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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANK M. ROSALES,
Plaintiff,

v.
CAROLYN W. COLVIN,
Commissioner of Social Security,
Defendant.

No. SACV 12-753-AG-AGR

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

The court submits this Report and Recommendation to the Honorable Andrew J. Guilford, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the magistrate judge recommends that the decision of the Commissioner of Social Security be reversed and the matter remanded for consideration of whether Plaintiff meets or equals Listing 12.05C.

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I.

PROCEDURAL BACKGROUND

On June 30, 2008, Plaintiff Frank M. Rosales filed applications for disability insurance benefits and supplemental security income, alleging an onset date of January 1, 2003. Administrative Record (“AR”) 17, 189-203. The applications were denied initially and on reconsideration. AR 17, 148-49, 153-54. Rosales requested a hearing before an Administrative Law Judge (“ALJ”) . AR 170-71. On May 20, 2010, the ALJ conducted a brief hearing at which Rosales produced medical records. AR 99-106. The ALJ continued the hearing to allow him time to review the records. AR 102, 106. On August 2, 2010, Rosales submitted additional documents. AR 804-08. On October 22, 2010, the ALJ conducted a supplemental hearing at which Rosales and a vocational expert (“VE”) testified. AR 107-47. At the hearing, Rosales produced a letter from the AIDS Services Foundation Orange County (“ASF”). AR 109, 810. The ALJ held the record open for Rosales to submit the supporting data from ASF. AR 109-10, 146. No additional documents were submitted. On December 10, 2010, the ALJ issued a decision denying benefits. AR 14-27. On March 10, 2011, the Appeals Council denied the request for review. AR 6-8.

On May 16, 2012, Rosales filed a complaint in this court. On May 13, 2013, the parties filed a Joint Stipulation (“JS”) that addressed the disputed issues. (Dkt. No. 18.)

II.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this court has authority to review the Commissioner’s decision to deny benefits. The decision will be disturbed only if it is not supported by substantial evidence, or if it is based upon the application of improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995) (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

1 “Substantial evidence” means “more than a mere scintilla but less than a
2 preponderance – it is such relevant evidence that a reasonable mind might accept as
3 adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In determining whether
4 substantial evidence exists to support the Commissioner’s decision, the court examines
5 the administrative record as a whole, considering adverse as well as supporting
6 evidence. *Drouin*, 966 F.2d at 1257. When the evidence is susceptible to more than
7 one rational interpretation, the court must defer to the Commissioner’s decision.
8 *Moncada*, 60 F.3d at 523.

9 III.

10 DISCUSSION

11 A. Disability

12 A person qualifies as disabled, and thereby eligible for such benefits, “only if his
13 physical or mental impairment or impairments are of such severity that he is not only
14 unable to do his previous work but cannot, considering his age, education, and work
15 experience, engage in any other kind of substantial gainful work which exists in the
16 national economy.” *Barnhart v. Thomas*, 540 U.S. 20, 21-22, 124 S. Ct. 376, 157 L. Ed.
17 2d 333 (2003) (citation omitted).

18 B. The ALJ’s Findings

19 The ALJ found that Rosales met the insured status requirements through June
20 30, 2007. AR 19. Following the five-step sequential analysis applicable to disability
21 determinations, *Lounsbury v. Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006),¹ the ALJ
22 found that Rosales had not engaged in substantial gainful activity since January 1,
23 2003, the alleged onset date. Rosales had the severe impairments of hypertension,
24 diabetes mellitus, obesity, heart condition, HIV positive, kidney disorder, sleep disorder,

25 ¹ The five-step sequential analysis examines whether the claimant engaged in
26 substantial gainful activity, whether the claimant’s impairment is severe, whether the
27 impairment meets or equals a listed impairment, whether the claimant is able to do his
28 or her past relevant work, and whether the claimant is able to do any other work.
Lounsbury, 468 F.3d at 1114.

1 depression, and anxiety. AR 19. He did not meet or equal a listed impairment. AR 19-
2 20. He had the residual functional capacity (“RFC”) to perform light work. Specifically,
3 he could occasionally lift and carry twenty pounds; frequently lift and carry ten pounds;
4 stand, walk and sit for six hours in an eight-hour workday with a sit/stand option every
5 hour; and occasionally use foot controls due to his use of an assistive device for walking
6 on uneven surfaces. He must avoid working around unprotected heights and
7 hazardous moving machinery, and must avoid excessive amount of dust, fumes, and
8 gases. AR 20.

9 Although Rosales was unable to perform his past relevant work, the ALJ found
10 there were jobs that existed in significant numbers in the national economy that Rosales
11 could perform, such as cashier II and assembler of plastic medical parts. AR 25-26.
12 The ALJ concluded Rosales was not under a disability from January 1, 2003 through
13 the date of the decision. AR 27.

14 **C. Listed Impairments**

15 Rosales contends the ALJ erred in finding that Rosales did not meet or equal a
16 listed impairment. Rosales identifies Listing 9.08A and Listing 12.05C.

17 At step three of the sequential analysis, the claimant bears the burden of
18 demonstrating that his impairments are equivalent to one of the listed impairments that
19 are so severe as to preclude substantial gainful activity. *Bowen v. Yuckert*, 482 U.S.
20 137, 141, 146 n. 5, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987). “If the impairment meets
21 or equals one of the listed impairments, the claimant is conclusively presumed to be
22 disabled. If the impairment is not one that is conclusively presumed to be disabling, the
23 evaluation proceeds to the fourth step.” *Id.* at 141; *see also Tackett v. Apfel*, 180 F.3d
24 1094, 1099 (9th Cir. 1999); 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

25 “The listings define impairments that would prevent an adult, regardless of his
26 age, education, or work experience, from performing *any* gainful activity, not just
27 ‘substantial gainful activity.’” *Sullivan v. Zebley*, 493 U.S. 521, 532, 110 S. Ct. 885, 107
28 L. Ed. 2d 967 (1990) (quoting 20 C.F.R. § 416.925(a)) (emphasis in original). “For a

1 claimant to show that his impairment matches a listing, it must meet *all* of the specified
2 medical criteria. An impairment that manifests only some of those criteria, no matter
3 how severely, does not qualify.” *Id.* at 530 (emphasis in original). “To *equal* a listed
4 impairment, a claimant must establish symptoms, signs and laboratory findings ‘at least
5 equal in severity and duration’ to the characteristics of a relevant listed impairment, or, if
6 a claimant’s impairment is not listed, then to the listed impairment ‘most like’ the
7 claimant’s impairment.” *Tackett*, 180 F.3d at 1099 (citation omitted; emphasis in
8 original). “‘Medical equivalence must be based on medical findings.’ A generalized
9 assertion of functional problems is not enough to establish disability at step three.” *Id.*
10 at 1100 (quoting 20 C.F.R. § 404.1526). “An ALJ must evaluate the relevant evidence
11 before concluding that a claimant’s impairments do not meet or equal a listed
12 impairment. A boilerplate finding is insufficient to support a conclusion that a claimant’s
13 impairment does not do so.” *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001).

14 **Listing 9.08A**

15 To meet or equal Listing 9.08A, the following must be present with diabetes
16 mellitus:

17 Neuropathy demonstrated by significant and persistent disorganization of
18 motor function in two extremities resulting in sustained disturbance of gross
19 and dexterous movements, or gait and station (see 11.00C).

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21 11.00C: Persistent disorganization of motor function in the form of paresis
22 or paralysis, tremor or other involuntary movements, ataxia and sensory
23 disturbances (any or all of which may be due to cerebral, cerebellar, brain
24 stem, spinal cord, or peripheral nerve dysfunction) which occur singly or in
25 various combinations, frequently provides the sole or partial basis for
26 decision in cases of neurological impairment. The assessment of
27 impairment depends on the degree of interference with locomotion and/or
28 interference with the use of fingers, hands and arms.

1 20 C.F.R. Pt. 404, Subpart P, Appendix 1, §§ 9.08A, 11.00C.

2 Rosales argues that he meets Listing 9.08A because of his “extreme limitation of
3 the ability to walk, i.e., an impairment(s) that interferes very seriously with the
4 individual’s ability to independently initiate, sustain, or complete activities.” JS 17
5 (quoting 20 C.F.R. Pt. 404, Subpart P, Appendix 1, § 1.00B2b).

6 Rosales has not offered any theory as to how his impairments meet or equal
7 Listing 9.08A. On October 10, 2003, a UCI clinic note indicated that Rosales had
8 peripheral neuropathy with decreased sensation of the bilateral feet and intact
9 sensation of the bilateral legs. AR 385. His gait was unsteady, but he was able to
10 ambulate and walk on his toes and heels. *Id.* On April 18, 2004, an Anaheim Memorial
11 Medical Center discharge summary indicated that Rosales was able to ambulate
12 without difficulty. AR 21, 349.

13 Rosales testified that he last worked in 2006 as a forklift operator² and lifted
14 twenty-five to fifty pounds. AR 112-14. He last looked for work in 2006. AR 113. On
15 October 23, 2008, Dr. Lim, a consultative examiner, found sensory deficit and moderate
16 pitting edema in both lower extremities, suggesting some degree of diabetic
17 neuropathy. AR 23, 505. He found normal muscle bulk and tone without atrophy,
18 strength 5/5 throughout without focal motor deficits, intact finger-to-nose and heel-to-
19 shin examinations, and rapid alternating movements without ataxia. AR 505. Rosales
20 had “a slow and mildly unsteady gait complaining of numbness of both lower
21 extremities,” but did not require the use of assistive devices for ambulation. AR 23,
22 505. Dr. Lim opined that Rosales’ limitations included standing and walking for four
23 hours in an eight-hour workday, and occasional pushing and pulling with the lower
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26 ² Dr. Dann, a State Agency consultant, noted that “forklift driving requires [the] ability
27 to stand unassisted in fast turning vehicle[s] with sensation in feet adequate to use foot
28 pedal controls. Gait unsteadiness would appear embellished in such a setting.” AR
527.

1 extremities. AR 24, 506. Dr. Lim opined that Rosales was still capable of performing a
2 range of light work. AR 24, 506, 521-26.

3 Subsequently, UCI treatment notes indicate Rosales had a steady gait on July 29
4 and August 30, 2009. AR 640, 653. On May 5, 2010, UCI treatment notes indicate
5 Rosales was advised to walk and engage in light activities every day. AR 691. A
6 Nursing Admission Assessment noted Rosales is able to walk a moderate distance at
7 least once every 1-2 hours. AR 680.

8 Rosales argues that his treating physicians “reported that [he] suffered from
9 peripheral neuropathy in his feet and legs which caused significant and persistent
10 disorganization of motor functions in 2 extremities leading to sustained disturbance of
11 gross and dexterous movements, or gait and station, and resulting in marked restriction
12 of activities of daily living.” JS 17 (emphasis omitted). Rosales does not provide a
13 citation to the record, and the court has not located such reports. The record contains a
14 check-the-box Medical Report filled out by M. Darpel, PA-C, on August 18, 2008.
15 Darpel noted neuropathy in the legs and feet, and checked the box for marked
16 restriction of activities of daily living. AR 269. No explanation was provided. On
17 September 15, 2008, Darpel filled out a form indicating Rosales could occasionally
18 lift/carry ten pounds, sit for less than six hours and stand/walk for less than two hours in
19 an eight-hour workday. AR 276-77. Darpel concluded Rosales had a “severely
20 reduced functional level secondary to multiple illnesses.” AR 276. However, on a
21 questionnaire dated September 15, 2008, Rosales stated he could complete his
22 household chores and could walk four blocks without resting, despite his “bad legs.” AR
23 273. This evidence, and the medical record as a whole, does not demonstrate that
24 Rosales met or equaled Listing 9.08A. The ALJ did not err.

25 **Listing 12.05C**

26 Listing 12.05 requires evidence of “significantly subaverage general intellectual
27 functioning with deficits in adaptive functioning initially manifested . . . before age 22.”
28 20 C.F.R. Pt. 404, Subpt. P, Appendix 1, § 12.05. The required level of severity is

1 satisfied when subparagraph A, B, C or D is met. *Id.* Subparagraph C requires a “valid
2 verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental
3 impairment imposing an additional and significant work-related limitation of function.”

4 *Id.* “In cases where more than one IQ is customarily derived from the test administered,
5 e.g., where verbal, performance, and full scale IQs are provided in the Wechsler series,
6 we use the lowest of these in conjunction with 12.05.” *Id.* § 12.00(D)(6)(c).

7 The ALJ did not analyze Listing 12.05C. “An ALJ is not required to discuss the
8 combined effects of a claimant’s impairments or compare them to any listing in an
9 equivalency determination, unless the claimant presents evidence in an effort to
10 establish equivalence.” *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

11 The Commissioner argues that Rosales “did not present any theory to the ALJ
12 regarding meeting Listing 12.05C.” JS 31. However, counsel argued Listing 12.05 at
13 the initial hearing on May 20, 2010, and in a letter dated August 2, 2010 before the
14 supplemental hearing. AR 102-03, 807. The Commissioner argues that Rosales has
15 never been diagnosed with “mental retardation.” There is no requirement that a
16 claimant be diagnosed with mental retardation to satisfy Listing 12.05. See *Wooten v.*
17 *Colvin*, 2013 U.S. Dist. LEXIS 137864, *8 (E.D. Cal. Sept. 25, 2013).

18 The ALJ erred in failing to address whether Rosales met Listing 12.05C.
19 Because of the conflicting evidence in this case, the ALJ’s error was not harmless.

20 The ALJ cited the opinion of Dr. Colonna, a consultative examiner. AR 20, 22-23.
21 Dr. Colonna administered the Wechsler Adult Intelligence Scale (WAIS-III). AR 494.
22 As the ALJ acknowledged, Rosales’ verbal IQ was 77, his performance IQ was 68 and
23 his full scale IQ was 70. AR 23, 497. Dr. Colonna opined that the IQ scores were “in
24 the valid range.”³ AR 497.

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27 ³ Dr. Colonna stated that the “test results appear to be an underestimation of the
28 claimant’s ability at this time but are in the valid range.” AR 497.

1 The Ninth Circuit, in an unpublished decision, stated: “We do not doubt that an
2 ALJ can decide that an IQ score is invalid. The regulations’ inclusion of the word
3 ‘invalid’ in Listing 12.05C makes the ALJ’s authority clear.” *Thresher v. Astrue*, 283
4 Fed. Appx. 473, 475 (9th Cir. 2008). In a footnote, the court stated: “We have never
5 decided what information is appropriately looked to in deciding validity. Some courts
6 have said that the score can be questioned on the basis of ‘other evidence,’ but have
7 not discussed exactly how other evidence impacts the validity of the score itself. Other
8 courts have been more explicit and have indicated that in questioning a score the ALJ
9 must find some empirical link between the evidence and the score.” *Id.* at 475 n.6.

10 As to whether onset occurred before the age of 22, Rosales testified that he
11 completed eighth grade in special education. AR 129. The ALJ’s hypothetical to the
12 VE accepted that Rosales had some special education, AR 138, but that is not by itself
13 sufficient. See *Rhein v. Astrue*, 2010 U.S. Dist. LEXIS 128615, *17 (E.D. Cal. Nov. 23,
14 2010). The Commissioner has interpreted the onset requirement to involve “the
15 common clinical practice of inferring a diagnosis of mental retardation when the
16 longitudinal history and evidence of current functioning demonstrate that the impairment
17 existed before the end of the developmental period.” Revised Medical Criteria for
18 Evaluating Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50746, 50772
19 (Aug. 21, 2000) (“Revised Medical Criteria”). The Ninth Circuit has not yet addressed
20 the applicable legal standard. However, several district courts in this circuit have
21 articulated a logical standard: before a claimant may claim a presumption that his/her
22 impairment existed prior to age 22 based solely on valid post-developmental IQ scores,
23 the claimant must provide evidence “supporting early onset of the mental impairment
24 and that no intervening circumstances have occurred to impact Plaintiff’s IQ.” *Rhein*,
25 2010 U.S. Dist. LEXIS 128615, *21 (emphasis in original) (citing *Markle v. Barnhart*, 324
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1 F.3d 182, 188-89 (3d Cir. 2003));⁴ *see also* *Wooten*, 2013 U.S. Dist. LEXIS 137864, *9-
2 *10 (collecting cases using different approaches in this circuit).

3 While Rosales' participation in special education classes would support an
4 inference of early onset, the Commissioner argues that Rosales has a twenty-year work
5 history that appears to have begun before the age of 22. Rosales testified that he last
6 worked in 2006. AR 112. Given that Rosales was born in 1966, he was 40 in 2006.
7 AR 26. Rosales testified that he had been a warehouse worker and forklift operator for
8 about 10 years, and previously worked as a security guard for about 10 years. AR 114-
9 16, 124-25. He learned how to operate a forklift after an eight-hour training, and
10 operated a forklift for about four hours out of an eight-hour workday at the warehouse.
11 AR 135. The VE testified that the jobs of forklift operator and security guard are semi-
12 skilled jobs. AR 138. The job of security guard requires Reasoning Level 3.⁵ DOT
13 372.667-034. Moreover, Dr. Colonna found that Rosales' "overall cognitive ability falls
14 within the borderline to low average range." AR 498. She concluded Rosales could
15 understand, remember and carry out short, simple instructions without difficulty, could
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18 ⁴ In *Markle*, the court discussed the claimant's special education and sporadic work
19 history, and the absence of evidence that retardation occurred later in life. 324 F.3d at
188-89 & n.2.

20 ⁵ Reasoning Level 3 requires a worker to "[a]pply commonsense understanding to
21 carry out instructions furnished in written, oral, or diagrammatic form. Deal with
22 problems involving several concrete variables in or from standardized situations." DOT
23 372.667-034. In the DOT, the General Educational Development ("GED") Scale
24 measures "those aspects of education (formal and informal) which are required of the
25 worker for satisfactory job performance." DOT, Appendix C, Section III, 1991 WL
26 688702 (1991). The GED Scale is composed of three divisions: Reasoning
27 Development, Mathematical Development, and Language Development. *Id.*
28 Reasoning Level One, the lowest level, requires a person to "[a]pply commonsense
understanding to carry out simple one- or two-step instructions. Deal with standardized
situations with occasional or no variables in or from these situations encountered on the
job." *Id.* Reasoning Level Two requires a person to "[a]pply commonsense
understanding to carry out detailed but uninvolved written or oral instructions. Deal with
problems involving a few concrete variables in or from standardized situations." *Id.*

1 make simple work-related decisions without special supervision, and could interact
2 appropriately with supervisors, coworkers and peers. AR 20, 498.

3 In addition, the Commissioner argues the record contains evidence of intervening
4 circumstances that may have impacted Rosales' IQ.⁶ Rosales testified that he stopped
5 using drugs in 2009. AR 120; *see also* AR 678. Rosales had used methamphetamine,
6 heroin and marijuana.⁷ AR 444, 678. He had been on meth for about 10 years. AR
7 119, 121; *compare* AR 678 (Rosales had been on drugs for 15 years).

8 Given the conflicting evidence in the record, it is recommended that this matter be
9 remanded for consideration of whether Rosales meets or equals Listing 12.05C. *See*
10 *Sorter v. Astrue*, 389 Fed. Appx. 620, 622 (9th Cir. 2010) (remanding for consideration
11 of whether claimant met Listing 12.05C based on conflicting evidence in the record).
12 Listing 12.05C contains an additional requirement of "a physical or other mental
13 impairment imposing an additional and significant work-related limitation of function."
14 The Commissioner has explained that the other impairment must be "severe" as defined
15 in 20 C.F.R. §§ 404.1520(c) and 416.920(c). Revised Medical Criteria at 50772 (citing
16 Social Security Ruling ("SSR") 98-1p);⁸ *see also Fanning v. Bowen*, 827 F.2d 631, 633
17 (9th Cir. 1987). The ALJ found that Rosales has the severe impairment of diabetes
18 mellitus, among others, and limited him to light work with additional restrictions. AR 19-
19 20. This finding appears to satisfy the requirement that a claimant have a physical or
20 other mental impairment imposing an additional and significant work-related limitation of
21 function. *See Gomez v. Astrue*, 695 F. Supp. 2d 1049, 1062 (C.D. Cal. 2010) (diabetes

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23 ⁶ Rosales did not mention to Dr. Colonna his use of methamphetamine and heroin.
24 Rosales stated that he was a "pot head" and smokes marijuana." AR 495.

25 ⁷ The medical records indicate that Rosales decided to get tested for HIV in June
26 2008 "out of curiosity" because of past IV drug use. AR 443.

27 ⁸ Social Security rulings do not have the force of law. Nevertheless, they "constitute
28 Social Security Administration interpretations of the statute it administers and of its own
regulations," and are given deference "unless they are plainly erroneous or inconsistent
with the Act or regulations." *Han v. Bowen*, 882 F.2d 1453, 1457 (9th Cir. 1989).

1 mellitus with retinopathy); see also *Markle*, 324 F.3d at 188 (impairments limiting
2 claimant to light work satisfy requirement of other impairments).

3 **D. Treating Physician**

4 Rosales contends the ALJ erred by ignoring the reports of Drs. Darpel and
5 Kushner. Darpel is actually a physician's assistant. AR 269. The Commissioner
6 concedes that the ALJ's decision did not expressly discuss Darpel's reports. JS 48.
7 The ALJ expressly considered Darpel's treatment records and found no significant
8 functional limitations. AR 24, 564-83.

9 An opinion of a treating physician is given more weight than the opinion of
10 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To reject an
11 uncontradicted opinion of a medically acceptable treating source, an ALJ must state
12 clear and convincing reasons that are supported by substantial evidence. *Bayliss v.*
13 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When a treating physician's opinion is
14 contradicted by another doctor, "the ALJ may not reject this opinion without providing
15 specific and legitimate reasons supported by substantial evidence in the record. This
16 can be done by setting out a detailed and thorough summary of the facts and conflicting
17 clinical evidence, stating his interpretation thereof, and making findings." *Orn*, 495 F.3d
18 at 632 (citations and quotation marks omitted). "When there is conflicting medical
19 evidence, the Secretary must determine credibility and resolve the conflict." *Thomas*,
20 278 F.3d at 956-57 (citation and quotation marks omitted).

21 Only licensed physicians and certain other qualified specialists are considered
22 "[a]cceptable medical sources." 20 C.F.R. § 404.1513(a). Physician's assistants are
23 defined as "other sources," 20 C.F.R. § 404.1513(d), and are not entitled to the same
24 deference.⁹ 20 C.F.R. § 404.1527; SSR 06-03p. An ALJ may discount testimony from

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26 ⁹ Although Rosales argues that a physician's assistant could be considered a
27 medically acceptable source as a physician's agent, the record does not show that
28 Darpel worked under the close supervision of Dr. Kushner. See *Molina*, 674 F.3d at
1111 (nurse practitioner worked under physician's close supervision such that she
acted as physician's agent)). Dr. Kushner did not sign the August and September 2008

1 “other sources” if the ALJ “gives reasons germane to each witness for doing so.”

2 *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012) (physician’s assistant) (citation
3 and internal quotation marks omitted).

4 The record contains two reports signed by Darpel. In the report dated August 18,
5 2008, Darpel identified fatigue and neuropathy in the legs and feet as manifestations of
6 HIV infection. He checked the box indicating marked restriction of activities of daily
7 living.¹⁰ AR 269. No explanation was provided. On September 15, 2008, Darpel
8 completed a “physician statement” that was attached to an HIV Questionnaire directed
9 to Rosales. AR 276-77. Darpel indicated that he first saw Rosales on August 29, 2008
10 and last saw him on September 15, 2008. Rosales was chronically ill and appeared
11 visibly fatigued due to HIV, diabetes mellitus and peripheral neuropathy. Rosales can
12 occasionally lift ten pounds, stand/walk for less than two hours, and sit for less than six
13 hours in an eight-hour day. AR 276. Darpel indicated that Rosales had a severely
14 reduced functional level secondary to multiple illnesses, and required much assistance
15 and referrals to specialists. *Id.* Darpel did not list objective findings to support Rosales’
16 limitations. AR 277. Darpel found no diagnosed mental impairment. *Id.*

17 The ALJ reviewed Darpel’s treatment records and found no significant functional
18 limitations. AR 24. On August 29, 2008, Darpel noted that Rosales had been diabetic
19 for 17 years. Darpel noted neuropathy but no edema in Rosales’ extremities. AR 582.
20 On September 15, 2008, Darpel noted that pedal edema was resolved and Rosales
21 should take Neurontin for neuropathy. AR 576. On October 2, 2008, Darpel noted
22 Rosales should continue with Neurontin for neuropathy. AR 571. On January 6, 2009,
23 Darpel noted poor compliance with medication and appointments. AR 565.

24 _____
25 reports, although his name is stamped. AR 269, 277. The majority of treatment records
26 were signed solely by someone whose signature appears to be Darpel’s and were not
27 stamped with a physician’s name. AR 565, 574, 576, 580-81.

28 ¹⁰ By contrast, Rosales stated he was able to manage his personal care, prepare
simple meals, do dishes, do laundry, go shopping, and manage funds. AR 256-59.

1 To the extent the ALJ erred in overlooking Darpel's reports, the error was
2 harmless. The ALJ's finding that Darpel's treating records did not contain significant
3 functional limitations would properly support rejection of even a treating physician's
4 conclusory opinions. *Batson v. Commissioner*, 359 F.3d 1190, 1195 (9th Cir. 2004)
5 (ALJ properly rejected treating physician's conclusory check-list report); *Thomas*, 278
6 F.3d at 957 (treating physician opinion that is conclusory and inadequately supported by
7 clinical findings may be rejected); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996)
8 (ALJ may reject check-off reports that did not contain explanations for conclusions).

9 In addition, the ALJ rejected the opinion that Rosales was limited to standing and
10 walking for two hours in an eight-hour workday as inconsistent with the record as a
11 whole, including Dr. Lim's opinion. AR 24. Inconsistency with medical evidence is a
12 germane reason for rejecting lay witness evidence. *Bayliss*, 427 F.3d at 1218. The ALJ
13 gave "great probative weight" to Dr. Lim, a consultative examiner. AR 24. An
14 examining physician's opinion constitutes substantial evidence when it is based on
15 independent clinical findings. *Orn*, 495 F.3d at 632. Dr. Lim opined that Rosales could
16 occasionally lift and carry twenty pounds and frequently lift and carry ten pounds; he
17 could stand and/or walk for four hours with "appropriate breaks;" he could sit for six
18 hours with "appropriate breaks;" he could occasionally push and pull with both lower
19 extremities; he could not climb or crouch; he must avoid unprotected heights; he had
20 "visual limitations in the right eye." AR 506. For this additional reason, any error was
21 harmless. *Molina*, 674 F.3d at 1117 (error in failing to address lay opinion is harmless
22 when ALJ gives germane reason for rejecting similar limitations).

23 **E. RFC Determination**

24 The ALJ found that, as of the date of his decision, Rosales' physical impairments
25 were moderate in nature. AR 25. Rosales contends the ALJ did not adequately
26 account for the impact of his fatigue, mental impairment, and vision problems in the
27 RFC.
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1 The RFC determination measures the claimant's capacity to engage in basic
2 work activities. *Bowen v. New York*, 476 U.S. 467, 471, 106 S. Ct. 2022, 90 L. Ed. 2d
3 462 (1986). The RFC is a determination of "the most [an individual] can still do despite
4 [his or her] limitations." 20 C.F.R. § 404.1545(a). It is an administrative finding, not a
5 medical opinion. 20 C.F.R. § 404.1527(e)(2). The RFC takes into account both
6 exertional limitations and non-exertional limitations. The RFC assessment must contain
7 "a narrative discussion describing how the evidence supports each conclusion, citing
8 specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily
9 activities, observations)." SSR 96-8p. The ALJ must also explain how he or she
10 resolved material inconsistencies or ambiguities in the record. *Id.* "When there is
11 conflicting medical evidence, the Secretary must determine credibility and resolve the
12 conflict." *Thomas*, 278 F.3d 947, 956-57 (citation omitted).

13 ***Fatigue***

14 Rosales contends that the ALJ did not adequately account for his fatigue.
15 Rosales argues that he "testified that he suffered from severe fatigue and provided a
16 detailed account of its profound impact on his functionality," and that "[t]reating sources'
17 records" and Dr. Lim "corroborated the diagnosis." JS 51.

18 Rosales' argument lacks support. Rosales testified that when he is not reading or
19 watching sports, he naps twice a day for one or two hours. AR 128. As the ALJ noted,
20 Rosales testified that he stopped taking medications or changed the dosage when they
21 were "making [him] sleep too much." AR 25, 131-32, 384.

22 It is unclear to which "[t]reating sources' records" Rosales refers. The ALJ noted
23 that Rosales complained of chronic fatigue to Dr. Lim. AR 23, 502. However, Dr. Lim
24 did not identify any additional functional limitations due to Rosales' fatigue or opine that
25 Rosales had a fatigue-induced impairment. AR 506. The ALJ found Rosales'
26 "testimony regarding the severity and impact of [Rosales'] impairments not supported by
27 the medical evidence of record." AR 25. There are some complaints of fatigue in the
28 record, but no indication that fatigue profoundly impacts Rosales' ability to function. AR

1 384, 386, 502, 582. As discussed below, the ALJ properly assessed Rosales'
2 credibility. Considering the record as a whole, the ALJ did not err.¹¹

3 ***Mental Impairment***

4 Rosales contends the ALJ did not properly account for his mental impairment.

5 The ALJ found that Rosales has the mental impairments of depression, anxiety,
6 and personality disorder; has moderate limitations in attention, concentration, and
7 memory; and has moderate limitations in understanding and carrying out detailed
8 instructions. AR 20-21. The ALJ relied on the opinion of Dr. Colonna, a consultative
9 examiner. AR 20. Dr. Colonna noted that Rosales could dress and bathe himself,
10 manage his own finances, get along well with others, and interact appropriately with
11 supervisors, co-workers, and peers. AR 20, 496, 498. Rosales' attention and
12 concentration were mildly diminished, and his fund of knowledge was poor. AR 20,
13 496. However, his insight and judgment were fair, and his intermediate and remote
14 memory was intact. AR 20, 496. He could understand, remember and carry out short,
15 simple instructions without difficulty. He had a mild inability to understand, remember
16 and carry out detailed instructions. He could make simple work-related decisions
17 without special supervision. AR 498. The ALJ conducted the proper mental functional
18 analysis.

19 Rosales argues that Dr. Colonna opined that he was limited to performing only
20 very short and simplistic work-tasks, which was not included in the RFC. Although Dr.
21 Colonna opined that Rosales could understand, remember and carry out short, simple
22 instructions without difficulty, she also opined that he has only a mild impairment in his
23 ability to understand, remember and carry out detailed instructions. AR 498. The RFC
24 does not conflict with Dr. Colonna's opinion.

25
26 ¹¹ The cases on which Rosales relies in footnote 15 are distinguishable. The ALJ
27 did not find that Rosales suffers from the severe impairments of chronic fatigue
28 syndrome or fatigue, did not fail to mention a fatigue-induced impairment that a
consultative examiner suggested, and did not find the claimant's testimony credible.
See Reddick v. Chater, 157 F.3d 715, 724-25 (9th Cir. 1998); *Swenson v. Sullivan*, 876
F.2d 683, 688 (9th Cir. 1989); *Shafer v. Barnhart*, 120 Fed. Appx. 688 (9th Cir. 2008).

1 **Vision Problems**

2 Rosales contends that the ALJ improperly dismissed Dr. Earl’s report and did not
3 adequately account for Rosales’ vision problems.

4 In an undated letter, Dr. Earl stated that Rosales has been followed at the Gavin
5 Herbert Eye Institute for proliferative diabetic reinopathy, diabetic macular edema,
6 cataracts, glaucoma suspect, and dry eye syndrome. Rosales had “multiple treatments
7 and surgeries in the past (laser, injection and vitrectomies) and may need further
8 treatments.” AR 804. Dr. Earl did not state that further treatment was necessary, nor
9 did he state that Rosales had any functional limitations.

10 The ALJ gave Dr. Earl’s letter “little weight.” AR 24. It was unknown when Dr.
11 Earl wrote the letter. The ALJ found no basis for the opinion, found it inconsistent with
12 the rest of the medical evidence, and found that it did not offer any functional limitations.

13 Rosales first argues that the ALJ’s reason for doubting the authenticity of Dr.
14 Earl’s letter because it was undated is without merit. However, the ALJ questioned
15 *when* Dr. Earl offered the opinion, not whether Dr. Earl offered the opinion. AR 24.
16 Rosales argues the ALJ should have contacted Dr. Earl about functional limitations.
17 “The ALJ . . . has an independent duty to fully and fairly develop the record and to
18 assure that the claimant’s interests are considered.” *Tonapetyan v. Halter*, 242 F.3d
19 1144, 1150 (9th Cir. 2001) (citations and quotation marks omitted). “An ALJ’s duty to
20 develop the record further is triggered only when there is ambiguous evidence or when
21 the record is inadequate to allow for proper evaluation of the evidence.” *Mayes v.*
22 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001). This principle does not, however,
23 allow a claimant to shift his burden of proving disability to the ALJ. *Id.* at 459. The ALJ
24 did not find that the record was insufficient or inadequate. Rather, he noted that Dr.
25 Earl’s opinion was unsupported and inconsistent with the medical evidence. AR 24.

26 Rosales argues that he submitted “extensive medical records which were
27 adduced after the hearing that document [Rosales’] profound vision loss.” JS 55.
28 Rosales submitted three documents after the initial hearing on May 20, 2010: the

1 undated letter from Dr. Earl; a letter from Rosales' attorney; and a letter from the AIDS
2 Service Foundation. AR 101, 804-10. Although the record was left open for the
3 production of additional documents after the supplemental hearing on October 22,
4 2010, no further documents were produced. AR 109. The record contains no
5 supporting treatment records from Dr. Earl or the Gavin Herbert Eye Institute.

6 The court reviewed the 2009 records from Retina Vitreous Associates Medical
7 Group, which documented the diagnosis and treatment of Rosales' diabetic retinopathy
8 and vitreous hemorrhages. AR 603-14. The record dated February 27, 2009 indicates
9 that, after treatment, Rosales had no pain and improved visual acuity in the right eye.
10 The treating doctor indicated, "great result." AR 605. Visual acuity was 20/200 in
11 Rosales' right eye without corrective lenses, and was 20/80 in his left eye without
12 corrective lenses.¹² AR 605-06. Rosales had a second surgery about eight months
13 prior to the hearing. AR 127. Rosales testified that he likes to read newspapers with
14 glasses. There is no indication that Rosales does not have sufficient visual acuity for
15 work. AR 127-28.

16 The ALJ did not err in the RFC determination.

17 **F. Credibility**

18 Rosales contends the ALJ failed to properly assess his credibility.

19 "To determine whether a claimant's testimony regarding subjective pain or
20 symptoms is credible, an ALJ must engage in a two-step analysis." *Lingenfelter v.*
21 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, "the ALJ must determine
22 whether the claimant has presented objective medical evidence of an underlying
23 impairment 'which could reasonably be expected to produce the pain or other
24 symptoms alleged.'" *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991))

25
26
27 ¹² Dr. Nawar, a state agency review physician, reviewed the February 2009 records
28 and affirmed the earlier assessment of Dr. Dann, another agency physician. AR 629.

1 (en banc)). The ALJ found that Rosales' medically determinable impairments could
2 reasonably be expected to produce the alleged symptoms. AR 25.

3 “Second, if the claimant meets this first test, and there is no evidence of
4 malingering, the ALJ can reject the claimant’s testimony about the severity of her
5 symptoms only by offering specific, clear and convincing reasons for doing so.”
6 *Lingenfelter*, 504 F.3d at 1036 (citation and quotation marks omitted). “In making a
7 credibility determination, the ALJ ‘must specifically identify what testimony is credible
8 and what testimony undermines the claimant’s complaints[.]’” *Greger v. Barnhart*, 464
9 F.3d 968, 972 (9th Cir. 2006) (citation omitted).

10 In weighing credibility, the ALJ may consider factors including: the nature,
11 location, onset, duration, frequency, radiation, and intensity of any pain; precipitating
12 and aggravating factors (e.g., movement, activity, environmental conditions); type,
13 dosage, effectiveness, and adverse side effects of any pain medication; treatment,
14 other than medication, for relief of pain; functional restrictions; the claimant’s daily
15 activities; and “ordinary techniques of credibility evaluation.” *Bunnell*, 947 F.2d at 346
16 (citing SSR 88-13) (quotation marks omitted). The ALJ may consider (a)
17 inconsistencies or discrepancies in a claimant’s statements; (b) inconsistencies
18 between a claimant’s statements and activities; (c) exaggerated complaints; and (d) an
19 unexplained failure to seek treatment. *Thomas*, 278 F.3d at 958-59.

20 The ALJ found that Rosales’ statements concerning the intensity, persistence and
21 limiting effects of his symptoms were not credible to the extent they were inconsistent
22 with the RFC. AR 25. The ALJ relied primarily on two reasons: (1) the objective
23 evidence did not support the severity of the alleged symptoms; and (2) Rosales’
24 treatment was conservative. *Id.*

25 “Although lack of medical evidence cannot form the sole basis for discounting
26 pain testimony, it is a factor that the ALJ can consider in his credibility analysis.” *Burch*
27 *v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). Here, the objective medical evidence
28 did not support the severity of Rosales’ subjective symptoms during the period prior to

1 the HIV positive diagnosis in June 2008. Rosales' diabetes was noted to be
2 "uncontrolled" or "poorly controlled," but he was referred to diabetes education classes
3 and directed to take his medication and monitor his glucose levels more effectively. AR
4 380-82, 385, 387, 446. In October 2003, Rosales complained of bilateral leg pain with
5 hip and groin pain. He was noted to have positive straight leg raising and positive
6 peripheral neuropathy. However, he had a normal spine x-ray, a normal hip MRI, and
7 normal pinprick of the bilateral thighs. AR 385, 401-02. His gait was unsteady, but he
8 was able to ambulate and walk on his toes and heels. AR 385. His medication was
9 changed and he was told to return in four weeks. *Id.* He continued to work as a forklift
10 operator during that time. AR 112-14. In April 2004, Rosales was admitted to Anaheim
11 Memorial Medical Center with pain and weakness in the lower extremities. A lumbar
12 puncture was within normal limits. There was no evidence of Guillain-Barre syndrome.
13 The pain "significantly improved" with medication. AR 360. In February 2006, Rosales
14 complained of numbness and tingling in his feet. An examination showed no pedal
15 edema and no lesions on his feet. He was treated with medication. AR 415. In
16 November 2006, Rosales complained of electrical shocks in both feet yet, on
17 examination, his extremities were normal. AR 407. In October 2007, Rosales reported
18 a seizure without tongue biting or jerking. His physical examination was normal. He
19 was diagnosed with "syncope?," "anxiety?," hypoglycemia, diabetes – poor control, and
20 neuropathy. There is no mention of gait unsteadiness or vision problems. AR 404.

21 After June 2008, the objective medical evidence did not support the severity of
22 Rosales' symptoms. In July 2008, a treating record indicated intact pulses on both feet
23 and no evidence of skin breakdown or lesions. AR 447. There is no mention of
24 unsteady gait. AR 445-49. In March 2009, treatment notes indicate Rosales was
25 recently admitted to the hospital because of leg pain and leg cramps, but his physical
26 examination was normal. AR 589. A May 2010 Emergency Department note indicates
27 Rosales was admitted for complaints of dizziness. AR 667. He had diminished
28 sensation of the bilateral lower extremities, but had a steady gait and could bear full

1 weight. AR 667, 675. The ALJ noted that although Rosales complained of numbness
2 in both lower extremities and unsteady gait, he did not require the use of assistive
3 devices for ambulation.¹³ AR 25, 505, 679.

4 “[E]vidence of ‘conservative treatment’ is sufficient to discount a claimant’s
5 testimony regarding severity of an impairment.” *Parra v. Astrue*, 481 F.3d 742, 751 (9th
6 Cir. 2007) (citation omitted). The record evidence indicates that Rosales’ impairments,
7 other than vision problems, were generally treated and controlled with medication. See,
8 e.g., AR 25, 349, 360, 363, 365, 382, 590, 676, 756; see also *Tommasetti v. Astrue*,
9 533 F.3d 1035, 1040 (9th Cir. 2008) (medication constitutes conservative treatment).
10 Rosales did undergo laser, injection, and vitrectomies regarding his eyes in February
11 and August 2009, but there is no indication that further treatment was necessary. AR
12 603-14, 804. Rosales testified that he likes to read newspapers with glasses. AR 127-
13 28. Rosales visited the ER for diabetic neuropathy, but he was treated with medication
14 that “significantly improved” his pain. AR 360; see also AR 25, 349, 365, 676.

15 When, as here, there is conflicting evidence, the ALJ must resolve the conflicts.
16 “If the ALJ’s credibility finding is supported by substantial evidence in the record, we
17 may not engage in second-guessing.” *Thomas*, 278 F.3d at 959 (citing *Morgan v.*
18 *Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999)).

19 **G. Step Five of the Sequential Analysis**

20 Rosales contends the ALJ erred in relying on the VE’s testimony at step five.

21 At step five of the sequential analysis, the Commissioner bears the burden of
22 demonstrating there is other work in significant numbers in the national economy the
23 claimant can do. *Lounsbury*, 468 F.3d at 1114. If the Commissioner satisfies this
24 burden, the claimant is not disabled and not entitled to disability benefits. If the
25

26
27 ¹³ Rosales testified that he had been using a cane for about a year, but it was not
28 prescribed. AR 133.

1 Commissioner cannot meet this burden, the claimant is disabled and entitled to
2 disability benefits. *Id.*

3 “There are two ways for the Commissioner to meet the burden of showing that
4 there is other work in ‘significant numbers’ in the national economy that claimant can
5 do: (1) by the testimony of a vocational expert, or (2) by reference to the Medical-
6 Vocational Guidelines at 20 C.F.R. pt. 404, subpt. P, app. 2.” *Id.* “[A]n ALJ may [not]
7 rely on a vocational expert’s testimony regarding the requirements of a particular job
8 without first inquiring whether the testimony conflicts with the [DOT].”¹⁴ *Massachi v.*
9 *Astrue*, 486 F.3d 1149, 1152 (9th Cir. 2007); *see also Bray v. Comm’r of Soc. Sec.*
10 *Admin.*, 554 F.3d 1219, 1234 (9th Cir. 2009). SSR 00-4p requires the ALJ to “first
11 determine whether a conflict exists” between the DOT and the VE’s testimony, and
12 “then determine whether the [VE’s] explanation for the conflict is reasonable and
13 whether a basis exists for relying on the expert rather than the [DOT].” *Massachi*, 486
14 F.3d at 1153.

15 In evaluating the VE’s explanation for the conflict, “an ALJ may rely on expert
16 testimony which contradicts the DOT, but only insofar as the record contains persuasive
17 evidence to support the deviation.” *Johnson*, 60 F.3d at 1435. The ALJ’s explanation is
18 satisfactory if the ALJ’s factual findings support a deviation from the DOT and
19 “persuasive testimony of available job categories” matches “the specific requirements of
20 a designated occupation with the specific abilities and limitations of the claimant.” *Id.* at
21 1435. Remand may not be necessary if the procedural error is harmless, i.e., when
22 there is no conflict or if the VE provided sufficient support for her conclusion to justify
23 any potential conflicts. *Massachi*, 486 F.3d at 1154 n. 19.

24 The VE testified that a hypothetical person with Rosales’ limitations could perform
25 the representative jobs of cashier II and “some assembler positions,” such as
26

27 ¹⁴ The DOT raises a rebuttable presumption as to job classification. *Johnson v.*
28 *Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995).

1 assembler, plastic hospital parts. AR 141. The ALJ was entitled to rely on the VE's
2 testimony. "A VE's recognized expertise provides the necessary foundation for his or
3 her testimony. Thus, no additional foundation is required." *Bayliss*, 427 F.3d at 1218.

4 Rosales argues that the ALJ's hypothetical to the VE did not include all of
5 Rosales' limitations. However, the hypothetical contained all of the limitations that the
6 ALJ found credible and supported by substantial evidence in the record. An ALJ may
7 rely on a VE's testimony given in response to such a hypothetical question. *Bayliss*,
8 427 F.3d at 1217-18. An ALJ is not required to include limitations that are not in his
9 findings. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Osenbrock v. Apfel*,
10 240 F.3d 1157, 1165 (9th Cir. 2001). The ALJ's determination that Rosales' conditions
11 could be controlled with medication without significant adverse side effects is supported
12 by substantial evidence. AR 22-25, 379-91, 404-15, 506, 564-83, 638-90.

13 Rosales argues that the VE's testimony indicating he could perform some light
14 work conflicted with the DOT because the RFC contained a sit/stand option of one hour
15 at a time. Rosales contends that light work requires standing at least two hours at a
16 time and six hours during an eight-hour workday. JS 62 (citing SSR 83-10). SSR 83-10
17 interprets the medical-vocational rules and specifies that "the full range of light work
18 requires standing or walking, off and on, for a total of approximately 6 hours of an 8-
19 hour workday[, and that] [s]itting may occur intermittently during the remaining time."
20 SSR 83-10. SSR 83-12 addresses the procedures when, as here, the claimant can do
21 less than the full range of light work. See *Polley v. Commissioner*, 1999 U.S. App.
22 LEXIS 824, *3 (9th Cir. 1999) (rejecting argument that sit/stand option is inconsistent
23 with light work). "[W]hen a claimant must alternate periods of sitting and standing, the
24 ALJ is directed to consult a vocational expert." *Delorme v. Sullivan*, 924 F.2d 841, 850
25 (9th Cir. 1991). The ALJ did so, and the VE explained that she would erode the number
26 of available jobs by 50% to accommodate the sit/stand option. AR 141-42; see *Fox v.*
27 *Barnhart*, 42 Fed. Appx. 911, 912 (9th Cir. 2002) (ALJ may rely on VE's testimony when
28

1 the expert specifically eroded the number of available [jobs] to address an apparent
2 conflict with the DOT).

3 Rosales argues that the representative jobs identified by the VE exceeded his
4 mental RFC. As the VE testified, the cashier II and assembler, plastic hospital products
5 jobs are unskilled work with an SVP of 2. AR 141. Unskilled work “needs little or no
6 judgment to do simple duties that can be learned on the job in a short period of time.”
7 20 C.F.R. § 416.968(a). Rosales argues, based on his IQ, that he is incapable of
8 Reasoning Level 3, which is required for the cashier II job (DOT 211.462-010). The VE
9 testified that Rosales’ previous jobs of forklift operator and security guard were semi-
10 skilled jobs. AR 138. The job of security guard, which Rosales testified he performed
11 for about ten years, requires Reasoning Level 3. DOT 372.667-034. Dr. Colonna found
12 that Rosales’ IQ scores were in the “valid range,” but “appear to be an underestimation
13 of [Rosales’] ability at this time.” AR 497. Any error would be harmless because the
14 alternative representative job of assembler, plastic hospital products, requires
15 Reasoning Level 2. DOT 712.687-010. Reasoning Level 2 is consistent with an RFC of
16 simple and repetitive tasks. See, e.g., *Meissl v. Barnhart*, 403 F. Supp. 2d 981, 984
17 (C.D. Cal. 2005).

18 **IV.**

19 **RECOMMENDATION**

20 For the reasons discussed above, it is recommended that the district court issue
21 an order (1) accepting this Report’s findings and recommendation; (2) reversing the
22 decision of the Commissioner; and (3) remanding the matter for consideration of
23 whether Rosales meets or equals Listing 12.05C.

24
25
26 DATED: November 19, 2013



27 _____
ALICIA G. ROSENBERG
United States Magistrate Judge