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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVID BARRERA,

 Plaintiff,

 v.

COMMISSIONER OF SOCIAL
SECURITY,

 Defendant.

Case No. 1:16-cv-01466-SAB

ORDER GRANTING IN PART PLAINTIFF’S
SOCIAL SECURITY APPEAL AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS

(ECF Nos. 20, 23, 24)

I.

INTRODUCTION

Plaintiff David Barrera (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner” or “Defendant”) denying his application for a period of disability, disability insurance benefits, and supplemental security income pursuant to the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to Magistrate Judge Stanley A. Boone.¹

Plaintiff suffers from lumbar degenerative disc disease; a major depressive disorder, single episode, moderate; vascular dementia; hypertension; hyperlipidemia; and insomnia. For the reasons set forth below, Plaintiff’s Social Security appeal shall be granted in part and remanded for further administrative proceedings.

¹ The parties have consented to the jurisdiction of the United States Magistrate Judge. (See ECF Nos. 7, 9.)

1 **II.**

2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 Plaintiff protectively filed a Title II application for a period of disability and disability
4 insurance benefits and a Title XVI application for supplemental security income on September
5 14, 2012. (AR 243-251, 254-260.) Plaintiff's applications were initially denied on January 18,
6 2013, and denied upon reconsideration on July 17, 2013. (AR 164-168, 172-176.) Plaintiff
7 requested and received a hearing before Administrative Law Judge Cynthia Floyd ("the ALJ").
8 Plaintiff appeared for a hearing on January 8, 2015. (AR 36-68.) On March 4, 2015, the ALJ
9 found that Plaintiff was not disabled. (AR 16-30.) The Appeals Council denied Plaintiff's
10 request for review on July 25, 2016. (AR 1-6.)

11 **A. Relevant Hearing Testimony**

12 Plaintiff appeared with counsel² and testified at the January 8, 2015 hearing. (AR 36-68.)
13 Plaintiff was born on February 22, 1959, and was 55 years old on the date of the hearing. (AR
14 40.) He lives alone in an apartment. (AR 41.) He is single and does not have any children. (AR
15 41.) Plaintiff completed 10th grade and does not have a GED. (AR 42, 53.)³ He has not had any
16 vocational training, but he does have a Class I license. (AR 42.) He has problems reading and
17 writing that have gotten worse since 2011. (AR 53.)

18 Plaintiff has a valid driver's license and there are no restrictions on it. (AR 41.) He does
19 not have a vehicle, so he uses a city bus for transportation 3 to 4 times a week. (AR 42.) The
20 only place he goes is to the grocery store. (AR 42.) Plaintiff also takes the bus to the doctor's
21 office. (AR 52.)

22 Plaintiff has not worked since his alleged onset date of April 1, 2011. (AR 42.) He has
23 not applied for any jobs since that date. (AR 42.) He last worked in 2011 as an in-home care
24 provider assisting his client and doing daily tasks in her home. (AR 43.) He worked full-time at
25 Universal Marketing Wholesale as a Class I driver in 1998 and 1999. (AR 43.) He drove a two-

26 _____
27 ² Counsel appeared by telephone. (AR 38.)

28 ³ Although he had filled out a form stating that he only finished 8 years of school, he believes that it was actually 10 years. (AR 53.)

1 ton bobtail truck with a lift. (AR 44.) He did not do any driving between 2000 and the time of
2 the hearing. (AR 44.) He stopped working as a driver because of his lower back problems and
3 he could not lift anymore. (AR 44.) He received unemployment benefits for a year and a half,
4 which he thinks was in 2008 and 2009; and he did not apply for benefits after 2010. (AR 45.)

5 Plaintiff cannot work because of his anxiety and mental stress. (AR 45.) He has had
6 memory problems since 2011 where he cannot remember what he is doing. (AR 45.) He has
7 trouble maintaining attention and concentration, such as not comprehending and quickly
8 processing instructions and everything is slow. (AR 45-46.) He has problems making decisions
9 because he gets frustrated and cannot follow through with the decision. (AR 46.) He states he
10 somewhat has problems relating to others because he is drawn to himself, cannot communicate
11 well, and does not like communicating. (AR 46.) He has anxiety daily and he also has
12 nightmares where he cannot rest at night. (AR 46.) He thinks that he would have trouble getting
13 to work and being there regularly when he is supposed to be there. (AR 53.) He does not think
14 he could make it through a whole day of work. (AR 53-54.)

15 Plaintiff takes medications daily to help his anxiety and they help. (AR 46-47.) They
16 calm him to where he can try to process things better and focus on what he is doing. (AR 47.)
17 He also goes to therapy weekly at Sierra Vista Clinic where he sees a therapist, Mark Jackson.
18 (AR 47-48.) The therapy helps because “[i]t relieves a little bit” and he can explain what he is
19 going through. (AR 48.) Mr. Jackson helps Plaintiff control his feelings, nightmares, and
20 anxieties. (AR 48.)

21 Plaintiff watches TV, but he has problems concentrating on a two-hour movie. (AR 51-
22 52.) He normally wakes up at 9 a.m., prepares a meal to eat, gets dressed, sits down, and then
23 goes downstairs and sits on the couches in the lobby of his building. (AR 55.) He talks to
24 people if they talk to him and he smiles at everybody, but he does not get into lengthy
25 communications. (AR 55-56, 65.) He talks to most people in the lobby. (AR 56.) He stays in
26 the lobby until he gets hungry around 1:00 p.m. and then he goes back to his apartment and
27 makes himself something to eat and watches TV. (AR 56.) For meals, he usually opens a can of
28 soup or makes a sandwich. (AR 65.) He also sits outside on the mall if the weather is nice. (AR

1 56.) He goes to check the mailbox and then goes back to his apartment and lies down. (AR 56.)
2 If he is feeling bad during the day, he will lie down. (AR 65-66.)

3 The bus stop is right across the street from where he lives. (AR 56.) The doctor's office
4 is right across the street from a bus stop. (AR 56.) He goes to Grocery Outlet on the bus which
5 is about four to six blocks away. (AR 56-57.) He does not have any hobbies. (AR 57.) He
6 washes dishes, does laundry, cleans his apartment, and changes his linens on his bed, but he is
7 slower than he was prior to his alleged disability date. (AR 57, 66.)

8 Plaintiff's lower back and feet affect his ability to work. (AR 48.) His feet swell and he
9 has constant back pain, but he has medication for it. (AR 48-49.) Before medication, his back
10 pain is a 10, but it is a 5 after medication. (AR 49.) The back pain affects his walking because
11 pain goes up and down his spine and neck and there is a "real heavy feeling" pulling him
12 down. (AR 49.) He can walk two blocks and then the pain gets more intense. (AR 49.) He can
13 stand for 1 hour before he has to sit down because of the pain and elevate his feet and rest for
14 approximately 20 to 45 minutes. (AR 50.) He can sit for 30 minutes and then he has to get up
15 and move because of the pain which is like numbness in his legs and buttocks. (AR 50.)

16 Plaintiff also has weak ankles and he gets a severe pain and needles feeling on the bottom
17 of his feet. (AR 50.) He was diagnosed as borderline diabetic so he thinks this is the cause of
18 the pins and needles feeling. (AR 51.) He does not take any medicine for diabetes because they
19 are trying to see if he can control it with diet. (AR 51.) He follows the prescribed diet. (AR 51.)

20 Plaintiff is most comfortable when he is lying down. (AR 54.) He spends more time
21 lying down than in other positions. (AR 54.) He uses heat and ice for his lower back and neck.
22 (AR 54.) He has never tried braces and has never used or needed a cane or crutch. (AR 54-55.)

23 Cheryl R. Chandler, a vocational expert ("VE") also testified at the hearing. (AR 58-64,
24 67.)

25 **B. ALJ Findings**

26 The ALJ made the following findings of fact and conclusions of law.

- 27 • Plaintiff meets the insured status requirements of the Social Security Act through
28 December 31, 2015.

- 1 • Plaintiff has not engaged in substantial gainful activity since April 1, 2011, the alleged
2 onset date.
- 3 • Plaintiff has the following severe impairments: lumbar degenerative disc disease; a major
4 depressive disorder, a single episode, moderate; and vascular dementia.
- 5 • Plaintiff does not have an impairment or combination of impairments that meets or
6 medically equals the severity of one of the listed impairments.
- 7 • Plaintiff has the residual functional capacity (“RFC”) to perform a range of work at the
8 medium exertional level. Specifically, he can lift and carry up to 50 pounds occasionally
9 and up to 25 pounds frequently, stand and walk approximately 6 hours and sit
10 approximately 6 hours in an 8-hour workday. Plaintiff is also able to frequently stoop,
11 kneel, climb, crouch, balance, and crawl. In addition, he is limited to performing only
12 simple routine tasks.
- 13 • Plaintiff is capable of performing past relevant work as a merchandise deliverer. This
14 work does not require the performance of work-related activities precluded by Plaintiff’s
15 RFC.
- 16 • Plaintiff has not been under a disability, as defined in the Social Security Act, from April
17 1, 2011, through the date of the decision.

18 (AR 19-30.)

19 III.

20 LEGAL STANDARD

21 To qualify for disability insurance benefits under the Social Security Act, the claimant
22 must show that he is unable “to engage in any substantial gainful activity by reason of any
23 medically determinable physical or mental impairment which can be expected to result in death
24 or which has lasted or can be expected to last for a continuous period of not less than 12
25 months.” 42 U.S.C. § 423(d)(1)(A). The Social Security Regulations set out a five step
26 sequential evaluation process to be used in determining if a claimant is disabled. 20 C.F.R. §
27 404.1520; Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1194 (9th
28 Cir. 2004). The five steps in the sequential evaluation in assessing whether the claimant is

1 disabled are:

2 Step one: Is the claimant presently engaged in substantial gainful activity? If so,
3 the claimant is not disabled. If not, proceed to step two.

4 Step two: Is the claimant's alleged impairment sufficiently severe to limit his or
5 her ability to work? If so, proceed to step three. If not, the claimant is not
6 disabled.

7 Step three: Does the claimant's impairment, or combination of impairments, meet
8 or equal an impairment listed in 20 C.F.R., pt. 404, subpt. P, app. 1? If so, the
9 claimant is disabled. If not, proceed to step four.

10 Step four: Does the claimant possess the RFC to perform his or her past relevant
11 work? If so, the claimant is not disabled. If not, proceed to step five.

12 Step five: Does the claimant's RFC, when considered with the claimant's age,
13 education, and work experience, allow him or her to adjust to other work that
14 exists in significant numbers in the national economy? If so, the claimant is not
15 disabled. If not, the claimant is disabled.

16 Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050, 1052 (9th Cir. 2006).

17 Congress has provided that an individual may obtain judicial review of any final decision
18 of the Commissioner of Social Security regarding entitlement to benefits. 42 U.S.C. § 405(g).
19 In reviewing findings of fact in respect to the denial of benefits, this court "reviews the
20 Commissioner's final decision for substantial evidence, and the Commissioner's decision will be
21 disturbed only if it is not supported by substantial evidence or is based on legal error." Hill v.
22 Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means more than a
23 scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)
(internal quotations and citations omitted). "Substantial evidence is relevant evidence which,
24 considering the record as a whole, a reasonable person might accept as adequate to support a
25 conclusion." Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec'y of
26 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

27 "[A] reviewing court must consider the entire record as a whole and may not affirm
28 simply by isolating a specific quantum of supporting evidence." Hill, 698 F.3d at 1159 (quoting
Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006). However, it is not
this Court's function to second guess the ALJ's conclusions and substitute the court's judgment
for the ALJ's. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) ("Where evidence is

1 susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be
2 upheld.”).

3 IV.

4 DISCUSSION AND ANALYSIS

5 Plaintiff argues that the ALJ erred by failing to provide legally adequate reasons to reject
6 the opinions of the Dr. Portnoff, Dr. Reinfurt, and Dr. Vesali; failing to provide clear and
7 convincing reasons to reject Plaintiffs testimony; and the RFC assessment is not supported by
8 substantial evidence and free of legal error. Defendant counters that the ALJ thoroughly
9 evaluated the medical evidence and provided legally sufficient reasons to reject the “extreme”
10 medical opinions. Further, Defendant contends that the ALJ properly considered Plaintiff's
11 failure to comply with treatment recommendations, daily activities, and the objective medical
12 evidence in making the credibility finding. Plaintiff replies that the Court cannot consider the
13 post hac rationalizations provided by Defendant and is limited to the reasons provided by the
14 ALJ in the opinion finding Plaintiff to not be disabled.

15 A. Plaintiff's Credibility

16 Plaintiff argues that the ALJ erred in finding his allegations not fully credible. Defendant
17 counters that the ALJ properly found Plaintiff's allegations not fully credible.

18 “An ALJ is not required to believe every allegation of disabling pain or other non-
19 exertional impairment.” Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (internal punctuation
20 and citations omitted). Determining whether a claimant's testimony regarding subjective pain or
21 symptoms is credible, requires the ALJ to engage in a two-step analysis. Molina v. Astrue, 674
22 F.3d 1104, 1112 (9th Cir. 2012). The ALJ must first determine if “the claimant has presented
23 objective medical evidence of an underlying impairment which could reasonably be expected to
24 produce the pain or other symptoms alleged.” Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th
25 Cir. 2007) (internal punctuation and citations omitted). This does not require the claimant to
26 show that his impairment could be expected to cause the severity of the symptoms that are
27 alleged, but only that it reasonably could have caused some degree of symptoms. Smolen, 80
28 F.3d at 1282.

1 Then “the ALJ may reject the claimant’s testimony about the severity of those symptoms
2 only by providing specific, clear, and convincing reasons for doing so.” Brown-Hunter v.
3 Colvin, 806 F.3d 487, 488–89 (9th Cir. 2015). “The ALJ must specifically make findings that
4 support this conclusion and the findings must be sufficiently specific to allow a reviewing court
5 to conclude the ALJ rejected the claimant’s testimony on permissible grounds and did not
6 arbitrarily discredit the claimant’s testimony.” Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir.
7 2004) (internal punctuation and citations omitted). Factors that may be considered in assessing a
8 claimant’s subjective pain and symptom testimony include the claimant’s daily activities; the
9 location, duration, intensity and frequency of the pain or symptoms; factors that cause or
10 aggravate the symptoms; the type, dosage, effectiveness or side effects of any medication; other
11 measures or treatment used for relief; functional restrictions; and other relevant factors.
12 Lingenfelter, at 1040; Thomas, 278 F.3d at 958. In assessing the claimant’s credibility, the ALJ
13 may also consider “ordinary techniques of credibility evaluation, such as the claimant’s
14 reputation for lying, prior inconsistent statements concerning the symptoms, and other testimony
15 by the claimant that appears less than candid.” Tommasetti v. Astrue, 533 F.3d 1035, 1039 (9th
16 Cir. 2008) (quoting Smolen, 80 F.3d at 1284). The district court is constrained to review those
17 reasons that the ALJ provided in finding the claimant’s testimony not credible. Brown-Hunter,
18 806 F.3d at 492.

19 Here, the ALJ found Plaintiff not fully credible and found that Plaintiff’s medically
20 determinable impairments could reasonably be expected to cause the alleged symptoms, but
21 Plaintiff’s statements regarding the intensity, persistence, and limiting effects of the symptoms
22 were not entirely credible for the reasons explained in the decision. (AR 28.)

23 1. Leaving Hospital Against Medical Advice on November 27, 2012

24 The ALJ rejected Plaintiff’s credibility because Plaintiff left the hospital on November
25 27, 2012, against medical advice when a clinician would not complete his paperwork for
26 supplemental security income. (AR 28.) The ALJ found that this indicates that his condition
27 was not as severe as alleged and detracts from the credibility of his allegations. (AR 28.)

28 The November 27, 2012 report from Plaintiff’s hospital visit for high blood pressure

1 indicates:

2 [Patient] declined further work-up after it became clear I would not fill out his SSI
3 paper work. I encouraged him to stay for work-up of end-organ damage, but he
4 declined. I was notified that the patient wished to leave AMA. I went and spoke
5 to the patient and related the risk of not diagnosing and treating the cause of his
6 hypertension, including Heart attack, kidney failure, stroke, grave illness, and
7 death. Patient acknowledged these risks, and stated that he still refused
admission/further work-up. [H]e appears to have the capacity to make this
decision. I gave him the opportunity to ask questions and made clear he could
return at any time if he changed his mind. He stated he would follow up with the
internal medicine clinic in a few days.

8 (AR 401.)

9 While Plaintiff left the hospital after the examining clinician would not fill out his
10 paperwork for supplemental security income, this does not show that his high blood pressure
11 issues were not as severe as alleged and detract from his credibility. As the ALJ noted, Plaintiff
12 declined further workup against medical advice on November 27, 2012, but the report indicates
13 that Plaintiff's blood pressure was severe and Plaintiff indicated during that hospital visit that he
14 would follow up with the internal medicine clinic in a few days. (AR 28, 401.) He then sought
15 an evaluation of his hypertension at a different facility on December 3, 2012. (AR 427.)⁴ The
16 Court notes that Plaintiff testified that he was unable to work because of issues with his back,
17 anxiety, and mental stress, but did not allege that hypertension limited his ability to work. (AR
18 44-45, 48.) Therefore, the Court finds that the ALJ's finding regarding Plaintiff leaving the
19 hospital against medical advice on November 27, 2012 is not a clear and convincing reason to
20 discredit Plaintiff's testimony.

21 2. Objective Findings

22 The only remaining reason that the ALJ provided for finding Plaintiff not fully credible is
23 that his allegations are inconsistent with the objective medical findings. (AR 28.) The ALJ

24
25 ⁴ Defendant asserts that Plaintiff did not receive any treatment for his physical condition until June 2013 and visited
26 the clinic only 5 more times during the course of his 16-month treatment period. However, the ALJ did not provide
27 this as a reason for rejecting Plaintiff's credibility. Therefore, the Court will not consider this post hoc reason.
28 Although the Court may draw reasonable inferences from the ALJ's opinion, Magallanes v. Bowen, 881 F.2d 747,
775 (9th Cir. 1989), it cannot consider Defendant's post hoc rationalizations. "A reviewing court can evaluate an
agency's decision only on the grounds articulated by the agency." Ceguerra v. Sec'y of Health & Human Servs.,
933 F.2d 735, 738 (9th Cir. 1991).

1 found Plaintiff's allegation of an irregular heartbeat,⁵ testimony and reports of significant
2 physical limitations, and allegation that his ability to use his hands is "affected" are inconsistent
3 and unsupported by the medical evidence. (AR 28.)

4 The determination that a claimant's complaints are inconsistent with clinical evaluations
5 can satisfy the requirement of stating a clear and convincing reason for discrediting the
6 claimant's testimony. Regennitter v. Commissioner of Social Sec. Admin., 166 F.3d 1294, 1297
7 9th Cir. 1999). However, "subjective pain testimony cannot be rejected on the sole ground that it
8 is not fully corroborated by objective medical evidence." Rollins v. Massanari, 261 F.3d 853,
9 857 (9th Cir. 2001) (citing 20 C.F.R. § 404.1529(c)(2)). The Social Security regulations state
10 that objective medical evidence is a useful indicator to assist in making reasonable conclusions
11 about the intensity and persistence of a claimant's symptoms and the effect those symptoms on
12 the claimant's ability to work. 20 C.F.R. § 404.1529(c)(2). However, a claimant's statements
13 about the intensity and persistence of his pain or other symptoms cannot be rejected solely
14 because the available objective medical evidence does not substantiate the statements. 20 C.F.R.
15 § 404.1529(c)(2).

16 Therefore, Plaintiff's credibility cannot be rejected solely on the ground that it is not fully
17 corroborated by objective medical evidence. See Rollins, 261 F.3d at 857. Thus, the ALJ erred
18 by failing to provide clear and convincing reasons supported by substantial evidence for finding
19 Plaintiff not fully credible.

20 **B. Medical Opinions and RFC**

21 If the claimant has established that he has a severe impairment but has not demonstrated
22 that his impairment or combination of impairments meets or equals a listed impairment, the ALJ
23 goes to step four to determine if the claimant possesses the RFC to perform his or her past
24 relevant work. Stout, 454 F.3d at 1052. A claimant's RFC is "the most [the claimant] can still
25 do despite [his] limitations." 20 C.F.R. § 416.945(a)(1). The RFC is "based on all the relevant

26 ⁵ The ALJ pointed out that Plaintiff alleged suffering from an irregular heartbeat in the February 6, 2013 disability
27 report. (AR 28, 310.) The ALJ also pointed out that on September 11, 2014, Dr. Robert Jablonsky found that
28 Plaintiff had a regular heart rate and rhythm with no murmurs, gallops, or rubs during examination. (AR 28, 515.)
However, the Court notes that on December 9, 2013, Plaintiff had a mild S1 decrescendo murmur heard best at "L
base." (AR 469.)

1 evidence in [the] case record.” 20 C.F.R. § 416.945(a)(1). “The ALJ must consider a claimant’s
2 physical and mental abilities, § 416.920(b) and (c), as well as the total limiting effects caused by
3 medically determinable impairments and the claimant’s subjective experiences of pain, §
4 416.920(e).” Garrison v. Colvin, 759 F.3d 995, 1011 (9th Cir. 2014).

5 The weight to be given to medical opinions depends upon whether the opinion is
6 proffered by a treating, examining, or non-examining professional. See Lester v. Chater, 81 F.3d
7 821, 830-831 (9th Cir. 1995). The opinion of an examining physician is entitled to greater
8 weight than the opinion of a nonexamining physician. Lester, 81 F.3d at 830. An examining
9 physician’s uncontradicted opinion “may be rejected only for clear and convincing reasons, and
10 when an examining physician’s opinion is contradicted by another doctor, the examining
11 physician’s opinion may be rejected only for specific and legitimate reasons supported by
12 substantial evidence in the record.” Bell v. Astrue, 640 F. Supp. 2d 1247, 1252 (E.D. Cal. 2009).

13 “The ALJ can meet this burden by setting out a detailed and thorough summary of the
14 facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.”
15 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (quoting Cotton v. Bowen, 779 F.2d
16 1403, 1408 (9th Cir. 1989)).

17 The ALJ discussed the mental impairments and physical impairments and the opinions
18 for each separately. The Court shall first address Plaintiff’s RFC for his physical impairments.

19 1. Physical Impairments

20 The record contains no treating medical source statement as to Plaintiff’s physical RFC.
21 The only medical opinions regarding Plaintiff’s physical impairment are Dr. Fariba Vesali, who
22 performed a consultative comprehensive orthopedic evaluation, and Dr. A. Nasrabadi and Dr. R.
23 Fast, who are state agency reviewing medical consultants. Plaintiff asserts that the ALJ erred in
24 rejecting all of these opinions and argues that the ALJ’s finding that Plaintiff could perform
25 medium work not based on any medical opinion of record. Defendant counters that the ALJ
26 properly evaluated the medical and opinion evidence for Plaintiff’s complaints of low back pain
27 and properly assessed the physical RFC. In his reply, Plaintiff contends that the ALJ’s decision
28 is based on her lay interpretation of the medical and psychiatric evidence and that the RFC is

1 based on insubstantial evidence.

2 **a. The ALJ provided a specific and legitimate reason to reject Dr. Vesali's**
3 **opinion that was supported by substantial evidence in the record**

4 Here, the ALJ considered a November 27, 2012 x-ray of the lumbar spine that showed
5 mild disc space narrowing at L4-L5 in conjunction with lower lumbar facet arthropathy and
6 some marginal osteophyte formation. (AR 24, 403.) The ALJ also noted that Plaintiff had not
7 seen a doctor in years. (AR 24, 400.) On November 27, 2012, Plaintiff exhibited normal range
8 of motion, with no tenderness or edema and full strength in all extremities and he was
9 asymptomatic with 5/5 strength in all extremities and normal muscle tone. (AR 24, 400-401.)
10 Subsequent examinations were generally unremarkable. (AR 24, 425, 426, 427, 457-458, 460,
11 469, 480, 486, 487, 515.) On December 9, 2013, Plaintiff reported no transient weakness. (AR
12 24, 468.) The ALJ also considered a December 26, 2014 x-ray of the lumbar spine that showed
13 some mild to moderate degenerative changes. (AR 24, 540.)

14 The ALJ considered that on November 26, 2012, Fariba Vesali, M.D., performed a
15 consultative comprehensive orthopedic evaluation. (AR 24, 394-397.) Dr. Vesali diagnosed
16 Plaintiff with chronic low back pain and found that straight leg raising test in supine position is
17 positive on the left side and walking on toes exacerbates the low back pain. (AR 396.) He
18 opined that with controlled blood pressure Plaintiff could walk and stand 4 hours in an 8-hour
19 workday with breaks every 30 minutes for rest; sit 6 hours in an 8-hour workday with breaks
20 every hour for stretching; lift and carry 20 pounds occasionally and 10 pounds frequently; and
21 occasionally do postural activities. (AR 396-397.) The ALJ discounted and gave little weight to
22 this opinion finding it inconsistent with the other evidence. (AR 24.) The ALJ then explained
23 that it is over-restrictive in light of a treatment report from the next day and that the opinion is
24 discounted because Dr. Vesali did not review any medical records and the opined limitations are
25 inconsistent with subsequent physical examinations, which were generally unremarkable. (AR
26 24.)

27 Plaintiff argues that the fact that the subsequent medical record fails to show any
28 examination findings is irrelevant because Dr. Vesali's examination did show limited range of

1 motion in Plaintiff’s hips, a positive straight leg test on the left, and a positive Patrick’s test.
2 Defendant counters that the ALJ properly considered that Dr. Vesali’s opinion was inconsistent
3 with the medical record which showed generally unremarkable examination findings and a
4 November 2012 x-ray of Plaintiff’s lumbar spine which showed only mild disc space narrowing
5 and some marginal osteophyte (bone spur) formation (AR 403), and a December 2014 x-ray of
6 the cervical and lumbar spine which merely showed mild to moderate degenerative changes (AR
7 540). Defendant contends that the medical record does not demonstrate the type of treatment and
8 findings that one would expect to find given the limitations opined by Dr. Vesali. In response,
9 Plaintiff argues his interpretation of the medical testing performed by Dr. Vesali, however it is
10 not for this Court to interpret the medical evidence but to determine if the ALJ provided, in this
11 instance, a specific and legitimate reason to reject Dr. Vesali’s opinion that is supported by
12 substantial evidence in the record. Garrison, 759 F.3d at 1012.

13 The ALJ meets his burden by setting out a detailed and thorough summary of the facts
14 and conflicting clinical evidence, stating his interpretation of the evidence, and making
15 findings.” Magallanes, 881 F.2d at 751. In this instance, the ALJ set forth the conflicting
16 evidence in the record and stated his interpretation and the reasons for his findings. While the
17 evidence in the record may be subject to a different interpretation, the ALJ reasonably found that
18 Dr. Vesali’s opinion was overly restrictive given the inconsistency with subsequent objective
19 examination findings in the record as whole. “Where evidence is susceptible to more than one
20 rational interpretation, it is the ALJ’s conclusion that must be upheld.” Burch, 400 F.3d at 679.
21 The ALJ’s finding that Dr. Vesali’s opinion is inconsistent with subsequent medical evidence in
22 the record is a specific and legitimate reason supported by substantial evidence in the record to
23 reject his opinion.

24 To the extent that the ALJ erred by discounting Dr. Vesali’s opinion because Dr. Vesali
25 did not review any medical evidence, any such error would be harmless as the ALJ provided a
26 specific and legitimate reason to reject the opinion. Molina, 674 F.3d at 1115.

27 ///

28 ///

1 **b. The physical residual functional capacity is not supported by substantial**
2 **evidence**

3 Plaintiff argues that the ALJ erred by rejecting all physician opinions and coming up with
4 a residual functional capacity that does not have support in the record. Both Dr. Nasrabadi and
5 Dr. Fast opined that Plaintiff could lift and carry 20 pounds occasionally and 10 pounds
6 frequently, sit for 6 hours in an 8-hour workday, and stand and walk about 6 hours in an 8-hour
7 workday. (AR 78, 93, 128, 145.) They also opined that Plaintiff could occasionally climb,
8 balance, stoop, kneel, crouch, and crawl. (AR 78-79, 93-94, 128, 145.) The ALJ discounted and
9 afforded little weight to these opinions as they “appear[ed] to be based upon the findings and
10 opinion of Dr. Vesali (see Exhibit 2F), which as discussed above were discounted and given little
11 weight because they were over-restrictive in light of the objective medical evidence.” (AR 25.)

12 The ALJ found that Plaintiff could lift and carry 50 pounds and occasionally lift and
13 carry 25 pounds, stand and walk 6 hours in an 8-hour workday, and sit 6 hours in an 8-hour
14 workday. (AR 23.) The ALJ also limited Plaintiff to frequent stooping, kneeling, climbing,
15 crouching, balancing, and crawling. (AR 23.)⁶ The ALJ determined that the RFC for medium
16 work “is most consistent with the evidence and adequately accounts for his severe physical
17 impairment, especially in light of the generally unremarkable physical examination findings (see
18 Exhibit 10F).” (AR 25.)

19 On reconsideration, the agency physician noted that the orthopedic consultative
20 examination “was essentially normal except for mildly decreased ROM and + SLR on the left
21 with a normal gait.” (AR 124.) It was also noted that Plaintiff was not taking any pain
22 medications or receiving any medical treatment and there were no physical limitations noted
23 during his October 2012 interview. (AR 124.) Considering this, Dr. Fast agreed with affirming
24 the light RFC. (AR 124.)

25 All the physicians who reviewed the medical evidence found that Plaintiff had the RFC to

26 ⁶ The Court notes that the physical RFC is actually consistent with several of the limitations opined by Dr.
27 Nasrabadi and Dr. Fast. While the ALJ stated that she was discounting and giving little weight to the opinions of the
28 state agency reviewing physicians for physical impairments, the RFC of standing and walking approximately 6
hours and sitting approximately 6 hours in an 8-hour workday is consistent with the state agency reviewing
physicians’ opinions. (AR 23-25.)

1 perform light work. However, the ALJ rejected all the physician opinions and substituted her
2 own opinion in lieu of the opinion of Dr. Vesali and the opinions of Dr. Nasrabadi and Dr. Fast.
3 The ALJ did not cite to any evidence in the record that would be substantial evidence to support
4 the RFC finding. The Court finds that the ALJ's determination that Plaintiff was able to perform
5 medium work is not supported by substantial evidence in the record.⁷

6 Accordingly, the Court finds that the ALJ erred in assessing Plaintiff's physical RFC.

7 2. Mental Impairments

8 Plaintiff argues that the ALJ erred in finding that he can perform simple routine tasks
9 with no other mental limitations by erroneously rejecting the opinions of Drs. Portnoff and
10 Reinfurt and the state agency psychologists who reviewed the case. Defendant counters that the
11 ALJ properly evaluated the medical record as a whole to assess Plaintiff's mental limitations and
12 provided legally valid reasons to discount the extreme opinions of Drs. Portnoff, Reinfurt,
13 Aquino-Caro and Garland. Plaintiff replies that the opinion of Dr. Reinfurt is most probative of
14 his mental functioning and if accepted would demonstrate that he is disabled.

15 a. **Dr. Portnoff's Opinion**

16 Plaintiff argues that while the ALJ accepted Dr. Portnoff's opinion that Plaintiff could
17 perform simple, repetitive tasks, the ALJ impermissibly rejected Dr. Portnoff's opinion in six
18 functional areas.

19 Dr. Portnoff performed a consultative comprehensive psychiatric evaluation on
20 November 16, 2012. (AR 387-391.) Plaintiff arrived on time and took a bus to the appointment.
21 (AR 387.) Dr. Portnoff did not review any records. (AR 387.) Plaintiff's chief complaints were
22 mental stress and lower back pain. (AR 387.) Dr. Portnoff found that Plaintiff demonstrated
23 adequate concentration, persistence, and pace in the current exam. (AR 388.) Plaintiff had mild
24 psychomotor fidgeting. (AR 388.) No abnormal movements were discerned. (AR 388.) Eye
25 contact was good and facial kinetics is mildly reduced. (AR 388.) Speech was spontaneous and

26 ⁷ Plaintiff contends that a limitation to sedentary work would prevent him from performing his past relevant work.
27 He also contends that if he is limited to sedentary work and considering his age, education, and transferable skills,
28 he meets the criteria for disabled in the Medical-Vocational Rules. However, the ALJ will have to reassess
Plaintiff's RFC on remand. Further, the Court notes that Dr. Nasrabadi and Dr. Fast opined that he had a light RFC.

1 prompt with normal tone and tempo without evidence of aphasia. (AR 388.) Receptive
2 language comprehension was grossly intact. (AR 388.) Process of thought was coherent but
3 moderately rambling and mildly confused. (AR 388.) Thought content was appropriate to
4 situation. (AR 388.) Plaintiff described his mood as depressed. (AR 388.) Affect was
5 characterized by moderate, anxious depression. (AR 388.) Plaintiff was oriented to time, and
6 place and was in touch with immediate surroundings. (AR 388.) Plaintiff's immediate recall
7 was intact. (AR 388.) Recent recall was 1/3. (AR 388.) Plaintiff was able to remember
8 autobiographical information. (AR 388.) Fund of knowledge lacking, but Plaintiff could
9 perform simple math calculations. (AR 388.) Plaintiff was able to count backwards from 20.
10 (AR 389.) Social judgment was found to be inadequate. (AR 390.) Clock drawing was
11 impaired Plaintiff drew a lopsided clock with disjuncting at connection point, but number
12 localization and hand placement were intact. (AR 390.) Index finger tapping for 10 second trial
13 was 10 for right hand and 14 for left hand, both very slow and suggest peripheral rather than
14 cortical motor deficit. (AR 390.) Testing for agraphesthesia was vitiated by Plaintiff's
15 confusion. (AR 390.) Plaintiff had adequate insight into his psychiatric symptoms and need for
16 treatment. (AR 390.)

17 Dr. Portnoff diagnosed Plaintiff with vascular dementia; major depressive disorder, single
18 episode, moderate; post-traumatic stress disorder, chronic; and a GAF of 52. (AR 390.) He
19 found that the prognosis for the MDD/PTSD is fair, depending upon underlying
20 health/homelessness and access/response to an appropriate psychotropic regimen. (AR 390.) He
21 found that the prognosis for the mild dementia is probably poor, absent treatment for his diabetes
22 and hypertension. (AR 390.) Dr. Portnoff opined that Plaintiff can perform simple and
23 repetitive tasks, but has moderate limitations in performing detailed and complex tasks. (AR
24 391.) He opined that Plaintiff has moderate limitations in all other areas of mental functioning
25 and that Plaintiff is not capable of managing his funds independently. (AR 391.)

26 The ALJ discounted Dr. Portnoff's opinion finding it inconsistent with the other
27 evidence, for example the moderate limitations are inconsistent with the treatment records
28 showing that Plaintiff's condition was improving, and because Dr. Portnoff did not review any of

1 Plaintiff's medical records. (AR 26.)

2 The ALJ discounted Dr. Portnoff's opinion because he did not review any of Plaintiff's
3 medical records. (AR 26.) Plaintiff asserts that the ALJ impermissibly discounted the opinion
4 based on the lack of review of medical records because Dr. Portnoff's opinion is properly based
5 on significant clinical findings from his psychiatric evaluation of Plaintiff and his specialized
6 expertise in neuropsychology. Plaintiff asserts that Dr. Portnoff's opinion deserves the weight of
7 an examining specialist's opinion.

8 The fact that Dr. Portnoff did not review any medical records is not in itself a specific and
9 legitimate reason supported by substantial evidence to reject his opinion. The appropriate
10 question is whether medical records that are part of the administrative record would have
11 changed or called into question the opinion.

12 The ALJ assessed a mental RFC of simple, routine tasks with no other mental limitations.
13 (AR 23.) There is no treating medical opinion regarding Plaintiff's mental limitations.⁸ The
14 ALJ gave little weight to Dr. Portnoff's opinion finding it inconsistent with the other evidence,
15 and noted that "moderate limitations in most areas of mental functioning is inconsistent with
16 treatment reports from Dr. Baca-Morgan and Mr. Jackson, which indicated [Plaintiff's] condition
17 was improving." (AR 26.) Therefore, the Court considers whether the medical record indicates
18 that Plaintiff's mental condition was improving.

19 Plaintiff argues that the exhibits cited to, Dr. Baca-Morgan's treatment records and Mr.
20 Jackson's treatment records, do not show that Plaintiff's mental impairments no longer seriously
21 affected his ability to work. Plaintiff states that Mr. Jackson's treatment notes indicate "some
22 progress" on May 12, 2014 (AR 494) and "minimal progress" on September 8, 2014 (AR 508),
23 but argues that these are inadequate to reject Dr. Portnoff's opinion. Plaintiff also points out that
24 he had a lower GAF score in October 2014 than November 2013 which Plaintiff contends is
25 indicative of a downward spiral of his mental functioning. Defendant points to several examples

26 ⁸ As the ALJ noted, the record contains three medical provider forms for Plaintiff's application for general relief
27 which were completed on December 4, 2012, May 27, 2014, and November 6, 2014, which opine that he was
28 temporarily unable to work. (AR 405-406, 531-534.) These are opinions on the ultimate issue of disability instead
of medical, clinical opinions. Plaintiff does not challenge the rejection of these opinions.

1 in the treatment record of Plaintiff's mental condition improving.⁹

2 The ALJ noted that Dr. Alexia Baca-Morgan, a treating clinician, between January 22,
3 2013, and March 8, 2013, assessed Plaintiff with a GAF between 61 and 66. (AR 25, 430, 432,
4 437, 443, 448.) LCSW Mark Jackson, another treating clinician, assessed a GAF score of 61 on
5 November 18, 2013, and March 10, 2014. (AR 25, 463, 465, 474, 476, 489, 493, 496.)
6 However, he also assessed between 52 and 60 between February 12, 2014, and October 14, 2014.
7 (AR 25, 483, 506, 510, 520, 524.) On November 6, 2012, Dr. Portnoff assessed a GAF of 52,
8 and on December 6, 2012, LCSW Lois Ratzlaff assessed a GAF of 60. (AR 25, 390, 416.)

9 The ALJ pointed out that these GAF scores are consistent with treatment reports showing
10 a logical thought process with unremarkable thought content, fair reasoning, fair impulse control,
11 and fair insight and judgment on November 18, 2013, December 9, 2013, January 8, 2014,
12 February 12, 2014, and March 10, 2014. (AR 25, 463, 465, 473-474, 483, 489.) The ALJ also
13 found that the GAF scores are further bolstered because Dr. Baca-Morgan and Mr. Jackson are
14 treating sources who routinely saw and treated Plaintiff. (AR 25.)

15 "A Global Assessment of Functioning ("GAF") score is the clinician's judgment of the
16 individual's overall level of functioning. It is rated with respect only to psychological, social,
17 and occupational functioning, without regard to impairments in functioning due to physical or
18 environmental limitations." Cornelison v. Astrue, 2011 WL 6001698, at *4 n.6 (C.D. Cal. Nov.
19 30, 2011) (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental
20 Disorders ("DSM-IV"), at 32 (4th ed. 2000)). "The Commissioner has determined the GAF
21 scale 'does not have a direct correlation to the severity requirements in [the Social Security
22 Administration's] mental disorders listings.' " McFarland v. Astrue, 288 F.App'x 357, 359 (9th
23 Cir. 2008) (unpublished)¹⁰ (quoting 65 Fed.Reg. 50,746, 50,765 (Aug. 21, 2000)). However,

24 ⁹ Defendant points to Ms. Ratzlaff's December 6, 2012 treatment note which indicates that Plaintiff's judgment was
25 improving. (See AR 416.) However, this note is not part of the treatment reports from Dr. Baca-Morgan and Mr.
26 Jackson. The Court notes that the treatment reports from Dr. Baca-Morgan and Mr. Jackson indicate that Plaintiff's
27 condition worsened after this December 6, 2012 treatment note. Defendant also points to Plaintiff's hearing
28 testimony regarding Plaintiff's improvement on medication, but the ALJ did not cite to Plaintiff's hearing testimony
as a reason for rejecting Dr. Portnoff's opinion. Therefore, the Court does not consider this post hoc rationalization.

¹⁰ Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of
this circuit in accordance with FRAP 32.1. Ninth Circuit Rule 36-3(b); see Animal Legal Def. Fund v. Veneman,

1 GAF scores are relevant and may be considered by the ALJ in considering the claimant’s general
2 functional abilities. Graham v. Astrue, 385 F.App’x 704, 706 (9th Cir. 2010).

3 Here, the ALJ considered that Plaintiff’s treating providers had generally assessed him
4 with a GAF score between 61 and 66 which indicate only mild symptoms or some difficulties in
5 social, occupational or school functioning. (AR 25.) See also Macias v. Colvin, No. 1:15-CV-
6 00107-SKO, 2016 WL 1224067, at *7 (E.D. Cal. Mar. 29, 2016) (A GAF score of 61 to 70
7 indicates mild symptoms or some difficulty in social, occupational, or school functioning.)

8 Plaintiff was first seen for treatment on December 6, 2012, and was assessed with a GAF
9 of 60. (AR 416.) Plaintiff had some short term memory problems. (AR 416.) Plaintiff’s
10 comprehension was found to be good. (AR 416.) His general fund of knowledge was limited.
11 (AR 416.) Judgment was improving and insight was good. (AR 416.) Plaintiff reported that he
12 liked to talk to people and enjoys reading, but had anxiety, sadness, tearfulness, sleep
13 disturbances, and nightmares. (AR 416.)

14 On January 22, 2013, Plaintiff was assessed with a GAF of 65. (AR 443, 447.) On
15 February 15, 2013, Plaintiff attended group therapy and was assessed with a GAF of 61. (AR
16 437.) On March 4 and 8, 2013, Plaintiff attended group therapy and was assessed with a GAF of
17 65 and 66 respectively. (AR 432, 430.)

18 On November 18, 2013, Plaintiff reported feeling depressed and stuck in life. (AR 462.)
19 Plaintiff’s appearance was appropriate. (AR 462.) He was oriented to person, place, time and
20 situation. (AR 462.) His behavior and psychomotor behavior were unremarkable. (AR 462.)
21 Speech and affect were appropriate. (AR 462.) Plaintiff’s mood was depressed. (AR 462.)
22 Plaintiff’s memory was intact. (AR 462.) Sensorium was clear consciousness. (AR 462.)
23 Intellect was average. (AR 462.) Attention was distracted and recalling details of past. (AR
24 462.) Reasoning, impulse control, judgment and insight were fair. (AR 462.) Self-perception
25 was realistic; thought process was logical; and thought content was unremarkable. (AR 462.)
26 Plaintiff was assessed with a GAF of 61. (AR 463.)

27
28 490 F.3d 725, 733 (9th Cir. 2007) (“as of January 1, 2007, we must now allow parties to cite even unpublished
dispositions and unpublished orders as persuasive authority”).

1 On December 9, 2013, Plaintiff reported that he had been unable to refill his medication
2 because he had no insurance coverage. (AR 464.) He was having problems sleeping. (AR 464.)
3 Behavior and psychomotor behavior were unremarkable. (AR 465.) Speech and affect were
4 appropriate. (AR 465.) Mood was depressed. (AR 465.) Memory was intact. (AR 465.)
5 Sensorium was clear consciousness. (AR 465.) Intellect was average. (AR 465.) Attitude was
6 hopeful, discouraged and concerned about housing review of disability criteria. (AR 465.)
7 Plaintiff's attention was maintained. (AR 465.) Reasoning, impulse control, judgment and
8 insight were fair. (AR 465.) Thought process was logical and thought content was
9 unremarkable. (AR 465.) Plaintiff was assessed with a GAF of 61. (AR 465.)

10 Plaintiff was seen again on January 8, 2014 and reported that his symptoms were poorly
11 controlled and he was currently not able to fill his prescriptions because of coverage issues. (AR
12 471.) Examination results were unchanged although Plaintiff's attitude was hopeful and
13 cooperative. (AR 473-474.) Similarly, Plaintiff was seen on January 21, 2014 with no change
14 noted in his mental status. (AR 475-476.)

15 On February 12, 2014, Plaintiff was seen complaining that he was frustrated that he had
16 not been able to get his medications. (AR 482.) Plaintiff's mental examination was unchanged
17 and he was assessed with a GAF of 60. (AR 483.)

18 On March 10, 2014, Plaintiff was seen and stated that he has been calming down and
19 changes while frustrating and still upsetting were not as much. (AR 488.) He was sleeping
20 better on his medication. (AR 488.) Plaintiff had no change in his mental status on examination,
21 although his mood is described as irritable. (AR 488-489.) He was assessed with a GAF of 61.
22 (AR 489.)

23 On April 14, 2014, Plaintiff was seen with an improved mood. (AR 492.) Plaintiff
24 reported he was working with a friend in the recycling business and it felt good to be focused on
25 something else. (AR 492.) Plaintiff's mood was euthymic¹¹ and his attitude was cooperative
26 and hopeful. (AR 493.) Plaintiff was still taking some pills as needed for sleep at night. (AR
27

28 ¹¹ Moderation of mood, not manic or depressed. Stedman's Medical Dictionary 678 (28th Ed. 2006).

1 492.) He was noted to have a GAF of 61. (AR 493.)

2 On May 12, 2014, Plaintiff was seen for individual therapy and reported that he was
3 working almost daily with his friend helping in his recycling business and staying with his
4 routine. (AR 494-495.) Plaintiff was assessed with a GAF of 61. (AR 496.)

5 On July 17, 2014, Plaintiff had an initial examination with Dr. Morgan. (AR 498-503.)
6 He reported functioning as somewhat difficult and complaining of anxious, fearful thoughts,
7 depressed mood, difficulty falling asleep, diminished interest or pleasure, excessive worry,
8 fatigue, and loss of appetite. (AR 498.) Plaintiff reported that he was currently working about
9 15 hours per week in his friend's recycling business. (AR 500) He did not currently want
10 medication for his depression. (AR 500) On examination, Plaintiff's mood was mild depression.
11 (AR 503.) He had full affect; clear speech; and logical thought process. (AR 503.) Perception,
12 cognition, insight were within normal limits. (AR 503.) Plaintiff's ability to make reasonable
13 decisions was impaired, but his judgment was within normal limits. (AR 503.) Intelligence was
14 average. (AR 503.)

15 On August 19, 2014, Plaintiff reported not sleeping well despite air conditioner being on
16 at night. (AR 505.) He was having nightmares about family fights, his childhood and the
17 anniversary of his sister swindling him out of his home. (AR 505) Plaintiff was working a few
18 hours with a friend who recycles batteries with farmers. (AR 506.) Plaintiff was assessed with a
19 GAF of 60. (AR 506.)

20 On September 8, 2014, Plaintiff reported not sleeping well and having nightmares and
21 struggling with family memories. (AR 508.) He had missed work due to feeling down. (AR
22 508-509.) Plaintiff was assessed with a GAF 55. (AR 510.)

23 On September 25, 2014, Plaintiff reported having trouble sleeping for the past three days.
24 (AR 518.) He also reported that his boss was going to close the business. (AR 518.) Plaintiff
25 was assessed with a GAF of 52. (AR 520.)

26 On October 14, 2014, Plaintiff reported that he had been unable to find any side jobs
27 recycling due to a housing inspection. (AR 522.) He was feeling down with the holidays
28 coming up and a missing a friend who had been killed by the police. (AR 523.) Plaintiff was

1 assessed with a GAF of 52. (AR 524.)

2 While the ALJ gave significant to the Global Assessment of Function (“GAF”) scores
3 assessed by Plaintiff’s treating doctors and licensed social workers assessed finding them
4 generally consistent with the other evidence and the treatment reports which showed a logical
5 thought process with unremarkable thought content, and fair reasoning, impulse control, insight,
6 and judgment (AR 25), this was not the reason the ALJ provided to reject the opinion of Dr.
7 Portnoff. Rather the ALJ found that the record demonstrates that Plaintiff’s symptoms are
8 improving. However, review of the record demonstrates that Plaintiff presented for treatment
9 with a GAF indicating mild symptoms and the examination findings show some depression but
10 generally normal findings. However, around the time Plaintiff lost his job because the business
11 closed in September 2014, the record demonstrates that his GAF was assessed as 52 to 55
12 indicating “moderate symptoms or moderate difficulty in social, occupational, or school
13 functioning (e.g., few friends, conflicts with peers or coworkers).” Cornelison, 2011 WL
14 6001698, at 4 n.6 (citing American Psychiatric Association, Diagnostic and Statistical Manual
15 of Mental Disorders (“DSM–IV”), at 34). Therefore, the Court finds that substantial evidence
16 does not support the ALJ’s finding that the medical record demonstrates that Plaintiff’s
17 symptoms were improving.

18 The ALJ’s finding that Dr. Baca-Morgan and Mr. Jackson’s treatment reports show
19 Plaintiff’s condition was improving is not a specific and legitimate reason to reject Dr. Portnoff’s
20 opinion.¹² Accordingly, the Court finds that the ALJ erred by not providing specific and
21 legitimate reasons supported by substantial evidence for rejecting Dr. Portnoff’s opinion.

22 **b. Dr. Reinfurt’s Opinion**

23 Plaintiff argues that the ALJ did not provide specific and legitimate reasons for rejecting
24 Dr. Reinfurt’s opinion that Plaintiff would have difficulty managing a full workday with the
25 standard schedule of breaks. Plaintiff contends that Dr. Reinfurt’s opinion should receive the
26

27 ¹² Defendant contends that Plaintiff’s reported daily activities undermined the extreme opinions of Dr. Portnoff and
28 Dr. Reinfurt. However, the ALJ did not provide this as a reason for rejecting either of these opinions, and therefore,
the Court does not consider this reason provided by Defendant.

1 greatest weight because she examined Plaintiff, including objective cognitive function and
2 memory testing, and reviewed Dr. Portnoff's report and Plaintiff's mental health record.

3 Dr. Reinfurt performed a consultative examination at the request of the state agency on
4 July 1, 2013. (AR 450-453.) She administered objective testing of Plaintiff's cognitive
5 functioning and memory and reviewed Dr. Portnoff's report in November 2012 and a Core
6 Assessment for Fresno County Mental Health Plan dated December 2012. (AR 450-453.)
7 Plaintiff had clear and coherent speech and he was quite articulate with a vocabulary developed
8 beyond someone with his limited education and abusive history. (AR 451.) He appeared to
9 adequately understand Dr. Reinfurt's directions and comments. (AR 451.) His affect was mildly
10 blunted and congruent with underlying mood. (AR 451.) There was sadness in his tone when he
11 spoke of being completely alone in his world, but frustration tolerance was adequate. (AR 451.)
12 He was alert and oriented for person, place, time, and situation. (AR 451.) His autobiographical
13 information differed in some details from other assessments as to the length of his marriage and
14 the types of work that he had been engaged in. (AR 451.) Cognitive ability was low average to
15 average even though some test scores fell below this level and there was no evidence of
16 disordered thinking or bizarre ideation. (AR 451.) He had good attention and concentration, but
17 his actual processing of meaning from both auditory linguistic materials and visual information
18 was rather deficient and she believed that it is possible that the processing limitations relate to
19 the vascular event. (AR 451-452.)

20 Dr. Reinfurt diagnosed Plaintiff with vascular dementia, major depression, and PTSD.
21 (AR 452.) She opined that he should be able to recall and implement simple instructions. (AR
22 452.) However, more complex might pose a challenge, but he should be able to comply if
23 repeated and demonstrated. (AR 452.) Changes in routine should not be a problem if they are
24 explained, but consistency and routine at this point in his life would be therapeutic. (AR 452.)
25 His independent reasoning ability is limited at present. (AR 452.) She found that:

26 His depression, if not controlled, might limit his ability to work as might some of
27 the cognitive limitations involving information processing. Distortions and
28 confusion undermine functioning. On a one-to-one basis, [Plaintiff] is quite
personable. His descriptions of his programs imply that he appreciates structured
ways to connect with others. A history of abuse and perceived betrayal, however,

1 has left him wounded and wary and may create barriers with coworkers and
2 supervisors. For reasons just discussed, the examiner believes that, at the present
3 time, [Plaintiff] would have difficulty managing a full workday with the standard
4 schedule of breaks. He should be able to manage his money.

5 (AR 452.)

6 First, the ALJ rejected Dr. Reinfurt's opinion that Plaintiff would have difficulty
7 managing a full workday with the standard schedule of breaks at the time of the evaluation
8 because it is vague, conclusory, calls for speculation as to its intended meaning and scope, and it
9 is tentative. (AR 26.)

10 Plaintiff asserts that this is not a specific or legitimate reason to reject Dr. Reinfurt's
11 opinion because the ALJ did not explain why the significant findings during Dr. Reinfurt's
12 examination and Dr. Portnoff's examination, which Dr. Reinfurt reviewed, do not support Dr.
13 Reinfurt's finding. Plaintiff also contends that the opinion that Plaintiff has deficits in the ability
14 to manage a full workday with standard breaks is not vague because if an individual has a
15 significantly impaired ability to perform sustained work in a competitive environment, then he or
16 she is disabled. Defendant asserts that Dr. Reinfurt's and Dr. Portnoff's examination findings
17 contradict the opinion.

18 It is unclear what the basis is for Dr. Reinfurt's finding that Plaintiff would have
19 difficulty managing a full workday with the standard schedule of breaks. Dr. Reinfurt does not
20 explain how much of a problem Plaintiff would have managing a full workday. As the ALJ
21 found, this statement regarding difficulty managing a full workday with the standard schedule of
22 breaks calls for speculation as to what this means and the scope and it is vague. Further, as the
23 ALJ found this is inconsistent with the treatment records which indicate that Plaintiff has
24 improving judgment, good insight, full orientation, appropriate mood and affect, logical thought
25 process, unremarkable thought content, fair reasoning and impulse control and a cooperative and
26 helpful attitude. (AR 26-27, 416, 462-463, 464-465, 474, 475-476, 482-483, 488, 492-493, 495,
27 500, 503, 506.)

28 Therefore, the Court finds that the ALJ provided specific and legitimate reasons
supported by substantial evidence to reject Dr. Reinfurt's opinion.

1 **c. Dr. Aquino-Caro's Opinion**

2 Plaintiff asserts that the ALJ improperly rejected part of the opinion of Dr. Aquino-Caro,
3 a state agency reviewing physician. Plaintiff argues that the ALJ improperly rejected Dr.
4 Aquino-Caro's opinion that Plaintiff was moderately limited in his ability to respond
5 appropriately to changes in a work setting because he did not provide any reasons for the
6 rejection. Plaintiff also asserts that the ALJ impermissibly rejected other moderate limitations,
7 and did not even address them. Defendant asserts that the ALJ properly discounted the opinion
8 of Dr. Aquino-Caro for the same reasons the ALJ discounted the opinions of Dr. Portnoff and
9 Dr. Reinfurt. However, the ALJ did not provide this as a reason and the Court will not consider
10 this post hoc rationalization. The Court next reviews Dr. Aquino-Caro's opinion and the ALJ's
11 decision to determine if the ALJ impermissibly rejected parts of the opinion without providing
12 legally adequate reasoning.

13 The ALJ gave Dr. Aquino-Caro's opinion some weight and found that the opinion
14 supports a finding that Plaintiff is limited to simple, routine tasks. (AR 27.)

15 While Dr. Aquino-Caro found that Plaintiff had moderate limitations in understanding
16 and remembering detailed instructions, Dr. Aquino-Caro explained in the narrative form section
17 for specific understanding and memory limitations that Plaintiff retained the ability to do simple
18 tasks.¹³ (AR 79-80, 94-95.) In the sustained concentration and persistence section of the form,
19 Dr. Aquino-Caro found that Plaintiff was moderately limited in his ability to carry out detailed
20 instructions, maintain attention and concentration for extended periods, work in coordination
21 with or in proximity to others without being distracted by them, and complete a normal workday
22 and workweek without interruptions from psychologically based symptoms and perform at a
23 consistent pace without an unreasonable number and length of rest periods. (AR 80, 95.)
24 However, Dr. Aquino-Caro found in the narrative section for these sustained concentration and
25 persistence limitations that Plaintiff can do simple work. (AR 80, 95.) In the adaptation
26

27 ¹³ The Court notes that the mental residual function capacity assessment section on the forms that Dr. Aquino-Caro
28 filled out indicates that "the actual mental residual functional capacity assessment is recorded in the narrative
discussion(s) in the explanation text boxes." (AR 79, 94.)

1 limitations section, Dr. Aquino-Caro opined that Plaintiff is moderately limited in his ability to
2 respond appropriately to changes in the work setting, but in the narrative form section found that
3 Plaintiff can make plans and goals. (AR 80, 95.)

4 Each individual rating in the understanding and memory, sustained concentration and
5 persistence, and adaptation limitations section is subsumed in the narrative section for those
6 limitations. The narrative sections indicate that Dr. Aquino-Caro believes that Plaintiff can do
7 simple tasks, simple work, and make plans and goals. (AR 80, 95.) The ALJ found that Dr.
8 Aquino-Caro's opinion supports a finding that Plaintiff is limited to simple, routine tasks and the
9 RFC states that Plaintiff is limited to performing only simple, routine tasks. (AR 23, 27.)
10 Therefore, the Court finds that the ALJ properly considered Dr. Aquino-Caro's findings and
11 incorporated the findings into the RFC.

12 **d. Dr. Garland's Opinion**

13 Plaintiff asserts that the ALJ only gave limited weight to the opinion of Dr. Garland, but
14 rejected his opinion that Plaintiff had to work in settings with low social contact. Defendant
15 asserts that the ALJ properly discounted the opinion of Dr. Garland for the same reasons the ALJ
16 discounted the opinions of Dr. Portnoff and Dr. Reinfurt. However, the Court is constrained to
17 consider the reasons provided by the ALJ to reject a physician opinion.

18 Dr. Garland opined that Plaintiff was capable of meeting the basic mental demands of
19 competitive, remunerative, unskilled work on a sustained basis, particularly in settings of low
20 social contact. (AR 27, 129-131, 146-148.) The ALJ gave the opinion limited weight because it
21 is not fully consistent with the other evidence indicating that he has only mild limitations relative
22 to social interaction. The ALJ then provided examples of evidence in the record for this finding.
23 (AR 27.)

24 The ALJ pointed out that Plaintiff's social limitations are unsupported by treatment
25 reports which showed that he had a cooperative and helpful attitude and good insight with
26 improving judgment. (AR 27, 416, 473.) A December 6, 2012 Fresno County Mental Health
27 Plan assessment by LCSW Lois Ratzlaff notes that Plaintiff has good insight and improving
28 judgment. (AR 416.) On January 8, 2014, Mr. Jackson found that Plaintiff's attitude was

1 cooperative and hopeful. (AR 474.) Further, Plaintiff's attitude was hopeful, discouraged, and
2 concerned about a housing review of disability criteria on December 9, 2013, cooperative,
3 hopeful, and discouraged on January 21, 2014, cooperative and discouraged on February 12,
4 2014, hopeful on March 10, 2014, and cooperative and hopeful on April 14, 2014. (AR 476,
5 483, 489, 493.) There are treatment notes that Plaintiff had fair insight and judgment on
6 November 18, 2013, December 9, 2013, January 8, 2014, January 21, 2014, February 12, 2014,
7 March 10, 2014, and April 14, 2014. (AR 463, 465, 474, 476, 483, 489, 493.) Therefore,
8 inconsistency with the treatment notes is a specific and legitimate reason supported by
9 substantial evidence for rejecting Dr. Garland's low social contact limitation.

10 The ALJ also found that the low social contact limitation is inconsistent with Plaintiff's
11 testimony concerning his activities of daily living, such as socializing with other residents in his
12 building, riding the bus three to four times a week, and going shopping. (AR 27.) Plaintiff
13 testified that normally he goes downstairs and sits on the couches in the lobby of his building
14 during the morning. (AR 55.) He talks to people if they talk to him and he smiles at everybody,
15 but he does not get into lengthy communications. (AR 55-56, 65.) He also testified that he does
16 not have a vehicle, so he uses a city bus for transportation 3 to 4 times a week to go to the
17 grocery store and the doctor's office. (AR 42, 52.) These daily activities are inconsistent with
18 Dr. Garland's opinion that Plaintiff was limited to settings of low social contact. Therefore, the
19 Court finds that the inconsistency between Plaintiff's daily activities and Dr. Garland's opinion
20 regarding Plaintiff's tolerance of social interaction or contact is a specific and legitimate reason
21 supported by substantial evidence for rejecting Dr. Garland's opinion. Accordingly, the Court
22 finds that the ALJ provided specific and legitimate reasons to reject the opinion of Dr. Garland
23 that are supported by substantial evidence in the record.

24 C. Remand

25 Plaintiff argues that this matter should be remanded for the award of benefits or, in the
26 alternative, for further development of the record.¹⁴ Defendant contends that if the Court

27
28 ¹⁴ Plaintiff also notes in a footnote in the remedy section that the ALJ erred when finding Plaintiff could perform his past relevant work as a merchandise deliverer because this job requires a reasoning level of 3 and that level cannot

1 overturns the decision, the matter should be remanded for further administrative proceedings.

2 The ordinary remand rule provides that when “the record before the agency does not
3 support the agency action, . . . the agency has not considered all relevant factors, or . . . the
4 reviewing court simply cannot evaluate the challenged agency action on the basis of the record
5 before it, the proper course, except in rare circumstances, is to remand to the agency for
6 additional investigation or explanation.” Treichler v. Comm’r of Soc. Sec. Admin., 775 F.3d
7 1090, 1099 (9th Cir. 2014). This applies equally in Social Security cases. Treichler, 775 F.3d at
8 1099. Under the Social Security Act “courts are empowered to affirm, modify, or reverse a
9 decision by the Commissioner ‘with or without remanding the cause for a rehearing.’” Garrison,
10 759 F.3d at 1019 (emphasis in original) (quoting 42 U.S.C. § 405(g)). The decision to remand
11 for benefits is discretionary. Treichler, 775 F.3d at 1100. In Social Security cases, courts
12 generally remand with instructions to calculate and award benefits when it is clear from the
13 record that the claimant is entitled to benefits. Garrison, 759 F.3d at 1019.

14 The Ninth Circuit has “devised a three-part credit-as-true standard, each part of which
15 must be satisfied in order for a court to remand to an ALJ with instructions to calculate and
16 award benefits: (1) the record has been fully developed and further administrative proceedings
17 would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for
18 rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly
19 discredited evidence were credited as true, the ALJ would be required to find the claimant
20 disabled on remand.” Garrison, 759 F.3d at 1020. The credit as true doctrine allows “flexibility”
21 which “is properly understood as requiring courts to remand for further proceedings when, even
22 though all conditions of the credit-as-true rule are satisfied, an evaluation of the record as a
23 whole creates serious doubt that a claimant is, in fact, disabled. Id. at 1021. Even when the
24 circumstances are present to remand for benefits, “[t]he decision whether to remand a case for
25 additional evidence or simply to award benefits is in our discretion.” Treichler. 775 F.3d at 1102

26 be performed by an individual who is limited to simple routine tasks. The Court notes that the ALJ found that
27 “[a]lthough [Plaintiff] is capable of performing past relevant work, there are other jobs existing in the national
28 economy that he is also able to perform.” (AR 29.) Based on the VE’s testimony, the ALJ cited cooks helper, food
service worker, and industrial cleaner which are all SVP 2. The ALJ will have to reassess Plaintiff’s RFC on
remand, and therefore, the jobs that he is capable of performing may change.

1 (quoting Swenson v. Sullivan, 876 F.2d 683, 689 (9th Cir. 1989)).

2 While the Court cannot consider Defendant’s post hoc rationalizations in determining
3 whether the ALJ erred in rejecting the doctors’ opinions and Plaintiff’s testimony, these reasons
4 show that an evaluation of the record as a whole creates serious doubt that Plaintiff is disabled.
5 Plaintiff’s x-rays of his lumbar spine show mild to moderate degenerative changes. (AR 403,
6 540.) Plaintiff’s daily activities as stated in both his testimony and in the medical reports
7 indicate he may not be as disabled as he alleges and may also be relevant to the opinions of the
8 medical doctors.

9 While Plaintiff argues that if he is limited to sedentary work he is disabled under the
10 grids, the agency physicians opined that Plaintiff is capable of light work and this is an issue that
11 must be decided upon remand. Therefore, the Court finds that this case raises serious doubts as
12 to whether Plaintiff is in fact disabled within the meaning of the Social Security Act. Treichler,
13 775 F.3d at 1106.

14 The Court finds that this action must be remanded for the ALJ to properly consider
15 Plaintiff’s symptom testimony, to consider the medical evidence in determining Plaintiff’s RFC,
16 and to determine whether jobs exist in the national economy that Plaintiff can perform.

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1 V.

2 **ORDER**

3 Based on the foregoing, the Court finds that the ALJ erred in discrediting Plaintiff's
4 testimony, failing to provide specific and legitimate reasons to reject the opinion of Dr. Portnoff,
5 and, substantial evidence does not support Plaintiff's physical RFC. The Court finds that the
6 ALJ did not err in evaluating the opinions of Dr. Vesali, Dr. Reinfurt, Dr. Aquino-Caro, and Dr.
7 Garland.

8 Accordingly, IT IS HEREBY ORDERED that Plaintiff's appeal from the decision of the
9 Commissioner of Social Security is GRANTED IN PART and this action shall be remanded for
10 further proceedings consistent with this order. It is FURTHER ORDERED that judgment be
11 entered in favor of Plaintiff David Barrera and against Defendant Commissioner of Social
12 Security. The Clerk of the Court is directed to CLOSE this action.

13 IT IS SO ORDERED.

14 Dated: January 19, 2018



15 UNITED STATES MAGISTRATE JUDGE