Could**  
14 **Return To His Past Relevant Work**  
15

16 Plaintiff contends that ALJ Radensky erred at step four by  
17 finding that he could perform his past relevant work as a cleaner.  
18 (P. Mem. at 6-9). The Court disagrees.  
19

20 Once the ALJ determines a claimant's RFC, he then compares  
21 these limitations with the job duties of the claimant's previous  
22 work. At step four, the question is whether the claimant can  
23 perform "[t]he actual functional demands and job duties of a  
24 particular past relevant job" or "[t]he functional demands and job  
25 duties of the occupation as generally required by employers  
26 throughout the national economy." Pinto v. Massanari, 249 F.3d  
27 840, 845 (9th Cir. 2001); Lewis v. Barnhart, 281 F.3d 1081, 1083  
28 (9th Cir. 2002) (claimant must be able to perform past relevant

1 work either as actually performed or as generally performed in the  
2 national economy). When classifying a claimant's past relevant  
3 job as "actually" performed, ALJs consider "a properly completed  
4 vocational report" and the claimant's testimony. Pinto, 249 F.3d  
5 at 845; see also Social Security Ruling ("SSR") 82-62, 1982 WL  
6 31386, at \*1, \*3 (SSA 1982) ("The claimant is the primary source  
7 for vocational documentation, and statements by the claimant  
8 regarding past work are generally sufficient for determining the  
9 skill level[,] exertional demands and nonexertional demands of such  
10 work.").

11  
12 The best source for information regarding how an occupation  
13 is "generally performed" is usually the Dictionary of Occupational  
14 Titles ("DOT"). Pinto, 249 F.3d at 845-46 (citations omitted).  
15 However, an ALJ may rely on expert testimony which contradicts the  
16 DOT if the record contains persuasive evidence to support the  
17 deviation. Id. at 846 (citing Johnson v. Shalala, 60 F.3d 1428,  
18 1435 (1995)); see also SSR 82-61, 1982 WL 31387, at \*2 (SSA 1982)  
19 (ALJ may obtain testimony from VE where available documentation is  
20 not "sufficient to determine how a particular job is usually  
21 performed"). Here, ALJ Radensky found that Plaintiff could perform  
22 his past relevant work as actually performed and as generally  
23 performed in the regional and national economy. (AR 19). The ALJ  
24 based his opinion principally on the testimony of VE Scott  
25 regarding Plaintiff's prior application for benefits. (AR 19).

26  
27 Plaintiff claims that, because some of the tasks listed in  
28 the DOT definition of "cleaner" appear to involve contact with the

1 public and social interactions, Plaintiff is precluded from  
2 performing work as a cleaner. (P. Mem. at 7-8). Specifically,  
3 Plaintiff claims that a cleaner must “keep premises of office  
4 building, apartment house, or other commercial or institutional  
5 buildings in clean and orderly condition and also set up table and  
6 chairs in auditoriums or halls. This would consist of keeping  
7 common areas and places open to the public clean where [Plaintiff]  
8 may have to deal or come into contact with the public. The RFC  
9 also noted having limited social interactions. However, it does  
10 not address with who, for example with supervisors or co-workers.  
11 As this job would also require [Plaintiff] to deliver messages or  
12 transport small equipment or tools between departments, which would  
13 lead to social interactions between co-workers and supervisors and  
14 possibly with the general public [sic]. Based on the above-  
15 mentioned, [Plaintiff] would not be able to perform his past  
16 relevant work as a cleaner.” (Id. at 8).

17  
18 Plaintiff is incorrect. The mere fact that some of the tasks  
19 in the DOT definition of “cleaner” may result in contact with the  
20 public or social interactions does not mean that the ALJ  
21 incorrectly relied on VE testimony that Plaintiff could return to  
22 his past relevant work. The Ninth Circuit’s analysis of the DOT  
23 in Gutierrez v. Colvin is instructive. In Gutierrez, the claimant  
24 was unable to lift her right arm above her shoulder, and her RFC  
25 included limitations to her ability to reach above shoulder level.  
26 A VE opined that the claimant could work as a cashier and stated  
27 that his opinion was consistent with the DOT’s description of  
28 working as a cashier. The ALJ therefore concluded that the claimant

1 could work as a cashier. On appeal, the claimant argued that the  
2 DOT definition of "cashier" required frequent "reaching," and the  
3 ALJ was required to ask specific questions of the VE regarding the  
4 claimant's ability to work as a cashier given her inability to  
5 reach overhead. See Gutierrez v. Colvin 844 F.3d 804, 807 (9th  
6 Cir. 2016).

7  
8 The Ninth Circuit affirmed the ALJ's opinion, observing that  
9 the DOT definition specified several duties required of only some  
10 cashiers. Id. at 808 ("The [DOT's] definition of 'cashier' [is] a  
11 windy, highly technical, 1000-word effort that specifies that a  
12 cashier may need to 'reach frequently,' but also be able to read  
13 'adventure stories and comic books,' write in 'cursive,' 'interpret  
14 bar graphs,' and follow 'instructions for assembling model  
15 cars.'"). The Ninth Circuit ruled that the ALJ did not err "because  
16 there was no apparent or obvious conflict between the [VE's]  
17 testimony that [the claimant] could perform as a cashier, despite  
18 her weight bearing and overhead reaching limitations with her right  
19 arm, and the [DOT's] general statement that cashiering requires  
20 frequent reaching." Id. The Ninth Circuit also noted that, "[f]or  
21 a difference between an expert's testimony and the [DOT's] listings  
22 to be fairly characterized as a conflict, it must be obvious or  
23 apparent," i.e., "the testimony must be at odds with the [DOT's]  
24 listing of job requirements that are essential, integral, or  
25 expected." Id.

26  
27 Gutierrez's treatment of the DOT is relevant here.  
28 Plaintiff's argument relies heavily on several elements of the DOT

1 definition of "cleaner" that may be required of only some cleaners.  
2 See DOT 381.687-014 (cleaner keeps premises in clean and orderly  
3 condition and cleans and polishes lighting fixtures, marble  
4 surfaces, and trim; may cut and trim grass, shovel snow, deliver  
5 messages, transport small equipment or tools, or set up tables and  
6 chairs in auditorium or hall). Moreover, although social  
7 interactions and contact with the public may be incidental to some  
8 work as a "cleaner," it is unclear that social interaction and  
9 public contact could necessarily be characterized as "essential,  
10 integral, or expected" in this occupation such that there is a  
11 "conflict" between the DOT definition and VE testimony that  
12 Plaintiff could work as a cleaner. Gutierrez, 844 F.3d at 808.

13  
14 Here, in the 2011 hearing before the ALJ, VE Scott confirmed  
15 that that an individual with Plaintiff's vocational profile who  
16 was limited to the performance of "simple, repetitive tasks" with  
17 "limited social contact" and no contact with the general public  
18 would be able to perform Plaintiff's past work as a cleaner. (AR  
19 58-60). VE Scott reported that his testimony was consistent with  
20 the DOT. (AR 57). In the second hearing, on January 5, 2015, VE  
21 Corine Porter specifically considered whether Plaintiff's work  
22 would require contact with the public and determined that it would  
23 not, particularly because Plaintiff's work as a "cleaner"  
24 principally involved "doing lawn work." (AR 94). Defendant is  
25 correct that Plaintiff has made no showing that his "speculative,  
26 lay interpretation of the DOT" should overcome expert VE testimony.  
27 (D. Mem. at 11-12 (citing Bayliss v. Barnhart, 427 F.3d 1211, 1218  
28 (9th Cir. 2005))); see also SSR 00-4P, 2000 WL 1898704, at \*2 (SSA

1 2000) (ALJ is entitled to rely on VE's experience in job placement  
2 to account for a particular job's requirements).

3  
4 The Court therefore disagrees with Plaintiff's contention that  
5 ALJ Radensky erred at step four by finding that Plaintiff could  
6 perform his past relevant work as a cleaner.<sup>4</sup>

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20 <sup>4</sup> Moreover, as Defendant notes, a conflict between Plaintiff's RFC  
21 and the DOT definition of "cleaner" affects whether Plaintiff may  
22 work as a cleaner as that occupation is "generally performed." (D.  
23 Mem. at 12); see also Pinto, 249 F.3d at 845-46. At step four, a  
24 claimant is not disabled if he can perform either "[t]he actual  
25 functional demands and job duties of a particular past relevant  
26 job" or "[t]he functional demands and job duties of the occupation  
27 as generally required by employers throughout the national  
28 economy." See id. at 845. ALJ Radensky found that Plaintiff could  
work as a cleaner "as actually and generally performed." (AR 19  
(emphasis added)). Plaintiff's arguments regarding the DOT are  
irrelevant to whether Plaintiff could work as a cleaner as he had  
actually performed that work in the past. Therefore, it appears  
that the error asserted by Plaintiff is inconsequential to the  
ultimate non-disability determination and therefore harmless. See  
Carmickle v. Comm'r, 533 F.3d 1155, 1162 (9th Cir. 2008).

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VIII.

CONCLUSION

Consistent with the foregoing, IT IS ORDERED that Judgment be entered AFFIRMING the decision of the Commissioner. The Clerk of the Court shall serve copies of this Order and the Judgment on counsel for both parties.

DATED: June 16, 2017

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/s/  
SUZANNE H. SEGAL  
UNITED STATES MAGISTRATE JUDGE

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