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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

FRANK DELGADO,	)	1:09-cv-1819 GSA
Plaintiff,	)	<b>ORDER REGARDING PLAINTIFF'S</b>
v.	)	<b>SOCIAL SECURITY COMPLAINT</b>
COMMISSIONER OF SOCIAL SECURITY,	)	
Defendant.	)	

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**BACKGROUND**

Plaintiff Frank Delgado (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for disability benefits pursuant to Title II of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Gary S. Austin, United States Magistrate Judge.<sup>1</sup>

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<sup>1</sup>The parties consented to the jurisdiction of the United States Magistrate Judge. (Docs. 5 & 7.)

1 **FACTS AND PRIOR PROCEEDINGS<sup>2</sup>**

2 In November 2006, Plaintiff filed an application for disability benefits, alleging disability  
3 as of December 15, 1999. AR 120-122. His application was denied initially and on  
4 reconsideration, and Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”).  
5 AR 105-114. ALJ Bert C. Hoffman, Jr. held a hearing and subsequently issued an order  
6 regarding benefits on May 29, 2008, finding Plaintiff was not disabled. AR 17-23, 47-83.  
7 Thereafter, on October 2, 2009, the Appeals Council denied review. AR 5-7.

8 **Hearing Testimony**

9 On February 21, 2008, ALJ Hoffman held a hearing in Fresno, California. Plaintiff  
10 appeared and testified. He was represented by attorney Sengthiene Bosavanh. AR 47-83.

11 Plaintiff was born December 10, 1946, and was sixty-one years old at the time of the  
12 hearing. He is five feet ten and one-half inches tall, weighs 180 pounds, and is right-handed. AR  
13 50-51. He is presently divorced. AR 50. Plaintiff resides with his twenty-two year old daughter.  
14 AR 50, 74.

15 Plaintiff possesses a valid California driver’s license, and drives two to three times per  
16 week, less than he used to. AR 51-52. He drives a 2003 GMC Sierra pickup. AR 72. Plaintiff  
17 typically drives to the grocery store, doctor’s appointments, and the gym. AR 51. On average,  
18 Plaintiff goes to the gym two to three times a week, but may workout as many as five days per  
19 week if he is “stressed out.” AR 51. He uses the treadmill for about a half an hour, and can walk  
20 without difficulty. AR 71.

21 After high school, Plaintiff earned an associates degree in industrial arts from the College  
22 of the Sequoias in Visalia. He has not received any additional education or work training beyond  
23 the associates degree. Plaintiff is able to read and write English. AR 52.

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26 \_\_\_\_\_  
27 <sup>2</sup>References to the Administrative Record will be designated as “AR,” followed by the appropriate page  
28 number.

1 After the Dairyman's Cooperative became Land O' Lakes, Plaintiff stopped working at  
2 the warehouse in Tulare. AR 52-53. He "couldn't take [] the politics or the BS going on all the  
3 time." AR 52. He last worked in late December 2004, and is presently retired and receiving a  
4 union pension. AR 53-54. As a warehouseman for about twenty-five years, Plaintiff operated a  
5 forklift and loaded and unloaded supplies to and from trucks. He typically worked the 2 p.m. to  
6 10 p.m. shift. AR 53-54.

7 When Land O' Lakes took over, the problems began. Plaintiff explained he "basically  
8 worked by" himself and management was "trying to like maybe combine jobs" and he "didn't  
9 want to go anywhere else" because he liked working by himself. AR 55. He did not wish to  
10 "join the crew." AR 55. Once Plaintiff indicated he was going to quit, he was left alone. AR 56.

11 When asked by counsel whether he could go back to work at any of his previous  
12 positions, Plaintiff replied, "[n]o, no way, no." AR 56. He explained that he has a hard time  
13 concentrating and is easily upset. His daughter helps him by letting him know when he is getting  
14 "out of control or whatever." AR 56. He has great difficulty dealing with people, and  
15 particularly supervisors or bosses. AR 57.

16 When counsel asked whether Plaintiff had any physical problems that kept him from  
17 working, he replied, "[n]o, you know, just a little bit of arthritis here and there . . . ." AR 57. In  
18 order to treat the arthritis in his back and neck, Plaintiff takes aspirin as advised by his physician.  
19 He does not have any problem sitting or standing. AR 57.

20 Plaintiff gets "depressed sometimes" and finds it hard to leave the house. He tends to  
21 spend a lot of time alone, and works in the yard. His psychiatrist recommended he work out at a  
22 gym to relieve his stress, and he does so. AR 57. Plaintiff indicated that he had suicidal thoughts  
23 many years ago, and has not had such thoughts lately. He had "seven, eight years of counseling"  
24 through the Veterans Administration ("VA") that helped. AR 57. Plaintiff becomes very  
25 irritable over little things, and it is hard for him to focus and concentrate. AR 58. For example,  
26 he has difficulty "filling out forms" because it "gets to" him. AR 58. Asked to describe his  
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1 difficulty focusing or concentrating by the ALJ, Plaintiff indicated he has to “really concentrate  
2 on” the task and he forgets things. AR 58. He feels himself become frustrated and he works to  
3 complete the task. He stated he can complete a task, but that “it just takes [him] way too much  
4 longer than it should.” AR 58. For example, if he is filling out forms, a short form “might be all  
5 right,” but “page after page” becomes more difficult. AR 59.

6 When he was asked what “things” he enjoyed, Plaintiff indicated he enjoyed his two  
7 children. He does not have any grandchildren. AR 59. He does not watch or participate in  
8 sports, but, as previously indicated, he does go to the gym. AR 59. His work out partner is an  
9 also retired, former coworker named John. AR 60-61. Plaintiff works with the free weights. AR  
10 59. When he first started working out at the gym, he could curl seventy-five to eighty pounds,  
11 for example, and now he can curl perhaps ninety to one hundred pounds. AR 59-60. The gym is  
12 not necessarily something he enjoys; he works out to release his frustration. AR 60.

13 Plaintiff indicated that he has “a hard time like doing more than one thing.” AR 61. He  
14 explained that he used to be able to barbeque and mow the lawn at the same time, or do “all  
15 kinds of things at the same time.” AR 61. Now he can do just one. AR 61. He suffers from  
16 post traumatic stress disorder (“PTSD”) as a result of a tour in Vietnam in 1966. AR 61. After  
17 suppressing the experience, Plaintiff began suffering from nightmares, panic attacks and  
18 increased anger. AR 61-62. The news in Iraq reminds him of Vietnam and causes him to  
19 become angry. AR 62. The nightmares and panic attacks vary in occurrence.<sup>3</sup> In other words,  
20 sometimes Plaintiff will have nightmares once or twice a week, but in another week he will have  
21 them four or five days in a row. AR 62. With regard to panic attacks, Plaintiff will wake up “all  
22 sweaty” and scared. AR 63. When he was asked by the ALJ what he meant by “panic attack,”  
23 Plaintiff agreed a panic attack is when one wakes suddenly and is startled, not knowing what has  
24 happened. AR 64. Then Plaintiff explained that he may know the contents of the dream,

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27 <sup>3</sup>At the request of ALJ Hoffman, Plaintiff’s counsel attempted to quantify Plaintiff’s nightmares separate  
from his panic attacks. AR 62-63.

1 meaning he “was getting stabbed or whatever, or [he] was seeing somebody get killed.” On  
2 some occasions he does not remember the dream. AR 64.

3 Flashbacks are also a problem. Plaintiff tried to explain a flashback, indicating that  
4 “there was a weird smell that was in Vietnam that you don’t forget about, and you smell that, and  
5 it just, just makes it more, more realistic.” It is on those occasions when Plaintiff has a  
6 flashback. AR 64.

7 On further examination by the ALJ, Plaintiff indicated that he had recently returned to  
8 Vietnam and stayed for five days following his retirement. He also visited Thailand and China  
9 and the entire trip lasted twenty days. He traveled with his son, Frank Jr. AR 65. Plaintiff’s son  
10 now works in Thailand as a commercial graphic artist. AR 66.

11 Plaintiff indicated that he is unable to return to work now because he has difficulty  
12 sleeping and would not wake up rested. AR 67. He could not handle the changes that occurred  
13 at his previous employment, prior to quitting. AR 67. Plaintiff sleeps about five to six hours a  
14 night and wakes up often. AR 79. When he was asked why he wakes often, Plaintiff said he did  
15 not know, but that it is “just hard” to “continuously sleep.” Different things will cause him to  
16 wake up, he may be restless. AR 80. He does not typically nap during the day, but does so  
17 occasionally. AR 81.

18 With regard to friendships and socializing with others, Plaintiff indicate he has two  
19 Vietnam veteran buddies that he gets together with “once in a while.” When they get together  
20 they will “shoot the bull [and] drink a couple of beers.” AR 67. They may also go to a nearby  
21 flea market or out to eat. AR 68. He does not attend church regularly any longer. AR 70.  
22 Plaintiff has seven siblings who are “around,” but he never sees them. AR 72. He does remain  
23 close with his two former brothers-in-law, one of whom lives in Tulare and the other in Delano.  
24 When they get together they drink a “couple of beers” and talk. AR 73.

25 Plaintiff met his girlfriend Linda at a friend’s house about a year ago. Typically the two  
26 hang out at Linda’s house. AR 70. However, he and Linda did recently go on a cruise to the  
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1 Mexican Riviera. AR 70-71. When asked more specifically about what he and his girlfriend do  
2 together, Plaintiff indicated that while neither of them care to go to the movies, they do walk the  
3 dogs together. AR 72-74.

4 Anxiety is also a problem, but Plaintiff indicated that he did not know why the anxiety  
5 would come about. Sometimes he is just “sitting there,” and he feels it. AR 77. Some days are  
6 worse than others. If he becomes frustrated, sometimes it shows. His daughter is “kind of like  
7 [his] angel,” because she reminds him not to get upset or to take it easy. AR 77-78. She keeps  
8 him “straight” three to four times per week. AR 78.

9 Although he lives with his daughter who has a computer, and who created an email  
10 address for him related to his service in Vietnam, Plaintiff rarely uses the computer and has not  
11 checked his email in “probably a month.” AR 68.

12 Plaintiff has had his drinking under control for “about five years.” He may have a couple  
13 of beers, two or three, but no more than that. There is a “lot of diabetes” in his family, although  
14 he himself does not have diabetes. AR 69. Plaintiff cooks and watches his diet and glucose  
15 levels. AR 72. His daughter also does some cooking. AR 76.

16 When he was asked to describe a typical day, Plaintiff indicated that he gets up in the  
17 morning, fixes himself something to eat, and keeps the house orderly. He does his own laundry,  
18 goes to the gym and works out, and returns to the house for a shower. Then he may fix a  
19 sandwich and watch the news. AR 78. Plaintiff used to enjoy photography and barbequing but  
20 he “hardly” does those things any more. He has lost his passion. AR 78. He finds yard work to  
21 be hard and keeps the front yard manicured and is trying to get the back yard under control. He  
22 used to love to do yard work, but now it is “kind of hard” and “real hard” because he becomes  
23 frustrated. If the engine on the mower will not start, for instance, he becomes frustrated and “it’s  
24 not a fun thing anymore.” AR 78-79.

25 With regard to prescribed medication, Plaintiff is taking Wellbutrin and indicated the  
26 dosage had recently been increased. It does not resolve all of his symptoms, but it does help. He  
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1 also takes Bupropion “for moods” as it keeps him from getting too anxious. AR 81. While  
2 initially Plaintiff would take the medication for a period of time and then discontinue its usage,  
3 he no longer does so. AR 81-82.

#### 4 **Medical Record**

5 The entire medical record was reviewed by the Court (AR 203-447), however, only those  
6 medical records relevant to the issues on appeal will be addressed below as needed in this  
7 opinion.

#### 8 **ALJ’s Findings**

9 ALJ Hoffman determined that Plaintiff has not engaged in substantial gainful activity  
10 since December 31, 2004, and has the medically determinable impairments of post-traumatic  
11 stress disorder and depression. AR 19. However, the ALJ determined that none of the medically  
12 determinable impairments or combination of impairments significantly limited Plaintiff’s ability  
13 to perform basic work-related activities. Thus, ALJ Hoffman found that Plaintiff does not have a  
14 severe impairment that met or exceeded one of the listing impairments and therefore is not  
15 disabled. AR 17-23.

#### 16 **SCOPE OF REVIEW**

17 Congress has provided a limited scope of judicial review of the Commissioner’s decision  
18 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,  
19 the Court must determine whether the decision of the Commissioner is supported by substantial  
20 evidence. 42 U.S.C. § 405(g). Substantial evidence means “more than a mere scintilla,”  
21 *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v.*  
22 *Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is “such relevant evidence as a  
23 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at  
24 401. The record as a whole must be considered, weighing both the evidence that supports and  
25 the evidence that detracts from the Commissioner’s conclusion. *Jones v. Heckler*, 760 F.2d 993,  
26 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must

1 apply the proper legal standards. *E.g., Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988).  
2 This Court must uphold the Commissioner's determination that the claimant is not disabled if the  
3 Secretary applied the proper legal standards, and if the Commissioner's findings are supported by  
4 substantial evidence. *See Sanchez v. Sec'y of Health and Human Serv.*, 812 F.2d 509, 510 (9th  
5 Cir. 1987).

## 6 REVIEW

7 In order to qualify for benefits, a claimant must establish that he is unable to engage in  
8 substantial gainful activity due to a medically determinable physical or mental impairment which  
9 has lasted or can be expected to last for a continuous period of not less than twelve months. 42  
10 U.S.C. § 1382c (a)(3)(A). A claimant must show that he has a physical or mental impairment of  
11 such severity that he is not only unable to do his previous work, but cannot, considering his age,  
12 education, and work experience, engage in any other kind of substantial gainful work which  
13 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989).  
14 The burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th  
15 Cir. 1990).

16 In an effort to achieve uniformity of decisions, the Commissioner has promulgated  
17 regulations which contain, inter alia, a five-step sequential disability evaluation process. 20  
18 C.F.R. §§ 404.1520 (a)-(f), 416.920 (a)-(f) (1994). Applying this process in this case, the ALJ  
19 found that Plaintiff: (1) had not engaged in substantial gainful activity since December 31, 2004;  
20 (2) has an impairment or a combination of medically determinable impairments (20 C.F.R. §  
21 404-1520(c); yet (3) does not have an impairment or combination of impairments which  
22 significantly limits his ability to perform basic work activities, nor does Plaintiff have a severe  
23 impairment (20 C.F.R. 404.1521). Thus, the ALJ found Plaintiff was not disabled.

24 On appeal, Plaintiff asserts the following arguments: (1) the ALJ's step two finding is not  
25 supported by substantial evidence and is based upon incorrect legal standards; (2) the ALJ  
26 improperly rejected the opinion of Dr. Manzano; (3) the ALJ failed to properly address the  
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1 disability finding by the VA; (4) the ALJ failed to comply with Social Security Ruling (“SSR”)
2 96-6p; (5) the ALJ improperly rejected Plaintiff’s testimony and allegations; (6) the ALJ failed to
3 properly address the testimony of the licensed clinical social worker; and (7) the ALJ failed to
4 address lay witness testimony.

5 **DISCUSSION**

6 ***Step Two Findings***

7 In an argument laden with a recitation of case law and rules but lacking in analysis,
8 Plaintiff argues “the uncontradicted evidence establishes that Plaintiff does have medical
9 determinable impairments and/or a combination of such impairments which are ‘severe’” and
10 thus disabling. (Doc. 13 at 9-12.) The Commissioner contends the ALJ’s determination that
11 Plaintiff does not have a severe impairment is supported by substantial evidence. (Doc. 14 at 4-
12 6.)

13 At step two of the sequential evaluation process, the ALJ must conclude whether Plaintiff
14 suffers from a “severe” impairment. The regulations define a non-severe impairment as one that
15 does not significantly limit the claimant’s physical and mental ability to do basic work activities.
16 An impairment is not severe “if the evidence establishes a slight abnormality that has ‘no more
17 than a minimal effect on an individual’s ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290
18 (9th Cir. 1996). To satisfy step two's requirement of a severe impairment, the claimant must
19 prove the existence of a physical or mental impairment by providing medical evidence consisting
20 of signs, symptoms, and laboratory findings; the claimant's own statement of symptoms alone
21 will not suffice. 20 C.F.R. §§ 404.1508, 416.908. The effects of all symptoms must be
22 evaluated on the basis of a medically determinable impairment which can be shown to be the
23 cause of the symptoms. 20 C.F.R. §§ 404.1529, 416.929. An overly stringent application of the
24 severity requirement violates the statute by denying benefits to claimants who do meet the
25 statutory definition of disabled. *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994).

26 The step two inquiry is a *de minimis* screening device to dispose of groundless or
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1 frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137, 153-154 (1987). Further, the ALJ must  
2 consider the combined effect of all of the claimant's impairments on his ability to function,  
3 without regard to whether each alone was sufficiently severe. 42 U.S.C. § 423(d)(2)(B). The  
4 combined effect “shall be considered throughout the disability determination process. *Id.* The  
5 adjudicator's role at step two is further explained by SSR 85-28:

6 A determination that an impairment(s) is not severe requires a careful evaluation of the  
7 medical findings which describe the impairment(s) and an informed judgment about its  
8 (their) limiting effects on the individual's physical and mental ability(ies) to perform basic  
9 work activities; thus, an assessment of function is inherent in the medical evaluation  
process itself. At the second step of sequential evaluation, then, medical evidence alone is  
evaluated in order to assess the effects of the impairment(s) on ability to do basic work  
activities.

10 SSR 85-28.

11 Here, ALJ Hoffman found Plaintiff was capable of basic work related activities for the  
12 following reasons:

13 In reaching the conclusion that the claimant does not have an impairment  
14 or combination of impairments that significantly limits his ability to perform basic  
work activities, the undersigned has considered all symptoms and the extent to  
15 which these symptoms can reasonably be accepted as consistent with the objective  
medical evidence and other evidence, based on the requirements of 20 CFR  
16 404.1529 and SSRs 96-4p and 96-7p. The undersigned has also considered  
opinion and evidence in accordance with the requirements of 20 CFR 404.1527  
and SSRs 96-2p, 96-5p, 96-6p and 06-3p.

17 In considering the claimant's symptoms, the undersigned must follow a  
two-step process in which it must first be determined whether there is an  
18 underlying medically determinable physical or mental impairments(s) – i.e., an  
impairment(s) that can be shown by medically acceptable clinical and laboratory  
19 diagnostic techniques – that could reasonably be expected to produce the  
claimant's pain or other symptoms.

20 Second, once an underlying physical or mental impairment(s) that could  
reasonably be expected to produce the claimant's pain or other symptoms has  
21 been shown, the undersigned must evaluate the intensity, persistence, and limiting  
effects of the claimant's symptoms to determine the extent to which they limit the  
22 claimant's ability to do basic work activities. For this purposes, whenever  
statements about intensity, persistence, or functionally limiting effects of pain or  
23 other symptoms are not substantiated by objective medical evidence, the  
undersigned must make a finding on the credibility of the statements based on a  
24 consideration of the entire case record.

25 In his testimony and written statements, . . . [Plaintiff] has a valid driver's  
license and he drives 2-3 times a week. . . . He feels that he cannot return to work  
26 due to problems of concentration and inability to deal with people, bosses, or  
supervisors. He has arthritis here and there in his back and neck for which he  
27 takes aspirin. He alleges no problems with sitting or standing. He gets depressed

1 sometimes and likes to stay by himself. Other symptoms of a post-traumatic  
2 stress disorder include nightmares 2-3 times per week and sometimes more; panic  
3 attacks, anger, irritability, anxiety, flashbacks of action in Vietnam. On activities  
4 of daily living, he has been divorced for approximately 3 years. The claimant  
5 advised that he does have a girlfriend with whom he recently went on a cruise. He  
6 lives with his daughter; his daughter is in college. He stated that since retiring, he  
7 went back to Vietnam, China and Thailand; that he spent 20 days there with his  
8 son. . . . Mr. Delgado advised that he performed household chores including  
9 laundry. He prepared meals and he shops for groceries and other household items.  
10 He eats out, visits with family and friends, and he worked out at the gym. He  
11 performs yard work, cares for his pet, watches television, he takes walks in the  
12 park, and he reads. Mr. Delgado reported that he spends most of his time outside.  
13 He stated that he does require reminders from time to time from his son as when  
14 to shower, mow the lawn, and water the trees, that this is because he cannot  
15 remember nor can he follow instructions. He can pay attention for two minutes.

16 AR 20-21.

17 Plainly, ALJ Hoffman carefully evaluated the medical findings offered for Plaintiff's  
18 mental impairment and assessed Plaintiff's ability to perform basic work activities. "Basic work  
19 activities" include physical functions, such as walking, standing, sitting, lifting, pushing, pulling,  
20 reaching, carrying, or handling; as well as mental capacities such as understanding, carrying out,  
21 and remembering simple instructions; using judgment; responding appropriately to supervision,  
22 co-workers, and usual work situations; and dealing with changes in a routine work setting. *See*  
23 20 C.F.R. § 404.1521(b). The medical record establishes that Plaintiff's mental impairments are  
24 slight abnormalities that would have no more than a minimal effect on his ability to work.  
25 *Smolen v. Chater*, 80 F.3d at 1290. Therefore, the ALJ's findings are supported by substantial  
26 evidence and are free of legal error.

### 27 ***Consideration of Medical Opinion***

28 Plaintiff contends that ALJ Hoffman committed reversible error because he failed to  
provide any reason or reasons for rejecting Dr. Manzano's opinions. Further, Plaintiff contends  
that if the doctor's opinions were properly considered, Plaintiff should be found to be disabled.  
(Doc. 13 at 12-14.) The Commissioner contends no error occurred because the ALJ did not  
reject the doctor's opinion. Rather, the ALJ considered the findings and conclusions of Dr.

1 Manzano and interpreted those findings within the proper framework, as well as the record as a  
2 whole. (Doc. 14 at 6.)

3 Cases in the Ninth Circuit distinguish among the opinions of three types of physicians:  
4 (1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the  
5 claimant (examining physicians); and (3) those who neither examine nor treat the claimant  
6 (nonexamining physicians). As a general rule, more weight should be given to the opinion of a  
7 treating source than to the opinion of doctors who do not treat the claimant. *Winans v. Bowen*,  
8 853 F.2d 643, 647 (9th Cir. 1987). At least where the treating doctor’s opinion is not  
9 contradicted by another doctor, it may be rejected only for “clear and convincing” reasons.  
10 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). Even if the treating doctor’s opinion is  
11 contradicted by another doctor, the Commissioner may not reject this opinion without providing  
12 “specific and legitimate reasons” supported by substantial evidence in the record for so doing.  
13 *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983).

14 The opinion of an examining physician is, in turn, entitled to greater weight than the  
15 opinion of a nonexamining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990);  
16 *Gallant v. Heckler*, 753 F.2d 1450 (9th Cir. 1984). As is the case with the opinion of a treating  
17 physician, the Commissioner must provide “clear and convincing” reasons for rejecting the  
18 uncontradicted opinion of an examining physician. *Pitzer*, 908 F.2d at 506. And like the opinion  
19 of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor,  
20 can only be rejected for specific and legitimate reasons that are supported by substantial evidence  
21 in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).

22 The opinion of a nonexamining physician cannot, by itself, constitute substantial evidence  
23 that justifies the rejection of the opinion of either an examining physician or a treating physician.  
24 *Pitzer*, 908 F.2d at 506 n.4; *Gallant*, 753 F.2d at 1456. In some cases, however, the ALJ can  
25 reject the opinion of a treating or examining physician, based in part on the testimony of a  
26 nonexamining medical advisor. *E.g., Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir.

1 1989); *Andrews*, 53 F.3d at 1043; *Roberts v. Shalala*, 66 F.3d 179 (9th Cir. 1995). For example,  
2 in *Magallanes*, the Ninth Circuit explained that in rejecting the opinion of a treating physician,  
3 “the ALJ did not rely on [the nonexamining physician's] testimony alone to reject the opinions of  
4 Magallanes's treating physicians . . .” *Magallanes*, 881 F.2d at 752. Rather, there was an  
5 abundance of evidence that supported the ALJ’s decision: the ALJ also relied on laboratory test  
6 results, on contrary reports from examining physicians, and on testimony from the claimant that  
7 conflicted with her treating physician's opinion. *Id.* at 751-52.

8 ALJ Hoffman considered Dr. Manzano’s opinion as follows:

9 Dr. N. Manzano, a treating source at the Veterans Administration  
10 estimates the claimant’s post-traumatic stress disorder is chronic secondary to loss  
11 of job and memories of losses in Vietnam. He opined that despite this condition,  
12 the claimant retains the ability to understand, remember, and carry out an  
13 extensive variety of technical, complex, and simple 1 - 2 step job instruction and  
14 notes that the claimant is not open to change. He can deal with the public but has  
15 difficulty relating socially in discussions pertaining to war. He can maintain  
16 concentration and attention for at least two hour increments except during times of  
17 stress. Overall, the claimant’s ability to make occupational, performance, and  
18 personal/social adjustments are fair to poor.

19 AR 21, internal citations omitted.

20 The Court is persuaded by the Commissioner’s position. ALJ Hoffman did not provide  
21 specific and legitimate reasons for rejecting Dr. Manzano’s opinion because he did not in fact  
22 reject it. Rather, he incorporated the doctor’s opinion into his own assessment. This is  
23 evidenced at page 23 of the administrative record wherein the ALJ identifies the fact Plaintiff is  
24 only mildly limited in the activities of daily living, social functioning, and concentration,  
25 persistence and pace. Dr. Manzano’s opinion indicates that Plaintiff is able to understand,  
26 remember and carry out complex, detailed and simple job instructions. AR 442. Of eight items  
27 listed under “Making Occupational Adjustments,” the doctor categorized Plaintiff’s ability to  
28 relate to co-workers and ability to deal with work stress as *both* fair and poor. AR 441. He  
believed Plaintiff’s ability to interact with supervisors was poor. AR 441. Dr. Manzano did not  
identify any “other work-related activities which are affected by the impairment.” AR 442.

1 Under the category of “Making Personal/Social Adjustments,” Plaintiff’s ability to relate  
2 predictably in social situations was identified as *both* fair and poor; all other abilities in this  
3 category were identified as good or fair. AR 442. A review of the evaluation found at page 444  
4 of the administrative record support the ALJ’s findings; while Plaintiff may have some limitation  
5 (“can do except . . .” “some difficulty”) those limitations were properly considered mild (“can  
6 do” “good”).

7 Despite Plaintiff’s strenuous argument to the contrary, no error occurred. The ALJ’s  
8 determination is supported by substantial evidence and is free of legal error.

9 ***Consideration of Veterans Administration Findings***

10 Plaintiff contends the ALJ failed to properly address the VA disability finding because  
11 “he gave no reasons for rejecting it.” (Doc. 13 at 14-15.) In reply, the Commissioner contends  
12 the ALJ properly considered the VA rating and correctly concluded Plaintiff’s mental impairment  
13 was not severe. (Doc. 14 at 6-7.)

14 A VA disability rating does not compel the Social Security Administration to reach an  
15 identical result. *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002). However, the  
16 ALJ must consider the VA’s findings in reaching a decision. *Id.* In fact, an ALJ “must ordinarily  
17 give great weight to a VA determination of disability” because of the similarities of the two  
18 federal programs. *Id.* The ALJ may give less weight to a VA disability rating if he “gives  
19 persuasive, specific, valid reasons for doing so that are supported by the record.” *Id.*

20 Here, ALJ Hoffman found, in pertinent part, as follows:

21 The medical evidence documents and supports a 100% disability rating  
22 and awarded from the Veterans Administration (VA) effective February of 2005  
23 secondary to post traumatic stress disorder, relevant to his military traumas. As a  
24 result of his award, recommended treatment included therapeutic services  
25 including weekly individual sessions, group therapy and crisis visits as needed.  
26 The claimant’s treatment is provided through the VA. Predating the alleged onset  
27 date, treatment records reflect treatment for anxiety and levels of depression that  
improved with medication. As of the alleged onset date of disability, treatment  
and routine follow-ups have focused on allegations of continued symptoms of  
PTSD events and stressors on day to day living that included problems with  
demanding supervisors secondary to reorganization of the company, finance[s],  
marital problems, and subsequently, adjusting to retirement. Since that time, his

1 *counseling has been on and off as symptoms increase/decrease for support and*  
2 *medication management which appears to have helped. Progress notes through*  
3 *April of 2007 indicate that symptoms regarding his PTSD were stable and he was*  
4 *compliant with low dose medication. Mental status examination reflected only a*  
*mildly restricted affect. The claimant was functionally independent. Mr. Delgado*  
*also has a history of alcohol abuse but no history of legal problems.*

5 AR 21, emphasis added & internal citations omitted. Clearly, ALJ Hoffman considered the VA  
6 disability rating. *McCartey v. Massanari*, 298 F.3d at 1076. Moreover, he gave persuasive,  
7 specific, valid reasons for doing affording the rating less weight and those reasons are plainly  
8 supported by this record. *Id.* Those reasons include medical records that support a finding of  
9 only mild limitation, stability and functional independence.

10 In sum, ALJ Hoffman's findings are not erroneous and are supported by substantial  
11 evidence.

#### 12 ***Compliance with SSR 96-6p***

13 Plaintiff complains that state agency physician Garcia opined that Plaintiff had a severe  
14 mental impairment, and thus, the ALJ erred as his findings are contrary to Dr. Garcia's opinion.  
15 (Doc. 13 at 15-16.) The Commissioner responds that in fact Dr. Garcia specifically found that  
16 Plaintiff did not suffer from a severe mental impairment, and therefore, the ALJ's findings are  
17 proper. (Doc. 14 at 7.)

#### 18 **Opinion of State Agency Physician**

19 Psychiatrist Archimedes Garcia, M.D., completed a Mental Residual Functional Capacity  
20 Assessment on June 27, 2005, wherein he concluded Plaintiff was not significantly limited in  
21 eighteen of the twenty categories considered. Dr. Garcia found Plaintiff to be moderately limited  
22 in only two areas: the ability to understand and remember detailed instructions, and the ability to  
23 carry out detailed instructions. AR 219-221. Dr. Garcia's functional capacity assessment  
24 specifically states as follows: "capable SRT with adequate pace and persistence; able to adapt;  
25 able to relate." AR 221. In a Consultation Request of the same date, Dr. Garcia concluded that  
26  
27  
28

1 Plaintiff's "MSE are basically intact. ADLs reduced but I think functioning [is] at the SRT  
2 level." AR 224.

3 A Psychiatric Review Technique also dated June 27, 2005, with regard to consideration  
4 of an affective disorder, opines that Plaintiff's medically determinable impairments of depression  
5 and PTSD do not satisfy the diagnostic criteria for a listing impairment. AR 228. The Paragraph  
6 B criteria were considered as well, and Dr. Garcia found Plaintiff to be mildly limited as to  
7 difficulties in maintaining social functioning, and mild and less than moderately limited with  
8 regard to the restriction of activities of daily living and difficulties in maintaining concentration,  
9 persistence or pace. AR 235.

### 10 **ALJ Hoffman's Findings re State Agency Opinion**

11 The ALJ's findings reflect the following:

12 As for the opinion evidence, Social Security ruling 96-6p requires the  
13 opinions of state agency medical and psychological consultants be treated as  
14 expert opinion evidence from nonexamining sources. The undersigned is not  
15 bound by the conclusions of these nonexamining sources, but has considered their  
16 opinions and given them appropriate weight in rendering this decision. These  
17 medical experts have indicated that the claimant has the necessary mental and  
18 physical residual functional capacity to perform work.

19 AR 22.

### 20 **Analysis**

21 Plaintiff contends the ALJ statement is erroneous because it does not comply with SSR  
22 96-6p "or accurately describe Dr. Garcia's [] opinion," nor does it consider his "age, education,  
23 and residual functional capacity . . ." (Doc. 13 at 16.)

24 ALJ Hoffman complied with SSR 96-6p by considering the opinions of both Dr. Garcia  
25 and Dr. Barnett;<sup>4</sup> he did not ignore these expert opinions. Further, he explained the weight given  
26 as "appropriate" and went on to indicate both found Plaintiff capable of performing work.  
27

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28 <sup>4</sup>Dr. Barnett concluded that Plaintiff "would be able to understand and remember simple or complex work-  
related instructions and tasks" and could sustain focus, attention and concentration to complete routine work-related  
tasks in a timely and appropriate fashion. He could interact with coworkers, supervisors and the public, and would  
have no difficulty adapting to change, hazards or stressors in the work environment. AR 324.



1 Title 20 of the Code of Federal Regulations section 404.1520(c) provides as follows:

2 You must have a severe impairment. If you do not have any impairment or  
3 combination of impairments which significantly limits your physical or mental  
4 ability to do basic work activities, we will find that you do not have a severe  
5 impairment and are, therefore, not disabled. *We will not consider your age,  
education, and work experience.* However, it is possible for you to have a period  
of disability for a time in the past even though you do not now have a severe  
impairment.

6 Emphasis added. Because all medical evidence indicates that Plaintiff's mental impairment is  
7 non-severe, the ALJ was not required to consider Plaintiff's age, education or work experience.

8 In conclusion, ALJ Hoffman did not err with regard to his consideration of the state  
9 agency physician's opinion.

10 ***Plaintiff's Testimony and Credibility***

11 Next, Plaintiff complains the ALJ failed to properly assess his credibility. (Doc. 13 at 16-  
12 20.) The Commissioner asserts that the ALJ provided sound reasons to discredit Plaintiff's  
13 subjective complaints. (Doc. 14 at 7-9.)

14 A two step analysis applies at the administrative level when considering a claimant's  
15 credibility. *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.1996). First, the claimant must  
16 produce objective medical evidence of an impairment that could reasonably be expected to  
17 produce some degree of the symptom or pain alleged. *Id.* at 1281-1282. If the claimant satisfies  
18 the first step and there is no evidence of malingering, the ALJ may reject the claimant's  
19 testimony regarding the severity of his symptoms only if he makes specific findings that include  
20 clear and convincing reasons for doing so. *Id.* at 1281. The ALJ must "state which testimony is  
21 not credible and what evidence suggests the complaints are not credible." *Mersman v. Halter*,  
22 161 F.Supp.2d 1078, 1086 (N.D. Cal.2001), quotations & citations omitted ("The lack of  
23 specific, clear, and convincing reasons why Plaintiff's testimony is not credible renders it  
24 impossible for [the] Court to determine whether the ALJ's conclusion is supported by substantial  
25 evidence"); Social Security Ruling ("SSR") 96-7p (ALJ's decision "must be sufficiently specific

1 to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave  
2 to the individual's statements and reasons for that weight").

3 An ALJ can consider many factors when assessing the claimant's credibility. *See Light v.*  
4 *Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.1997). The ALJ can consider the claimant's  
5 reputation for truthfulness, prior inconsistent statements concerning his symptoms, other  
6 testimony by the claimant that appears less than candid, unexplained or inadequately explained  
7 failure to seek treatment, failure to follow a prescribed course of treatment, claimant's daily  
8 activities, claimant's work record, or the observations of treating and examining physicians.  
9 *Smolen*, 80 F.3d at 1284; *Orn v. Astrue*, 495 F.3d 625, 638 (2007).

### 10 **ALJ Hoffman's Relevant Findings**

11 ALJ Hoffman found as follows with regard to Plaintiff's credibility and symptoms:

12 After considering the evidence of record, the undersigned finds that the  
13 claimant's medically determinable impairments could have been reasonably  
14 expected to produce the alleged symptoms; however, the claimant's statements  
15 concerning the intensity, persistence and limiting effects of these symptoms are  
16 not credible and not consistent with the findings that reflect that the claimant has  
17 no severe impairment or combination of impairments for the reasons explained  
18 below.

19 In terms of the claimant's alleged impairments, there is no evidence of a  
20 condition characterized by a disturbance of mood accompanied by a full or partial  
21 manic or depressive syndrome as described in 12.04; or generalized persistent  
22 anxiety accompanied by three out of four of the criteria listed in 12.06A and  
23 resulting in marked restriction of activities of daily living; or marked difficulties  
24 in social functioning; or marked difficulties in maintaining concentration,  
25 persistence, or pace; or repeated episodes of decompensation, each of extended  
26 duration.

27 Mr. Delgado admits to a wide range of activities which is consistent with  
28 the evidence overall in that he has no significant physical limitations. He has  
advised of how his divorce caused him stress but with support therapy and  
medication he has been able to interact appropriately and get along with others [].  
He has been able to initiate social contacts and by his own admission, he has a  
girlfriend and [] he enjoys her company. There is no evidence of inability to  
communicate clearly with others or interact and actively participate in group  
activities. Based on his ability to work in the dairy industry for 32 years  
demonstrates a cooperative behavior and a degree of social maturity. The  
claimant reported trips to places that he alleges continue to cause him stress; that  
he stayed twenty days. He went on a cruise and he was able to restore [a]  
relationship with his son which is inconsistent with the allegations of isolation. He  
goes to the park, he takes walks, and he works out at the gym on a daily basis. He  
told Dr. Manzano that he has "buried the hatch"; that there is nothing that can be  
done about the losses, "so we just need to move on." There is no evidence of

1           altercations, or social isolation, or avoidance of interpersonal relationships. There  
2 is no evidence of inability to maintain sustained concentration, persistence, or  
3 pace. Progress notes indicate that he claimant’s alleged symptoms are stable  
4 regarding his PTSD. His treatment consists of low dose bupropion which the  
5 claimant takes intermittently. In conjunction with his missed appointments, the  
6 nature of his treatment, the claimant’s response to treatment, and his admitted  
activities of daily living, the undersigned finds that the claimant has the ability to  
maintain sustained attention and persist at simple tasks and instructions. The  
undersigned further finds that he has not had a condition that met the durational  
requirements of the Act and that his alleged impairments, based on the medical  
evidence, are not as severe as alleged.

7 AR 22.

### 8                   **Analysis**

9           The first step in assessing Plaintiff’s subjective complaints is to determine whether  
10 Plaintiff’s condition could reasonably be expected to produce the pain or other symptoms  
11 alleged. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). Here, ALJ Hoffman found  
12 that Plaintiff’s medically determinable impairments of PTSD and depression could reasonably be  
13 expected to produce the alleged symptoms. AR 22. This finding satisfied step one of the  
14 credibility analysis. *Smolen*, 80 F.3d at 1281-1282.

15           Because the ALJ did not find that Plaintiff was malingering, he was required to provide  
16 clear and convincing reasons for rejecting Plaintiff’s testimony. *Smolen*, 80 F.3d at 1283-1284;  
17 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (as amended). When there is evidence of an  
18 underlying medical impairment, the ALJ may not discredit the claimant’s testimony regarding the  
19 severity of his symptoms solely because they are unsupported by medical evidence. *Bunnell v.*  
20 *Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991); SSR 96-7. Moreover, it is not sufficient for the ALJ  
21 to make general findings; he must state which testimony is not credible and what evidence in the  
22 record leads to that conclusion. *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.1993); *Bunnell*,  
23 947 F.2d at 345-346.

24           In this case, the ALJ made numerous credibility findings. ALJ Hoffman indicated that  
25 Plaintiff admitted to a wide range of activities including long distance travel, enjoying social  
26 contacts and personal relationships in spite of his claims of isolation, daily activities including  
27

1 working out at a gym, taking walks and going to the park, the fact that Plaintiff's treatment  
2 involves a low dose medication, and other reasons. These are all specific reasons to discredit  
3 Plaintiff's testimony and reported symptomology: an ALJ can look to daily living activities as  
4 part of the credibility analysis (*Burch v. Barnhart*, 400 F.3d at 680; *Fair v. Bowen*, 885 F.2d at  
5 603; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d at 600); an ALJ can consider the  
6 claimant's reputation for truthfulness, prior inconsistent statements concerning his symptoms,  
7 other testimony by the claimant that appears less than candid, unexplained or inadequately  
8 explained failure to seek treatment, failure to follow a prescribed course of treatment, claimant's  
9 daily activities, claimant's work record, or the observations of treating and examining physicians  
10 (*Smolen v. Chater*, 80 F.3d at 1284; *Orn v. Astrue*, 495 F.3d at 638). *See also Warre v. Comm'r*  
11 *of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (impairments that are effectively  
12 controlled with medication are not disabling); *Tidwell v. Apfel*, 161 F.3d 599, 601-602 (9th Cir.  
13 1998) (finding a mild or minor medical condition with all other tests reporting normal provides a  
14 basis for rejecting claimant's testimony of severity of symptoms); *Johnson v. Shalala*, 60 F.3d  
15 1428, 1434 (9th Cir. 1995) (inconsistencies between the record and medical evidence supports a  
16 rejection of a claimant's credibility; no medical treatment or a conservative level of medical  
17 treatment has been found to suggest a lower level of pain and functional limitations); *Bunnell v.*  
18 *Sullivan*, 947 F.2d at 346-47 (factors to evaluate credibility include medication effectiveness,  
19 side effects of medication, and functional restrictions, as well as "ordinary techniques of  
20 credibility evaluation"; treatment and lack of treatment are factors used to evaluate credibility);  
21 *Fair v. Bowen*, 885 F.2d at 603-04 (claiming severe conditions yet receiving minimal,  
22 conservative, or no treatment is a basis to reject claimant's testimony; additionally, failure to  
23 follow prescribed treatment can be considered in determining credibility); 20 C.F.R. § 416.929  
24 (objective medical evidence can be used in determining credibility; inconsistencies in evidence  
25 will support a rejection of credibility); SSR 96-7p (objective medical evidence is a useful  
26 indicator to assist in making a reasonable conclusion about credibility and the ability to function).



1 these records and testimony. Further, the Court notes that its review of the medical record - the  
2 same record reviewed and considered by the ALJ - reveals the progress notes are very  
3 conclusory, and fail to offer any information regarding either functional or mental limitations.  
4 Rather, the notes merely indicate, for example, that Plaintiff was depressed and/or anxious, or  
5 that he participated in group or individual therapy. *See* AR 242-322. Therefore, the Court finds  
6 that while ALJ Hoffman did not expressly assess what weight he assigned to the LCSW records,  
7 the failure to do so in this instance constitutes harmless error. *Stout v. Commissioner Soc. Sec.*  
8 *Admin.*, 454 F.3d 1050, 1054-56 (9th Cir. 2006); *see also Henderson v. Astrue*, 2009 WL 159229  
9 (W.D. Wash. Jan. 22, 2009).

10 In light of the foregoing, a remand or reversal on this basis is not warranted. ALJ  
11 Hoffman's findings are supported by substantial evidence and are free of legal error.

### 12 ***Lay Witness Testimony***

13 Plaintiff finally argues the ALJ erred with regard to Plaintiff's son's statement by  
14 "disregard[ing] it with [a] cursory assertion." Plaintiff argues that in fact his son's statements  
15 corroborate his allegations. (Doc. 13 at 23-24.) The Commissioner contends the ALJ's  
16 reasoning regarding the lay witness statement was germane to the witness, and thus proper.  
17 (Doc. 14 at 9-10.)

18 Lay witness testimony as to a claimant's symptoms is competent evidence which the  
19 Commissioner must take into account. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). The  
20 ALJ may reject such testimony if he does so expressly, in which case "he must give reasons that  
21 are germane to each witness." *Id.* The ALJ need not discuss lay witness testimony that pertains  
22 to whether or not an impairment exists. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996).  
23 These medical diagnoses are beyond the competence of lay witnesses and therefore do not  
24 constitute competent evidence. 20 C.F.R. § 404.1513(a). However, once an impairment has  
25 been established by medical evidence, the extent of the diagnosed impairment may be testified to  
26  
27  
28

1 by the lay witnesses. 20 C.F.R. § 404.1513(e); *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.  
2 1987).

3 ALJ Hoffman considered the lay testimony in the form of a Function Report - Adult  
4 Third Party completed by Plaintiff's son, Frank L. Delgado:

5 Third party statements indicate that the claimant arises early, waters the  
6 lawn, takes off for drives, and sits in the park. He does not bother anyone; that he  
7 just hangs out until dark. He is reminded from time to time of a need to shower  
8 and to keep his bills current. He does not need anyone to accompany him when  
he goes out. His temper is short and he is not as social as in the past since he quit  
working but he has never been filed. The Third Party Statement seems much  
more restrictive than claimant's own testimony regarding his usual activities.

9 AR 21, internal citation omitted.

10 ALJ Hoffman clearly considered Plaintiff's son's statement, and offered a germane  
11 reason for rejecting it: it did not corroborate Plaintiff's own testimony. *See Carmickle v.*  
12 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir.2008) (germane reasons for rejecting a  
13 lay witness's testimony include inconsistencies between that testimony and the claimant's  
14 presentation to treating physicians or the claimant's activities, and the claimant's failure to  
15 participate in prescribed treatment); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005)  
16 (noting that “[i]nconsistency with medical evidence” is one “germane” reason for rejecting lay  
17 witness testimony).

18 For the foregoing reasons, ALJ Hoffman did not err with regard to his consideration of  
19 the lay witness's statement. Thus, this finding is supported by substantial evidence and is free of  
20 legal error.

1 CONCLUSION

2 Based on the foregoing, the Court finds that the ALJ's decision is supported by  
3 substantial evidence in the record as a whole and is based on proper legal standards.  
4 Accordingly, this Court DENIES Plaintiff's appeal from the administrative decision of the  
5 Commissioner of Social Security. The Clerk of this Court is DIRECTED to enter judgment in  
6 favor of Defendant Michael J. Astrue, Commissioner of Social Security and against Plaintiff,  
7 Frank Delgado.

8  
9 IT IS SO ORDERED.

10 **Dated: March 24, 2011**

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE