

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **EASTERN DIVISION**

11  
12 JAMES G. W.,

13 Plaintiff,

14 v.

15 ANDREW M. SAUL, COMMISSIONER  
16 OF SOCIAL SECURITY  
ADMINISTRATION,

17 Defendant.

No. ED CV 19-1580-PLA

**MEMORANDUM OPINION AND ORDER**

18  
19 **I.**

20 **PROCEEDINGS**

21 James G. W.<sup>1</sup> (“plaintiff”) filed this action on August 22, 2019, seeking review of the  
22 Commissioner’s denial of his application for a period of disability and Disability Insurance Benefits  
23 (“DIB”). The parties filed Consents to proceed before a Magistrate Judge on October 4, 2019, and  
24 October 5, 2019. Pursuant to the Court’s Order, the parties filed a Joint Submission (alternatively  
25 “JS”) on April 16, 2020, that addresses their positions concerning the disputed issues in the case.

26  
27 <sup>1</sup> In the interest of protecting plaintiff’s privacy, this Memorandum Opinion and Order uses  
28 plaintiff’s (1) first name and middle and last initials, and (2) year of birth in lieu of a complete birth  
date. See Fed. R. Civ. P. 5.2(c)(2)(B), Local Rule 5.2-1.

1 The Court has taken the Joint Submission under submission without oral argument.

2  
3 **II.**

4 **BACKGROUND**

5 Plaintiff was born in 1959. [Administrative Record (“AR”) at 200.] He has past relevant  
6 work experience as a senior information technology systems analyst supervisor, and as a  
7 computer laboratory technician. [Id. at 25, 66, 85-86.]

8 On July 27, 2015, plaintiff filed an application for a period of disability and DIB alleging that  
9 he has been unable to work since April 15, 2013. [Id. at 10; see also id. at 200-01.] After his  
10 application was denied initially and upon reconsideration, plaintiff timely filed a request for a  
11 hearing before an Administrative Law Judge (“ALJ”). [Id. at 136-37.] A hearing was held on July  
12 27, 2018, at which time plaintiff appeared represented by an attorney, and testified on his own  
13 behalf. [Id. at 43-94.] A vocational expert (“VE”) also testified. [Id. at 66, 85-92.] On September  
14 19, 2018, the ALJ issued a decision concluding that plaintiff was not under a disability from April  
15 15, 2013, the alleged onset date, through September 19, 2018, the date of the decision. [Id. at  
16 10-25.] Plaintiff requested review of the ALJ’s decision by the Appeals Council. [Id. at 198-99.]  
17 When the Appeals Council denied plaintiff’s request for review on July 3, 2019 [id. at 1-5], the  
18 ALJ’s decision became the final decision of the Commissioner. See Sam v. Astrue, 550 F.3d 808,  
19 810 (9th Cir. 2008) (per curiam) (citations omitted). This action followed.

20  
21 **III.**

22 **STANDARD OF REVIEW**

23 Pursuant to 42 U.S.C. § 405(g), this Court has authority to review the Commissioner’s  
24 decision to deny benefits. The decision will be disturbed only if it is not supported by substantial  
25 evidence or if it is based upon the application of improper legal standards. Berry v. Astrue, 622  
26 F.3d 1228, 1231 (9th Cir. 2010) (citation omitted).

27 “Substantial evidence . . . is ‘more than a mere scintilla[,]’ . . . [which] means -- and means  
28 only -- ‘such relevant evidence as a reasonable mind might accept as adequate to support a

1 conclusion.” Biestek v. Berryhill, 139 S. Ct. 1148, 1154, 203 L. Ed. 2d 504 (2019) (citations  
2 omitted); Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017). “Where evidence is susceptible  
3 to more than one rational interpretation, the ALJ’s decision should be upheld.” Revels, 874 F.3d  
4 at 654 (internal quotation marks and citation omitted). However, the Court “must consider the  
5 entire record as a whole, weighing both the evidence that supports and the evidence that detracts  
6 from the Commissioner’s conclusion, and may not affirm simply by isolating a specific quantum  
7 of supporting evidence.” Id. (quoting Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014)  
8 (internal quotation marks omitted)). The Court will “review only the reasons provided by the ALJ  
9 in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.”  
10 Id. (internal quotation marks and citation omitted); see also SEC v. Chenery Corp., 318 U.S. 80,  
11 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943) (“The grounds upon which an administrative order must  
12 be judged are those upon which the record discloses that its action was based.”).

#### 13 14 IV.

#### 15 THE EVALUATION OF DISABILITY

16 Persons are “disabled” for purposes of receiving Social Security benefits if they are unable  
17 to engage in any substantial gainful activity owing to a physical or mental impairment that is  
18 expected to result in death or which has lasted or is expected to last for a continuous period of at  
19 least twelve months. Garcia v. Comm’r of Soc. Sec., 768 F.3d 925, 930 (9th Cir. 2014) (quoting  
20 42 U.S.C. § 423(d)(1)(A)).

#### 21 22 A. THE FIVE-STEP EVALUATION PROCESS

23 The Commissioner (or ALJ) follows a five-step sequential evaluation process in assessing  
24 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920; Lounsbury v. Barnhart, 468  
25 F.3d 1111, 1114 (9th Cir. 2006) (citing Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999)).  
26 In the first step, the Commissioner must determine whether the claimant is currently engaged in  
27 substantial gainful activity; if so, the claimant is not disabled and the claim is denied. Lounsbury,  
28 468 F.3d at 1114. If the claimant is not currently engaged in substantial gainful activity, the

1 second step requires the Commissioner to determine whether the claimant has a “severe”  
2 impairment or combination of impairments significantly limiting his ability to do basic work  
3 activities; if not, a finding of nondisability is made and the claim is denied. Id. If the claimant has  
4 a “severe” impairment or combination of impairments, the third step requires the Commissioner  
5 to determine whether the impairment or combination of impairments meets or equals an  
6 impairment in the Listing of Impairments (“Listing”) set forth at 20 C.F.R. § 404, subpart P,  
7 appendix 1; if so, disability is conclusively presumed and benefits are awarded. Id. If the  
8 claimant’s impairment or combination of impairments does not meet or equal an impairment in the  
9 Listing, the fourth step requires the Commissioner to determine whether the claimant has sufficient  
10 “residual functional capacity” to perform his past work; if so, the claimant is not disabled and the  
11 claim is denied. Id. The claimant has the burden of proving that he is unable to perform past  
12 relevant work. Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir. 1992). If the claimant meets  
13 this burden, a prima facie case of disability is established. Id. The Commissioner then bears  
14 the burden of establishing that the claimant is not disabled because there is other work existing  
15 in “significant numbers” in the national or regional economy the claimant can do, either (1) by  
16 the testimony of a VE, or (2) by reference to the Medical-Vocational Guidelines at 20 C.F.R. part  
17 404, subpart P, appendix 2. Lounsbury, 468 F.3d at 1114. The determination of this issue  
18 comprises the fifth and final step in the sequential analysis. 20 C.F.R. §§ 404.1520, 416.920;  
19 Lester v. Chater, 81 F.3d 721, 828 n.5 (9th Cir. 1995); Drouin, 966 F.2d at 1257.

## 21 **B. THE ALJ’S APPLICATION OF THE FIVE-STEP PROCESS**

22 At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since  
23 April 15, 2013, the alleged onset date.<sup>2</sup> [AR at 12.] At step two, the ALJ concluded that plaintiff  
24 has the severe impairments of chronic lung disease status-post coccidioidal infection<sup>3</sup>; reactive  
25

---

26 <sup>2</sup> The ALJ concluded that plaintiff met the insured status requirements of the Social  
27 Security Act through December 31, 2019. [AR at 12.]

28 <sup>3</sup> Coccidioides are fungi that cause valley fever. [JS at 10.]

1 airway disease; and status-post left wrist fracture. [Id.] The ALJ found plaintiff’s hypertension,  
2 gastroesophageal reflux disease, sleep apnea, rhinitis, right shoulder impingement syndrome  
3 status-post rotator cuff repair, and lumbar sprain, to be non-severe as they are “controlled with  
4 medication, have only mild symptoms, and/or resolved with treatment.” [Id. at 13.] At step three,  
5 the ALJ determined that plaintiff does not have an impairment or a combination of impairments  
6 that meets or medically equals any of the impairments in the Listing. [Id. at 14.] The ALJ further  
7 found that plaintiff retained the residual functional capacity (“RFC”)<sup>4</sup> to perform medium work as  
8 defined in 20 C.F.R. § 404.1567(c),<sup>5</sup> as follows:

9 [H]e can push or pull frequently with the left upper extremity within the lifting and  
10 carrying restrictions of medium work. He can frequently reach overhead and in  
11 other directions with his left upper extremity. He has no limitaiton to reaching with  
12 his right upper extremity. [He] can climb ramps, stairs, ladders, ropes, and scaffolds  
frequently. He can frequently balance, stoop, kneel, crouch, and crawl. [He] should  
never work in concentrated exposure to humidity and wetness; dusts, odors, fumes,  
or pulmonary irritants; or extreme heat or cold.

13 [Id. at 15.] At step four, based on plaintiff’s RFC and the testimony of the VE, the ALJ concluded  
14 that plaintiff is able to perform his past relevant work as a senior information technology systems  
15 analyst supervisor as generally performed, and as a computer laboratory technician as generally  
16 and actually performed. [Id. at 24, 25, 87-89.] Accordingly, the ALJ determined that plaintiff was  
17 not disabled at any time from the alleged onset date of April 15, 2013, through September 19,  
18 2018, the date of the decision. [Id. at 25.]

19 /  
20 /  
21 /  
22 /

---

23  
24 <sup>4</sup> RFC is what a claimant can still do despite existing exertional and nonexertional  
25 limitations. See Cooper v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989). “Between steps  
26 three and four of the five-step evaluation, the ALJ must proceed to an intermediate step in which  
the ALJ assesses the claimant’s residual functional capacity.” Massachi v. Astrue, 486 F.3d 1149,  
1151 n.2 (9th Cir. 2007) (citation omitted).

27 <sup>5</sup> “Medium work involves lifting no more than 50 pounds at a time with frequent lifting or  
28 carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that  
he or she can also do sedentary and light work.” 20 C.F.R. § 404.1567(c).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

V.

**THE ALJ'S DECISION**

Plaintiff contends that the ALJ erred when she: (1) considered the relevant medical evidence of record in assessing plaintiff's RFC; and (2) rejected plaintiff's subjective symptom testimony. [JS at 4.] As set forth below, the Court agrees with plaintiff, in part, and remands for further proceedings.

**A. LEGAL STANDARD**

An RFC is "an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." Soc. Sec. Ruling ("SSR")<sup>6</sup> 96-9p, 1996 WL 374184, at \*1 (1996). It reflects the most a claimant can do despite his limitations. See Smolen v. Chater, 80 F.3d 1273, 1291 (9th Cir. 1996). An RFC must include an individual's functional limitations or restrictions as a result of all of his impairments -- even those that are not severe (see 20 C.F.R. § 404.1545(a)(1)-(2), (e)) -- and must assess his "work-related abilities on a function-by-function basis." SSR 96-9p, 1996 WL 374184, at \*1; see also Valentine v. Comm'r of Soc. Sec. Admin., 574 F.3d 685, 690 (9th Cir. 2009) ("an RFC that fails to take into account a claimant's limitations is defective"). An ALJ errs when she provides an incomplete RFC ignoring "significant and probative evidence." Hill v. Astrue, 698 F.3d 1153, 1161-62 (9th Cir. 2012) (further noting that the error is not harmless when an ALJ fails to discuss significant and probative evidence favorable to a claimant's position because when the RFC is incomplete, the hypothetical question presented to the VE is incomplete and, therefore, the ALJ's reliance on the VE's answers is improper)). An RFC assessment is ultimately an administrative finding reserved to the Commissioner. 20 C.F.R. § 404.1527(d)(2). However, an RFC determination must be based on all of the relevant evidence, including the diagnoses, treatment, observations, and

---

<sup>6</sup> "SSRs do not have the force of law. However, because they represent the Commissioner's interpretation of the agency's regulations, we give them some deference. We will not defer to SSRs if they are inconsistent with the statute or regulations." Holohan v. Massanari, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001) (citations omitted).

1 opinions of medical sources, such as treating and examining physicians. Id. § 404.1545. A district  
2 court must uphold an ALJ’s RFC assessment when the ALJ has applied the proper legal standard  
3 and substantial evidence in the record as a whole supports the decision. See Bayliss v. Barnhart,  
4 427 F.3d 1211, 1217 (9th Cir. 2005); Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).

5  
6 **B. THE PARTIES’ CONTENTIONS**

7 Plaintiff argues that because of his physical impairments he “is not now nor at any relevant  
8 time since his alleged onset date been capable of performing and persisting” at full-time medium  
9 work activity. [JS at 5.] He also contends that he is not capable of performing and persisting at  
10 his past relevant work activity, which is skilled with a specific vocational preparation (“SVP”) rating  
11 of 7, because plaintiff’s “mental impairments and cognitive limitations would preclude him from  
12 performing and persisting at such highly skilled work activity at all times relevant herein.” [JS at  
13 5.]

14 Specifically, plaintiff contends that the record reflects that as early as 2009 he was  
15 complaining of low back pain; as early as May 24, 2011, he was complaining of anxiety; on  
16 October 7, 2011, he complained of shortness of breath; and on January 30, 2012, he reported  
17 ongoing fatigue. [Id. at 5-6 (citing AR at 508, 518, 528, 541).] On February 16, 2012, he had a  
18 positive coccidioidal serology test. [Id. at 6 (citing AR at 518).] He also notes the following  
19 treatment records: (1) on April 9, 2012, he continued to complain of fatigue, depression, and  
20 insomnia [id. (citing AR at 546)]; (2) on May 15, 2012, he reported he was tired all of the time and  
21 dozing off two to three times per day [id. (citing AR at 309)]; (3) also in May 2012 he was found  
22 to have mild obstructive sleep apnea [id. (citing AR at 315)]; (4) on July 20, 2012, he reported  
23 anxiety and depression [id. (citing AR at 549)]; (5) on July 30, 2012, he was noted to have a work  
24 injury date of February 1, 2011, and he was diagnosed with valley fever, asthmatic bronchitis,  
25 restrictive lung disease, history of restless leg syndrome, and history of obstructive sleep apnea;  
26 and (6) on March 1, 2013, he reported right shoulder pain extending to his right elbow [id. (citing  
27 AR at 299, 303-04, 421)]. Plaintiff summarized a number of other relevant physical and mental  
28 health records reflecting fatigue, stress, anxiety, chronic cough, difficulties with concentration,

1 decreased memory; physical therapy for his low back pain; pain, decreased range of motion and  
2 tenderness in his right shoulder; positive Hawkins and Neers tests in his right shoulder (indicative  
3 of right shoulder impingement); continued right shoulder pain and elbow pain and he received a  
4 steroid injection in his right shoulder on August 31, 2015; continued right shoulder pain despite  
5 the injection; positive right shoulder impingement again noted on September 14, 2015; right  
6 shoulder arthroscopic surgery on October 22, 2015; and another right shoulder steroid injection  
7 on March 7, 2016 -- post-surgery. [Id. at 6-7 (citations omitted).]

8 Plaintiff submits that the ALJ failed to properly consider the severity of his right shoulder  
9 impairment -- for which he received at least two steroid injections and surgery for an impingement  
10 and tear of the labrum -- on his ability to perform and persist at medium work activity, "which  
11 contemplates the ability to lift up to 50 pounds over 2 hours out of the work day and 25 pounds  
12 nearly 6 hours out of the work day." [Id. (citing AR at 599, 621, 668-69, 681, 692, 718, 822), 8.]

13 Plaintiff also contends the ALJ did not properly consider the effect of plaintiff's anxiety,  
14 depression, insomnia, fatigue, and pain on his ability to perform and persist at his past relevant  
15 occupations; the November 25, 2015, report of the psychiatric consultative examiner who  
16 assessed plaintiff with a cognitive disorder and stated that he would anticipate plaintiff would have  
17 mild difficulties with detailed tasks; or the March 14, 2016, report of a state agency psychiatric  
18 consultant, David Rovno, M.D., who found plaintiff moderately limited in his ability to understand  
19 and remember detailed instructions, limited to performing 1-2 step tasks, and moderately limited  
20 in his ability to interact appropriately with the general public. [Id. at 8 (citing AR at 118-19).]

21 Plaintiff observes that the ALJ only "briefly" discussed Dr. Rovno's opinion regarding plaintiff's  
22 ability to perform 1-2 step tasks, and that he should have limited public contact. [Id. at 9.] He  
23 notes that the ALJ "simply" stated that "[t]his portion of [Dr. Rovno's] opinion gives maximal  
24 consideration to [plaintiff's] allegation of memory issues and social isolation; however, in light of  
25 the grossly normal mental status examinations and [plaintiff's] activities, such limitations are not  
26 warranted." [Id. (citing AR at 19-20).] Finally, plaintiff notes the following: in February 2017 he  
27 was diagnosed with asthma and bronchitis; in August 2017 he was noted to be experiencing  
28 coughing and wheezing; and on June 18, 2018, it was noted that he was undergoing



1 psychotherapy for depression and anxiety. [Id. at 7-8 (citations omitted).]

2 Plaintiff submits that none of his activities of daily living is inconsistent with the limitations  
3 suggested by Dr. Rovno with respect to plaintiff's "significant limitations on his ability to persist at  
4 complex and detailed tasks such as were required by his past relevant work." [Id.] He concludes  
5 that his inability to perform complex occupations such as his past relevant work is also supported  
6 by his consistent complaints of anxiety, depression, fatigue, insomnia, decreased concentration  
7 and memory, and pain and, therefore, the ALJ's conclusions are not supported by or consistent  
8 with the totality of evidence in the record, including the opinions of defendant's own examiners.  
9 [Id.]

10 With respect to plaintiff's physical impairments, defendant responds that the ALJ "properly  
11 pointed to substantial evidence in the record to support her RFC finding." [Id. at 10 (citations  
12 omitted).] He notes that the ALJ acknowledged plaintiff's chronic lung disease "warranting some  
13 functional limitations," but also noted that the only bronchoscopy in the record was grossly normal;  
14 by June 2013 serology testing was negative for coccidioides ("fungus that causes valley fever");  
15 unremarkable chest x-rays with no evidence of acute pulmonary process; a "largely normal" recent  
16 spirometry; oxygen saturation regularly over 96 percent; "largely normal" physical examination  
17 findings; and "normal neurological findings." [Id. (citations omitted).] The ALJ also considered  
18 limitations due to plaintiff's left wrist fracture, but noted that plaintiff was able to "generate 100  
19 pounds of force with his left hand," and had grossly normal range of motion and strength in his  
20 upper extremities. [Id. at 11 (citing AR at 19, 459-61, 815).] Additionally, the ALJ "reasonably  
21 found" that plaintiff's right shoulder pain "appeared to have resolved" after his 2015 surgery, as  
22 plaintiff related few complaints; treatment notes indicated his wounds were healed; he could flex  
23 and extend his elbow/wrist and fingers; and he had good strength. [Id. (citing AR at 13, 715-20,  
24 799-804, 821-27).] Notwithstanding plaintiff's March 2016 steroid injection, "his treatment provider  
25 nonetheless noted that [plaintiff] could engage in activity as tolerated and recommended  
26 '[a]ggressive stretching.'" [Id. (citing AR at 799, 821).] And, as defendant and the ALJ both  
27 noted, plaintiff reported the ability to exercise moderately to strenuously up to 7 hours a week. [Id.  
28 (citing AR at 13, 603, 697, 798, 882, 921, 950, 983).] Defendant further notes that the ALJ relied

1 on the opinions of the State agency physicians, and the internal consultative examiner Azizollah  
2 Karamlou, M.D., who determined that plaintiff could perform medium exertion work with certain  
3 manipulative, postural, and environmental limitations, finding their opinions were consistent with  
4 and supported by the record. He notes that Dr. Karamlou, who examined plaintiff shortly after his  
5 shoulder surgery, found normal range of motion in both shoulders and in the back with no  
6 evidence of muscle spasm, tenderness, joint deformities, effusion, crepitus, or pain on motion.  
7 [Id. (citing AR at 460).] Defendant points out that the ALJ also observed that plaintiff's worker's  
8 compensation physician Gary Zagelbaum, M.D., opined in July 2013 that plaintiff could continue  
9 in his usual and customary job activities, although it would be prudent to avoid exposure to  
10 pulmonary irritants. [Id. at 12 (citing AR at 22-23, 460, 1038).] Defendant states that plaintiff does  
11 not challenge the ALJ's reliance on these medical opinions in forming her RFC finding, and points  
12 to no physician opinion "that includes greater limitations than those assessed" by the ALJ. [Id.  
13 (citation omitted).] Additionally, several of the limitations plaintiff "points to in the record reflect his  
14 subjective self-reports of symptoms, which the ALJ did not find fully consistent with the record."  
15 [Id. at 13 (citation omitted).]

16 With respect to plaintiff's mental health impairments, defendant notes that the ALJ found  
17 these impairments to be not severe, based on the opinions from the state mental health  
18 consultants, the psychological consultative examiner, and several worker's compensation  
19 physicians. [Id. (citing AR at 13-14, 19-21, 101-02, 114-15, 118-19, 355-56, 365-66, 450-55).]  
20 He notes again that plaintiff does not dispute the ALJ's reliance on these opinions, but "argues that  
21 the ALJ erred in finding his mental impairments were not severe, as Dr. Rovno found he would be  
22 limited to one-to-two step tasks" and, therefore, he would not be able to perform his past relevant  
23 complex work. [Id.] Defendant disputes plaintiff's "characterization that Dr. Rovno found [plaintiff]  
24 was *limited* to one-to-two step tasks," as "this does not mean this was the *most* Plaintiff could do,"  
25 especially as Dr. Rovno "noted Plaintiff's minimal treatment history, benign mental status  
26 examination findings, and 'well retained functional ability,' all of which suggest greater functional  
27 capacity." [Id. at 13-14 (citing AR at 115).] Defendant also argues that the ALJ provided valid  
28 reasons for rejecting Dr. Rovno's limitations, as his opinion was "inconsistent with the largely

1 normal mental status examinations”; both worker’s compensation physicians found plaintiff “would  
2 not be disabled at any point based on mental impairments”; and Dr. Rovno’s opinion appeared  
3 internally inconsistent as he found plaintiff’s mental impairments were not severe and assessed  
4 only mild limitations in the four areas of mental functioning, but “also [found] that Plaintiff would  
5 have additional mental limitations.” [*Id.* at 14 (citing AR at 101-02, 113, 114-15, 118-19).]

6 Defendant also suggests that Dr. Rovno’s opinion was not supported by plaintiff’s daily  
7 activities, which included the fact that plaintiff “was independent in his daily activities, spent 15 to  
8 20 hours a week doing church work,<sup>[7]</sup> watched television, read, completed household chores, paid  
9 bills, did laundry, shopped, played golf, worked on cars, prepared meals, worked in his garden,  
10 coached a softball team, communicated with his girlfriend in Asia over the internet, and eventually  
11 traveled to Cambodia to meet and marry his girlfriend.” [*Id.* at 14-15 (citing AR at 77-78, 327-28,  
12 362-63, 451-52).] Defendant concludes that even if there was error, that error would be harmless  
13 because even after finding plaintiff’s mental impairments to be non-severe, the ALJ assessed  
14 plaintiff’s RFC “in combination [with] *all* of the functional limitations established by the reliable  
15 evidence, not just the impairments identified as severe.” [*Id.* at 15 (citing AR at 13, 15-24).]

### 16 17 **C. ANALYSIS**

18 Although the opinion of a non-examining physician “cannot by itself constitute substantial  
19 evidence that justifies the rejection of the opinion of either an examining physician or a treating  
20 physician,” Lester, 81 F.3d at 831, state agency physicians are “highly qualified physicians,  
21 psychologists, and other medical specialists who are also experts in Social Security disability  
22 evaluation.” 20 C.F.R. §§ 404.1527(e)(2)(i), 416.927(e)(2)(i); Soc. Sec. Ruling 96-6p; Bray v.  
23 Comm’r of Soc. Sec. Admin., 554 F.3d 1219, 1221, 1227 (9th Cir. 2009) (the ALJ properly relied  
24 “in large part on the DDS physician’s assessment” in determining the claimant’s RFC and in  
25 rejecting the treating doctor’s testimony regarding the claimant’s functional limitations). Reports

26  
27 <sup>7</sup> Defendant neglects to mention that after plaintiff moved to southern California in October  
28 2014, the number of hours he spent doing church work (which mainly consisted of meetings with  
other parishioners), was reduced to about three per week. [See, e.g., AR at 16.]

1 of non-examining medical experts “may serve as substantial evidence when they are supported  
2 by other evidence in the record and are consistent with it.” Andrews v. Shalala, 53 F.3d 1035,  
3 1041 (9th Cir. 1995).

4 Here, the ALJ gave the March 14, 2016, opinion of non-examining physician Dr. Rovno  
5 “great weight,” as follows:

6 [Dr. Rovno’s] opinions are supported by the grossly normal mental status  
7 examinations in the record. Further, the opined limitations are consistent with  
8 [plaintiff’s] reported activities, including his ability to attend to household chores, golf,  
9 maintain an active-church life, exercise, and coach softball. Additionally, . . . Dr.  
10 Rovno is a licensed psychiatrist . . . [with] extensive experience in the evaluation and  
11 treatment of persons with mental impairments. Moreover, as [a] State agency  
12 consultant[] . . . Dr. Rovno [is] familiar with the rules, procedures, and evidentiary  
13 standards of the Social Security Administration. Because [his] opinions are well  
14 supported by the record and consistent with [plaintiff’s] activities and because of  
15 [his] expertise, the opinions of . . . Dr. Rovno are given great weight. However, Dr.  
16 Rovno additionally opined that [plaintiff] was at least capable of performing one- or  
17 two-step tasks and sustaining attention and concentration for such tasks. He further  
18 opined that [plaintiff] could adapt to changes in the workplace and interact  
19 appropriately with co-workers, but should have limited public contact. This portion  
20 of his opinion gives maximal consideration to [plaintiff’s] allegations of memory  
21 issues and social isolation; however, in light of the grossly normal mental status  
22 examinations and [plaintiff’s] activities, such limitations are not warranted.

23 [AR at 19-20.]

24 After reviewing the record and the arguments of the parties, the Court finds that the ALJ  
25 failed to provide specific and legitimate reasons supported by substantial evidence for discounting  
26 the opinions of Dr. Rovno regarding plaintiff’s limitation to simple repetitive and/or 1-2 step tasks,  
27 and limited public contact.

28 First, Dr. Rovno on reconsideration was asked to reconsider the *previous* finding at the  
initial level of review that plaintiff had the maximum residual functional capacity for simple  
repetitive tasks. [AR at 113; see also id. at 100.] The January 16, 2016, finding on initial review  
that plaintiff was limited to simple repetitive tasks appears to have been based at least in part on  
a November 25, 2015, medical source statement (to which the ALJ gave “great weight” [id. at 20])  
that found, based on psychometric testing, plaintiff’s test results were “in the impaired range for  
tasks requiring sustained attention and visual-tracking ability”; he presented “with a personal  
weakness in his working memory ability as compared to other areas of functioning”; and his

1 general memory “is in the mildly delayed to low average range.” [Id. at 100; see also id. at 20-21,  
2 453.] At the reconsideration level, Dr. Rovno was given the following instruction:

3 At the initial level the claimant was issued an MRFC [mental residual functional  
4 capacity] for SRT [simple repetitive tasks]. At the recon level new evidence was  
5 requested but no evidence came in to support a change in prior decision. Please  
6 affirm MRFC for SRT.

7 [Id.] Dr. Rovno replied: “MER [medical evidence of record] reviewed. Affirm initial PRTF  
8 [psychiatric review technique findings]/MRFC as written.” [Id.]

9 Based on his record review and the November 2015 psychometric test results, Dr. Rovno  
10 specifically noted that plaintiff has “understanding and memory limitations,” is not significantly  
11 limited in his ability to understand, remember, and carry out very short and simple instructions, is  
12 moderately limited in his ability to understand, remember, and carry out detailed instructions, “is  
13 able to perform 1-2 step tasks,” and is not significantly limited in his ability to maintain attention  
14 and concentration for extended periods (presumably so long as limited to 1-2 step tasks). [Id. at  
15 118.] Thus, contrary to the ALJ’s reason for discounting Dr. Rovno’s opinion because it was  
16 based on plaintiff’s subjective allegations, there was objective supporting evidence in the record  
17 upon which Dr. Rovno specifically relied in making his assessment.

18 Second, defendant and the ALJ attempt to twist Dr. Rovno’s statement that plaintiff “is able  
19 to sustain concentration and persistence for 1-2 step tasks,” by suggesting that this statement  
20 “does not mean this was the *most* Plaintiff could do.” [JS at 13 (emphasis in original); AR at 20  
21 (stating that Dr. Rovno “opined that [plaintiff] was *at least* capable of performing one- or two-step  
22 tasks”) (emphasis added).] Indeed, Dr. Rovno made this finding with respect to his assessment  
23 of plaintiff’s mental residual functional capacity [see AR at 118], which by definition reflects the  
24 *most* a claimant can do despite his limitations. Smolen, 80 F.3d at 1291. Thus, this strained  
25 interpretation is not supported by the very purpose for which the statement was made, or by its  
26 terms, which asked Dr. Rovno to “[e]xplain in narrative form [plaintiff’s] sustained concentration  
27 and persistence *capacities* and/or *limitations*,” with respect to his finding that plaintiff was  
28 moderately limited in his ability to understand and remember detailed instructions, not to explain  
the *least* that plaintiff was able to do. [Id. at 118.] Additionally, as previously noted, this limitation

1 was supported by the results of the November 15, 2015, psychometric testing reviewed by Dr.  
2 Rovno.

3 Third, defendant's suggestion that the ALJ properly rejected Dr. Rovno's opinion as  
4 internally inconsistent with plaintiff's "largely normal mental status examinations," and with the  
5 opinions of plaintiff's worker's compensation physicians who found plaintiff would not be disabled  
6 based on mental impairments, is not persuasive. Dr. Rovno gave consideration to the purportedly  
7 "largely normal mental status examinations" in finding that plaintiff had only mild limitations with  
8 respect to the paragraph B criteria of the Listings (restriction of activities of daily living, difficulties  
9 in maintaining social functioning, and difficulties in maintaining concentration, persistence or pace)  
10 -- criteria that are used to determine whether an impairment is severe at step two. [*Id.* at 114-15.]  
11 In contrast, in assessing plaintiff's mental residual functional capacity, Dr. Rovno also considered  
12 the results of formal psychiatric testing in determining that plaintiff's non-severe mental  
13 impairments nevertheless resulted in a limitation to performing 1-2 step tasks. And, in their  
14 reports, plaintiff's worker's compensation physicians did not find that plaintiff "would not be  
15 disabled at any point based on mental impairments" as suggested by defendant; instead, those  
16 physicians were primarily explaining that plaintiff's mental impairments were not attributable to  
17 work-related factors or did not warrant a period of temporary psychiatric disability. [*See id.* at 356  
18 (noting that plaintiff "may well have some cognitive inefficiency related to his anxiety and  
19 depression; however, this does not meet the threshold of industrial causation," and absent an  
20 industrial-caused neuropsychological injury, "there is no neuropsychological disability on an  
21 industrial basis"), 366-67 (plaintiff's "predominant cause of his depression remains industrial . . .  
22 [but] does not warrant any periods [of] temporary psychiatric disability").]

23 Finally, with respect to plaintiff's daily activities (such as attending to household chores,  
24 maintaining an active church life for 2-3 hours per week, exercising, and coaching softball), none  
25 reflects an ability to perform medium-level work five days a week, eight hours a day. *Popa v.*  
26 *Berryhill*, 872 F.3d 901, 906 (9th Cir. 2017) (plaintiff's "considerable activities of daily living" were  
27 not consistent with regularly attending a full-time job and not a valid reason to reject the treating  
28 psychologist's opinion). Both defendant and the ALJ make much of the fact that plaintiff admitted

1 to his physicians on several occasions that he was able to perform “moderate to strenuous”  
2 exercise for 420 minutes per week -- or roughly one hour per day. What they both ignored is that  
3 the medical form reflecting plaintiff’s estimates regarding the amount of time he spends exercising,  
4 states that “like a brisk walk” is an example of “moderate to strenuous” exercise.” [See, e.g., *id.*  
5 at 603.] Indeed, there is no evidence that plaintiff was doing anything more strenuous than  
6 walking briskly every day, e.g., performing exercises that required heavy lifting, or strenuous or  
7 repetitive motion involving his left wrist, right shoulder, or lower back, or that he was participating  
8 in his other daily activities on any sort of regular basis for lengthy periods of time. Even with  
9 respect to his exercise, plaintiff reported performing varying amounts of such exercise, ranging  
10 between two and seven hours per week, at different visits over time. [See, e.g., *id.* at 603 (2 hours  
11 per week), 697 (5 hours per week), 798 (7 hours per week), 983 (3 hours per week).] In any  
12 event, the ALJ does not explain how plaintiff’s daily activities, or the level at which plaintiff  
13 describes performing them, including his exercise program, provide a valid reason to discount Dr.  
14 Rovno’s opinions that plaintiff is limited to 1-2 step tasks (and able to sustain attention and  
15 concentration for such tasks), and should have limited public contact.<sup>8</sup> See *Popa*, 872 F.3d at 906  
16 (finding the ALJ erred when he failed to explain why the claimant’s daily activities of attending  
17 church, watching television, and shopping for groceries were inconsistent with the doctor’s  
18 opinion).

19 Based on the foregoing, the ALJ failed to provide specific and legitimate reasons supported  
20 by substantial evidence for discounting Dr. Rovno’s opinions regarding plaintiff’s limitation to 1-2  
21 step tasks and limited public contact. Remand is warranted on this issue.<sup>9</sup>

---

22  
23 <sup>8</sup> Moreover, after initially stating that the limitations found by Dr. Rovno “are consistent with  
24 [plaintiff’s] reported activities, including his ability to attend to household chores, golf, maintain an  
25 active-church life, exercise, and coach softball” [AR at 19], the ALJ then found -- inconsistently and  
26 without explanation -- that Dr. Rovno’s rejected opinions relating to limitations to 1-2 step tasks  
and limited public contact are inconsistent with his daily activities of attending to household chores,  
golfing, maintaining an active church life, exercising, and coaching softball. [*Id.* at 20.]

27 <sup>9</sup> Because the Court finds that remand is warranted on this issue, and the ALJ on remand  
28 will necessarily have to reconsider the medical evidence relating to plaintiff’s physical and mental  
(continued...)

1  
2 **VI.**

3 **REMAND FOR FURTHER PROCEEDINGS**

4 The Court has discretion to remand or reverse and award benefits. Trevizo v. Berryhill, 871  
5 F.3d 664, 682 (9th Cir. 2017) (citation omitted). Where no useful purpose would be served by  
6 further proceedings, or where the record has been fully developed, it is appropriate to exercise this  
7 discretion to direct an immediate award of benefits. Id. (citing Garrison, 759 F.3d at 1019). Where  
8 there are outstanding issues that must be resolved before a determination can be made, and it  
9 is not clear from the record that the ALJ would be required to find plaintiff disabled if all the  
10 evidence were properly evaluated, remand is appropriate. See Garrison, 759 F.3d at 1021.

11 In this case, there are outstanding issues that must be resolved before a final determination  
12 can be made. In an effort to expedite these proceedings and to avoid any confusion or  
13 misunderstanding as to what the Court intends, the Court will set forth the scope of the remand  
14 proceedings. First, because the ALJ failed to provide specific and legitimate reasons for  
15 discounting the opinions of Dr. Rovno, the ALJ on remand shall reassess the medical opinions of  
16 record relating to plaintiff's physical and mental impairments, including the opinions of Dr. Rovno.  
17 The ALJ must explain the weight afforded to each opinion and provide legally adequate reasons  
18 for any portion of an opinion that the ALJ discounts or rejects. Second, the ALJ on remand, in  
19 accordance with SSR 16-3p, shall reassess plaintiff's subjective allegations and either credit his  
20 testimony as true, or provide specific, clear and convincing reasons, supported by substantial  
21 evidence in the case record, for discounting or rejecting any testimony.

22 /

23 /

24  
25  
26 \_\_\_\_\_  
27 <sup>9</sup>(...continued)  
28 impairments, as well as his subjective symptom testimony, the Court will not discuss plaintiff's  
other issues herein.



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

VII.

**CONCLUSION**

**IT IS HEREBY ORDERED** that: (1) plaintiff's request for remand is **granted**; (2) the decision of the Commissioner is **reversed**; and (3) this action is **remanded** to defendant for further proceedings consistent with this Memorandum Opinion.

**IT IS FURTHER ORDERED** that the Clerk of the Court serve copies of this Order and the Judgment herein on all parties or their counsel.

**This Memorandum Opinion and Order is not intended for publication, nor is it intended to be included in or submitted to any online service such as Westlaw or Lexis.**

*Paul L. Abrams*

DATED: April 29, 2020

---

PAUL L. ABRAMS  
UNITED STATES MAGISTRATE JUDGE