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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JESSE VEGA,

CASE NO. 1:09-cv-00735-SMS

Plaintiff,

ORDER AFFIRMING AGENCY’S
DENIAL OF BENEFITS

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

_____ /

Plaintiff Jesse Vega, proceeding *in forma pauperis*, by his attorney, Law Offices of Lawrence D. Rohlfing, seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for supplemental security income (“SSI”), pursuant to Title XVI of the Social Security Act (42 U.S.C. § 301 *et seq.*) (the “Act”). The matter is currently before the Court on the parties’ cross-briefs, which were submitted, without oral argument, to the Honorable Sandra M. Snyder, United States Magistrate Judge.¹ Following a review of the complete record and applicable law, the Court concludes that the ALJ properly found Plaintiff ineligible for benefits.

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¹ Both parties consented to the jurisdiction of a United States Magistrate Judge (Docs. 8 & 10).

1 **I. Administrative Record**

2 **A. Procedural History**

3 On June 1, 2003, Plaintiff filed for supplementary security income, alleging disability
4 beginning June 1, 1998.² AR 68. His claim was initially denied on December 26, 2003, and upon
5 reconsideration, on September 21, 2004. AR 68. On November 15, 2004, Plaintiff filed a timely
6 request for a hearing. AR 68. Plaintiff appeared and testified at a hearing on May 17, 2006.³ AR
7 565-600. On September 14, 2006, Administrative Law Judge Bert C. Hoffman, Jr., denied
8 Plaintiff's application. AR 68-74. Thereafter, the Appeals Council remanded the matter for
9 further evaluation of Plaintiff's mental impairment. AR 19. An additional hearing took place on
10 March 25, 2008. AR 527-564. On July 24, 2008, the ALJ again denied Plaintiff's application.
11 AR 19-25. The Appeals Council denied review on March 11, 2009. AR 10-12. On April 23,
12 2009, Plaintiff filed a complaint seeking this Court's review (Doc. 1).

13 **B. Factual Background**

14 In 1972, Plaintiff (born March 3, 1953) graduated from Pershing High School, where he
15 attended special education classes.⁴ AR 170. Plaintiff has experienced fatigue since 1967, when
16 he was sixteen years old. AR 215. His asthma is exacerbated by lawn mowing, car exhaust,
17 exertion, and heat. AR 215.

18 In the 1970's and 1980's, Plaintiff was a construction laborer, measuring manholes,
19 digging potholes to locate utility lines and water pipes, and carrying bags of cement. AR 165,
20 210.

21 Plaintiff speaks English but cannot read or write it. AR 163. Accordingly, Plaintiff cannot
22 follow written instructions. AR 181. At an agency interview in 2003, Plaintiff demonstrated

23
24 ² Plaintiff had filed multiple prior SSI applications. Materials from prior applications were included within
25 the record for this application. Although the Court reviewed the complete record in this case, not all materials
incorporated from prior applications have been explicitly recounted in this decision.

26 ³ An additional hearing was convened on January 12, 2006, but was adjourned without testimony being
taken to permit Plaintiff to secure the services of an attorney. AR 601-612.

27 ⁴ Examining Plaintiff for the agency in 1997, in the course of one of Plaintiff's earlier applications for SSI,
28 testing administered by Gregory Butler, Ph.D., indicated that Plaintiff's intellectual functioning was borderline
(verbal IQ=72; performance IQ=84; full scale IQ=77). See AR 462.

1 difficulty with reading, writing, and sitting.⁵ AR 174. Plaintiff also has occasional difficulty
2 following verbal instructions. AR 181.

3 At an agency interview in 2001, Plaintiff had difficulty breathing and used an inhaler
4 several times. AR 206. His eyes were yellow, and he appeared jaundiced. AR 206.

5 In a daily activities questionnaire, Plaintiff reported that asthma limited his daily activities.
6 AR 177. He had difficulty sleeping because of anxiety attacks. AR 177. Because his hands
7 swelled while he slept, he was sometimes unable to care for his personal needs in the morning.
8 AR 177.

9 Plaintiff cooked his own meals with help from his sister, who brought him prepared meals
10 to heat. AR 178. His sister also shopped for him. AR 178. He was able do household cleaning,
11 laundry, and ironing. AR 178. Plaintiff's sister came three times a week; he spoke with family by
12 phone daily. AR 180.

13 Plaintiff enjoyed making model cars and restoring antique furniture. AR 178. He also
14 enjoyed watching television alone or with his granddaughter. AR 179. Plaintiff cared fully for his
15 two dogs.

16 Plaintiff went out of his home twice a week, traveling by foot or bus, usually going to see
17 the doctor. AR 179. Because of his asthma, he experienced shortness of breath on long walks.
18 AR 180.

19 Plaintiff's anxiety impaired his concentration and led him to be easily annoyed by others.
20 AR 180, 181.

21 The report of Plaintiff's friend, Henrietta Gonzales,⁶ largely repeated the information on
22 Plaintiff's daily activities report. AR 188. Gonzales confirmed that Plaintiff had difficulties
23 meeting his personal needs when his hands were swollen. AR 184. She added that he enjoyed
24 working on landscaping projects. AR 185. Many activities aggravated Plaintiff's asthma,
25 rendering him short of breath. AR 187. Some of his medications made him drowsy, and Plaintiff
26

27 ⁵ Plaintiff rose from his chair and stretched several times during the thirty minute interview.

28 ⁶ Gonzales had helped Plaintiff, who cannot read or write English, complete his written activities report.

1 was not always aware that his medications sometimes affected his thinking. AR 187. Gonzales
2 reported that, because Plaintiff had rheumatic fever as a child, he continued to experience aching
3 and swelling of his joints. AR 188.

4 In 2001, Plaintiff reported experiencing an asthma attack about once a week. AR 190. He
5 had previously been taken to the emergency room for treatment of an asthma attack, and once
6 spent two days in Fresno Community Hospital. AR 190, 191. Plaintiff has experienced both
7 asthma and repercussions from rheumatic fever since childhood. AR 191.

8 In response to an agency inquiry on December 24, 2003, Plaintiff stated that his mental
9 disorder was controlled with medication and that he was not being treated by a psychiatrist or
10 psychologist. AR 338.

11 **S. Damania Psychiatric Evaluation (January 9, 2002).** Shireen R. Damania, M.D.,
12 conducted a psychiatric evaluation of Plaintiff for the agency. AR 242-245. Plaintiff was the sole
13 source of background information and reported that his medical problems included asthma, a heart
14 murmur, and hepatitis A, B, and C. AR 242. His medications included ibuprofen, Xanax, aspirin,
15 and Tylenol with codeine. AR 242. He also took methadone, having ended intravenous drug
16 abuse of heroin and cocaine five or six years earlier. AR 242. Plaintiff initially denied smoking
17 and drinking alcohol, but later disclosed that he occasionally drank beer and had abused alcohol as
18 “a teenager.” AR 242-243. Damania described Plaintiff’s accounts of his alcohol use as “evasive
19 and guarded.” AR 243.

20 Plaintiff related that in the past, he had been “in and out of jail,” but had not been
21 incarcerated since 1991. AR 243. He lived with his mother, his twenty-year-old daughter, and
22 two-year-old granddaughter. AR 243. Plaintiff previously worked in construction but had not
23 been employed since the mid-1980's. AR 243.

24 Damania diagnosed:

- | | | |
|----|---------|--|
| 25 | Axis I | 1. Alcohol dependence, unspecified, 303.90 in partial remission, by history. |
| 26 | | 2. Polysubstance abuse, unspecified, 304.80 in remission five years, by history. |
| 27 | | 3. Adjustment disorder, with anxious mood. 309.24. |
| 28 | Axis II | Personality disorder, not otherwise specified. 301.9 |

1 Axis III 1. hepatitis A, B, and C, by history only.
2 2. Bronchial asthma, by history.

3 Axis IV Level of psychosocial stressors – Mild.
(Unemployed.)

4 Axis V GAF current – 55. Highest past year – 42.

5 AR 244.

6 Damania further summarized:

7 The claimant was neatly dressed and groomed, pleasant, appropriate, cooperative,
8 with adequate interpersonal and social skills. No difficulties were noted in
9 memory, either recent or remote, concentration, persistence, and pace. There is no
10 evidence of any emotional lability. He is able to understand, carry out, and
11 remember simple, as well as one and two step job instructions. He is able to
12 respond appropriately to co-workers, supervisors, and the public. He is able to
13 respond appropriately to usual work situations, and deal with changes in a routine
14 work setting, if the instructions are presented simply and undimensionally.

15 AR 244.

16 **R. Damania Physical Evaluation (January 9, 2002).** Plaintiff complained of body pain
17 and night sweats to Rustom Damania, M.D., who prepared a medical evaluation for the agency.
18 AR 247. Again, medical history was acquired solely from Plaintiff's accounts. AR 247. Plaintiff
19 had bronchial asthma, which was treated with a nebulizer. AR 247. He had never been
20 hospitalized for asthma and had one emergency room visit in the past year. AR 247. Plaintiff was
21 not dependent on oxygen or steroids. AR 247. According to laboratory tests reported to Plaintiff,
22 he had hepatitis A, B, and C. AR 247. Plaintiff's mother informed him that he had a heart
23 murmur, but he had no cardiac symptoms. AR 247.

24 Medications included Tylenol with codeine, Xanax, aspirin, methadone, and albuterol and
25 Azmacort inhalers. AR 248. Plaintiff denied alcohol use and reported that he had stopped
26 smoking two years earlier. AR 248. Plaintiff denied a history of psychiatric problems. AR 248.

27 Damania diagnosed bronchial asthma (by history); hepatitis A, B, and C (by history);
28 vague arthralgias of undetermined origin; prior intravenous heroin use, now maintained on
methadone; rule out thyrotoxicosis. AR 250. Damania found no clinical evidence of cardiac
problems. AR 250. His assessment was:

The patient is a 48-year-old male who appears to be well-oriented to time, place
and person. He answers questions. On gross clinical exam I did not observe any

1 gross mental impairments. I did not observe or find any objective evidence for
2 gross physical disability. Because of his severe diaphoresis at night and fine
3 tremors of the hands, I recommend that he return to the clinic and have some
4 thyroid function tests done.

5 Otherwise, the patient is ambulatory and does not require an assistive device to
6 ambulate. I did not find any gross exertional limitations. No postural limitations
7 with bending, stooping or crouching. No manipulative limitations with reaching,
8 handling, feeling, grasping, or fingering. No relevant visual or communicative
9 impairments.

10 AR 250.

11 **Middleton's Assessments for Agency (March 12, 2002).** Performing the psychiatric
12 review technique for the agency, Allen Middleton, Ph.D., noted anxiety-related disorders
13 (adjustment disorder), personality disorders (indiscipherable), and substance addiction disorders
14 (alcohol dependence in remission). AR 253-256. He found mild restriction of activities of daily
15 living, mild difficulties in maintaining social functioning, and mild difficulties in maintaining
16 concentration, persistence, or pace. AR 257. He did not evaluate episodes of decompensation
17 due to insufficient evidence. AR 257.

18 Middleton's assessment of Plaintiff's residual functional capacity found no significant
19 limitations except that Middleton rated Plaintiff's ability to understand and remember detailed
20 instructions and his ability to carry out detailed instructions as ranging from not significantly
21 limited to moderately limited. AR 259.

22 **Murillo's review.** Evangeline Murillo, M.D., performed a psychiatric review technique
23 for the agency on December 24, 2003. AR321. She found no medically determinable
24 impairment. AR 321.

25 **2003 RFC Assessment.** On November 17, 2003, Ernest Wong prepared an RFC analysis
26 for the agency in which he concluded that Plaintiff had no limitations other than avoidance of
27 fumes and odors. AR 322-329.

28 **Valley Health Resources Assessments.** On October 21, 2003, Naeemah H. Ghafur,
M.D., prepared an assessment for the agency in which he found "no objective findings on which
to base restriction of this patient's physical activities." AR 286-290.

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1 On May 28, 2008, Dr. Rustom Damania prepared an assessment for the agency in which
2 he reported no functional limitations. AR 348-352. Damania opined that Plaintiff could lift fifty
3 pounds occasionally and twenty-five pounds frequently. AR 352.

4 **Hijazi Records.** Records of medical treatment by Plaintiff's primary care physician, Saad
5 Hijazi, M.D., are included in the record at AR 281-285, 342-347.

6 On May 6, 2003, Plaintiff was treated for anxiety resulting from his methadone
7 withdrawal. AR 285. By May 27, 2003, Plaintiff was also experiencing associated sleep
8 problems. AR 285.

9 In a statement to Fresno County Child Support Services dated June 26, 2003, Hijazi noted
10 that Plaintiff was permanently disabled as a result of body ache and back pain attributable to his
11 history of rheumatic fever; depression and anxiety disorder; and chronic fatigue syndrome. AR
12 283.

13 On July 24, 2003, Hijazi provided a conclusory assessment that Plaintiff was disabled on a
14 prescription blank. AR 281. On that date, Plaintiff complained of increased shortness of breath,
15 which Hijazi attributed to acute exacerbation of Plaintiff's asthma. AR 282. Hijazi also noted an
16 intent to taper the Valium prescribed for Plaintiff's anxiety. AR 282.

17 **University Medical Center Records (AR 297-320).** In or about April 2004, Plaintiff had
18 surgery at University Medical Center to treat a scrotal abscess. On July 19, 2004, an
19 echocardiogram found Plaintiff to have normal left ventricle systolic function and size. AR 297.

20 **Residual Functional Capacity Assessment.** A RFC assessment completed February 23,
21 2002, by an agency medical consultant found that Plaintiff had no limitations except for a need to
22 avoid concentrated exposure to fumes, odors, dusts, gases, and poor ventilation. AR262-269.

23 **Childhood Medical Records.** Medical records from Plaintiff's childhood are included in
24 the record at AR 355-447. Among other things, these records reflect that Plaintiff was first
25 diagnosed with asthma in childhood and that he experienced frequent joint pain, particularly in his
26 knees.

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1 **St. Agnes testing.** Tests performed at St. Agnes Medical Center on November 16, 1997,
2 confirmed that Plaintiff had an abnormally high Rheumatoid factor as well as elevated liver
3 enzymes. AR 496.

4 **Plaintiff's testimony (May 17, 2006).** Plaintiff has not had a driver's license since 1972,
5 when it was revoked for nonpayment of child support. AR 572-573. Plaintiff testified that he did
6 not need a license since has no car and travels by bus. AR 573. In addition to a high school
7 diploma, Plaintiff attended, but did not complete, a two-year course at City College in body and
8 fender work. AR 573.

9 Plaintiff had not worked in the past fifteen years. AR 574. He testified that no one would
10 hire someone with asthma and back problems, but admitted that he had not tried to find work. AR
11 576.

12 Plaintiff had asthma, back pain, arthritis in his hands, and Hepatitis C. AR 576-577, 587-
13 588. He had not been treated for either arthritis or hepatitis; in fact, he had no symptoms of
14 hepatitis that he knew of. AR 577. Because he always felt tired, Plaintiff napped for one hour
15 around lunchtime and slept about eleven hours each night. AR 585-586.

16 Plaintiff was allergic to the lawn, cats, and cleaning solvents, and was sensitive to extreme
17 temperatures. AR 584-585. He treated himself for shortness of breath nearly every day, either
18 with an inhaler or a nebulizer. AR 577-578. Typically, if Plaintiff found himself short of breath,
19 he would first try a shot of inhaler, followed by a second shot. AR 579-580. If that did not relieve
20 his breathlessness, he would then use the nebulizer for two or three minutes. AR 580. Plaintiff
21 generally needed to use the nebulizer about twice a week. AR 583. After using the nebulizer, he
22 generally regained normal breathing but felt shaky and had to rest for about one-half hour. AR
23 580-581. If home treatment was unsuccessful, Plaintiff had to go to an emergency room. AR
24 581. He last needed emergency treatment six or more months earlier. AR 581.

25 Plaintiff was able to perform his own personal care and to cook for himself. AR 586-587.
26 He cleaned the inside of his home. AR 592-594. He was able to concentrate well. AR 599.

27 **Plaintiff's testimony (March 25, 2008).** By the time Plaintiff testified at the
28 administrative hearing on March 25, 2008, he lived alone in the family home, which was owned

1 by his sister. AR 532. He had lost medical benefits during his daughter's tenure in the house and
2 had not regained them. AR 533-534. As a result, he tried to visit Dr. Hijazi only when care was
3 absolutely necessary. AR 534. Hijazi continued to prescribe drugs for Plaintiff's asthma and
4 depression, including the nebulizer, inhalers, and Valium. AR 536-537. Plaintiff used the
5 nebulizer more often than previously, since the inhalers did not relieve his symptoms. AR 537-
6 539. Plaintiff described his depression as an inability to tolerate others for more than a short time.
7 AR 554. When others got on his nerves, he told them he did not feel well and went inside. AR
8 554-555. He had suicidal thoughts which lasted fifteen or twenty minutes until he could get his
9 mind off suicide by watching television.. AR 557.

10 Plaintiff also complained of fatigue, difficulty sleeping, and pain in his hands and lower
11 back. AR 540-542. Hijazi prescribed Valium to alleviate the back pain. AR 545. Plaintiff had
12 not had any other treatment of his back problems because he was unable to afford it. AR 536.
13 Plaintiff treated the pain in his hands by wearing special gloves that his son had brought him. AR
14 551. He was unable to lift more than a cup of coffee without experiencing great pain from his
15 arthritis. AR 551-552. Plaintiff had given up his hobby of making model cars because he could
16 not get them to go together. AR 556. He spent his time watching western movies on television.
17 AR 556-557.

18 Plaintiff's sister traveled to Fresno daily from Avenal to care for him. AR 549. She did
19 his laundry because he did not know how to operate the machine. AR 544. His sister also
20 cleaned the house because of Plaintiff's sensitivity to cleaning products. AR 543, 545. Plaintiff
21 cooked soft-boiled eggs, sandwiches and TV dinners for himself. AR 548. His sister shopped for
22 him, using his food stamps. AR 548. Plaintiff was afraid that he would get dizzy or faint if he
23 shopped.

24 **II. Discussion**

25 **A. Legal Standards**

26 To qualify for benefits, a claimant must establish that he or she is unable to engage in
27 substantial gainful activity because of a medically determinable physical or mental impairment
28 which has lasted or can be expected to last for a continuous period of not less than twelve months.

1 42 U.S.C. § 1382c (a)(3)(A). A claimant must demonstrate a physical or mental impairment of
2 such severity that he or she is not only unable to do his or her previous work, but cannot,
3 considering age, education, and work experience, engage in any other substantial gainful work
4 existing in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989).

5 To encourage uniformity in decision making, the Commissioner has promulgated
6 regulations prescribing a five-step sequential process for evaluating an alleged disability. 20
7 C.F.R. §§ 404.1520 (a)-(f); 416.920 (a)-(f). The process requires consideration of the following
8 questions:

9 Step one: Is the claimant engaging in substantial gainful activity? If so, the
10 claimant is found not disabled. If not, proceed to step two.

11 Step two: Does the claimant have a “severe” impairment? If so, proceed to
12 step three. If not, then a finding of not disabled is appropriate.

13 Step three: Does the claimant’s impairment or combination of impairments
14 meet or equal an impairment listed in 20 C.F.R., Pt. 404, Subpt. P,
15 App. 1? If so, the claimant is automatically determined disabled. If
16 not, proceed to step four.

17 Step four: Is the claimant capable of performing his past work? If so, the
18 claimant is not disabled. If not, proceed to step five.

19 Step five: Does the claimant have the residual functional capacity to perform
20 any other work? If so, the claimant is not disabled. If not, the
21 claimant is disabled.

22 *Lester v. Chater*, 81 F.3d 821, 828 n. 5 (9th Cir. 1995).

23 The ALJ found that Plaintiff had not engaged in substantial gainful activity since June 1,
24 2003. AR 21. Asthma was Plaintiff’s single severe impairment. AR 21. His impairment did not
25 meet or medically equal one of the listed impairments in 20 C.F.R. Part 404, Subpt. P. Appendix
26 1 (20 C.F.R. §§ 416.920(d), 416.925, and 416.926). AR 23. Plaintiff had no past relevant work.
27 AR 24. Plaintiff had the residual functional capacity to perform the full range of medium work.
28 AR 24. After considering Plaintiff’s age, education, work experience, and residual functional
capacity, the ALJ concluded that unskilled jobs that Plaintiff could perform existed in the national
economy in significant numbers. AR 24.

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1 **B. Scope of Review**

2 Congress has provided a limited scope of judicial review of the Commissioner’s decision
3 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,
4 a court must determine whether substantial evidence supports the Commissioner’s decision. 42
5 U.S.C. § 405(g). Substantial evidence means “more than a mere scintilla” (*Richardson v. Perales*,
6 402 U.S. 389, 402 (1971)), but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d
7 1112, 1119 n. 10 (9th Cir. 1975). It is “such relevant evidence as a reasonable mind might accept
8 as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. The record as a whole must
9 be considered, weighing both the evidence that supports and the evidence that detracts from the
10 Commissioner’s decision. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the
11 evidence and making findings, the Commissioner must apply the proper legal standards. *See, e.g.*,
12 *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the ALJ’s
13 determination that the claimant is not disabled if the ALJ applied the proper legal standards, and if
14 the ALJ’s findings are supported by substantial evidence. *See Sanchez v. Secretary of Health and*
15 *Human Services*, 812 F.2d 509, 510 (9th Cir. 1987). The scope of review requires this Court to
16 consider the record as a whole, examining both the evidence supporting the ALJ’s decision and
17 the evidence that does not.

18 **C. Plaintiff’s Claim**

19 Plaintiff contends that the ALJ erred in rejecting the opinion of [Dr. Shireen] Damania,
20 who examined Plaintiff, and accepting the opinion of Dr. Middleton, who did not examine him,
21 with regard to Damania’s opinion that Plaintiff’s mental impairments limited him the simple one-
22 and two-step instructions. The agency replies that the ALJ properly assigned little weight to
23 Damania’s opinion regarding the severity of Plaintiff’s mental impairment since her opinion was
24 inconsistent with both other medical evidence in the record and other portions of Damania’s own
25 evaluation.

26 Consideration of Plaintiff’s claims would be incomplete without acknowledging that
27 Plaintiff’s brief confuses the ALJ’s analysis of whether his mental impairment was severe and the

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1 ALJ's analysis of Plaintiff's residual functional capacity. These separate concepts must be
2 separated and considered individually.

3 **1. Step 2: Severe Impairment?**

4 Contrary to Plaintiff's representation in his briefs, the ALJ compared and considered
5 Damania and Middleton's opinions in the contest of determining whether Plaintiff's mental
6 impairment was severe. The ALJ found that Plaintiff had no severe mental impairment.

7 **The ALJ's decision.** In his second opinion after the Appeals Council's remand, the ALJ
8 again concluded that Plaintiff's only severe impairment was his asthma. Focusing on the ALJ's
9 analysis of the doctors' opinions is worthwhile. The ALJ first noted Plaintiff's testimony
10 regarding his depression and "suicidal thoughts which last for 20 to 30 minutes" until Plaintiff can
11 distract himself with a movie or television program. AR 21. Although Plaintiff had multiple
12 prescriptions for medications usually considered antidepressants (Xanax, Valium, Wellbutrin, and
13 Elavil), these medications had been prescribed in the course of Plaintiff's withdrawal from
14 methadone and subsequent insomnia. Since at least December 2003, Plaintiff's medical records
15 made no mention of any mental issues even as the prescriptions had continued.⁷

16 The ALJ questioned Damania's assessing Plaintiff's global functioning at 55 (indicative of
17 "moderate symptoms or moderate difficulty in functioning") when the narrative of her evaluation
18 stated:

19 The claimant was neatly dressed and groomed, pleasant, appropriate, cooperative,
20 with adequate interpersonal and social skills. No difficulties were noted in
21 memory, either recent or remote, concentration, persistence and pace. There is no
22 evidence of any emotional lability. He is able to understand, carry out, and
23 remember simple, as well as one and two step job instructions. He is able to
24 respond appropriately to co-workers, supervisors, and the public. He is able to
25 respond appropriately to usual work situations, and deal with changes in a routine
26 work setting, if the instructions are presented simply and unidimensionally.

27 AR 22.

28 The ALJ then summarized the balance of Damania's evaluation:

The mental status examination also showed that the claimant's speech was
normoproductive, his mood was only mildly anxious, and his affect was
appropriate to though content and situation. He denied any suicidal or homicidal

⁷ Plaintiff himself testified that he took Valium to relieve his back pain.

1 ideation. Impulse control and frustration tolerance were within normal limits.
2 There was no evidence of hallucinations, delusions, or any thought disorder. He
3 was oriented to time, place, and person. Memory for recent and past recall was
4 intact. Attention span was within normal limits. He recalled three out of three
5 objects in three minutes and was able to do simple calculations. Insight and
6 judgment were fair except for alcohol usage, as he indicated he continued to drink
7 occasionally.

8 AR 22.

9 The ALJ then considered Middleton's assessments, alone and in conjunction with agency
10 psychiatrist Evangeline Murillo, that Plaintiff (1) had only mild limitations in activities of daily
11 living, maintaining social functioning, and maintaining concentration, persistence and pace, and
12 (2) failed to demonstrate any medically determinable mental impairment. AR 22. In conclusion,
13 the ALJ rejected Damania's GAF rating of 55, indicative of moderate symptoms or moderate
14 difficulty in functioning, finding Plaintiff's mental impairment caused no more than mild
15 limitations in functioning.

16 Little can be added to the ALJ's step-two analysis; the record includes little evidence of
17 severe mental impairment. As the ALJ discussed in detail, Damania's conclusion that Plaintiff's
18 global functioning was 55, or moderately impaired, contradicted her own factual observations and
19 was unsupported by the record as a whole.⁸ When carefully considered, Damania's narrative
20 account of minimal mental impairment was consistent with the assessments of Middleton and
21 Murillo. Thus, substantial evidence supported the ALJ's determination to reject the inconsistent
22 numerical GAF assessment in favor of consistent assessments of Plaintiff's mental impairment as
23 mild or minimal.

24 **2. Step Five: Residual Functional Capacity**

25 Because the ALJ did not consider the medical assessments of Plaintiff's mental
26 impairments in determining his residual functional capacity at step five, Plaintiff's contention that
27 the ALJ improperly rejected Damania's opinion that he be limited to positions requiring him to
28 follow no more than simple one- or two-step instructions is misplaced. Having concluded that

⁸ As the agency points out in its brief (Doc. 18 at 6), the agency explicitly rejected mandating consideration of the GAF score when it amended regulations regarding mental impairment. 65 Fed. Reg. 50746, 50764-65 (2000).

1 Plaintiff's asthma was his single serious impairment, the ALJ concentrated on limiting Plaintiff's
2 exposure to environmental factors that aggravated his asthma.

3 In the course of his brief analysis at step five, the ALJ notably rejected the conclusory
4 opinion of Plaintiff's treating physician, Dr. Hijazi, that Plaintiff was fully disabled. He acted
5 correctly. An ALJ is "not bound by an expert medical opinion on the ultimate question of
6 disability." *Tomasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); Social Security Ruling 96-
7 5p. Although a treating physician's opinion is generally afforded the greatest weight in disability
8 cases, it is not binding on an ALJ with respect to the existence of an impairment or the ultimate
9 determination of disability." *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The
10 issue of whether a claimant is disabled within the meaning of the Social Security Act is an issue
11 reserved for the Commissioner, and therefore the opinion of a treating physician that a claimant is
12 disabled will not be given special significance. 20 C.F.R. §§ 404.1527(e)(1), 416.927(e)(1).

13 3. Step Five: Plaintiff's Inability to Follow Complex Instructions

14 The foregoing discussion sidesteps the substantive question of whether the ALJ failed to
15 consider Damania's opinion that Plaintiff's was unable to follow more than simple one- or two-
16 step instructions. Substantial evidence in the record, including Plaintiff's having been classified
17 as a special education student and the 1997 testing that indicated his borderline intellectual ability,
18 supports a conclusion of limited intellectual ability. The ALJ implicitly addressed this question in
19 concluding that the national economy included a significant number of jobs that Plaintiff could
20 perform:

21 If the claimant has solely nonexertional limitations, Section 204.00 in the Medical-
22 Vocational Guidelines provides a framework for decisionmaking (SSR 85-15).

23 The claimant's ability to perform work at all exertional levels has been
24 compromised by nonexertional limitations. However, these limitations have little
25 or no effect on the occupational base of unskilled work at all exertional levels. A
26 finding of "not disabled" is therefor appropriate under the framework of section
27 204.00 in the Medical-Vocational Guidelines.

28 AR 74.

Although the Social Security Regulations contain only two categories of abilities in regard
to understanding and remembering instructions, either "short and simple" and "detailed" or

1 “complex,” the DOT has six gradations for measuring the ability to understand and remember
2 instructions. *Meissl v. Barnhart*, 403 F.Supp.2d 981, 984 (C.D.Cal. 2005). For example, DOT
3 level 2 requires application of “commonsense understanding to carry out detailed but uninvolved
4 written or oral instructions” and the ability to “[d]eal with problems involving a few concrete
5 variables in or from standardized situations.” *Id.* at 984 (*citation omitted*). Considering claimant
6 Meissl’s limitation to “simple tasks performed at a routine or repetitive pace,” the Central District
7 Court opined:

8 To equate the Social Security regulations use of the term “simple” with its use in
9 the DOT would necessarily mean that all jobs with a reasoning level of two or
10 higher are encapsulated within the regulations’ use of the word “detail.” Such a
“blunderbuss” approach is not in keeping with the finely calibrated nature in which
the DOT measures a job’s simplicity.

11 *Meissl*, 403 F.Supp.2d at 984.

12 Concluding that the claimant’s RFC had to be compared to the DOT’s reasoning scale, the
13 Meissl court concluded that both DOT reasoning levels one and two encompassed an ability to
14 perform “simple and routine work tasks.” *Id.* Courts within the Ninth Circuit have consistently
15 held that a limitation requiring simple or routine instructions encompasses the reasoning levels of
16 one and two. *See, e.g., Seechan v. Astrue*, 2010 WL 1812637 (E.D.Cal. May 5, 2010)(No. 1:09-
17 cv-00610-GSA); *Villafana v. Astrue*, 2010 WL 1286818 (E.D.Cal. March 29, 2010)(No. 1:08-cv-
18 01954-GSA); *Racette v. Astrue*, 2010 WL 1286786 (E.D.Cal. March 29, 2010)(No. 1:08-cv-
19 01645-GSA); *Stroda v. Astrue*, 2010 WL 129814 (W.D.Wash. January 11, 2010)(No. C09-
20 5112BHS); *Erickson v. Astrue*, 2010 WL 129677 (C.D.Cal. January 5, 2010)(No. EDCV 09-484-
21 OP); *Sorg v. Astrue*, 2009 WL 4885184 (W.D.Wash. December 16, 2009)(No. C09-5063KLS);
22 *Vasquez v. Astrue*, 2009 WL 3672519 (C.D.Cal. October 30, 2009)(No. CV 08-5305-OP); *Moua*
23 *v. Astrue*, 2009 WL 997104 (E.D.Cal. April 14, 2009)(No. 2:07-cv-02024-GGH); *Angulo v.*
24 *Astrue*, 2009 WL 817506 (E.D.Cal. March 27, 2009)(No. 1:07-cv-01681-TAG); *Salazar v.*
25 *Astrue*, 2008 WL 4370056 (C.D.Cal. September 23, 2008)(No. EDCV 07-00565-MAN); *Isaac v.*
26 *Astrue*, 2008 WL 2875879 (E.D.Cal. July 24, 2008)(CIV S-07-0442 GGH); *Squier v. Astrue*,
27 2008 WL 2537129 (C.D.Cal. June 24, 2008)(No. EDCV 06-1324-RC); *Howard v. Astrue*, 2008
28 WL 3201221 (C.D.Cal. August 7, 2008) (EDCV 07-1291 RNB). *See also Stubbs-Danielson v.*

1 *Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008); *Fletcher v. Astrue*, 2010 WL 1644877 (N.D.Tex.
2 March 31, 2010)(No. CIVA509-CV-070-BG); *Burnette v. Astrue*, 2009 WL 863372 (E.D.N.C.
3 March 24, 2009)(No. 2:08-CV-009-FL).

4 The ALJ here found Plaintiff capable of performing in an unskilled position. By
5 definition, unskilled positions do not require complex directions or analysis.

6 Unskilled work is work which needs little or no judgment to do simple duties that
7 can be learned in a short period of time. The job may or may not require
8 considerable strength. For example, we consider jobs unskilled if the primary
9 work duties are handling, feeding and offbearing (that is, placing or removing
10 materials from machines that are automatic or operated by others), or machine
11 tending, and a person can usually learn to do the job in 30 days, and little specific
12 vocational preparation and judgment are needed.

13 20 C.F.R. § 416.968(a).

14 The ALJ did not err by failing to explicitly discuss Plaintiff's limitation to positions with
15 simple instructions.

16 **III. Conclusion and Order**

17 Based on the foregoing, the Court finds that substantial credible evidence supported the
18 ALJ's determination that Plaintiff was not disabled. Accordingly, this Court
19 DENIES Plaintiff's appeal from the administrative decision of the Commissioner of Social
20 Security. The Clerk of Court is DIRECTED to enter judgment in favor of the Commissioner and
21 against Plaintiff.

22 IT IS SO ORDERED.

23 **Dated: December 1, 2010**

24 /s/ Sandra M. Snyder
25 UNITED STATES MAGISTRATE JUDGE

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