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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
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11 MICHAEL ALAN MURRAY,

12 Plaintiff,

13 v.

14 COMMISSIONER OF SOCIAL
15 SECURITY,

16 Defendant.

Case No. 1:16-cv-01536-SAB

ORDER GRANTING PLAINTIFF'S SOCIAL
SECURITY APPEAL

(ECF Nos. 16, 17)

17 **I.**

18 **INTRODUCTION**

19 Plaintiff Michael Alan Murray ("Plaintiff") seeks judicial review of a final decision of the
20 Commissioner of Social Security ("Commissioner" or "Defendant") denying his application for
21 disability benefits pursuant to the Social Security Act. The matter is currently before the Court
22 on the parties' briefs, which were submitted, without oral argument, to Magistrate Judge Stanley
23 A. Boone.¹

24 Plaintiff suffers from status post left shoulder arthroscopy for impingement of rotator cuff
25 pathology with full range of motion, bipolar disorder, antisocial personality disorder, anxiety
26 disorder not otherwise specified with mixed anxiety and depressive symptoms. For the reasons
27

28 ¹ The parties have consented to the jurisdiction of the United States Magistrate Judge. (See ECF Nos. 11, 12.)

1 set forth below, Plaintiff's Social Security appeal shall be granted.

2 **II.**

3 **FACTUAL AND PROCEDURAL BACKGROUND**

4 Plaintiff protectively filed a Title XVI application for supplemental security income on
5 December 31, 2012. (AR 60; 157-165.) Plaintiff's application was initially denied on May 10,
6 2013, and denied upon reconsideration on November 25, 2013. (AR 87-91, 97-101.) Plaintiff
7 requested and received a hearing before Administrative Law Judge Andrew Verne ("the ALJ").
8 Plaintiff appeared for a hearing on April 15, 2015. (AR 26-59.) On July 13, 2015, the ALJ
9 found that Plaintiff was not disabled. (AR 7-21.) The Appeals Council denied Plaintiff's request
10 for review on August 11, 2016. (AR 1-3.)

11 **A. Relevant Hearing Testimony**

12 Plaintiff appeared with counsel and testified at a hearing on April 15, 2015. (AR 31-53.)
13 Plaintiff was born on May 13, 1981. (AR 31.) He is 6 feet tall and weighs 185 pounds. (AR 31-
14 32.) Plaintiff is left handed. (AR 32.) Plaintiff was married and has three children ages 13, 9,
15 and 3. (AR 32.) His children live with their mother, and Plaintiff has been living with his
16 grandparents and his mother for about a year. (AR 32.) Plaintiff worked part time for a while.
17 (AR 32.) He was homeless, living in the streets, and he had no choice. (AR 32.) Plaintiff does
18 not receive any public assistance because he is an ex-drug offender. (AR 33.)

19 Plaintiff does not have a driver's license because he was unable to pass the test although
20 he tried about six times. (AR 33.) He is not interested so he cannot remember the information.
21 (AR 33-34.) Plaintiff gets around by riding his bicycle. (AR 34.) Plaintiff is able to read and
22 write. (AR 34.)

23 Plaintiff completed the eleventh grade, but only received enough credits for the ninth
24 grade. (AR 35.) Plaintiff was in special education classes and had anger problems, problems
25 getting along with people, and problems concentrating. (AR 35.)

26 Plaintiff has spent about 10 of the last 15 years in jail. (AR 34.) His family picked him
27 up off the streets and is helping him. (AR 34.) Plaintiff has never worked longer than six
28 months at a job in his life. (AR 35.) He cannot hold a job and went to prison for hurting

1 someone at work. (AR 35.) Plaintiff was working on a production line and then got a promotion
2 to a peanut brittle cook at Blue Creek Foods in 2002. (AR 37.) He worked there for 30 days.
3 (AR 37.) He was doing a good job but he thought people were messing with him. (AR 38.)
4 Plaintiff thought they were urinating in his water and lunch so he whacked them in the head and
5 went to prison. (AR 35.) Plaintiff went to a substance abuse program in prison. (AR 35.) He
6 was kicked out three times. (AR 35.) He went into the hole and they did not want to give up on
7 him so they put him back in the program. (AR 35-36.) He was paroled and received a
8 certificate. (AR 36.) Plaintiff worked in the print shop for a while. (AR 36.) They wanted him
9 to get his GED but he was fighting and doing stuff in prison so he could not get it. (AR 36.)

10 Plaintiff also worked in 2004 and 2005 for As Is Insurance and Salvage Services of
11 America doing insurance claims repos. (AR 38.) He was working in the warehouse and
12 customer service for a bit, but then he went to prison. (AR 38.) They eventually went out of
13 business. (AR 38.) Plaintiff lied on his application stating that he had a diploma and a bunch of
14 stuff so they would hire him. (AR 39.) On his birthday, Plaintiff got a DUI and went to prison.
15 (AR 39.) He got drunk; there was a high speed chase and a wreck. (AR 39.)

16 Plaintiff is unable to work because he is schizophrenic, thinks people want to harm him,
17 and has ear problems. (AR 40.) Plaintiff has been seeing Dr. Garcia since he was released from
18 prison in 2010. (AR 41.) He also sees Dr. King at the same office. (AR 41-42.) Plaintiff sees
19 Dr. Vanek for his shoulder. (AR 42.) He has torn ligaments and structural damage because the
20 police beat him up. (AR 42.) Plaintiff also has problems with his legs and his toes are numb.
21 (AR 42.) He was stabbed eight times while he was in prison. (AR 42.)

22 Plaintiff was just in the hospital due to his heart racing. (AR 45.) He stayed overnight
23 and they said it was from his mental health condition. (AR 45.)

24 Plaintiff's shoulder is worse on the left side. (AR 49.) Plaintiff had surgery on April 28,
25 2014, but it was bad the whole time he was in prison, about two and a half years. (AR 49.) His
26 shoulder is worse since his surgery. (AR 50.) His right shoulder is also worse and he has not
27 had surgery on it. (AR 50.) He fired his specialist and he has not seen another specialist yet.
28 (AR 50.) It hurts Plaintiff to reach above his shoulders. (AR 50.) Anything that Plaintiff does

1 with his arms hurts, even gripping. (AR 51.) The physical therapist said that his grip on the left
2 was 60 to 65 percent compared to 110 on the right. (AR 51.) Everything Plaintiff does causes
3 him to have pain. (AR 51.) If Plaintiff reaches out in front of him his shoulder will pop and he
4 has pain. (AR 51.) Reaching above his head is worse than reaching in front of himself. (AR
5 52.)

6 A vocational expert (“VE”) Jose L. Chaparro also testified at the hearing. (AR 54-58.)

7 **B. ALJ Findings**

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

- 9 • Plaintiff has not engaged in substantial gainful activity since the application date of
10 December 31, 2012.
- 11 • Plaintiff has the following severe impairments: bipolar disorder, antisocial personality
12 disorder, anxiety disorder not otherwise specified with mixed anxiety and depressive
13 symptoms.
- 14 • Plaintiff does not have an impairment or combination of impairments that meets or
15 medically equals the severity of one of the listed impairments.
- 16 • Plaintiff has the residual functional capacity to perform a full range of work at all
17 exertion levels but with the following nonexertional limitations: Plaintiff is capable of
18 performing simple, repetitive tasks and is able to have occasional contact with the
19 public, coworkers, and supervisors.
- 20 • Plaintiff has no past relevant work.
- 21 • Plaintiff was born on May 13, 1981, and was 31 years old, which is defined as a
22 younger individual age 18-49, on the date the application was filed.
- 23 • Plaintiff has a limited education and is able to communicate in English.
- 24 • Transferability of job skills is not an issue because the claimant does not have past
25 relevant work.
- 26 • Considering Plaintiff’s age, education, work experience, and residual functional
27 capacity, there are jobs that exist in significant numbers in the national economy that
28 Plaintiff can perform.

1 Commissioner’s final decision for substantial evidence, and the Commissioner’s decision will be
2 disturbed only if it is not supported by substantial evidence or is based on legal error.” Hill v.
3 Astrue, 698 F.3d 1153, 1158 (9th Cir. 2012). “Substantial evidence” means more than a
4 scintilla, but less than a preponderance. Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996)
5 (internal quotations and citations omitted). “Substantial evidence is relevant evidence which,
6 considering the record as a whole, a reasonable person might accept as adequate to support a
7 conclusion.” Thomas v. Barnhart, 278 F.3d 947, 955 (9th Cir. 2002) (quoting Flaten v. Sec’y of
8 Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 1995)).

9 “[A] reviewing court must consider the entire record as a whole and may not affirm
10 simply by isolating a specific quantum of supporting evidence.” Hill, 698 F.3d at 1159 (quoting
11 Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006). However, it is not
12 this Court’s function to second guess the ALJ’s conclusions and substitute the court’s judgment
13 for the ALJ’s. See Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is
14 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be
15 upheld.”).

16 IV.

17 DISCUSSION AND ANALYSIS

18 Plaintiff contends that the ALJ erred at step 2 by finding that his left shoulder impairment
19 was not severe. Defendant counters that the ALJ properly evaluated the medical evidence and
20 found no impairment.

21 “An impairment or combination of impairments can be found ‘not severe’ only if the
22 evidence establishes a slight abnormality that has ‘no more than a minimal effect on an
23 individual[’s ability to work.’ ” Smolen, 80 F.3d at 1290 (citations omitted). Step two is a “de
24 minimis screening devise to dispose of groundless claims.” Id., 80 F.3d at 1290. An ALJ can
25 only find that claimant’s impairments or combination of impairments are not severe when his
26 conclusion is clearly established by medical evidence. Webb v. Barnhart, 433 F.3d 683, 687 (9th
27 Cir. 2005) (quoting S.S.R. 85-28). In considering an impairment or combination of impairments,
28 the ALJ must consider the claimant’s subjective symptoms in determining their severity.

1 Smolen, 80 F.3d at 1290.

2 Symptoms are not medically determinable physical impairments and cannot by
3 themselves establish the existence of an impairment. Titles II & XVI: Symptoms, Medically
4 Determinable Physical & Mental Impairments, & Exertional & Nonexertional Limitations, SSR
5 96-4P (S.S.A. July 2, 1996). In order to find a claimant disabled, there must be medical signs
6 and laboratory findings demonstrating the existence of a medically determinable ailment. Id.
7 “[R]egardless of how many symptoms an individual alleges, or how genuine the individual’s
8 complaints may appear to be, the existence of a medically determinable physical or mental
9 impairment cannot be established in the absence of objective medical abnormalities; i.e., medical
10 signs and laboratory findings. . . . In claims in which there are no medical signs or laboratory
11 findings to substantiate the existence of a medically determinable physical or mental impairment,
12 the individual must be found not disabled at step 2 of the sequential evaluation process.” Id.

13 At step 2, the ALJ found that Plaintiff’s alleged status post left shoulder arthroscopy for
14 impingement of rotator cuff pathology with full range of motion was not a severe impairment
15 because there was no evidence that the condition had more than a minimal effect on Plaintiff’s
16 ability to work. (AR 12.) The record did not contain evidence of functional limitations resulting
17 from the condition and Plaintiff has not required any significant treatment. (AR 12.)

18 Defendant argues that the ALJ noted that Plaintiff was stable and well controlled with his
19 medication and that he was not always compliant with his medication. However, these findings
20 were made in the context of Plaintiff’s mental health assessment. The only reason provided by
21 the ALJ to find that Plaintiff’s shoulder impairment was not severe was because it did not meet
22 the durational requirement.

23 Further, as discussed more fully below, Plaintiff presented evidence that after he injured
24 his shoulder he had surgery to repair a labrum tear in his shoulder; following surgery he
25 continued to complain of pain; there were objective findings of decreased range of motion and
26 tenderness; and a subsequent MRI indicated labrum tears in the shoulder. The ALJ erred by
27 finding that Plaintiff’s left shoulder impairment was not severe. However, any such error would
28 be harmless if the ALJ appropriately considered Plaintiff’s shoulder impairment in determining

1 his residual functional capacity at step 4. See Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007)
2 (any error considering impairment severe at step 2 is harmless where the ALJ considered the
3 limitations imposed by the impairment in determining the claimant's residual functional
4 capacity).

5 In determining Plaintiff's residual functional capacity, the ALJ considered that Plaintiff
6 reported left shoulder pain aggravated by lifting. (AR 15.) The medical record noted decreased
7 range of motion. (AR 15.) A left shoulder x-ray in August 2013 was normal. (AR 15.) Dr.
8 Vanek noted on September 10, 2013, that Plaintiff had left shoulder impingement status post fall
9 with possible rotator cuff pathology. (AR 15.) In February 2015, Plaintiff underwent a left
10 shoulder arthroscopy and had full range of motion with pain. (AR 15.)

11 An MRI of the left shoulder in April 2015 revealed mild impingement with degenerative
12 changes of the acromioclavicular joint, otherwise essentially negative. (AR 15.) Left shoulder
13 MRI revealed biceps tenosynovitis, changes of impingement and deformed anterior labrum with
14 minimal posterior labrum tear, not lasting 12 months. (AR 15.) Pursuant to the regulations an
15 impairment is disabling if it can be expected to last for a continuous period of not less than 12
16 months. (AR 15.)

17 Plaintiff concedes that at the time he was examined by Dr. Yusufzие on June 29, 2010, he
18 had no physical impairments. (Opening Brief 8, ECF No. 16.) Further, Plaintiff concedes that
19 even during the initial and reconsideration phase of the process he had no physical impairments.
20 (Id.) Plaintiff alleges that on August 5, 2013, he fell on his left shoulder. (Id. at 17.) Although
21 the record indicates that Plaintiff was working following his surgery (329, 390), the ALJ's based
22 his opinion on the medical evidence and found that Plaintiff had not met the duration
23 requirement for his shoulder impairment. Accordingly, the Court examines the record after
24 August 5, 2013, in considering whether the ALJ erred in finding that Plaintiff had not shown that
25 his left shoulder impairment would be expected to last a continuous period of not less than 12
26 months.

27 Plaintiff injured his shoulder on August 5, 2013. (AR 315.) The record notes that
28 Plaintiff's range of motion was decreased and he was having pain lifting his arm above his

1 shoulder and popping. (AR 321.) An October 24, 2013 MRI of his left shoulder indicated that
2 Plaintiff had a labrum tear. (AR 344.) By November 2013, Plaintiff had decreased range of
3 motion and popping in his shoulder secondary to the labrum tear. (AR 335.)

4 On January 21, 2014, Plaintiff's range of motion is described as significantly limited and
5 he underwent surgery for his left shoulder impingement on January 29, 2014. (AR 334, 337-
6 341.)

7 Following his surgery, Plaintiff did report increased range of motion and no or minimal
8 pain for the next few months. (AR 332, 333.) However, as Plaintiff increased his activity he
9 experienced increased pain and difficulty lifting at all levels due to the pain. (AR 337, 403.) In
10 May 2014, Plaintiff was noted to have pain lifting above the shoulder with popping, normal grip
11 strength, decreased range of motion, and shoulder tenderness. (AR 337.) On May 23, 2014,
12 Plaintiff reported difficulties lifting at all levels due to pain, and was found to have poor
13 scapular-humeral mechanics when he moved his arm in abduction indicating muscle trigger
14 points and weakness. (AR 403.)

15 In June 2014, Plaintiff had increased range of motion but was continuing to complain of
16 pain and examination revealed tenderness in all quadrants of the left deltoid muscle and AC
17 joint. (AR 331.)

18 By August 2014, Plaintiff was reporting popping of his shoulder when it reached 90
19 degrees, although he was found to have maintained his range of motion. (AR 330.) Plaintiff's
20 shoulder was tender to palpation. (AR 330.) Plaintiff reported that he had increased pain as he
21 was increasing his activity but that his medication was keeping him at ease so that he was able to
22 tolerate his every day activities and work. (AR 329.) Examination revealed full range of motion
23 but tenderness to palpation in all quadrants of his left shoulder. (AR 329.) Plaintiff received an
24 injection. (AR 329.)

25 On February 2, 2015, Plaintiff reported left shoulder pain that radiated to his neck, was
26 sharp, and was aggravated by lifting. (AR 382.) Plaintiff reported that his pain was worse after
27 he had been arrested and handcuffed. (AR 382.) Plaintiff was found to have decreased range of
28 motion and pain when lifting above the shoulder with popping, although grip strength was

1 normal. (AR 384.) On February 17, 2015, Plaintiff reported that he had full range of motion but
2 pain that was emanating from the left shoulder to the elbow and he also complained of right
3 shoulder pain. (AR 402.)

4 In March 2015, Plaintiff still reported full range of motion, but continued to report the
5 pain emanating to his elbow. (AR 328.) He reported that he was working at Dole Packing
6 House in Atwater. (AR 390.) He also reported that his shoulder was popping and his pain was
7 made worse by movement. (AR 395.) Examination revealed bilateral shoulder pain with
8 extension and abduction. (AR 397.)

9 An April 6, 2015 MRI of the left shoulder suggested that Plaintiff had anterior and
10 posterior labrum tears. (AR 407.)

11 The Court finds that review of the record does not support the finding that Plaintiff's left
12 shoulder impairment does not meet the durational requirement. Plaintiff injured his shoulder in
13 August 2013, and while he did have some improvement following his surgery in January 2014,
14 he has generally complained of pain with objective findings of pain. Further the April 6, 2015
15 MRI of Plaintiff's left shoulder suggested that he has labrum tears.

16 Plaintiff also argues that the failure to order a consultative examination is reversible error
17 in this case. Defendant argues that it is Plaintiff's burden to establish disability and the ALJ only
18 needs to develop the record where it is ambiguous. Here, Plaintiff's shoulder injury occurred
19 following the initial denial of Plaintiff's application, and the denial on reconsideration. The ALJ
20 found that Plaintiff retained the residual functional capacity to perform a full range of work at all
21 exertional levels. (AR 14.)

22 The ALJ has a duty to further develop the record where the evidence is ambiguous or the
23 ALJ finds that the record is inadequate to allow for proper evaluation of the evidence. Mayes v.
24 Massanari, 276 F.3d 453, 459-60 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1150
25 (9th Cir. 2001). A specific finding of ambiguity or inadequacy in the record is not required to
26 trigger the necessity to further develop the record where the record itself establishes the
27 ambiguity or inadequacy. McLeod v. Astrue, 640 F.3d 881, 885 (9th Cir. 2011). In this
28 instance, Plaintiff presented evidence to demonstrate that he has a severe shoulder impairment

1 and the ALJ pointed to no medical evidence opining as to Plaintiff's functional capacity due to
2 this impairment nor does the Court find such evidence in the record. This action shall be
3 remanded for further proceedings for the ALJ to solicit medical opinion addressing Plaintiff's
4 residual functional capacity with his left shoulder impairment.

5 V.

6 **CONCLUSION AND ORDER**

7 Based on the foregoing, the Court finds that the ALJ erred in determining that Plaintiff's
8 left shoulder impingement was not severe. Accordingly, IT IS HEREBY ORDERED that
9 Plaintiff's appeal from the decision of the Commissioner of Social Security is GRANTED and
10 this matter is remanded back to the Commissioner of Social Security for further proceedings
11 consistent with this order. It is FURTHER ORDERED that judgment be entered in favor of
12 Plaintiff Michael Alan Murray and against Defendant Commissioner of Social Security. The
13 Clerk of the Court is directed to CLOSE this action.

14 IT IS SO ORDERED.

15 Dated: November 7, 2017

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17 _____
18 UNITED STATES MAGISTRATE JUDGE