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

GLEN R. WITHROW,	)	No. CV 13-1959-AS
	)	
Plaintiff,	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
CAROLYN W. COLVIN,	)	
Acting Commissioner of the	)	
Social Security Administration,	)	
	)	
Defendant.	)	
	)	

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**PROCEEDINGS**

On December 26, 2013, Plaintiff filed a Complaint, pursuant to 42 U.S.C. §§ 405(g) and 1383(c), seeking review of the Commissioner's denial of his application for supplemental social security income ("SSI"). (Docket Entry No. 3.) On May 19, 2014, Defendant filed an Answer to the Complaint and the Certified Administrative Record ("A.R."). (Docket Entry Nos. 13, 14.) The parties have consented to proceed before a United States Magistrate Judge. (Docket Entry Nos. 8, 10.) On July 31, 2014, the parties filed a Joint Stipulation ("Joint Stip.") setting forth their respective positions on the two

1 issues relevant to the consideration of Plaintiff's claim. (Docket  
2 Entry No. 15.) The Court has taken the action under submission  
3 without oral argument. See C.D. Local R. 7-15; "Order re Procedures  
4 in Social Security Case" (Docket Entry No. 7).

5  
6 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

7  
8 Plaintiff Glen R. Withrow ("Plaintiff"), a former Walmart  
9 employee and Taco Bell cashier, asserts disability beginning  
10 September 15, 2008, based on the following alleged physical and  
11 mental impairments: depression, anxiety, leg and back problems, and  
12 alleged that the onset date of these impairments was September 20,  
13 2008. (A.R. 302, 322, 383.) on April 17, 2012, the Administrative  
14 Law Judge ("ALJ") examined the record and heard testimony from  
15 Plaintiff and a vocational expert. (A.R. 18.) Plaintiff testified  
16 that he hurt his leg while working at Walmart, and that he received  
17 treatment for his back pain and leg pain in conjunction with a  
18 worker's compensation case for that incident. (A.R. 120, 125.) On  
19 May 24, 2012, the ALJ issued a decision denying Plaintiff's  
20 application for SSI. (A.R. 15-36.)

21  
22 The ALJ applied the five-step evaluation process to determine  
23 whether Plaintiff was disabled. (A.R. 19-30.) At step one, the ALJ  
24 determined that Plaintiff was not engaged in any "substantially  
25 gainful activity." (A.R. 20.) At step two, the ALJ found that  
26 Plaintiff suffers from the following medically determinable  
27 impairments: right knee and lumbar sprains/strains; patellofemoral  
28 chondromalacia of the right knee; depression; and anxiety. (Id.) At

1 step three, the ALJ determined that Plaintiff's severe impairments  
2 did not meet or equal a medical listing found in 20 C.F.R. Part 404,  
3 Subpart P, Appendix 1. (A.R. 20.)

4  
5 Before proceeding to step four, the ALJ found that Plaintiff had  
6 the RFC to perform light work with the following limitations:

7  
8 [Plaintiff] is able to stand for 6 hours, sit for 6 hours,  
9 and walk for 6 hours with the option to sit/stand at will.  
10 He should avoid climbing ladders, ropes, and scaffolds, but  
11 can occasionally engage in climbing balancing, stooping,  
12 kneeling, crouching, and crawling. In addition, the  
13 claimant can occasionally utilize a cane for uneven  
14 surfaces. He has pain in his back, leg, knee, and abdomen  
at a moderate level but is or can be controlled by  
appropriate medication or treatment without significant  
adverse side effects . . . He would have moderate  
capability of completing an undisturbed normal workday.

15 (A.R. 22.) The ALJ based the RFC finding in part on Plaintiff's  
16 "routine and conservative" treatment record rendered in connection  
17 with his worker's compensation claim for his knee injury. (A.R. 23.)

18  
19 At step four, the ALJ determined that Plaintiff was unable to  
20 return to his past work as a pizza maker/baker, lumberyard worker,  
21 stores laborer, or fast food worker. (A.R. 29.) The ALJ made this  
22 determination after comparing Plaintiff's RFC with the requirements  
23 of his past relevant work, and hearing testimony from a vocational  
24 expert. (A.R. 29.)

25  
26 At step five, the ALJ relied on the VE's testimony that  
27 Plaintiff could perform the following jobs identified in the  
28

1 Dictionary of Occupational Titles ("DOT"): (1) cashier II, (2)  
2 garment bagger, (3) and production assembler (A.R. 29-30), along with  
3 Plaintiff's age, education, work experience, and RFC, to conclude  
4 that the "claimant is capable of making a successful adjustment to  
5 other work that exists in significant numbers in the national  
6 economy." (See id.) Accordingly, the ALJ found that Plaintiff was  
7 "not disabled." (Id.)  
8

9 On October 18, 2013, the Appeals Council denied review of the  
10 ALJ's decision. (A.R. 1-6.)  
11

#### 12 STANDARD OF REVIEW

13

14 This court reviews the Administration's decision to determine  
15 if: (1) the Administration's findings are supported by substantial  
16 evidence; and (2) the Administration used proper legal standards.  
17 Smolen, 80 F.3d at 1279. "Substantial evidence is more than a  
18 scintilla, but less than a preponderance." Andrews v. Shalala, 53  
19 F.3d 1035, 1039 (9th Cir. 1995). To determine whether substantial  
20 evidence supports a finding, "a court must consider [] the record as  
21 a whole, weighing both evidence that supports and evidence that  
22 detracts from the [Commissioner's] conclusion." Reddick v. Chater,  
23 157 F.3d 715, 720 (9th Cir. 1998). As a result, "[i]f evidence can  
24 reasonably support either affirming or reversing the ALJ's  
25 conclusion, [a] court may not substitute its judgment for that of the  
26 ALJ." Batson v. Comm'r of Soc. Sec. Admin., 359 F.3d 1190, 1196 (9th  
27 Cir. 2004).  
28



1 more than a minimal effect on an individual's ability to work.'" Id.  
2 at 1290 (quoting Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.  
3 1988)). "[I]f the ALJ concludes that the claimant does have a  
4 medically severe impairment, the ALJ proceeds to the next step in the  
5 sequence." Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005); See  
6 20 C.F.R. § 404.1520(a)(4)(ii).

7  
8 At step three, the ALJ considers whether the claimant's severe  
9 impairments are disabling. 20 C.F.R. § 404.1520(a)(4)(iii). The  
10 claimant is considered disabled if his purported conditions meet or  
11 are medically equivalent to a listing found in 20 C.F.R. Part 404,  
12 Subpart P, Appendix 1. Burch v. Barnhart, 400 F.3d 676, 679 (9th  
13 Cir. 2005). "[An] impairment is medically equivalent to a listed  
14 impairment in appendix 1 if it is at least equal in severity and  
15 duration to the criteria of any listed impairment." 20 C.F.R.  
16 404.1526. "Medical equivalence must be based on medical findings[]"  
17 rather than "[a] generalized assertion" or opinion testimony  
18 regarding "functional problems." Tackett v. Apfel, 180 F.3d 1094,  
19 1100 (9th Cir. 1999) (citing 20 C.F.R. § 404.1526).

20  
21 If the ALJ concludes that the claimant is not disabled at step  
22 three, the ALJ moves to step four and considers whether the claimant  
23 can return to his past relevant work. Burch, 400 F.3d at 679; See 20  
24 C.F.R. § 404.1520(a)(4)(iv). In order to do so, the ALJ determines  
25 claimant's Residual Functional Capacity ("RFC"). 20 C.F.R.  
26 § 404.1520(a)(4)(iv). A claimant's RFC is "what [claimant] can still  
27 do despite [claimant's] limitations," and is "based on all the  
28 relevant medical and other evidence in [the] case record." 20 C.F.R.

1 416.945(a)(1). If the claimant's RFC dictates that he can return to  
2 his past relevant work, he is not considered disabled. Burch, 400  
3 F.3d at 679.

4  
5 If the claimant proves in step four that he cannot return to his  
6 past relevant work, the ALJ proceeds to step five. 20 C.F.R.  
7 § 404.1520(a)(4)(v). At step five "the burden of proof shifts to the  
8 Secretary to show that the claimant can do other kinds of work."  
9 Embrey v. Bowden, 849 F.2d 418, 422 (9th Cir. 1988). At this point,  
10 ALJs "can call upon a vocational expert to testify as to: (1) what  
11 jobs the claimant, given his or her [RFC], would be able to do; and  
12 (2) the availability of such jobs in the national economy." Tackett,  
13 180 F.3d at 1101. If the claimant does not have the RFC to work in  
14 any available jobs, he is considered disabled. 20 C.F.R.  
15 § 404.1520(a)(4)(v).

16  
17 **PLAINTIFF'S CONTENTIONS**

18  
19 Plaintiff contends that the ALJ: (1) erred in relying on the  
20 VE's testimony because it purportedly conflicts with agency policy  
21 and responds to incomplete hypothetical questions; and (2) improperly  
22 assessed Plaintiff's ability to stand and walk.<sup>1</sup>

23  
24  
25  
26 <sup>1</sup> Although the Parties' Joint Stipulation also included a  
27 third claim - whether the ALJ properly considered the testimony of  
28 Plaintiff - the parties did not brief this issue. See Joint Stip.  
(Docket Entry No. 15).





1 for "clear and convincing reasons." See Carmickle v. Commissioner,  
2 533 F.3d 1155, 1164 (9th Cir. 2008) (quoting Lester, 81 F.3d at 830-  
3 31). Where, as here, a treating physician's opinion is controverted  
4 by other evidence, the ALJ must provide "specific and legitimate  
5 reasons" supported by substantial evidence to properly reject it.  
6 Lester, 81 F.3d at 830-31 (citing Andrews v. Shalala, 53 F.3d 1035,  
7 1043 (9th Cir. 1995)); see also Orn, 495 F.3d at 632-33; Soc. Sec.  
8 Ruling 96-2p.

9  
10 Plaintiff contends that the ALJ did not give specific and  
11 legitimate reasons for rejecting certain opinions of Plaintiff's  
12 consultative and treating physicians. (A.R. 18-19.) As set forth  
13 below, the Court does not agree.

14  
15 Dr. Piasecki

16  
17 Plaintiff purportedly sustained a knee injury at work in 1997  
18 and was reinjured while working in 2008. (A.R. 492, 659.) In  
19 September 2009, Plaintiff's treating physician, Jack O. Piasecki, MD,  
20 prepared a "Permanent and Stationary Report" for Plaintiff's worker's  
21 compensation claim. (A.R. 688.) Dr. Piasecki diagnosed Plaintiff  
22 with musculoligamentous strain and sprain of the lumbar spine;  
23 musculoligamentous strain and sprain of the right button and  
24 posterior hamstrings; patellofemoral chondromalacia of the right  
25 knee; and depression. (A.R. 691.) Dr. Piasecki observed a marked  
26 right-sided limp using a cane, lumbar spine tenderness and spasm with  
27 movement, and an inability to independently stand on the right leg.  
28 (A.R. 690.) Dr. Piasecki also noted that Plaintiff's right knee was

1 stable, that he had a full range of motion in his knee, no effusion,  
2 and a negative McMurray's test.<sup>3</sup> (A.R. 690.) Thus, Dr. Piasecki  
3 opined that Plaintiff should avoid heavy lifting and climbing, and  
4 needed the option to sit and stand at will. (A.R. 692.)

5  
6 In October 2010, Dr. Piasecki performed a re-evaluation of  
7 Plaintiff and concluded that the diagnosis expressed in the September  
8 2009 permanent and stationary report remained unchanged. (A.R. 638,  
9 640.) An MRI scan of Plaintiff's right knee was completely normal.  
10 (A.R. 640.)

11  
12 With respect to Dr. Piasecki's opinions, the ALJ stated the  
13 following:

14  
15 In the context of workers' compensation law, an opinion  
16 [that] a person is "permanent and stationary" means the  
17 person has reached a point of "maximum medical improvement"  
18 after receiving appropriate treatment. This is not the  
19 same criteria used to determine disability under the Social  
20 Security Act. Therefore, the conclusion by a physician  
21 that a claimant's condition is "permanent and stationary"  
22 in the context of a workers' compensation case is not  
23 relevant with regard to an application under the Social  
24 Security Act and therefore no weight is afforded. Dr.  
25 Piasecki also opined the claimant was unable to perform his  
26 past relevant work in the fast food industry, which the  
27 undersigned notes is an issue reserved to the Commissioner  
28 (20 C.F.R. 416.1527(e)(1)). Moreover, this physician  
asserted that claimant should avoid heavy lifting and  
climbing, and needed the option to sit and stand at will.  
Although the avoidance of heavy lifting is quite vague, it  
is emphasized that the restrictions indicated by Dr.

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26 <sup>3</sup> A McMurray's test is used to determine whether there is an  
27 inner meniscal tear. See Meniscus Tears, MedlinePlus,  
28 <http://www.nlm.nih.gov/medlineplus/ency/article/001071.htm> (last  
visited Dec. 29, 2014).

1 Piasecki are consistent with those determined in this  
2 decision. Therefore partial weight is accorded.

3 (A.R. 26.)  
4

5 Plaintiff contends that the ALJ failed to address Dr. Piasecki's  
6 opinion that Plaintiff was not able to stand on the right leg.  
7 (Joint Stip. 18.) However, the ALJ properly noted that Dr.  
8 Piasecki's findings were based on the criteria used for evaluating a  
9 worker's compensation claim which differ from the criteria used for a  
10 finding of disability under the Social Security Act.. Rodriguez v.  
11 Colvin, No. ED CV 13-1199-SP, 2014 WL 2711800, at \*6 (C.D. Cal. June  
12 12, 2014); see also 20 C.F.R. § 404.1504. Nevertheless, the ALJ  
13 accorded partial weight to Dr. Piasecki's lifting/climbing and  
14 sit/stand restrictions in determining Plaintiff's RFC. (A.R. 26.)  
15

16 The Court finds that the ALJ provided specific and legitimate  
17 reasons for partially discounting the opinions of Dr. Piasecki.  
18

19 Dr. Baird  
20

21 Robert Baird, M.D., an independent medical examiner for  
22 Plaintiff's worker's compensation case, examined Plaintiff in  
23 February 2009. (A.R. 503-08.) Dr. Baird diagnosed Plaintiff with  
24 probable sciatica of the right leg, bilateral lower extremity  
25 spasticity (right greater than left), and no appreciable right knee  
26 joint pathology. (A.R. 506.) Dr. Baird recommended that Plaintiff  
27 be restricted from "standing more than 15 minutes and walking more  
28

1 than 10 minutes per hour," which he specified in a separate form as  
2 one hour of standing and one hour of walking in a workday. (A.R.  
3 507, 536.) Dr. Baird evaluated Plaintiff's physical capacities in  
4 accordance with the Department of Labor Guidelines, and concluded the  
5 following:

6  
7 [Plaintiff] is able to sit for eight hours out of an eight-  
8 hour day, stand for brief periods only, walk for brief  
9 periods only, climb one flight of stairs occasionally, lift  
10 up to 10 pounds occasionally, carry up to 10 pounds  
11 occasionally, pull up to 25 pounds occasionally, and bend,  
12 squat, twist, and use upper extremities in an unrestricted  
13 fashion.

14 (A.R. 507.) Dr. Baird stated that this qualified Plaintiff for  
15 sedentary work under the DOL guidelines. (A.R. 507.)

16 The ALJ discounted Dr. Baird's assertions regarding Plaintiff's  
17 standing and walking limitations:

18 The undersigned affords [Dr. Baird's] opinion partial  
19 weight because it is generally supported by the medical  
20 evidence of record and the opinions of other examining  
21 physicians. However, some of Dr. Baird's assertions are  
22 somewhat vague and imprecise, such as the restriction of  
23 standing and walking for only brief periods. Dr. Baird did  
24 not provide the number of hours the claimant could perform  
25 these tasks and therefore, Dr. Baird's assertions in this  
26 regard are without support and afforded little weight.  
27 Furthermore, the undersigned notes Dr. Baird's additional  
28 restrictions that the claimant could stand for 1 out of 8  
hours, walk for 1 out of 8 hours, drive for 2 out of 8  
hours remains unsupported by the evidence of record,  
including claimant's own statements. Therefore, the  
standing and walking limitations are afforded little  
weight, and Dr. Baird's opinion on the whole is afforded  
partial weight.

(A.R. 24-25.)

1 An ALJ "need not accept the opinion of any physician, including  
2 a treating physician, if that opinion is brief, conclusory and  
3 inadequately supported by clinical findings." Thomas v. Barnhart,  
4 278 F.3d 947, 957 (9th Cir. 2002); 20 C.F.R. § 404.1527(d)(2) ("If we  
5 find that a treating source's opinion . . . is well-supported . . .  
6 and not inconsistent with the other substantial evidence in your case  
7 record, we will give it controlling weight"). Additionally, an ALJ  
8 may properly discount a treating physician's limitations as "not  
9 supported by any findings" where there is "no indication in the  
10 record what the basis for these restrictions might be." Rollins v.  
11 Massanari, 261 F.3d 853, 856 (9th Cir. 2001); see also 20 C.F.R. §  
12 404.1527(c)(2); Valentine v. Comm'r Soc. Sec. Admin., 574 F.3d 685,  
13 692-93 (9th Cir. 2009) (contradiction between a treating physician's  
14 opinion and his treatment notes constitutes a specific and legitimate  
15 reason for rejecting the treating physician's opinion); Bayliss v.  
16 Barnhart, 427 F.3d 1211, 1216 (9th Cir. 2005) (contradiction between  
17 treating physician's assessment and clinical notes justifies  
18 rejection of assessment); see also Johnson v. Shalala, 60 F.3d 1428,  
19 1432 (9th Cir. 1995) (ALJ properly rejected physician's determination  
20 where it was "conclusory and unsubstantiated by relevant medical  
21 documentation").

22  
23 Here, the ALJ noted that Dr. Baird's objective findings fail to  
24 support his opinions regarding Plaintiff's standing and walking  
25 limitations. Although Plaintiff came to Dr. Baird's office with a  
26 history of significant knee pain, Dr. Baird found no evidence of an  
27 intrinsic knee joint injury. (A.R. 506.) Dr. Baird observed that  
28 Plaintiff's motor strength was 5/5 in all muscle groups of the

1 bilateral lower extremities. (A.R. 505.) Plaintiff's straight leg  
2 raise was positive at 55 to 60 degrees. (Id.) Dr. Baird noted that  
3 Plaintiff's lumbar spine flexion and extension was limited due to  
4 pain, but also stated that Plaintiff might benefit from over the  
5 counter analgesics or nonsteroidal anti-inflammatory drugs. (A.R.  
6 507.) Additionally, although Plaintiff complained of difficulty with  
7 prolonged sitting, Dr. Baird noted that Plaintiff sat in an  
8 examination room for 20 to 30 minutes without getting up, moving  
9 around, or complaining of pain. (A.R. 507.) Thus, Dr. Baird's  
10 restrictions that Plaintiff could stand or walk for 1 out of 8 hours  
11 are not supported by his objective findings.

12  
13 Accordingly, the ALJ provided specific and legitimate reasons  
14 for partially discounting the opinions of Dr. Baird.

15  
16 Dr. Chung

17  
18 In January 2011, Dr. Chung conducted an orthopedic consultation  
19 of Plaintiff at the request of the stage agency. (A.R. 700-05.) Dr.  
20 Chung observed tenderness and reduced range of motion in the lumbar  
21 spine. (A.R. 702-04.) Plaintiff was diagnosed with  
22 musculoligamentous strain of the lumbosacral spine and ligamentous  
23 strain of the right knee with probable chondromalacia of the right  
24 patella. (A.R. 704.) Dr. Chung opined that Plaintiff could stand  
25 and walk for four hours in an eight-hour day. (A.R. 704.) Dr. Chung  
26 also observed that Plaintiff had been using a cane for two years, but  
27 that he did not find any indication for use of the cane based on his  
28 examination. (A.R. 704.)

1  
2 With respect to Dr. Chung's opinions, the ALJ found the  
3 following:

4  
5 This opinion is generally afforded great weight to the  
6 extent it is supported by the medical evidence of record  
7 and consistent with the residual functional capacity  
8 decision reached herein. The lifting limitations as  
9 outlined by Dr. Chung are consistent with the objective and  
10 clinical findings, as well as the opinions of other  
11 physicians. However, the undersigned finds that based on  
12 claimant's activities of daily living, he is able to stand  
13 and walk more than was generally outlined.

14 (A.R. 25.)

15 An inconsistency between a treating physician's opinion and a  
16 claimant's daily activities is a specific and legitimate reason to  
17 discount the treating physician's opinion. Ghanin v. Colvin, 763  
18 F.3d 1154, 1162 (9th Cir. 2014). The ALJ noted that Plaintiff  
19 reported being able to care for his own personal hygiene, prepare  
20 simple meals, perform light household chores, use public  
21 transportation, and shop outside the home. (A.R. 23, 25, 28.)  
22 Moreover, just after the alleged onset date, the Plaintiff was noted  
23 to be walking 3 to 4 miles on a regular basis. (A.R. 28 (citing A.R.  
24 626).) Thus, the ALJ properly concluded that these daily activities  
25 indicate that Plaintiff can stand and walk for longer periods than  
26 the opinion provided by Dr. Chung.

27 Thus, the Court finds that the ALJ provided specific and  
28 legitimate reasons for partially discounting Dr. Chung's opinion.

1  
2       **B. The ALJ Properly Relied on the VE's Testimony**

3  
4       Plaintiff contends that the ALJ's reliance on the VE's testimony  
5 was misplaced because: (1) the hypothetical question posed to the VE  
6 failed to include all of Plaintiff's limitations, and (2) the VE's  
7 testimony was inconsistent with agency policy. (A.R. 6-9.)

8  
9       1. The ALJ Posed Complete Hypotheticals to the Vocational Expert

10  
11       A hypothetical question posed to a vocational expert must set  
12 out all the limitations and restrictions of the claimant. Embrey v.  
13 Bowen, 849 F.2d 418, 422 (9th Cir. 1988) (emphasis in original). The  
14 hypothetical question must be accurate, detailed, and supported by  
15 the medical record. Gamer v. Secretary of Health & Human Servs., 815  
16 F.2d 1275, 1279-80 (9th Cir. 1987). However, the ALJ is not required  
17 to include limitations in the hypothetical that are not supported by  
18 substantial evidence. See Osenbrock v. Apfel, 240 F.3d 1157, 1164-65  
19 (9th Cir. 2001).

20  
21       The ALJ called Howard Goldfarb to testify as a vocational  
22 expert. (A.R. 64.) The ALJ then posed multiple hypothetical  
23 questions to the VE. (A.R. 128-132.) The first hypothetical  
24 included the following limitations: lift 20 pounds occasionally and  
25 10 pounds frequently; carry, sit, stand and walk up to six hours  
26 during the day, with the ability to sit and stand at his option;  
27 occasionally climb, balance, stoop, kneel, crouch and crawl;  
28 occasional use of cane for uneven surfaces; slight pain in back,



1 knee, leg, and abdomen that can be controlled by appropriate  
2 medications without adverse side effects; sleep disturbance with  
3 slight impact; mood disorder causing mild limitations in attention,  
4 concentration, motivation, and memory; mild to moderate capability to  
5 carry out detailed instructions; mild capability to complete a normal  
6 workday; and mild capability to relate to the public, coworkers, and  
7 supervisors. (A.R. 128-29.) The VE testified that a hypothetical  
8 person with these limitations could perform various jobs available in  
9 the national economy, including that of a cashier II, production  
10 assembler, or garment bagger. (A.R. 130-31.)

11  
12 The second hypothetical included all of the same limitations as  
13 the first hypothetical, except that the pain and psychiatric problems  
14 were moderate and would have a moderate effect on Plaintiff's ability  
15 to do basic work activities, but could still be controlled by  
16 appropriate medication without significant adverse side effects.  
17 (A.R. 131.) The VE testified that because the conditions could be  
18 controlled, his response would be the same as in the first  
19 hypothetical. (A.R. 131-32.)

20  
21 The third hypothetical included all of the same limitations as  
22 the first hypothetical, except that the pain and the psychiatric  
23 problems were severe and could not be controlled by any medication,  
24 or the appropriate medication would markedly interfere with the  
25 person's ability to maintain pace and concentration. (A.R. 132.)  
26 The VE testified that there would be no jobs available in the local  
27 or national economy for this hypothetical person. (A.R. 132.)

1 Plaintiff contends that the ALJ failed to include a hypothetical  
2 with moderate and uncontrolled impairments in maintaining attention,  
3 concentration, motivation, memory, completing a normal workday, or  
4 interacting with the public, coworkers, or supervisors. (Joint Stip.  
5 7-8.) However, Plaintiff cites no evidence that his moderate  
6 limitations in these areas are uncontrolled. As the ALJ noted,  
7 Plaintiff's mental health treatment consisted of Zoloft, which kept  
8 his mood stable and resulted in significant improvement. (A.R. 26,  
9 509, 617-21.) Moreover, the ALJ found that although Plaintiff was  
10 recommended to undergo psychological treatment, he attended only a  
11 few appointments from March through June 2010, and has not reengaged  
12 in any treatment. (A.R. 26.)

13  
14 Even assuming Plaintiff's psychological impairments were  
15 moderate and uncontrolled, the VE was presented with an additional  
16 hypothetical by Plaintiff's attorney that included the consideration  
17 of moderate and uncontrolled impairments in addition to the same  
18 limitations as the first hypothetical. (A.R. 133.) The VE testified  
19 that although these limitations would preclude a person from  
20 performing skilled and semi-skilled work, these limitations would  
21 still permit the hypothetical individual to perform the unskilled  
22 work identified. (A.R. 133-34.) Thus, the hypotheticals presented  
23 to the VE considered all of Plaintiff's limitations that were  
24 supported by the record. Thomas, 278 F.3d at 956.

25 ///

26 ///

27 ///

28 ///

1           2.    The VE's Testimony Does Not Conflict With Agency Policy

2  
3           Plaintiff also contends that the VE's testimony that a moderate  
4 limitation in completing a normal workday would leave the unskilled  
5 work base intact deviated from agency policy. (Joint Stip. 8.)  
6 Plaintiff's argument is premised on the Social Security  
7 Administration's Program Operations Manual System ("POMS"), an  
8 internal agency document used by employees to process claims. POMS  
9 imposes a strict requirement that all claimants must show the ability  
10 to "complete a normal workday and workweek without interruptions from  
11 psychologically based symptoms and perform at a consistent pace."  
12 (Joint Stip. 10 (citing POMS DI 25020.010.B.3).)

13  
14           POMS may be "entitled to respect" under Skidmore v. Swift & Co.,  
15 323 U.S. 134 (1944), to the extent it provides a persuasive  
16 interpretation of an ambiguous regulation, see Christensen v. Harris  
17 Cnty., 529 U.S. 576, 587-88 (2000), but it "does not impose  
18 judicially enforceable duties on either this court or the ALJ."  
19 Lockwood v. Comm'r Soc. Sec. Admin., 616 F.3d 1068, 1073 (9th Cir.  
20 2010); see also Moore v. Apfel, 216 F.3d 864, 868-69 (9th Cir. 2000)  
21 (declining to review allegations of noncompliance with internal  
22 agency manual because such a manual "does not carry the force and  
23 effect of law.").

24  
25           Even though POMS does not impose any judicially enforceable  
26 duties on the SSA, "[t]he Code of Federal Regulations is clearly  
27 binding upon the Commissioner." Moore, 216 F.3d at 869. The  
28 regulations applicable here do not require a finding that a claimant

1 is disabled when the claimant exhibits a moderate limitation in the  
2 ability to complete a normal workday without interruption from  
3 psychologically-based symptoms. See 20 C.F.R. §§ 404.1520,  
4 404.1520a; see also Hoopai v. Astrue, 499 F.3d 1071, 1076-77 (9th  
5 Cir. 2007) (holding that a diagnosis of "moderately significant forms  
6 of depression" and moderate limitations in the ability to complete a  
7 normal workday and workweek without interruption from  
8 psychologically-based symptoms did not preclude a finding of  
9 nondisability); McLain v. Astrue, No. SA CV 10-1108 JC, 2011 WL  
10 2174895, at \*6 (C.D. Cal. June 3, 2011) ("[m]oderate mental  
11 functional limitations . . . are not *per se* disabling, nor do they  
12 preclude the performance of jobs that involve simple, repetitive  
13 tasks"). Therefore, the VE's testimony does not conflict with agency  
14 policy.

15  
16 Accordingly, the Court finds that the ALJ properly relied on the  
17 VE's testimony because the hypotheticals presented to the VE  
18 considered all of the claimant's limitations that were supported by  
19 the record. See Thomas, 278 F.3d at 956 (considering VE testimony  
20 reliable if the hypothetical posed includes all of claimant's  
21 functional limitations, both physical and mental supported by the  
22 record); Bayliss, 427 F.3d 1211, 1218 (9th Cir. 2005) ("A VE's  
23 recognized expertise provides the necessary foundation for his or her  
24 testimony").

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ORDER

For all of the foregoing reasons, this Court affirms the decision of the Administrative Law Judge.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 5, 2015.

\_\_\_\_\_/s/\_\_\_\_\_  
ALKA SAGAR  
UNITED STATES MAGISTRATE JUDGE

**NOTICE**

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3        Reports and Recommendations are not appealable to the Court of  
4 Appeals, but may be subject to the right of any party to file  
5 objections as provided in the Local Rules Governing the Duties of  
6 Magistrate Judges and review by the District Judge whose initials  
7 appear in the docket number. No notice of appeal pursuant to the  
8 Federal Rules of Appellate Procedure should be filed until entry of  
9 the judgment of the District Court.