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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUSTIN CODY WILSON,
Plaintiff,

Case No. 1:16-cv-01861-SKO

v.

ORDER ON PLAINTIFF’S SOCIAL
SECURITY COMPLAINT

NANCY A. BERRYHILL,
Acting Commissioner of Social Security,¹
Defendant.

(Doc. 1)

I. INTRODUCTION

On December 12, 2016, Plaintiff Justin Cody Wilson (“Plaintiff”) filed a complaint under 42 U.S.C. § 1383(c) seeking judicial review of a final decision of the Commissioner of Social Security (the “Commissioner” or “Defendant”) denying his application for Supplemental Security Income (SSI). (Doc. 1.) The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Sheila K. Oberto, United States

¹ On January 23, 2017, Nancy A. Berryhill became the Acting Commissioner of the Social Security Administration. See <https://www.ssa.gov/agency/commissioner.html> (last visited by the court on February 27, 2017). She is therefore substituted as the defendant in this action. See 42 U.S.C. § 405(g) (referring to the “Commissioner’s Answer”); 20 C.F.R. § 422.210(d) (“the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant”).

1 Magistrate Judge.²

2 II. BACKGROUND

3 On October 31, 2011, Plaintiff filed a claim for SSI payments, alleging he became
4 disabled on February 25, 2011, due to bipolar disorder, “[b]roken ankles that have never healed,”
5 “leg problems,” depression, “[f]antasies about harming others,” and post-traumatic stress disorder
6 (PTSD).³ (Administrative Record (“AR”) 23, 25, 362, 385, 413–14, 445, 468.) Plaintiff was
7 born on August 28, 1988, and was 23 years old on the application date. (AR 46, 362.) Plaintiff
8 has a high school education, and worked in maintenance at a convalescent hospital between 2008
9 and 2011. (AR 28, 385–86.)

10 A. Relevant Medical Evidence

11 1. Treating Physician Mike Kifune, M.D.

12 On April 7, 2011, Plaintiff presented to Dr. Kifune with pain in his bilateral ankle and
13 depression. (AR 604–05.) With respect to his ankle, Plaintiff reported that his pain was
14 aggravated by movement, with decreased mobility, swelling, and weakness. (AR 604.) Plaintiff
15 also reported that it was “somewhat difficult to meet home, work, or social obligations” due to
16 social isolation and that his symptoms are aggravated by conflict or stress at work. (AR 604.) He
17 stated that Depakote made him “calmer, but also tired.” (AR 604.) Dr. Kifune’s assessment of
18 Plaintiff was that he had pain in his limbs and bipolar affect with depressed mood. (AR 605.)

19 Plaintiff presented for a follow up appointment on May 12, 2011, complaining of “aching
20 and sharp pain” in his left ankle. (AR 606–08.) Plaintiff also stated that his depression had
21 “improved,” but that he was still experiencing anxious, fearful thoughts, depressed mood, fatigue
22 or loss of energy, poor concentration, indecisiveness and restlessness or sluggishness. (AR 606.)
23 Plaintiff denied sleep disturbance. (AR 606.) Plaintiff also complained of worsening bilateral
24 knee pain. (AR 606.) On examination, Dr. Kifune observed Plaintiff had a flat affect, but was
25

26 ² The parties consented to the jurisdiction of a U.S. Magistrate Judge. (Docs. 4, 5.)

27 ³ Plaintiff previously received SSI benefits based on disability as a child. (AR 185.) On February 19, 2010, an
28 Administrative Law Judge (ALJ) concluded that Plaintiff’s disability ended on June 1, 2007, and that Plaintiff had
not become disabled against since that date. (AR 185–93.) Plaintiff does not challenge that decision here. On April
20, 2016, the ALJ found that Plaintiff alleged “new impairments” constituting “changed circumstances” since the
prior unfavorable decision, such that “the presumption of continuing nondisability does not apply.” (AR 20.)

1 negative for anhedonia, was not agitated or anxious, had no flight of ideas, and did not exhibit
2 compulsive behavior. (AR 607.) Plaintiff behaved appropriately for his age, had normal
3 knowledge, insight, judgment, and language, was not in denial, euphoric, or fearful, and did not
4 have memory loss. (AR 607.) Plaintiff denied hallucinations, paranoia, obsessive thoughts, and
5 suicidal ideation, but had mood swings and poor attention span and concentration. (AR 607.)

6 On July 1, 2011, Plaintiff complained of depression, musculoskeletal pain, and back pain.
7 (AR 609–11.) Although he experienced issues with extreme anger and irritability after going
8 without medication for four days, he reported “doing much better” after taking all of his
9 medication regularly. (AR 609.) Dr. Kifune observed Plaintiff had an irritable affect, but was
10 negative for anhedonia, and denied hallucinations, hopelessness, paranoia, obsessive thoughts,
11 suicidal ideation, and memory loss. (AR 610.) Plaintiff exhibited normal insight, attention span,
12 and concentration, but poor judgment. (AR 610.) He was not agitated, anxious, and did not
13 exhibit compulsive behavior. (AR 610.)

14 Plaintiff complained of left ankle pain and presented with the symptoms of a “major
15 depressive episode” on September 1, 2011. (AR 612–14.) Plaintiff reported that his medication
16 relieved his symptoms. (AR 612.) His overall appearance was “depressed,” but he was negative
17 for anhedonia and had no compulsive behavior or mood swings. (AR 613.) Plaintiff was not
18 agitated, anxious, or forgetful, but had poor attention span and concentration and poor judgment.
19 (AR 613.) Plaintiff had normal language, knowledge, and insight. (AR 613.) Dr. Kifune
20 prescribed Plaintiff Trazodone and Depakote. (AR 613.)

21 On October 13, 2011, Plaintiff reported that his depression symptoms were relieved by
22 “conversing.” (AR 615.) Plaintiff also complained of pain in his left ankle, which was relieved
23 by physical therapy. (AR 615.) Dr. Kifune observed Plaintiff had a flat affect, but was negative
24 for anhedonia. (AR 616.) Plaintiff was not agitated or anxious, and did not have pressured
25 speech or suicidal ideation. (AR 616.) He had normal insight, judgment, attention span and
26 concentration. (AR 616.)

27 Plaintiff’s depression had “improved” on December 14, 2011, and he reported his
28 symptoms were relieved by medication and he would be starting counselling that next month.

1 (AR 618.) He reported dealing with “some stress due to issues with his siblings.” (AR 618.)
2 Plaintiff had a flat affect, but was negative for anhedonia. (AR 619.) He was not agitated,
3 anxious, or fearful, and denied hallucinations, hopelessness, mood swings, obsessive thoughts,
4 and suicidal ideation. (AR 619.) He did not exhibit compulsive behavior. (AR 619.) Plaintiff
5 had normal knowledge, language, insight, and judgment, but had poor attention span. (AR 619.)
6 Plaintiff also complained of left ankle pain that radiated to his left knee, with aching and burning
7 pain that is aggravated by walking and standing. (AR 618.) Plaintiff denied crepitus and
8 limping. (AR 618.)

9 On December 21, 2011, Plaintiff underwent imaging studies of his left ankle. (AR 622.)
10 The studies showed “old posttraumatic and perioperative change related to healed fracture of the
11 fibula with hardware tracts in the tibia and fibula similar to the prior exam [on January 10, 2011
12 (AR 628)].” (AR 622.) No acute findings, spurring, or other degenerative change was shown.
13 (AR 622.)

14 Plaintiff attended his two-month follow up appointment with Dr. Kifune on February 14,
15 2012, at which he reported experiencing “depressed mood and thoughts of death or suicide.”
16 (AR 681.) Plaintiff also had “frequent issues with anger” of which he was not aware. (AR 681.)
17 On examination, Dr. Kifune observed Plaintiff had a normal affect and was not agitated, anxious,
18 forgetful, or fearful, and did not exhibit compulsive behavior. (AR 682.) Plaintiff had normal
19 knowledge, language, insight, judgment, attention span, and concentration, and behaved
20 appropriately for his age. (AR 682.) He denied hopelessness, mood swings, memory loss,
21 obsessive thoughts, paranoia, and suicidal ideation. (AR 682.)

22 On March 27, 2012, Plaintiff reported feeling “anxious, fearful thoughts, depressed mood
23 and thoughts of death or suicide and paranoia.” (AR 658.) He was also “[e]asily angered and
24 easily frustrated” and frequently had “very vivid dreams or nightmares.” (AR 658.) Plaintiff was
25 irritable with flat affect, but was not agitated or anxious, and behaved appropriately for his age.
26 (AR 659.) He denied hallucinations or flight of ideas, but had mood swings, paranoia, and poor
27 insight. (AR 659.) Plaintiff did not exhibit compulsive behavior. (AR 659.)

28 Plaintiff reported on April 24, 2012, that he “[s]till has occasional violent thoughts at

1 random intervals” that are “not driven by anything in particular.” (AR 655.) He admitted to
2 “fantasizing about hurting people at times,” but did not focus on anyone in particular. (AR 656.)
3 Dr. Kifune observed Plaintiff had an irritable affect, but was not agitated, anxious, forgetful, or
4 fearful. (AR 656.) Plaintiff had normal knowledge, language, insight, attention span,
5 concentration, and behaved appropriately for his age, but exhibited poor judgment. (AR 656.)
6 He denied hopelessness, mood swings, memory loss, paranoia, and suicidal ideation, but admitted
7 having obsessive thoughts. (AR 656.) Plaintiff reported on May 22, 2012, becoming “very
8 angry” whenever he forgot to take his medication, Depakote, and that his medication relieved his
9 symptoms. (AR 652.) Plaintiff reported his symptoms are “aggravated by conflict or stress at
10 home or work.” (AR 652.) He was diagnosed with post-traumatic stress disorder. (AR 653.)

11 On July 24, 2012, Plaintiff stated he felt counselling sessions have been “slowly helping
12 anger management,” and that he “[o]ccasionally has had thoughts of suicide but very rarely.”
13 (AR 648.) Plaintiff also complained of left ankle pain that is aggravated by movement and
14 relieved by rest. (AR 648.) He reported that his ankle continued to swell at times and feels
15 unstable. (AR 648.) On physical examination, Plaintiff had moderate swelling in his left lateral
16 ankle and reduced range of motion. (AR 650.) Plaintiff’s mental examination showed flat affect,
17 but no agitation, anxiety, forgetfulness, or fearfulness. (AR 650.) Plaintiff had normal
18 knowledge, language, insight, and judgment, but with poor attention span and concentration.
19 (AR 650.) He denied hopelessness, mood swings, memory loss, paranoia, obsessive thoughts,
20 and suicidal ideation. (AR 650.)

21 On August 7, 2012, Dr. Kifune completed an “Assessment of Ability to Do Work-Related
22 Activities (Mental)” form. (AR 693–94.) Dr. Kifune assessed Plaintiff with chronic and acute
23 PTSD, moderate to severe bipolar disorder, bilateral ankle damage, chronic back pain, and head
24 trauma, ruling out PTSD due to encephalopathy. (AR 693.) He noted Plaintiff had problems
25 with his occupation, finances, and social environment. (AR 693.) Dr. Kifune assigned Plaintiff a
26 current Global Assessment of Functioning (GAF) score of 47, and noted Plaintiff’s highest GAF
27 score from the past year was 50. (AR 693.)

28 Dr. Kifune opined Plaintiff had a seriously limited ability to no useful ability to relate to

1 co-workers, no useful ability to deal with the public, a seriously limited ability to no useful ability
2 to use judgment depending on the situation, and no useful ability to deal with work stressors.
3 (AR 693.) He opined Plaintiff had seriously limited but not precluded ability to follow work
4 rules, interact with supervisors, and to maintain attention and concentration. (AR 693.) Plaintiff
5 had a limited but satisfactory ability to function independently. (AR 693.) Dr. Kifune opined
6 Plaintiff would be absent from work two to three times a week due to his impairments or
7 treatment. (AR 694.)

8 According to Dr. Kifune, Plaintiff had a seriously limited ability to no useful ability to
9 understand, remember, and carry out complex job instructions, and a seriously limited ability to
10 do the same for detailed, but not complex, job instructions so long as they were written. (AR
11 694.) Dr. Kifune rated Plaintiff's ability to understand, remember, and carry out simple job
12 instructions as limited but satisfactory. (AR 694.) Dr. Kifune noted Plaintiff had a limited but
13 satisfactory ability to maintain his personal appearance. (AR 694.) Plaintiff's ability to behave
14 in an emotionally stable manner and to demonstrate reliability were rated as seriously limited but
15 not precluded. (AR 694.) Dr. Kifune opined Plaintiff had a seriously limited ability to no useful
16 ability to relate predictably in social situations. (AR 694.) He commented Plaintiff is "impulsive
17 and explosive," and noted that while working for Job Connections that prior year, Plaintiff had a
18 confrontation with a co-worker that resulted in Plaintiff yelling and walking off the job to avoid a
19 physical altercation. (AR 694.) Dr. Kifune also noted Plaintiff is "[f]earful of not having self-
20 control." (AR 694.)

21 Plaintiff reported on September 10, 2012, he stopped all medications the week prior due
22 to gastrointestinal upset. (AR 645.) He was prescribed Seroquel. (AR 647.) On September 17,
23 2012, Plaintiff exhibited the "symptoms of a major depressive episode." (AR 643.) He reported
24 Seroquel has caused "significant lethargy but has not helped anger issues." (AR 643.) Plaintiff
25 had a flat affect, but was negative for anhedonia. (AR 644.) He was not agitated, anxious, or
26 fearful, and denied hallucinations, hopelessness, mood swings, obsessive thoughts, and suicidal
27 ideation. (AR 644.) Plaintiff had normal knowledge, language, attention span, and
28 concentration, but had poor insight and judgment and "moderately impaired" short term memory.

1 (AR 644.) He did not exhibit compulsive behavior. (AR 644.) Dr. Kifune recommended
2 changing Plaintiff's medication to Seroquel-XR "in hope of slower release preparation not
3 causing as much sedation." (AR 644.) Dr. Kifune also noted he hoped to "see some
4 improvement in anger control with more time on the medication." (AR 644.)

5 On September 21, 2012, Plaintiff stated Seroquel was causing a worsening of his
6 symptoms, and he was prescribed Risperdal and Ativan instead. (AR 854-55.) Plaintiff's status
7 was improved on September 25, 2012, particularly his anger issues, which "improved
8 significantly with change in medication." (AR 852.) Plaintiff denied any medication side effects,
9 had a normal affect, and was not agitated, anxious, forgetful, or fearful. (AR 852-53.) Plaintiff
10 had normal knowledge, language, insight, judgment, attention span, and concentration. (AR
11 853.) He denied hopelessness, memory loss, obsessive thoughts, paranoia, and suicidal ideation.
12 (AR 853.) Dr. Kifune observed Plaintiff on November 26, 2012, as "gradual[ly] improv[ing]." (AR
13 846.) Plaintiff reported his current medications "have helped to control anger outbursts
14 better than prior [medications] without the sedation he had been experiencing." (AR 846.)
15 Plaintiff experienced suicidal ideation at times but had not acted on those thoughts in months.
16 (AR 846.)

17 On December 3, 2012, Dr. Kifune wrote a letter stating Plaintiff was seen primarily for
18 post-traumatic stress disorder and "a behavioral disorder which is poorly controlled by medical
19 therapy." (AR 704.) Dr. Kifune wrote that Plaintiff has been "unable to maintain stable
20 employment" and has been unemployed for several months "due to his inability to control his
21 anger and frustration." (AR 704.) With respect to Plaintiff's treatment, which "combines
22 medication and counseling," Dr. Kifune noted that Plaintiff "has been on several different
23 medical regimens with sub-optimal results." (AR 704.) Although Plaintiff's current medical
24 therapy seemed to afford him some improvement, Dr. Kifune noted Plaintiff's history that "any
25 improvement in behavior has not been long lasting." (AR 704.) Dr. Kifune opined that
26 counselling through behavioral health "needs to be a permanent part" of Plaintiff's treatment plan
27 and he did not "foresee a permanent resolution of [Plaintiff's] health problem." (AR 704.) Dr.
28 Kifune concluded that he supported Plaintiff's application for permanent disability. (AR 704.)

1 On December 26, 2012, Plaintiff reported his medications “continue to help,” although he
2 was still having “anger outbursts where he breaks things at home, and experiences nightmares
3 with significant sweating frequently.” (AR 843.) Plaintiff told Dr. Kifune on January 23, 2013,
4 he was experiencing more anxiety and stress as a result of his wife working more and having to
5 take care of the children by himself. (AR 840.) He indicated he was drinking more as a result.
6 (AR 840.) On examination, Dr. Kifune observed Plaintiff had an irritable affect, but was
7 negative for anhedonia. (AR 841.) Plaintiff was agitated, anxious, and exhibited poor judgment,
8 but had normal insight, attention span and concentration. (AR 841.)

9 Plaintiff’s status was worsening on March 6, 2013, and he had the symptoms of a “major
10 depressive episode.” (AR 831.) His symptoms were aggravated by traumatic memories. (AR
11 831.) Dr. Kifune noted that Plaintiff had a flat affect and was positive for anhedonia, but was not
12 agitated, anxious, forgetful, or fearful. (AR 832.) Plaintiff had normal knowledge, language,
13 insight, judgment, attention span, and concentration. (AR 832.) He denied hopelessness,
14 memory loss, hallucinations, paranoia, and suicidal ideation. (AR 832.). Plaintiff was also noted
15 as being “[c]onstantly concerned about bad things happening to his family” and “dwells on
16 physical abuse as a child.” (AR 832.)

17 On March 30, 2013, Plaintiff reported feeling “stressed consistently due to caring for his
18 children” and believed that two Lorazepam were “not as helpful as he would like,” yet he was
19 feeling “lethargic” and falling asleep at times during the day. (AR 828.) Dr. Kifune decreased
20 Plaintiff’s Risperidone dosage “due to lethargy” and increased his Lorazepam dosage for anxiety.
21 (AR 828.) Plaintiff stated on April 3, 2013, that he feels “very anxious and stressed at home
22 taking care of his children,” but he denied any “temper outbursts or physical violence.” (AR
23 825.) Plaintiff told Dr. Kifune he felt he needed “a little more sedation and help with sleep.”
24 (AR 825.) On April 24, 2013, Plaintiff’s status had improved, and he reported he had not had any
25 “significant emotional outbursts recently.” (AR 822.) He did note he had been “much more
26 sedated” as a result of the medication changes the prior month. (AR 822.)

27 On November 11, 2014, Dr. Kifune completed a “Physical Residual Functional Capacity
28

1 ["RFC"]⁴ Questionnaire" as Plaintiff's medical provider for "over four years." (AR 881–85.)
2 Dr. Kifune diagnosed Plaintiff with PTSD, anxiety, ankle pain, and low back pain. (AR 881.)
3 He noted that an x-ray showed a prior left ankle fracture. (AR 881.) Plaintiff's symptoms were
4 anger, insomnia, mood changes, and joint pain, while Dr. Kifune's clinical findings were
5 depression, irritability, memory loss, and anger. (AR 881.) Dr. Kifune responded Plaintiff's
6 emotional factors contributed to the severity of Plaintiff's symptoms and functional limitations,
7 including depression, anxiety, and psychological factors. (AR 882.) He opined Plaintiff's
8 experience of pain or other symptoms were severe enough to frequently interfere with attention
9 and concentration needed to perform even simple work tasks during a typical workday. (AR
10 882.) Stress was noted to be a "major factor" in bringing on Plaintiff's symptoms, and Dr.
11 Kifune opined that Plaintiff was incapable of even "low stress" jobs due to his "very significant
12 negative reaction to stress." (AR 882.)

13 Dr. Kifune opined that, if Plaintiff were placed in a "competitive work situation," Plaintiff
14 could walk two city blocks without rest, could sit for one hour at one time, could stand for 30
15 minutes at one time, could stand and walk less than two hours in an eight-hour workday, and
16 could sit for about two hours in an eight-hour workday. (AR 882–83.) According to Dr. Kifune,
17 Plaintiff required a job that permitted shifting positions at will from standing, standing, or
18 walking, and that Plaintiff sometimes needed to take unscheduled breaks of 15 to 30 minutes
19 every two to three hours of an eight-hour workday. (AR 883.) Plaintiff did not need a cane or
20 other assistive device to stand or walk. (AR 883.)

21 Dr. Kifune found that Plaintiff could occasionally lift 10 pounds and rarely 20 pounds.
22 (AR 884.) Plaintiff could rarely twist, stoop, crouch, and climb stairs, and could never climb
23 ladders. (AR 884.) He had no limitations in repetitive reaching, handling, or fingering. (AR
24 884.) Dr. Kifune opined that Plaintiff would likely be absent from work as a result of his

25 _____
26 ⁴ RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a
27 work setting on a regular and continuing basis of 8 hours a day, for 5 days a week, or an equivalent work schedule.
28 Social Security Ruling 96-8p. The RFC assessment considers only functional limitations and restrictions that result
from an individual's medically determinable impairment or combination of impairments. *Id.* "In determining a
claimant's RFC, an ALJ must consider all relevant evidence in the record including, inter alia, medical records, lay
evidence, and 'the effects of symptoms, including pain, that are reasonably attributed to a medically determinable
impairment.'" *Robbins v. Social Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006).

1 impairments more than four days per month. (AR 885.) According to Dr. Kifune, Plaintiff's
2 onset date of the opined limitations was "over [ten] years" ago. (AR 885.)

3 On December 12, 2014, at Dr. Kifune's request, additional imaging studies were
4 conducted of Plaintiff's ankle, which showed removed hardware and old healed fractures, but
5 otherwise "no unfavorable change" and "stable" results. (AR 902.) Imaging studies of Plaintiff's
6 lumbar spine were also performed that day, which showed normal bodies and disc spaces, normal
7 alignment, normal posterior elements and joints, normal soft tissue planes, and an overall
8 negative study. (AR 901.)

9 On December 8, 2015, Dr. Kifune wrote a letter in support of Plaintiff's application for
10 disability benefits, noting that Plaintiff has "significant emotional and psychiatric disability
11 stemming from past history of physical and emotional abuse." (AR 899.) Dr. Kifune wrote that
12 Plaintiff "suffers from bipolar disorder and post-traumatic stress and likely has a component of
13 organic brain syndrome as well." (AR 899.) Dr. Kifune concluded that he did "not feel Plaintiff
14 is employable as his social skills are almost non-existent." (AR 899.)

15 **2. Therapist Janet Black, L.C.S.W.**

16 On June 5, 2012, Plaintiff attended a therapy session with Ms. Black. (AR 738–40.) She
17 observed Plaintiff appeared to be "less guarded" with some anxiety and agitation. (AR 738.)
18 Plaintiff reported that he had not been taking his medication for two days due to stomach upset,
19 and then forgot to take them on the third day, when he accompanied his son on a school field trip.
20 (AR 738.) Plaintiff recounted that the field trip was "very overwhelming" and that he got "really
21 angry" at people there. (AR 738.) He was able to focus on his son and his friend, which "kept
22 [him] under control," but later at home he got into a "big argument" with his wife. (AR 738.)
23 Plaintiff also recounted to Ms. Black how he was upset with his mother that his sister was moving
24 in with her. (AR 738.) Ms. Black advised Plaintiff to continue to take his medications and to eat
25 crackers to help stomach upset. (AR 739.)

26 Plaintiff reported on June 19, 2012, "feeling better" but "kind of stressed" due to an
27 impending visit from his biological father. (AR 735.) He had "high hopes that it will go well."
28 (AR 735.) Plaintiff informed Ms. Black that he had a "really good father's day," on which he

1 went fishing with his family, and that he planned to take his kids swimming that next day. (AR
2 735.) Although Plaintiff reported that he was getting “frustrated” with parenting, Ms. Black
3 noted that “it appears [Plaintiff] does pretty well” with his kids. (AR 735.)

4 On June 26, 2012, Plaintiff presented with a “labile” mood. (AR 732.) He told Ms. Black
5 that he cannot visit his mother because he knows he’ll “get into it” with his sisters and their
6 boyfriends, whom he believes are just “using” his mom for a place to live. (AR 732.) Plaintiff
7 reported on July 11, 2012, “looking forward” to going camping, commenting that “I’ll be in the
8 woods fishing most of the time, it’ll be all good, plus my friends will be with me.” (AR 726.) He
9 also noted to Ms. Black that he was experiencing conflict in his marriage with respect to
10 intimacy, but that he “loves her [and] wants to make it work.” (AR 726.)

11 On July 19, 2012, Plaintiff presented to Ms. Black with “pressured speech” and was “very
12 interactive.” (AR 723.) He reported two incidents where he was able to walk away from an
13 altercation without physical violence. (AR 723.) Ms. Black noted that Plaintiff appeared to be
14 getting out into the public more recently. (AR 723.) Plaintiff also expressed the concern that his
15 two-year-old child is bipolar. (AR 724.)

16 Plaintiff saw Ms. Black for a therapy session on July 26, 2012. (AR 720–21.) He was
17 agitated, “irritable, tense, and tearful [at] times.” (AR 720.) He reported having had a “really bad
18 week,” being “really depressed” and “sleeping a lot.” (AR 720.) Plaintiff stated he was worried
19 about his mother, who informed him she had a blockage in her heart, and what he would do were
20 she to die. (AR 720.) Ms. Black observed that Plaintiff was “[v]ery dependent” on his mother
21 and took care of her. (AR 720.) Plaintiff indicated he planned to visit his best friend in the
22 coming weekend. (AR 721.)

23 On July 31, 2012, Plaintiff presented to Ms. Black “really stressed” due to the possibility
24 of losing his car insurance as a result of the payment being due the same day his wife receives her
25 “monthly money.” (AR 717.) Plaintiff reported on August 7, 2012, that while fishing in a boat
26 his left leg “went numb” such that he “couldn’t move it or anything.” (AR 706.) He told Ms.
27 Black he was in “a lot of pain” both in his legs in back, but nevertheless he “still had fun—it was
28 a good day.” (AR 706.)

1 Plaintiff presented as “less agitated” on October 2, 2012. He reported to Ms. Black that
2 the medications are “helping” but that he still stays away from people. (AR 803.) Plaintiff took
3 his kids swimming and “had a good time.” (AR 803.) He did “o.k.” taking care of the kids while
4 his wife was gone over the weekend working. (AR 803.) Plaintiff reported at his therapy session
5 on October 16, 2012, his wife is working weekends and as a result he has responsibility for his
6 children from 2:30 p.m. to 11:30 p.m. (AR 800.) He told Ms. Black that the responsibility it
7 “stressful” but he is “working on it.” (AR 800.) On November 6, 2012, Plaintiff reported that his
8 “new medications are working better than the [D]epakote.” (AR 794.)

9 On November 27, 2012, Ms. Black wrote a letter to Plaintiff’s attorney. (AR 696.) In it,
10 Ms. Black stated that she has seen Plaintiff for approximately 25 sessions since May 8, 2012.
11 (AR 696.) She reported that Plaintiff “continues to struggle with symptoms of Post-Traumatic
12 Stress Disorder,” including difficulty falling and staying asleep, “severe nightmares and terrors.”
13 (AR 696.) Plaintiff wakes up “totally wet from sweating so much during a nightmare (or terror
14 incident).” (AR 696.) Ms. Black wrote that Plaintiff “has had multiple traumatic events in his
15 life since young childhood,” including experiencing a “severe head injury at age 5 or 6” and other
16 head traumas as a teenager as a result of “wresting, physical [altercations].” (AR 696.)

17 Ms. Black wrote of Plaintiff’s statement that he was “expelled from all the schools in
18 every district in Calaveras County” because teachers and janitors “couldn’t handle [him] being
19 open with [his] thoughts.” (AR 696.) Plaintiff did ultimately receive a diploma through adult
20 education at age 18 or 19 years old, but “[n]o class work or attendance was required,” and there
21 was “not much communication between teacher and [Plaintiff],” which is why he was able to
22 accomplish it. (AR 696.) Ms. Black wrote that Plaintiff “appears to have increased difficulty
23 being in public, in a crowd or a group of people.” (AR 697.) He “[h]as a lot of difficulty with
24 trust and is fearful that something is going to happen,” and “[w]hen he feels threatened or his
25 family is threatened, he will act accordingly to protect them,” which “explains the Intermittent
26 Explosive Disorder.” (AR 697.) Ms. Black noted that Plaintiff “is very loyal and focused on
27 protecting his family,” which is “[p]ossibly due to the traumatic experiences in his childhood.”
28 (AR 697.)

1 Ms. Black diagnosed Plaintiff on Axis I with post-traumatic stress disorder, major
2 depressive disorder, dysthymia, intermittent explosive disorder, and dyscalculia. (AR 697.)
3 Plaintiff's Axis II diagnosis was mixed personality disorder, and he was assigned a GAF score of
4 50. (AR 697.) Ms. Black observed Plaintiff "struggles when he is around people other than his
5 family," and opined that "between the PTSD and the Major Depression, he is unable to work in
6 any type of occupation." (AR 697.) She stated that Plaintiff's "symptoms interferes with his
7 learning and retention of new information and his hypervigilance and increased worrying about
8 being safe prevents him from focusing and staying on task to complete any task consistently."
9 (AR 697.) Ms. Black concluded by writing "I appreciate you also considering my perception in
10 his case to support that [Plaintiff] meets the diagnostic criterion for Federal Disability." (AR
11 697.)

12 On December 18, 2012, Plaintiff presented to his therapy session with Ms. Black as
13 "happy." (AR 773.) He reported that it was his daughter's third birthday and "we're all excited."
14 (AR 773.) Plaintiff commented that he had had "a pretty good week." (AR 773.) On January
15 15, 2013, Plaintiff reported having "intense dreams" again and feeling unable to be a good father.
16 (AR 767.) He also reported that his wife had increased her work days to four days a week, which
17 would "affect the rent and cash aid." (AR 768.) Plaintiff told Ms. Black that his "sleeping pill
18 isn't strong enough." (AR 768.)

19 Plaintiff was "tired and tearful" on January 22, 2013. (AR 764.) He reported having
20 more difficulty parenting now that his wife was working four days a week and being afraid of
21 "not knowing what to do with the kids if something happens." (AR 764.) Plaintiff told Ms.
22 Black that he "had to take a couple of shots" of alcohol at noon one day "to feel right" and that he
23 had been drinking every day. (AR 764.) Plaintiff reported that his "meds aren't working as
24 well." (AR 765.) On February 5, 2013, Plaintiff presented to Ms. Black as more rested and less
25 agitated. (AR 758.) He reported that his new medication schedule was "better" and that he was
26 "getting more comfortable" taking care of his children. (AR 758.)

27 Plaintiff presented to Ms. Black on February 26, 2013, as "very tired," "robotic like," and
28 "guarded" at times. (AR 755.) He reported taking his morning dosage of Risperidone and

1 Lorazepam and it made him “very sleepy.” (AR 755.) Plaintiff noted that although the kids
2 “wear [him] out,” he’s “getting better” at parenting, yet he still worries what he would do if there
3 were an accident, as he has no cell phone or car to transport the children to the hospital. (AR
4 755.) He reported spending time with his older sister and her children and going to a movie with
5 his wife, which “helped his attitude a little bit.” (AR 755.)

6 On April 9, 2013, Plaintiff reported to Ms. Black that his wife broke her wrist while
7 jumping a fence, causing her to work the “graveyard shift,” which was “easier” on him. (AR
8 745.) He told Ms. Black he was “[g]etting used to being a single parent,” and that recently he had
9 been around other people with only some, but “not much,” anxiety. (AR 745.) On November 18,
10 2013, Ms. Black wrote that she had referred Plaintiff to John Tim Rourke, Ph.D. to assist with
11 treatment and to “assist with [Plaintiff’s] appeal” of his denial of disability benefits. (AR 874.)

12 On November 11, 2014, Ms. Black completed a “Mental Impairment Questionnaire” co-
13 signed by Dr. Kifune. (AR 876–80.) Plaintiff was diagnosed on Axis I with “postconcussion
14 [sic] syndrome” and post-traumatic stress disorder. (AR 876.) Plaintiff’s Axis II diagnosis was
15 narcissistic personality disorder, and he was diagnosed on Axis III with a head injury and “back
16 and leg issues.” (AR 876.) Plaintiff was assigned a GAF score of 53. (AR 876.) Plaintiff was
17 listed as having been prescribed Risperidone, Lorazepam, Abilify, Trazodone, Hydrocodone, and
18 Ibuprofen, and was noted as compliant with his treatment and responding appropriately. (AR
19 876.) Noted side-effects from the medication were dizziness or drowsiness at times. (AR 876.)
20 Plaintiff’s prognosis was rated as “poor” due to “severity of head trauma.” (AR 876.) Plaintiff’s
21 symptoms were noted as including anhedonia, decreased energy, feelings of guilt, impaired
22 impulse control, generalized persistent anxiety, mood disturbance, difficulty thinking or
23 concentrating, recurrent obsessions or compulsions, emotional withdrawal, hyperactivity,
24 emotional lability, flight of ideas, vigilance and scanning, pressured speech, easy distractibility,
25 and sleep disturbance with nightmares and night sweats. (AR 877.)

26 Plaintiff was not noted as having a “low IQ or reduced intellectual functioning.” (AR
27 878.) He had moderate limitation in activities of daily living and marked limitation in
28 maintaining social functioning. (AR 878.) Plaintiff’s concentration, persistence, and pace were

1 moderately to markedly limited, in that he needed to write down what he needed to do every day.
2 (AR 878.) He was noted to have four or more repeated episodes of decompensation with a 12
3 month period, each of at least two weeks' duration, but later was noted to have only three
4 episodes within 12 months lasting only hours. (AR 879.) It was estimated Plaintiff would be
5 absent from work more than four days per month as a result of his impairments. (AR 879.)
6 Other limitations noted were that Plaintiff reports his "legs give out" and he is "not able to
7 maintain momentum." (AR 880.) It was recommended that Plaintiff be referred to a neurologist
8 for his complaints of numbness in his feet and legs and "sharp pain" in his lower back. (AR 880.)

9 In February 2016, Ms. Black wrote that Plaintiff's behaviors have "become more
10 aggressive within the past [five] months" and that six months ago he was "overwhelmed and
11 depressed" due to his wife having had surgery for cancer and a wildfire causing his evacuation
12 from his home. (AR 906.) According to Ms. Black, Plaintiff reported feeling "more tired and
13 angry" since "changes" in his medications, and that he and Dr. Kifune were working together to
14 get his medications "more balanced with the goal of decreasing adverse reactions." (AR 906.)

15 3. State Agency Physicians

16 On February 24, 2012, A. Nasrabadi, M.D., a state agency physician, reviewed the record
17 and assessed Plaintiff's physical RFC. (AR 199–200.) Dr. Nasrabadi and found that Plaintiff
18 could (1) occasionally lift and/or carry 10 pounds and frequently 10 pounds; (2) stand and/or
19 walk for four hours in an eight-hour workday; (3) sit for about six hours in an eight-hour
20 workday; and (4) perform unlimited pushing/pulling with the upper and lower extremities,
21 subject to the lift and carry restrictions. (AR 199–200.) Dr. Nasrabadi found that Plaintiff had no
22 other limitations. (AR 200.) Upon reconsideration on October 24, 2012, another state agency
23 physician, J. Linder, M.D., reviewed the record and affirmed Dr. Nasrabadi's findings. (AR 210,
24 212–213.)

25 On October 31, 2012, medical consultant John Harper, M.D., completed a "Review of
26 Physical Residual Functional Capacity Assessment" form, in which he agreed with the
27 conclusions reached by Drs. Nasrabadi and Linder. (AR 678–79.) Specifically, Dr. Harper found
28 that the limitations opined by Drs. Nasrabadi and Linder were "reasonable and supported by

1 evidence in the file,” that the physicians “discussed alleged or documented symptoms and
2 assessed symptom-related limitations,” and that they “discussed all relevant treating or examining
3 source statements.” (AR 678.)

4 State agency physician R.E. Brooks, M.D., reviewed the record and assessed Plaintiff’s
5 mental RFC on February 27, 2012. (AR 200–202.) Dr. Brooks opined that Plaintiff was capable
6 of performing simple, repetitive, tasks with no public contact. (AR 202.) Upon reconsideration
7 on October 26, 2012, another state agency physician, A. Garcia, M.D., reviewed the record and
8 affirmed Dr. Brooks’ findings. (AR 210, 214.)

9 On October 31, 2012, psychiatric medical consultant R. Warren, M.D., completed a
10 “Review of Mental Residual Functional Capacity Assessment” form, in which he found that
11 Plaintiff has the ability to: understand and remember simple instructions; attend and concentrate
12 for periods of two hours as is required in the workplace; interact appropriately with peers and
13 supervisors; adapt to routine workplace changes. (AR 676–77.)

14 **4. Consultative Examiner John Tim Rourke, Ph.D.**

15 On November 26, 2012, psychologist Dr. Rourke authored a report detailing his
16 examinations of Plaintiff that took place for approximately five hours on October 19 and
17 November 3, 2012, at the recommendation of Dr. Kifune and Ms. Black. (AR 698–702.)
18 Plaintiff was noted to have “social apprehension and neuromuscular signs of tension in social
19 settings and apprehension in verbal communication.” (AR 699.) He demonstrated “repeated
20 difficulty with self-doubt, sadness, and frustration,” symptoms that Dr. Rourke observed were
21 “highly suggestive of depression.” (AR 699.) Dr. Rourke noted Plaintiff’s reports of growing up
22 in a “difficult family situation” and was exposed to domestic violence. (AR 699.) Dr. Rourke
23 observed that “[s]igns and suggestion of anxiety are severe.” (AR 699.) He noted that Plaintiff
24 had difficulty with times tables and division indicative of dyscalculia. (AR 699.) Dr. Rourke
25 also noted that Plaintiff’s apparent “traumatic open head injury” sustained when he hit his head
26 on a mental trampoline frame also further “complicat[es] the clarification of [Plaintiff’s]
27 subjective distress and dysfunction.” (AR 699.)

28 On mental status examination, Plaintiff was grossly oriented to person, place, times, and

1 situation. (AR 700.) He was “pleasant and cooperative” and his appearance “unremarkable.”
2 (AR 700.) Dr. Rourke observed Plaintiff was “guarded” with “flattened affect” and his speech
3 soft and slightly slurred. (AR 700.) Plaintiff’s mood was “mildly sullen” and “slightly
4 dysphoric” suggesting dysthymia. (AR 700.) He denied hallucinations and his sensorium was
5 “seemingly realistic.” (AR 700.) Dr. Rourke noted Plaintiff’s short-term memory was mildly to
6 moderately impaired and “no distinct episodes of anger or mood lability were directly observed.”
7 (AR 700.) Plaintiff denied personal chemical dependency. (AR 700.)

8 Dr. Rourke found the results of Plaintiff’s neuropsychological testing suggested
9 “problems with short-term memory retentional process, impulsivity and impairments of
10 sequencing that interfere with [Plaintiff’s] adaptive problem solving.” (AR 700.) Plaintiff’s
11 arithmetic calculation scores “demonstrated a significant level of impairment suggesting a
12 dyscalculia learning disorder.” (AR 700.) Plaintiff performed adequately on the Bender Visual
13 Motor Gestalt Test, but it showed “mild grapho-motor impairment consistent with his anxiety
14 findings.” (AR 700.) Dr. Rourke observed indications of “mild simplification, impulsivity and
15 collision tendency” in Plaintiff’s record, and noted a “mild organic impairment was suggested
16 beyond the previously mentioned anxiety signs.” (AR 700.) Testing criterion for the diagnosis
17 of AD/HD was not found, but the results were positive for impulsivity and aggressive proneness.
18 (AR 701.)

19 Dr. Rourke also found Plaintiff had the indications for a “mild, yet pervasive organic
20 impairment effecting visual reproduction, cognitive switching and sequencing,” and noted that
21 Plaintiff suffered from “marked emotional impairment” in both depression and anxiety relative to
22 past life trauma. (AR 701.) Plaintiff was noted as being “moderately depressed (non-suicidal)
23 and severely anxious.” (AR 701.) Dr. Rourke deemed Plaintiff “behaviorally and emotionally
24 compromised by this behavioral disinhibition like condition,” which in his opinion “produces
25 profound and negative effects on [Plaintiff’s] self-perception, ability to socially affiliate and
26 overall sense of emotional security and safety.” (AR 701.)

27 Dr. Rourke assessed Plaintiff Axis I diagnoses of chronic post-traumatic stress disorder,
28 moderate major depressive disorder, dysthymia, intermittent explosive disorder, and suggested

1 dyscalculia. (AR 701.) Plaintiff was diagnosed on Axis II with mixed personality disorder with
2 severe avoidant and dependent symptoms, and suggested, but not documentarily confirmed
3 medically, post traumatic encephalopathy on Axis III. (AR 701.) Dr. Rourke assigned Plaintiff a
4 GAF score of 50. (AR 702.)

5 Dr. Rourke concluded Plaintiff was “seen as manifesting moderate to severe levels of
6 acute and chronic depression as well as severe levels of anxiety (both in the form of social
7 apprehension and trauma related anxiety).” (AR 702.) He recommended further medication
8 management, found that a mathematic learning disorder was “indicated,” and noted that a
9 diagnosis of an organic mental disorder could not medically confirmed, despite Plaintiff
10 manifesting possible symptoms. (AR 702.) Dr. Rourke found Plaintiff’s prognosis was
11 “guarded” due to the “intensity and severity of his subjective distress and objective behavioral
12 dyscontrol.” (AR 702.) He opined that Plaintiff’s level of distress and dysfunction is sufficient
13 to expect that he will not meaningfully improve sufficiently for gainful employment for at least a
14 year, and that his level of impairment is such that Dr. Rourke “sees [Plaintiff] as meeting the
15 diagnostic criterion for federal disability.” (AR 702.)

16 **5. Consultative Examiner Les P. Kalman, M.D., Psy.D.**

17 Psychiatrist Dr. Kalman reviewed Plaintiff’s medical records and performed a
18 psychological evaluation of Plaintiff on October 25, 2013. (AR 863–67.) Plaintiff complained of
19 suicidal thoughts, depression, PTSD, and anxiety. (AR 863.) He reported being beaten by his
20 mother’s boyfriends until the age of 12 and had flashbacks and nightmares of those events. (AR
21 863.) Plaintiff acknowledged feelings of worthlessness, helplessness, and suicidal thoughts. (AR
22 863.) He described his symptoms of “borderline personality with self injurious behavior, quick to
23 anger, moody, agitated, with chronic empty feelings.” (AR 863.)

24 Plaintiff completed high school through a continuation program, and claimed he was
25 expelled from regular school because “I couldn’t handle my mood and attitude.” (AR 864.) He
26 had “a lot of outbursts, fights, and was a slow learner.” (AR 864.) Plaintiff denied drug use but
27 admitted to drinking as recently as the night before, when he consumed five shots of rum. (AR
28 864.) Dr. Kalman assessed Plaintiff’s medical history as status post fractured ankles, left leg with

1 screws in it from a skateboard accident and status post head injury with post concussive
2 syndrome. (AR 864.)

3 Upon mental status examination, Plaintiff was cooperative, his speech was of average rate
4 and volume, and his eye contact was good. (AR 864.) He was alert and oriented to person, place,
5 and situation, but did not know the date. (AR 864.) He was able to recall one of three objects at
6 five minutes, to repeat four digits forward and three backward, to perform “serial 3’s” with no
7 errors, to add, subtract, and multiply, and to recall one of the past five presidents. (AR 864–65.)
8 Dr. Kalman rated Plaintiff’s intelligence at below average. (AR 864.) Plaintiff’s abstractions
9 were intact, but he had poor insight into his mental illness and his judgment was poor. (AR 865.)
10 Dr. Kalman noted that Plaintiff’s “poor performance on the cognitive functioning scale may in
11 part be due to the head trauma which he suffered in early childhood.” (AR 865.)

12 Dr. Kalman observed Plaintiff’s mood was depressed and his affect “constricted.” (AR
13 865.) Plaintiff admitted to suicidal thoughts and denied homicidal thoughts. Plaintiff’s form of
14 thought was logical and goal directed, with no loose assertions, mood swings, or emotional
15 lability. (AR 865.) Plaintiff did not report any hallucinations, but he “readily acknowledged”
16 paranoid feelings. (AR 865.) With respect to present daily activities, Plaintiff reported that he
17 does not do his own shopping, cooking, or housekeeping, tries to avoid crowds, cannot manage
18 his own transportation, and does not pay his own bills. (AR 865.) Plaintiff reported that he is
19 capable of caring for his own personal hygiene. (AR 865.) According to Plaintiff, he is
20 estranged from his family and has one friend. (AR 865.) Plaintiff reported that on a typical day
21 he smokes cigarettes, picks up kids, watches television, and feels like something bad will happen
22 if he goes outside. (AR 865.)

23 Dr. Kalman diagnosed Plaintiff on Axis I with schizoaffective disorder, post-traumatic
24 stress disorder, cognitive disorder (status post head trauma), and alcohol abuse. (AR 866.)
25 Plaintiff’s Axis II diagnosis was borderline personality disorder, and he was assigned a GAF
26 score of 50. (AR 866.) Dr. Kalman concluded Plaintiff’s condition was not expected to improve
27 significantly in the next 12 months, and that he was not competent to manage his own funds.
28 (AR 866.)

1 Dr. Kalman found Plaintiff had markedly limited ability to: understand, remember, and
2 carry out detailed (3 or more steps) instructions or tasks; work in coordination with or in
3 proximity to others without being unduly distracted by them; and get along with coworkers or
4 peers without distracting them or exhibiting behavioral excesses. (AR 868–70.) Plaintiff had
5 moderate limited ability to: maintain attention and concentration for extended periods; perform
6 activities within a schedule, maintain regular attendance, and be punctual within customary
7 tolerances; complete a normal workday and workweek without interruptions from
8 psychologically based symptoms, and perform at a consistent pace without an unreasonable
9 number and length of rest periods; ask simple questions or request assistance from supervisors;
10 and set realistic goals or make plans independently of others. (AR 868–70.) Dr. Kalman opined
11 Plaintiff had mild limitations in his ability to: remember locations and work-like procedures;
12 sustain an ordinary routine without special supervision; make simple work-related decisions;
13 respond appropriately to expected and unexpected changes in the work setting; and travel in
14 unfamiliar places or use public transportation. (AR 868–70.) Plaintiff’s ability to interact
15 appropriately with the general public or customers and to accept instructions and respond
16 appropriately to criticism from supervisors was extremely limited. (AR 868–70.) Plaintiff had
17 no significant limitation in his ability to: understand, remember, and carry out very short and
18 simple repetitive instructions and tasks; maintain socially appropriate behavior, and to adhere to
19 basic standards of neatness and cleanliness; and be aware of normal hazards and take appropriate
20 precautions. (AR 868–70.)

21 Dr. Kalman found the following “work-related stressors” would “increase the level of
22 impairment” beyond that which he had already identified: unruly, demanding, or disagreeable
23 customers, even on an infrequent basis; production demands or quotas; a demand for precision;
24 and a need to make accurate, independent decisions in problem solving on a consistent basis.
25 (AR 870.) A routine, repetitive, simple, entry-level job was not deemed to be a stressor for
26 Plaintiff. (AR 870.) He opined Plaintiff would likely be absent from work as a result of his
27 impairments five days or more a month. Dr. Kalman also found that Plaintiff would likely be
28 unable to complete an eight-hour workday five days or more a month. (AR 870.)

1 On March 13, 2015, Plaintiff underwent a second consultative psychological evaluation
2 with Dr. Kalman. (AR 887–90.) Dr. Kalman observed Plaintiff’s posture and gait were normal
3 and there were no involuntary movements noted. (AR 887.) Plaintiff complained of “[j]ust
4 everyday life, bad thoughts.” (AR 863.) He reported having suicidal thoughts since he was little
5 and that he made attempts but was never hospitalized. (AR 887.) Plaintiff also reported auditory
6 and visual hallucinations, including “seeing signs of animals that are not there.” (AR 887.)
7 According to Plaintiff, he stopped working in 2008 due to “depression and the inability to
8 function.” (AR 888.) He was jailed once for assault. (AR 888.) Plaintiff reported drinking two
9 shots of Bacardi every other day. (AR 888.) Upon mental status examination, Plaintiff was
10 cooperative, his speech was of average rate and volume, and his eye contact was fair. (AR 888.)
11 He was alert and oriented to person, place, date and situation. (AR 888.) He was able to recall
12 one of three objects at five minutes, to repeat three digits forward and two backward, to perform
13 “serial 3’s” with no errors, to add, subtract, and multiply, and to recall one of the past five
14 presidents. (AR 888.) Dr. Kalman rated Plaintiff’s intelligence at average. (AR 888–89.)
15 Plaintiff’s abstractions were intact and his proverb interpretation fair, but he had poor insight into
16 his mental illness and his judgment was poor. (AR 889.)

17 Dr. Kalman observed Plaintiff’s mood was anxious, irritable, and depressed and his affect
18 labile. (AR 889.) Plaintiff admitted to suicidal thoughts and denied homicidal thoughts, but
19 admitted aggressive thoughts and behavior. Plaintiff’s form of thought was logical and goal
20 directed, with no loose assertions and mood swings, but positive for emotional lability. (AR
21 889.) Plaintiff admitted to auditory and visual hallucinations unrelated to mood, but no
22 delusions. (AR 889.) With respect to present daily activities, Plaintiff reported that he does not
23 do his own shopping, cooking, or housekeeping, cannot manage his own transportation, and does
24 not pay his own bills. (AR 889.) Plaintiff reported that he is capable of caring for his own
25 personal hygiene. (AR 889.) According to Plaintiff, he gets along with his girlfriend and has one
26 friend. (AR 889.) Plaintiff reported that on a typical day he gets up around 10 a.m., watches
27 television, “[c]hill[s] all day,” takes a sleeping pill and goes to sleep. (AR 889.)

28 Dr. Kalman observed Plaintiff was “somewhat restless” during the interview. (AR 890.)

1 Plaintiff “has a long history of trauma stemming from childhood and traumatic brain injury.”
2 (AR 890.) Dr. Kalman noted because Plaintiff has a “very short temper and gets irritated easily,”
3 he struggled in school, was expelled, and has a legal history. (AR 890.) He observed Plaintiff
4 “has difficulty dealing with people and maintaining employment,” and noted Plaintiff’s reports of
5 feeling depressed, suicidal, and experiencing hallucinations. (AR 890.) Dr. Kalman’s opinion
6 was that Plaintiff is not able to interact with supervisors and co-workers; not able to deal with the
7 public; able to understand, remember, and carry out simple one and two-step job instructions;
8 cannot maintain attention, concentration, and memory; and has limited ability to withstand the
9 stress and pressures associated with daily work activities. (AR 890.) Dr. Kalman diagnosed
10 Plaintiff with schizoaffective disorder and intermittent explosive disorder, rule out alcohol abuse
11 and antisocial personality disorder. (AR 890.) He concluded Plaintiff’s condition was not
12 expected to improve significantly in the next 12 months, and that he was not competent to
13 manage his own funds. (AR 890.)

14 In the “Ability to Do Work-Related Activities (Mental)” questionnaire completed that
15 same day, Dr. Kalman opined Plaintiff had no useful ability to understand, remember, and carry
16 out complex instructions, and to make judgments on complex work-related decisions. (AR 891–
17 92.) Plaintiff was noted as having substantial loss in his ability to interact with the public,
18 supervisors, and coworkers. (AR 892.)

19 **B. Plaintiff’s Statements**

20 On January 20, 2012, Plaintiff completed an Adult Function Report. (AR 403–10.) He
21 stated he lives in an apartment with family members. (AR 403.) When asked to describe what he
22 did from the time he wakes up to the time he goes to bed, Plaintiff reported he takes his
23 medications, tries his best to help his girlfriend with their children, cleans up around the house
24 until “the pain sets in or until I get mad,” and then watches television or naps. (AR 403.)
25 Plaintiff stated that he sometimes walks his children to school and then climbs into bed because
26 he is “drained of energy” and his legs are swollen and hurting. (AR 403.) He helps his
27 girlfriend⁵ take care of his three children but she “pretty much does everything.” (AR 404.)

28 _____
⁵ Plaintiff refers to his companion both as his “wife” and as his “girlfriend.”

1 Plaintiff reported that insomnia and “severe pain” keep him from sleeping. (AR 404.) He does
2 not need any assistance with his personal care and needs no reminders to do so. (AR 404.)
3 Plaintiff’s girlfriend has to remind him every day to take his medication. (AR 405.)

4 Plaintiff heats up a “Hot Pocket” or leftovers in the microwave about two times a week,
5 otherwise his girlfriend cooks his meals. (AR 405.) He vacuums, straightens up the living room
6 every other morning for an hour, and sweeps the porch with encouragement. (AR 405.) Plaintiff
7 reports that he tries to go outside every day and can do so by himself. (AR 406.) He walks and
8 uses public transportation, but does not drive because he does not own a vehicle or license and
9 also does not have the patience for it. (AR 406.) Plaintiff shops in stores for hygiene products
10 and food with his girlfriend once a month for two to three hours. (AR 406.) He can pay bills
11 with the assistance of his girlfriend, count change, and use money orders to pay bills. (AR 406.)

12 Plaintiff’s hobbies and interests include fishing, watching television, and playing his
13 PlayStation. (AR 407.) He watches television every day, plays his PlayStation every other day,
14 and goes fishing about three times a year. (AR 407.) Plaintiff reports that he calls his mother
15 every morning and night and visits his only friend’s house once a week. (AR 407.) He has to be
16 reminded to attend doctor’s appointments and to go to the pharmacy but can go by himself to
17 those places. (AR 407) Plaintiff does not get along with his family, has only one friend, and is
18 nervous to meet new people, as he does not like crowded places. (AR 408.) He has trouble
19 walking, kneeling, squatting, standing and climbing due to the fact that he “severely broke” his
20 ankle, which in turn injured his knees. (AR 408.) Plaintiff reports that he has stop walking after
21 one city block due to pain in his legs and has to rest about five to ten minutes. (AR 408.)

22 Plaintiff has difficulty completing tasks and if he doesn’t “get the project quick, [he]
23 destroys it, no matter what it is.” (AR 408.) He can only pay attention for less than half an hour.
24 (AR 408.) Plaintiff follows written instructions “down to the tee,” but does not follow spoken
25 instructions well. (AR 408.) Plaintiff has not been fired or laid off from a job because of
26 problems getting along with other people. (AR 409.) He does not handle stress well and
27 “struggle[s]” with changes in routine. (AR 409.) His ability to get along with authority figures
28 “depends on how they treat [him,]” and his attitude “does get in the way.” (AR 409.)

1 Plaintiff completed another Adult Function Report on September 18, 2012. (AR 430–38.)
2 He stated that he lives in an apartment with his girlfriend and children. (AR 430.) Plaintiff states
3 his ankle injuries limit his ability to pick up things from the ground, it gets swollen when standing
4 too long, and he is in severe pain most of the time. (AR 430.) According to Plaintiff, his mental
5 conditions are a burden in his relationship and social activities, and it is “very rare” that he has a
6 good day. (AR 430.) During a typical day, Plaintiff goes outside for a bit, plays with his
7 daughter and will care for her until her mother gets home. (AR 430.) During this time, he tries to
8 get some housework done and watches cartoons with his daughter. (AR 431.) Plaintiff calls his
9 mother more than 10 times a day to ask her questions while watching his daughter. (AR 431.)
10 He cannot fall asleep until his brain is “exhausted,” has “severe night sweats,” and sometimes
11 experiences “agonizing” pain in his calf and ankle. (AR 431.) Plaintiff’s condition does not
12 affect his personal care. (AR 423.) His girlfriend has to remind him to take his medication every
13 day or else he is “not a nice person.” (AR 432.)

14 Plaintiff is “very paranoid” about using the stove and oven. (AR 432.) He reports he will
15 cook himself a frozen pizza or other foods that can be heated in the microwave, otherwise he will
16 eat only sandwiches until his girlfriend returns home. (AR 432.) Plaintiff cleans the living room,
17 does “a little dusting,” and, “on a good day,” does dishes until his “legs swell[] and ache[.]” (AR
18 432.) It takes him four hours to perform these chores, which he performs every other day, with
19 encouragement. (AR 432.)

20 Plaintiff goes outside every day, attends doctor’s appointments once a month, attends his
21 counseling sessions once a week, and visits his friend two times a month. (AR 433.) He walks
22 and rides in a car driven by his girlfriend; he is “[t]errified to drive with others” and “never really
23 drove a lot.” (AR 433.) Plaintiff shops in stores for “main necessities” every other month. (AR
24 433.) He can pay bills, count change, and use a checkbook or money orders. (AR 433.)

25 Plaintiff’s hobbies and interests include watching football and fishing. (AR 434) He goes
26 fishing about two times a year and watches football every Thursday, Sunday, and Monday,
27 totaling 267 football games in 16 weeks. (AR 434.) Plaintiff reports he talks to his mother on the
28 phone at least five times a day and visits his friend’s house two times a month. (AR 434.) He

1 attends doctor's and counseling appointments, so long as it is written on a calendar. (AR 434.)
2 Although Plaintiff does not need anyone to accompany him, he stated he feels more comfortable
3 if someone he "trust[s]" is with him. (AR 434.) He reported he always fights with his sisters and
4 tries to fight their boyfriends. (AR 435.) According to Plaintiff, his conditions affect his ability
5 to lift, squat, bend, stand, walk, kneel, climb stairs, remember, concentrate, and get along with
6 others. (AR 435.) He can walk one or two city blocks before he needs to rest for about five
7 minutes. (AR 435.) Plaintiff stated he can pay attention between five and ten minutes. (AR
8 435.) He is "excellent" at following written instructions, but needs to be told spoken instructions
9 three to four times before following them. (AR 435.) As long as authority figures are respectful
10 to him, Plaintiff will be respectful to them, otherwise he will "beat the respect out of them." (AR
11 436.) He has "explosive reactions" to stress and is "lost" out of routine. (AR 436.) Plaintiff
12 reported he fantasizes about harming others and is unable to handle his anger mood swings. (AR
13 436.) He takes medication, including his recently-switched medication of Seroquel XR, with no
14 side effects. (AR 437.)

15 Plaintiff's journal of daily activities from September 27, 2013, to January 18, 2015,
16 recounts him doing laundry, making beds, mopping floors, washing walls, going to the movies,
17 going grocery shopping, going swimming, washing windows, taking his children to doctor's
18 appointments and swimming, attending a family reunion, shopping for costumes for his children,
19 attending his children's teacher meeting, helping with his son's project for school, attending
20 meetings, attending his son's wrestling practices and tournament, helping his son sell See's
21 Candies, attending his children's singing recital, helping his children count change, shopping for
22 Christmas presents, visiting his mother, going to "Lawrence's" for dinner; taking his children
23 outside to ride their bicycles, taking his children to the park, and cooking dinner (AR 499, 501,
24 503, 505, 507, 508, 509, 510, 511, 513, 514, 517, 521, 526, 527, 528, 531, 533, 535, 539, 540,
25 541, 542, 545, 547, 549, 550, 553, 556, 558, 559, 561, 562, 565, 569, 570, 571, 574, 576, 580,
26 581, 582, 583, 584, 585, 587, 588.)

27 **C. Plaintiff's Girlfriend's Statements**

28 On January 20, 2012, Plaintiff's girlfriend Christina A. Carter completed a Third Party

1 Adult Function Report. (AR 394–401.) Ms. Carter reported that she has known Plaintiff almost
2 10 years and spends every day with him, playing with their children and watching television.
3 (AR 394.) During a typical day, Plaintiff wakes up and Ms. Carter tells him to take his
4 medication. (AR 394.) He then plays with his daughter, cleans the living room, and watches
5 television. (AR 394.) Plaintiff helps Ms. Carter take care of their children, changes diapers and
6 helps the older children get dressed. (AR 395.) According to Ms. Carter, Plaintiff “tosses and
7 turns” all night complaining of pain, even after having taken a sleeping pill. (AR 395.) Ms.
8 Carter reported that Plaintiff’s condition does not affect his personal care. (AR 396.) She has to
9 remind him to take his medication and attend his doctor’s appointments. (AR 396, 398.)

10 According to Ms. Carter, she makes all of Plaintiff’s meals unless they can be cooked in
11 the microwave because Plaintiff gets too frustrated to cook. (AR 396.) Plaintiff cleans the living
12 room and vacuums every other day for an hour with Ms. Carter’s encouragement. (AR 396.)
13 Ms. Carter reported she tries to get Plaintiff outside every day and that he can go out alone. (AR
14 397.) Plaintiff walks and uses public transportation. (AR 397.) He does not have a license or a
15 car and does not drive because he gets “very angry.” (AR 397.) Ms. Carter reported Plaintiff
16 shops in stores for hygiene products and food once a month for four hours. (AR 397.) He can
17 pay bills and count change but cannot handle a savings account or use a checkbook/money
18 orders. (AR 397.)

19 Plaintiff’s hobbies and interests include fishing, watching television, and playing his
20 PlayStation. (AR 398.) Ms. Carter reported that Plaintiff plays his PlayStation every other day
21 and watches television “all the time.” (AR 398.) According to Ms. Carter, Plaintiff spends time
22 with his family and “calls his mom every morning and night.” (AR 398.) He is with his family
23 “all the time.” (AR 398.) Ms. Carter reported Plaintiff stays home unless he has a doctor’s
24 appointment. (AR 398.) Plaintiff “really only get [sic] along with his mom” and has one friend.
25 (AR 399.) Ms. Carter stated that Plaintiff has to stop walking after one city block and has to rest
26 about 15 to 20 minutes. (AR 399.)

27 Plaintiff has difficulty completing tasks and he gets “very upset” if he concentrates too
28 long. (AR 399.) He can only pay attention for less than half an hour. (AR 399.) According to

1 Ms. Carter, Plaintiff cannot get along with people. (AR 399.) Plaintiff follows written
2 instructions “very well” and needs to be “shown what to do or have someone read it to him.”
3 (AR 399.) Plaintiff has not been fired or laid off from a job because of problems getting along
4 with other people. (AR 400.) He does not handle stress or change well. (AR 400.) As far as
5 getting along with authority figures, Ms. Carter stated it “depends on how these people treat
6 him,” i.e., if he feels they are being rude to him then he will reciprocate. (AR 400.)

7 Ms. Carter completed another Adult Third Party Function Report on September 18, 2012.
8 (AR 420–28.) Ms. Carter reported that she has known Plaintiff seven years and spends every day
9 with him. (AR 420.) Plaintiff is “very angry and moody” and cannot “be around a lot of people,”
10 as he gets angry and “has to leave.” (AR 420.) During a typical day, Plaintiff wakes up, watches
11 television “all day,” goes outside or shopping with Ms. Carter, and watches his daughter until Ms.
12 Carter returns home. (AR 421.) Plaintiff takes care of his daughter while she works. (AR 421.)
13 Plaintiff has to talk to his mother on the phone more than 10 times while he watches his daughter.
14 (AR 421.) Plaintiff has insomnia and gets up 20 times a night; his condition does not affect his
15 personal care, except that Ms. Carter must remind Plaintiff to shave, brush his hair, and brush his
16 teeth. (AR 421–22.) She has to remind him to take his medication every day. (AR 422.)

17 According to Ms. Carter, she makes all of Plaintiff’s meals because Plaintiff “is not sure
18 about using the stove.” (AR 422.) Plaintiff takes the garbage out every other day at Ms. Carter’s
19 repeated instruction. (AR 422.) Ms. Carter reported Plaintiff goes outside when he has a
20 doctor’s appointment and to “hang out with our kids.” (AR 423.) Plaintiff rides in a car and does
21 not have a license or drive because he has had “road rage.” (AR 423.) Plaintiff shops in stores
22 for “the necessities” every other month for two hours, and can pay bills and count change. (AR
23 423.)

24 Plaintiff’s hobbies and interests include watching television, teaching his daughter how to
25 count and recite her “ABCs,” and helping his son with his homework. (AR 424) Ms. Carter
26 reported that Plaintiff does these things every day. (AR 424.) According to Ms. Carter, Plaintiff
27 talks to his mother on the phone “at least 10 times a day.” (AR 424.) Ms. Carter reported
28 Plaintiff attends doctor’s and dentist appointments. (AR 424.) Ms. Carter stated that Plaintiff

1 consults a calendar as a reminder to go places but does not need anyone to accompany him. (AR
2 424.) According to Ms. Carter, Plaintiff gets very irritated at parties or family get-togethers, as
3 he feels a lot of anxiety and wants to “run or fight.” (AR 425.)

4 Ms. Carter reports Plaintiff cannot be active outside because his ankle becomes “weak and
5 numb.” (AR 425.) He can walk one city block before he needs to rest for 30 minutes. (AR 425.)
6 According to Ms. Carter, Plaintiff can pay attention for 30–40 minutes and can follow written
7 instructions, but has to read them “at least 5 different time[s].” (AR 425.) He can follow spoken
8 instructions so long as he is shown as well as told. (AR 425.) As long as authority figures are
9 respectful to him, he will be respectful to them. (AR 426.) Ms. Carter reports Plaintiff has not
10 been fired or laid off from a job because of problems getting along with other people. (AR 426.)
11 He does not handle stress well and “gets angry and starts telling at everyone around him” and
12 “shuts down” in response to changes in routine. (AR 426.) Ms. Carter reports Plaintiff takes
13 medication but there are no side effects. (AR 427.) Ms. Carter writes that she is “emotionally
14 abused every day” by Plaintiff, and that Plaintiff needs to “get on the right medication so this
15 family can have some peace.” (AR 427.)

16 **D. Administrative Proceedings**

17 The Commissioner denied Plaintiff’s application for benefits initially on March 2, 2012,
18 and again on reconsideration. (AR 254–58, 260–64.) Consequently, Plaintiff requested a
19 hearing before an Administrative Law Judge (“ALJ”). (AR 265–73.) A hearing was held on
20 June 4, 2013, before an ALJ. (AR 56–131.) The ALJ issued a decision on September 4, 2013,
21 finding Plaintiff not disabled. (AR 222–44.)

22 Plaintiff sought review of the ALJ’s decision before the Appeals Council, which was
23 granted. On January 26, 2015, the Appeals Council remanded the case to the ALJ to: obtain
24 additional evidence concerning Plaintiff’s impairments; obtain evidence from a medical expert
25 to clarify the nature and severity of Plaintiff’s mental impairment; give further consideration to
26 Plaintiff’s maximum RFC; and obtain supplemental evidence from a vocational expert to clarify
27 the effect of the assessed limitations on Plaintiff’s occupational base, if warranted. (AR 250–
28 52.)

1 Upon remand, on February 9, 2016, the ALJ conducted a second hearing. (AR 130–80.)
2 At the hearing, Plaintiff appeared with counsel and testified before an ALJ as to his alleged
3 disabling conditions. (AR 135–50.)

4 **1. Plaintiff’s Testimony at the June 2013 Hearing**

5 Plaintiff testified about his symptoms and limitations at the hearing. Plaintiff stated he
6 was on medication for his post-traumatic stress disorder and the medication helped. (AR 59.)
7 On a typical day, he takes his medication and helps his children with their homework or plays
8 with them. (AR 60.) To pass the time, he sleeps and plays his PlayStation about an hour before
9 he has to stop. (AR 61, 66.) Plaintiff testified that he goes fishing every chance he gets and
10 estimated he would go fishing about five times a month. (AR 61.) He fishes for “a couple of
11 hours” before needing to stop. (AR 65.) Plaintiff first stated that he stands the whole time
12 while fishing, although he later testified that he alternates between sitting and standing. (AR
13 65–66.)

14 Plaintiff testified he could only walk a quarter mile due to having had surgery in his left
15 leg in 2009, and that he has pain in his left leg rated a “6” or “7” out of “10.” (AR 61, 68.) He
16 can only stand 5 to 10 minutes due to problems with his back and legs. (AR 61.) Plaintiff
17 testified that he was not getting medical treatment for his back. (AR 62.) He cannot sit long
18 because he cannot stay still. (AR 62.) Plaintiff testified he could lift about 50 pounds, since his
19 daughter weighs that much and he can lift her. (AR 62.) He can pick her up and carry her
20 around five times a day for about three minutes at a time. (AR 67.)

21 He stated his children stress him out and he did not believe that he would be able to care
22 for them full time without his girlfriend’s help. (AR 63.) According to Plaintiff, he only
23 supervises them alone for two hours. (AR 63.) He spends his day “pacing back and forth in the
24 house.” (AR 65–66.) Plaintiff testified he experiences depression “all the time,” and
25 experiences anxiousness, sleepiness, anger, and fearsome thoughts. (AR 69.) He can count
26 change but has problem with calculations and keeping track of time. (AR 69.) He has thoughts
27 about hurting or killing others, and does not take criticism well. (AR 70.) He once “broke open
28 his head” that required surgery, and has suffered severe migraines and short term memory

1 problems as a result. (AR 71.) According to Plaintiff, counselling is helping his symptoms and
2 his medications help his outbursts. (AR 64, 70.) Plaintiff testified that he used to have severe
3 nightmares and night sweats but the medication has helped. (AR 71.)

4 **2. Plaintiff's Testimony at the February 2016 Hearing**

5 Plaintiff also testified at a second hearing in February 2016. Plaintiff testified he was 27
6 years old at the time of the hearing. (AR 136.) He testified he "somewhat" had basic math
7 skills, including multiplication and division. (AR 137.) According to Plaintiff, his supervisor at
8 his prior workplace is now his "best friend." (AR 156.)

9 Plaintiff stated that his anger and "other people" are the primary reasons why it is
10 difficult for him to work. (AR 138.) He experiences anxiety and panics when he is under
11 pressure, causing him to hyperventilate and become angry. (AR 139.) Plaintiff testified he has
12 insomnia and "severe dreams," and that he choked his girlfriend in his sleep. (AR 143.) He
13 stated he has symptoms from post-traumatic stress disorder, including sleep disturbances and
14 "anger all the time." (AR 143–44.) His anger causes him to "crash stuff, break stuff" and he
15 does not like to be around people. (AR 144.) He gets into arguments with his girlfriend due to
16 his mood swings. (AR 145.) According to Plaintiff, he would not be able to take criticism from
17 a supervisor, just as he was not able to handle criticism from teachers at school, causing him to
18 drop out. (AR 145.) He testified he could not perform any jobs full-time, even those simple
19 and routine with no public interaction, due to his "anger [and] lack of motivation" and the fact
20 that he does not get along with people and does not take criticism well. (AR 146–47.)

21 Plaintiff testified he stopped showing up for work because he "didn't like to go to work"
22 and "didn't have the strength to get up" and go. (AR 141.) He lacked motivation to work and
23 also could not lift more than 20 pounds due to a "severely" broken ankle. (AR 141.) According
24 to Plaintiff, he continues to have "blood flow" problems with his ankle causing it to go numb
25 and impeding his ability to lift and to walk long distances. (AR 142.) Plaintiff testified he has
26 pain in his ankle "all the time," rated an "8" to a "10" out of "10." (AR 142.) He stated he has
27 a "firm sock" he wears to put pressure on his ankle which gives him relief. (AR 150.) Plaintiff
28 testified that he did physical therapy which he is trying to resume. (AR 150.)

1 Plaintiff has been seeing a counselor for five years, and testified that his sessions are
2 helpful by allowing him to express his feelings. (AR 139–40.) He testified his counselor
3 showed him “coping strategies” that work in addressing his stress, but that most of the time he
4 reacts before he has a chance to think. (AR 148–49.) Plaintiff stated he nevertheless still has
5 mood swings and “anger issues.” (AR 139.) He takes medications for pain, which help. (AR
6 142.) Side effects from his medications include drowsiness. (AR 147.)

7 **3. Medical Expert’s Testimony at the February 2016 Hearing**

8 Martin Cary, M.D., a clinical psychologist, testified at the hearing as a medical expert.
9 (AR 150–71.) Dr. Cary identified Plaintiff’s medically determinable impairments as
10 depression, post-traumatic stress disorder (PTSD), and alcohol abuse that is currently in
11 remission. (AR 159.) Dr. Cary opined that Plaintiff was probably exaggerating some of his
12 symptoms, or “putting his worst foot forward,” given the inconsistencies in the medical record.
13 (AR 164–65.) Dr. Cary concluded that, based upon his review of the medical record, Plaintiff
14 would be capable of performing simple, routine tasks with only occasional changes in work
15 setting, occasional interaction with the general public, and occasional interaction with
16 coworkers and supervisors. (AR 171.)

17 **4. Vocational Expert’s Testimony at the February 2016 Hearing**

18 A Vocational Expert (“VE”) testified at the hearing that Plaintiff had no past work. (AR
19 174.) The ALJ asked the VE to consider a person of Plaintiff’s age and education, and with no
20 past work, who is capable of performing at the sedentary level. (AR 174.) The VE was also to
21 assume this person was limited to: work that is defined as “simple” by the Dictionary of
22 Operational Titles (“DOT”), i.e., specific vocational preparation (SVP)⁶ levels of 1 and 2; routine
23 and repetitive tasks; occasional changes in the work setting; and occasional interaction with the
24 general public, coworkers, and supervisors. (AR 175.) The VE testified that such a person could
25 perform work as a hand bander, DOT code 920.687-030, SVP 2, of which there are 16,000 jobs

26 _____
27 ⁶ Specific vocational preparation, as defined in DOT, App. C, is the amount of lapsed time required by a typical
28 worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a
specific job-worker situation. DOT, Appendix C – Components of the Definition Trailer, 1991 WL 688702 (1991).
Jobs in the DOT are assigned SVP levels ranging from 1 (the lowest level – “short demonstration only”) to 9 (the
highest level – over 10 years of preparation). *Id.*

1 in the national economy. (AR 175.) The VE also testified that such a person could perform work
2 as a bag cutter, DOT code 789.687-010, SVP 2, for which there are 8,500 jobs, and could also
3 perform work as a final assembler (optical), DOT code 713.687-018, SVP 2, for which there are
4 7,000 jobs in the nation. (AR 175.)

5 In the next hypothetical, the VE was asked to consider this same first hypothetical person
6 but include the additional limitation that the person would likely have three or more unexcused or
7 unscheduled absence per month. (AR 175.) The VE testified that no jobs were available for that
8 person. (AR 175.) For the third hypothetical, the VE was asked to consider the first hypothetical
9 person but include the additional limitation that, due to a combination of medical conditions
10 associated with pain and mental impairments, the person would be unable to engage in sustained
11 work activity on a regular and continued basis for eight hours a day, five days a week for a 40
12 hour work week or equivalent schedule. (AR 176.) The VE testified that no jobs were available
13 for that person. (AR 176.)

14 Plaintiff's counsel then asked the VE to consider the ALJ's first hypothetical person, with
15 the additional limitation that, on at least two occasions during the first 30-day "probationary
16 period," such person would "raise their voice" to say something "oppositional" to the supervisor
17 when he/she gave criticism and perhaps "walk away and take a break" (AR 178.) The VE
18 testified that such person was "likely to be viewed as an individual with some work adjustment
19 problems" and "it is likely that they would not be able to maintain employment due to . . . those
20 infractions." (AR 178.)

21 **E. The ALJ's April 2016 Decision⁷**

22 In a decision dated April 20, 2016, the ALJ found that Plaintiff was not disabled. (AR
23 19-47.) The ALJ conducted the five-step disability analysis set forth in 20 C.F.R. § 416.920.
24 (AR 22-47.) The ALJ decided that Plaintiff had not engaged in substantial gainful activity since
25 October 31, 2011, the application date. (AR 22.) The ALJ found that Plaintiff had the severe
26 impairments of (1) left ankle fracture post Open reduction Internal Fixation (ORIF); (2) obesity;
27 (3) affective disorder; (4) bipolar disorder; (5) intermittent explosive disorder; (6) mixed

28

⁷ The prior ALJ's decision that was reviewed by the Appeals Council is not summarized.

1 personality disorder; and (7) Post-Traumatic Stress Disorder. (AR 22.) However, Plaintiff did
2 not have an impairment or combination of impairments that met or medically equaled one of the
3 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (“the Listings”). (AR 22–28.)

4 The ALJ determined that Plaintiff had the RFC

5 to perform sedentary work as defined in 20 CFR [§] 416.967(a) with the
6 following limitations: is limited to work that is defined as simple by the
7 [DOT], [SVP] levels 1 and 2, routine and repetitive tasks; should only
8 involve occasional changes in the work setting; and should only have
9 occasional interaction with the general public, coworkers, and supervisors.

10 (AR 28.)

11 The ALJ determined Plaintiff had no past relevant work, but that Plaintiff was not
12 disabled because, given his RFC, he could perform a significant number of other jobs in the local
13 and national economies, specifically hand bander, bag cutter, and final assembler (optical). (AR
14 46–47.) In reaching his conclusions, the ALJ also determined that Plaintiff’s subjective
15 complaints were “not entirely consistent with the medical evidence and other evidence in the
16 record” (AR 43.)

17 Plaintiff sought review of this decision before the Appeals Council, which denied review
18 on October 7, 2016. (AR 1–15.) Therefore, the ALJ’s decision became the final decision of the
19 Commissioner. 20 C.F.R. § 416.1481.

20 III. SCOPE OF REVIEW

21 The ALJ’s decision denying benefits “will be disturbed only if that decision is not
22 supported by substantial evidence or it is based upon legal error.” *Tidwell v. Apfel*, 161 F.3d 599,
23 601 (9th Cir. 1999). In reviewing the Commissioner’s decision, the Court may not substitute its
24 judgment for that of the Commissioner. *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996).
25 Instead, the Court must determine whether the Commissioner applied the proper legal standards
26 and whether substantial evidence exists in the record to support the Commissioner’s findings.
27 *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). “Substantial evidence is more than a
28 mere scintilla but less than a preponderance.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198
(9th Cir. 2008). “Substantial evidence” means “such relevant evidence as a reasonable mind
might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401

1 (1971) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court
2 “must consider the entire record as a whole, weighing both the evidence that supports and the
3 evidence that detracts from the Commissioner’s conclusion, and may not affirm simply by
4 isolating a specific quantum of supporting evidence.” *Lingenfelter v. Astrue*, 504 F.3d 1028,
5 1035 (9th Cir. 2007) (citation and internal quotation marks omitted).

6 IV. APPLICABLE LAW

7 An individual is considered disabled for purposes of disability benefits if he or she is
8 unable to engage in any substantial, gainful activity by reason of any medically determinable
9 physical or mental impairment that can be expected to result in death or that has lasted, or can be
10 expected to last, for a continuous period of not less than twelve months. 42 U.S.C.
11 §§ 423(d)(1)(A), 1382c(a)(3)(A); *see also Barnhart v. Thomas*, 540 U.S. 20, 23 (2003). The
12 impairment or impairments must result from anatomical, physiological, or psychological
13 abnormalities that are demonstrable by medically accepted clinical and laboratory diagnostic
14 techniques and must be of such severity that the claimant is not only unable to do her previous
15 work, but cannot, considering her age, education, and work experience, engage in any other kind
16 of substantial, gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)–(3),
17 1382c(a)(3)(B), (D).

18 The regulations provide that the ALJ must undertake a specific five-step sequential
19 analysis in the process of evaluating a disability. In the First Step, the ALJ must determine
20 whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. §§
21 404.1520(b), 416.920(b). If not, in the Second Step, the ALJ must determine whether the
22 claimant has a severe impairment or a combination of impairments significantly limiting her from
23 performing basic work activities. *Id.* §§ 404.1520(c), 416.920(c). If so, in the Third Step, the
24 ALJ must determine whether the claimant has a severe impairment or combination of
25 impairments that meets or equals the requirements of the Listing of Impairments (“Listing”), 20
26 C.F.R. 404, Subpart P, App. 1. *Id.* §§ 404.1520(d), 416.920(d). If not, in the Fourth Step, the
27 ALJ must determine whether the claimant has sufficient residual functional capacity despite the
28 impairment or various limitations to perform her past work. *Id.* §§ 404.1520(f), 416.920(f). If

1 not, in Step Five, the burden shifts to the Commissioner to show that the claimant can perform
2 other work that exists in significant numbers in the national economy. *Id.* §§ 404.1520(g),
3 416.920(g). If a claimant is found to be disabled or not disabled at any step in the sequence, there
4 is no need to consider subsequent steps. *Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir.
5 1999); 20 C.F.R. §§ 404.1520, 416.920.

6 V. DISCUSSION

7 Plaintiff contends that the ALJ erred in three ways. First, Plaintiff claims the ALJ erred in
8 his treatment of the opinions of Dr. Kifune, Ms. Black, Dr. Rourke, and Dr. Kalman. (*See* Doc.
9 19 at 11–17; Doc. 21 at 2–4.) Second, Plaintiff asserts that the ALJ improperly discounted
10 Plaintiff’s testimony regarding his subjective complaints based on his activities of daily living.
11 (*See* Doc. 19 at 17–19; Doc. 21 at 4–6.) Finally, Plaintiff contends the ALJ’s finding at Step Five
12 is not supported by substantial evidence. (*See* Doc. 19 at 19–20; Doc. 21 at 6–7.)

13 Defendant counters that that the ALJ properly evaluated Dr. Kifune’s, Ms. Black’s, Dr.
14 Rourke’s, and Dr. Kalman’s opinions, that the ALJ properly relied on evidence in the record that
15 undermined the credibility of Plaintiff’s allegations of disabling symptoms and limitations, and
16 that the ALJ properly relied on the VE’s testimony at Step Five. (*See* Doc. 20 at 7–14.)

17 A. The ALJ Properly Found Plaintiff Less Than Fully Credible.

18 1. Legal Standard

19 In evaluating the credibility of a claimant’s testimony regarding subjective pain, an ALJ
20 must engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). First,
21 the ALJ must determine whether the claimant has presented objective medical evidence of an
22 underlying impairment that could reasonably be expected to produce the pain or other symptoms
23 alleged. *Id.* The claimant is not required to show that her impairment “could reasonably be
24 expected to cause the severity of the symptom [he] has alleged; [he] need only show that it could
25 reasonably have caused some degree of the symptom.” *Id.* (quoting *Lingenfelter v. Astrue*, 504
26 F.3d 1028, 1036 (9th Cir. 2007)). If the claimant meets the first test and there is no evidence of
27 malingering, the ALJ can only reject the claimant’s testimony about the severity of the symptoms
28 if he gives “specific, clear and convincing reasons” for the rejection. *Id.* As the Ninth Circuit has

1 explained:

2 The ALJ may consider many factors in weighing a claimant’s credibility,
3 including (1) ordinary techniques of credibility evaluation, such as the claimant’s
4 reputation for lying, prior inconsistent statements concerning the symptoms, and
5 other testimony by the claimant that appears less than candid; (2) unexplained or
6 inadequately explained failure to seek treatment or to follow a prescribed course
of treatment; and (3) the claimant’s daily activities. If the ALJ’s finding is
supported by substantial evidence, the court may not engage in second-guessing.

7 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (citations and internal quotation marks
8 omitted); *see also Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1226–27 (9th Cir. 2009).

9 Other factors the ALJ may consider include a claimant’s work record and testimony from
10 physicians and third parties concerning the nature, severity, and effect of the symptoms of which
11 he complains. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

12 The clear and convincing standard is “not an easy requirement to meet,” as it is ““the most
13 demanding required in Social Security cases.”” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir.
14 2014) (quoting *Moore v. Comm’r of Social Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).
15 General findings are not sufficient to satisfy this standard; the ALJ ““must identify what
16 testimony is not credible and what evidence undermines the claimant’s complaints.”” *Burrell v.*
17 *Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.
18 1995)).

19 **2. Analysis**

20 The ALJ found Plaintiff’s “medically determinable impairments could reasonably be
21 expected to cause the alleged symptoms.” (AR 43.) The ALJ also found that “[Plaintiff’s]
22 statements concerning the intensity, persistence and limiting effects of these symptoms are not
23 entirely consistent with the medical evidence and other evidence in the record for the reasons
24 explained in this decision.” (AR 43.) Since the ALJ found Plaintiff’s “medically determinable
25 impairments could reasonably be expected to cause the alleged symptoms,” the only remaining
26 issue is whether the ALJ provided “specific, clear and convincing reasons” for Plaintiff’s adverse
27 credibility finding. *See Vasquez*, 572 F.3d at 591. Here, the ALJ found Plaintiff’s credibility was
28 undermined by several factors: the functional abilities he demonstrated in daily activities that

1 were in excess of his allegations of disability; his lack of compliance in taking prescribed
2 medications that, when taken, helped control his symptoms; and evidence showing his mental
3 symptoms were exacerbated by situational stressors rather than his medically determinable
4 impairments. (AR 43–45.) The Court takes each finding in turn.

5 **a. Inconsistencies with Activities of Daily Living**

6 The ALJ found that Plaintiff “has described activities of daily living that are not as limited
7 as one would expect given [Plaintiff’s] complaints of disabling symptoms and limitations.” (AR
8 43.) It is appropriate for an ALJ to consider a claimant’s activities that undermine claims of
9 totally disabling pain in making the credibility determination. *See Fair v. Bowen*, 885 F.2d 597,
10 603 (9th Cir. 1989); *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999);
11 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) *See also Thomas v. Barnhart*, 278 F.3d
12 947, 958–59 (9th Cir. 2002) (An ALJ may support a determination that the claimant was not
13 entirely credible by identifying inconsistencies between the claimant’s complaints and the
14 claimant’s activities of daily living.). Notwithstanding, it is well-established that a claimant need
15 not “vegetate in a dark room” in order to be deemed eligible for benefits. *Cooper v. Bowen*, 815
16 F.2d 557, 561 (9th Cir. 1987). However, if a claimant is able to spend a substantial part of his
17 day engaged in pursuits involving the performance of physical functions that are transferable to a
18 work setting, a specific finding as to this fact may be sufficient to discredit an allegation of
19 disabling excess pain. *Fair*, 885 F.2d at 603. “Even where [Plaintiff’s daily] activities suggest
20 some difficulty functioning, they may be grounds for discrediting the claimant’s testimony to the
21 extent that they contradict claims of a totally debilitating impairment.” *Molina v. Astrue*, 674
22 F.3d 1104, 1113 (9th Cir. 2012).

23 According to the ALJ, Plaintiff alleges he has difficulty completing tasks and can only
24 pay attention for less than half an hour. (AR 43, 408, 435.) Plaintiff claims that he does not
25 handle stress well, sometimes resulting in “explosive reactions,” and is “lost” and “struggle[s]”
26 with changes in routine. (AR 43, 409, 436.) The ALJ further notes that Plaintiff asserts he does
27 not prepare meals except for using the microwave or preparing sandwiches. (AR 43, 405, 432,
28 865, 889.) He testified that he can only stand 5 to 10 minutes and cannot sit long because he

1 cannot stay still. (AR 44, 61–62.) Plaintiff also claims that he cannot have any public interaction
2 and keeps himself locked in his house (AR 44, 144, 146–47, 408, 410).

3 However, in evaluating Plaintiff’s credibility, the ALJ cited activities of daily living that
4 were inconsistent with Plaintiff’s testimony concerning the severity of his symptoms and
5 impairments. The ALJ noted, and the record reflects, that Plaintiff lives in an apartment with his
6 family, which includes his girlfriend and their children. (AR 26, 43, 403, 430.) While his
7 girlfriend works, Plaintiff will sometimes take care of his daughter during the week and of all
8 three children from 2:30 p.m. to 11:30 p.m. on weekends. (AR 24, 25, 33, 39, 41, 43, 421, 800.)
9 He changes his daughter’s diapers, plays with her, and enjoys teaching her how to count and to
10 recite her ABCs. (AR 24, 26, 27, 43, 60, 394, 395, 424, 430.) Plaintiff testified at the June 2013
11 hearing that he lifts and carries his daughter, who weighs about 50 pounds, five times a day for
12 about three minutes at a time. (AR 23, 33, 67.) The record shows that Plaintiff walks the older
13 children to school, helps get them dressed, and assists his son with his homework. (AR 23, 24,
14 25, 26, 32, 33, 39, 60, 395, 403, 424.) Plaintiff served as a chaperone as his son’s field trip,
15 helped his son sell See’s Candies, attended a singing recital and his son’s wrestling practices and
16 tournaments. (AR 25, 27, 33, 34, 41, 42, 495–588, 738.) He takes the children to their doctor’s
17 appointments and to the park, as recounted in his journal of daily activities. (AR 25, 34, 39, 495–
18 588.) As the ALJ observed elsewhere in his decision, “there is no evidence that his children are
19 truant or disciplined due to [Plaintiff’s] inability to perform his duties of taking them to school or
20 helping them prepare for school.” (AR 39.) Medical expert Dr. Cary similarly noted at the
21 February 2016 hearing that there was no indication in the record that Child Protective Services
22 were called at any time while Plaintiff was parenting his children. (AR 170.)

23 The ALJ noted Plaintiff needs no assistance taking care of his personal care needs. (AR
24 43, 396, 404, 422, 421–22.) He performs various tasks around the house, such as cleaning the
25 living room, taking out the garbage every other day, washing dishes, vacuuming, sweeping the
26 porch, and washing windows and walls. (AR 23, 24, 25, 26, 32, 43, 394, 396, 403, 405, 422, 432,
27 495–588). Plaintiff’s journal reflects him cooking dinner. (AR 495–588.) Plaintiff enjoys
28 watching television, including cartoons with his daughter. (AR 27, 431.) He indicated in his

1 Adult Function Report that during football season he watches football every Thursday, Sunday,
2 and Monday, totaling 267 football games in 16 weeks. (AR 32, 33, 434.) Plaintiff also enjoys
3 playing his PlayStation, which he does every other day. (AR 24, 27, 398, 307, 61.) He states in
4 his Adult Function Reports he is “excellent” at following written instructions, which he does
5 “down to a tee.” (AR 27, 43, 408, 435. *See also* AR 398.) Plaintiff is able to pay bills and count
6 change. (AR 25, 27, 39, 43, 397, 406, 423, 433.)

7 The record shows Plaintiff uses public transportation and he can go out alone. (AR 24,
8 26, 43, 397, 406, 407.) He goes to the movies with his wife, camping with friends, has dinner
9 with friends, and visits his mother and his friend’s homes. (AR 24, 27, 32, 33, 43, 407, 433, 434,
10 495–588, 721, 726, 755.) Plaintiff enjoys fishing and testified at the June 2013 hearing that he
11 goes “every chance [he] get[s],” which he estimated was about five times a month. (AR 23, 24,
12 43, 61. *See also* AR 398, 407, 434, 706, 726, 735.) He regularly spends time with his family and
13 speaks to his mother several times a day on the telephone. (AR 26, 27, 43, 394, 403, 407, 421,
14 424, 430, 431, 434, 495–588.) Plaintiff shops with his girlfriend for hygiene products and food
15 once a month for up to four hours. (AR 25, 26, 27, 32, 33, 39, 41, 397, 406, 421, 423, 433.) His
16 journal also reflects him shopping for groceries, for costumes for his children, and for Christmas
17 presents. (AR 27, 32, 33, 41, 495–588.)

18 The Court finds Plaintiff’s daily activities were reasonably considered by the ALJ to be
19 inconsistent with his claims of inability to finish what he started, and to handle stress, changes in
20 routine, and public interaction. The ALJ also reasonably found Plaintiff’s assertions that he
21 cannot stand or sit for more than a few minutes and cannot prepare meals were undermined by his
22 activities. Even if these activities do not rise to the level of transferable work skills, as Plaintiff
23 asserts, *see* Doc. 19 at 18, they are inconsistent with allegations of completely debilitating
24 impairment. *Molina*, 674 F.3d at 1113. To be sure, the evidence of Plaintiff’s daily activities in
25 this case may be interpreted more favorably to him. However, such evidence is susceptible to
26 more than one rational interpretation, and therefore the ALJ’s conclusion must be upheld. *See*
27 *Burch*, 400 F.3d at 679. Accordingly, the inconsistencies between Plaintiff’s activities of daily
28 living and his complaints was a clear and convincing reason to find his testimony not credible

1 with regard to his symptoms. *See Gonzalez v. Comm’r of Soc. Sec.*, No. 1:16-cv-03157-MKD,
2 2017 WL 3712215, at *10 (E.D. Wash. Aug. 8, 2017) (ALJ properly discredited the claimant’s
3 subjective complaints of disability headaches, depression, and anxiety where claimant engaged in
4 activities such as taking care of her children; doing household chores such as cleaning, laundry,
5 household repairs, ironing, and mowing; taking her children to school; shopping for clothing,
6 groceries, and personal needs; and paying bills, counting change, and using a checkbook.) *See*
7 *also, e.g., Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175 (9th Cir. 2008) (finding that the ALJ
8 sufficiently explained his reasons for discrediting the claimant’s testimony because the record
9 reflected that the claimant performed normal activities of daily living, including cooking,
10 housecleaning, doing laundry, and helping her husband managing finances); *Morgan*, 169 F.3d at
11 600 (ALJ’s determination regarding claimant’s ability to “fix meals, do laundry, work in the yard,
12 and occasionally care for his friend’s child” was a specific finding sufficient to discredit the
13 claimant’s credibility).

14 **b. Lack of Compliance with Medication and Adequate Control of**
15 **Symptoms**

16 The ALJ’s next ground for discounting Plaintiff’s credibility is that Plaintiff was not
17 compliant in taking prescribed medications that, when taken, were successfully helping control
18 his symptoms, which “suggests that his symptoms may not have not been as limiting as [Plaintiff]
19 has alleged in connection with this application and appeal.” (AR 44.) As the ALJ sets forth in
20 his decision, the record is replete with instances where Plaintiff reported medication improved his
21 symptoms significantly. (AR 44.) For example, Plaintiff reported in April 2011, that Depakote
22 made him “calmer.” (AR 604.) Although he experienced issues with extreme anger and
23 irritability after going without medication for four days, he reported on July 1, 2011, “doing much
24 better” after taking all of his medication regularly. (AR 609.) In May 2012, Plaintiff told Dr.
25 Kifune medication relieved his symptoms. (AR 652.) Plaintiff’s status was improved in
26 September 2012, particularly his anger issues, which “improved significantly with change in
27 medication.” (AR 852.) In October 2012, Plaintiff presented to Ms. Black as “less agitated.”
28 (AR 803.) He reported that the medications are “helping,” that he still stays away from people,

1 but that he took his children swimming and “had a good time.” (AR 803).

2 On November 6, 2012, Plaintiff reported that his “new medications are working better
3 than the [D]epakote.” (AR 794.) Dr. Kifune observed Plaintiff on November 26, 2012, as
4 “gradual[ly] improv[ing],” and Plaintiff reported his current medications “have helped to control
5 anger outbursts better than prior [medications] without the sedation he had been experiencing.”
6 (AR 846.) In December 2012, Plaintiff reported his medications “continue to help,” although he
7 was still having “anger outbursts where he breaks things at home, and experiences nightmares
8 with significant sweating frequently.” (AR 843.) Plaintiff’s status had improved in April 2013,
9 and he reported he had not had any “significant emotional outbursts recently.” (AR 822.) He
10 noted he had been “much more sedated” as a result of the medication changes the prior month.
11 (AR 822.)

12 Nonetheless, despite the fact the medication offered him relief from his symptoms, the
13 ALJ noted several examples where Plaintiff did not take it, or took it less often than prescribed.
14 The record indicates Plaintiff went without medication for four days in 2011, during which he
15 experienced issues with extreme anger and irritability. (AR 44, 609.) Plaintiff reported in May
16 2012 instances of forgetting to take his Depakote, during which he would become “very angry.”
17 (AR 44, 652.) In June 2012, Plaintiff reported that he had not been taking his medication for two
18 days due to stomach upset, and then forgot to take them on the third day, when he accompanied
19 his son on a school field trip. (AR 44, 738.) Plaintiff recounted that the field trip was “very
20 overwhelming” and that he got “really angry” at people there. (AR 44, 738.) Ms. Black advised
21 Plaintiff to continue to take his medications and to eat crackers to help upset stomach. (AR 44,
22 739.) Plaintiff reported on September 10, 2012, he stopped all medications the week prior due to
23 gastrointestinal upset. (AR 44, 645.) Later that month Plaintiff was prescribed different
24 medications, which he reported caused no side effects. (AR 44, 852–83.)

25 In evaluating a claimant’s claimed symptoms, an ALJ may find a plaintiff less credible
26 when his or her symptoms can be controlled by medication. *See* 20 C.F.R. § 416.929(c)(3)(iv);
27 *see also Warre v. Comm’r*, 439 F.3d 1001, 1006 (9th Cir. 2006) (“Impairments that can be
28 controlled effectively with medication are not disabling for purposes of determining eligibility for

1 SSI benefits.”); *Morgan*, 169 F.3d at 599 (ALJ’s adverse credibility determination properly
2 accounted for physician’s report of improvement with medication). An ALJ may also consider a
3 claimant’s failure to follow a prescribed course of treatment when weighing a claimant’s
4 credibility. *See Tommasetti*, 533 F.3d at 1039–40; *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th
5 Cir.1995). In doing so, however, an ALJ must consider a claimant’s explanation for failing to
6 undergo the recommended treatment. *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996).
7 As the Ninth Circuit explained in *Fair v. Bowen*, it is the claimant’s burden to adequately explain
8 his or her failure to follow a prescribed course of treatment. 885 F.2d at 603 (claimant’s failure to
9 explain failure to seek treatment or follow a prescribed course of treatment can “cast doubt” on
10 the sincerity of his testimony); *see also Smolen*, 80 F.3d at 1293. An ALJ may discount a
11 claimant’s credibility due to an “unexplained or inadequately explained failure to seek treatment
12 or to follow a prescribed course of treatment.” *Tommasetti*, 533 F.3d at 1039.

13 Here, Plaintiff’s brief does not address the ALJ’s reliance on Plaintiff’s improvement with
14 medication and his lack of compliance with his prescribed course of treatment as reasons to
15 discredit his subjective complaints, and therefore he proffers no explanation for his frequent
16 failure to take his medication. In view of Plaintiff not having met his burden of adequately
17 explaining his failure to follow his treatment regimen, *see Fair*, 885 F.2d at 603, and viewing the
18 record as a whole, the Court finds that ALJ’s conclusion that Plaintiff was non-compliant with
19 taking medication, and his improvement when he was taking it, is supported by substantial
20 evidence. While the Court could draw an inference from the record that Plaintiff’s non-
21 compliance was the result of gastrointestinal side effects and/or memory impairment, the ALJ’s
22 different inference that Plaintiff’s “symptoms may not have not been as limiting as [Plaintiff] has
23 alleged” is equally supported and will not be second-guessed. *Tommasetti*, 533 F.3d at 1039;
24 *Thomas*, 278 F.3d at 959; *Morgan*, 169 F.3d at 600. The ALJ’s determinations that Plaintiff was
25 non-compliant with his use of prescribed medications, and that when taking them he experienced
26 better control of his symptoms, are therefore clear and convincing reasons for discounting
27 Plaintiff’s subjective symptom testimony. *Tommasetti*, 533 F.3d at 1039; *Warre*, 439 F.3d at
28 1006; *Morgan*, 169 at 599; *Fair*, 885 F.2d at 603; *Williams v. Berryhill*, No. 17CV226-

1 AJB(JMA), 2018 WL 656087, at *10–11 (S.D. Cal. Feb. 1, 2018) (finding the ALJ’s
2 determination that Plaintiff was non-compliant with his use of prescribed medication was a clear
3 and convincing reason for discounting Plaintiff’s subjective symptom testimony.); *Hives v.*
4 *Colvin*, No. 2:14-cv-2953-CKD, 2016 WL 336200, at *11 (E.D. Cal. Jan. 28, 2016) (finding the
5 ALJ’s determination that the plaintiff’s impairments were well-controlled with medication was a
6 clear and convincing reason for discounting the plaintiff’s subjective claim that her impairments
7 caused her to be disabled).

8 **c. Situational Stressors**

9 The final reason given by the ALJ for discounting Plaintiff’s subjective complaints was
10 his finding that Plaintiff had experienced “other non-medical problems,” which suggested that at
11 least some of Plaintiff’s difficulties may be “situational, and not medical, in nature.” (AR 45.)
12 As the ALJ noted in his decision, Plaintiff’s providers observed his symptoms were exacerbated
13 by situational stressors, including family relationships and medical issues, financial issues, and
14 his housing situation. (*See, e.g.*, AR 618 (treatment note discussing Plaintiff dealing with “some
15 stress due to issues with his siblings”); AR 625 (noting Plaintiff’s symptoms are “aggravated by
16 conflict or stress at home or work.”); AR 725 (counseling note discussing Plaintiff’s stress due to
17 an impending visit from his biological father); AR 732 (counseling note reporting Plaintiff’s
18 problems sisters and their boyfriends, whom he believed are just “using” his mom for a place to
19 live); AR 726 (noting conflict in Plaintiff’s marriage); AR 724 (counseling note describing
20 Plaintiff’s concern that his two-year-old child is bipolar); AR 720 (counseling note discussing
21 Plaintiff’s concern about his mother, who informed him she had a blockage in her heart, and that
22 he “really depressed” and “sleeping a lot” as a result); AR 717 (counseling note describing
23 Plaintiff as “really stressed” due to possibility losing his car insurance as a result of the payment
24 being due the same day his wife receives her “monthly money”); AR 745 (discussing stress of
25 Plaintiff’s wife having broken her wrist while jumping a fence); AR 768 (counseling note
26 discussing stress associated with Plaintiff’s wife increasing her working to four days a week,
27 which would “affect the rent and cash aid”); AR 755 (counseling note describing Plaintiff’s
28 worry about what he would do if there were an accident while watching the children, as he has no

1 cell phone or car to transport them to the hospital); AR 906 (describing Plaintiff as “overwhelmed
2 and depressed” due to his wife having had surgery for cancer and a wildfire causing his
3 evacuation from his home).) The Court finds the ALJ’s reasoning was specific, clear and
4 convincing and supported by substantial evidence in the record. *See Chesler v. Colvin*, 649 F.
5 App’x 631, 632 (9th Cir. 2016) (symptom testimony properly rejected in part because “the record
6 support[ed] the ALJ’s conclusion that [plaintiff’s] mental health symptoms were situational”);
7 *Menchaca v. Comm’r, Soc. Sec. Admin.*, No. 6:15-cv-01470-HZ, 2016 WL 8677320, at *7 (D.
8 Or. Oct. 7, 2016) (symptoms caused by “situational stressors” is “legitimate reason to discount . .
9 . credibility”); *Oraivej v. Colvin*, No. C15-630-JPD, 2015 WL 10713977, at *6 (W.D. Wash. Oct.
10 5, 2015); *Melendez v. Colvin*, No. 1:13-CV-00691 GSA, 2014 WL 4678272, at *5 (E.D. Cal.
11 Sept. 19, 2014); *DeMaio v. Astrue*, No. 1:09-cv-01840-SMS, 2011 WL 837180, at *12 (E.D.
12 Cal. Mar. 7, 2011) (the fact that Plaintiff was going through a divorce and was experiencing
13 related financial difficulties was relevant to the ALJ’s evaluation of the credibility of her
14 subjective symptom testimony). *But see Bryant v. Astrue*, No. C12-5040-RSM-JPD, 2012 WL
15 5293018, at *5-7 (W.D. Wash. Sept. 24, 2012) (finding mental-health symptoms exacerbated by
16 “situational stressors” “not clear and convincing reason to discount plaintiff’s credibility”).

17 Plaintiff asserts in his reply brief that the ALJ’s finding that some of Plaintiff’s problems
18 may be situational and not medical is erroneous because it ignores that Plaintiff’s mental illness
19 “results in his having an abnormally adverse response to seemingly benign everyday interactions
20 with others and typical life situations.” (Doc. 21 at 5.) While it is true that Plaintiff’s mental
21 impairments could have triggered his reaction to situational stressors (as opposed to the other way
22 around), again this Court may not second-guess the ALJ’s credibility finding simply because the
23 evidence may have been susceptible of other interpretations more favorable to Plaintiff. *See*
24 *Tommasetti*, 533 F.3d at 1039. Moreover, even if the ALJ erred in predicating his credibility
25 determination in part on this finding, such error is harmless because the ALJ articulated other,
26 permissible reasons for discounting Plaintiff’s credibility, specifically, as set forth above,
27 evidence in the record that conflicted with Plaintiff’s allegation of total disability, including his
28 activities of daily living and non-compliance with prescription medications, which controlled his

1 symptoms. See *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)
2 (citing *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)); *Tonapetyan*
3 *v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

4 In sum, because the ALJ provided multiple clear and convincing reasons supported by
5 substantial evidence to discount Plaintiff’s credibility regarding his physical and mental
6 limitations, the ALJ’s adverse credibility determination shall be affirmed.

7 **B. The ALJ Appropriately Assessed the Opinions of Dr. Kifune, Ms. Black, Dr.**
8 **Rourke, and Dr. Kalman.**

9 **1. Legal Standard**

10 **a. Drs. Kifune, Rourke, and Kalman**

11 The weight given to medical source opinions from licensed physicians and licensed or
12 certified psychologists depends in part on whether they are proffered by treating, examining, or
13 non-examining professionals. *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001);
14 *Lester*, 81 F.3d at 830. Generally speaking, a treating physician’s opinion carries more weight
15 than an examining physician’s opinion, and an examining physician’s opinion carries more
16 weight than a non-examining physician’s opinion. *Holohan*, 246 F.3d at 1202.

17 To evaluate whether an ALJ properly rejected a medical opinion, in addition to
18 considering its source, the court considers whether (1) contradictory opinions are in the record;
19 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a
20 treating or examining medical professional only for “clear and convincing” reasons. *Lester*, 81
21 F.3d at 830–31. In contrast, a contradicted opinion of a treating or examining professional may
22 be rejected for “specific and legitimate” reasons. *Id.* at 830. While a treating professional’s
23 opinion generally is accorded superior weight, if it is contradicted by a supported examining
24 professional’s opinion (supported by different independent clinical findings), the ALJ may
25 resolve the conflict. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing *Magallanes*
26 *v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). The regulations require the ALJ to weigh the
27 contradicted treating physician opinion, *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir.
28

1 2001),⁸ except that the ALJ in any event need not give it any weight if it is conclusory and
2 supported by minimal clinical findings. *Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999)
3 (treating physician’s conclusory, minimally supported opinion rejected); *see also Magallanes*,
4 881 F.2d at 751. The opinion of a non-examining professional, by itself, is insufficient to reject
5 the opinion of a treating or examining professional. *Lester*, 81 F.3d at 831.

6 **b. Ms. Black**

7 Unlike “acceptable medical sources” Drs. Kifune, Rourke, and Kalman, licensed clinical
8 social workers like Ms. Black are considered “other” medical sources. *See* Social Security
9 Ruling (“SSR”) 06–03p (noting that medical sources who are not “acceptable medical sources”
10 include licensed clinical social workers); *see also Kelly v. Astrue*, 471 F. App’x 674, 676 (9th Cir.
11 2012 (Social workers are not considered “acceptable medical sources” under the regulations.)
12 The ALJ can use these other medical source opinions in determining the “severity of [the
13 individual’s] impairment(s) and how it affects [the individual’s] ability to work.” 20 C.F.R. §
14 416.913(d). An “other” medical source may not, however, provide medical opinions or be given
15 “controlling” weight as a treating medical source. *See* SSR 06–03p.

16 An ALJ may not reject the competent testimony of “other” medical sources without
17 comment. *Stout v. Comm’r*, 454 F.3d 1050, 1053 (9th Cir. 2006). To reject the competent
18 testimony of “other” medical sources, the ALJ need only give “reasons germane to each witness
19 for doing so.” *Molina*, 674 F.3d at 1111 (quoting *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217,
20 1224 (9th Cir. 2010)). In rejecting such testimony, the ALJ need not “discuss every witness’s
21 testimony on an individualized, witness-by-witness basis. Rather, if the ALJ gives germane
22 reasons for rejecting testimony by one witness, the ALJ need only point to those reasons when
23 rejecting similar testimony by a different witness.” *Id.* at 1114. The ALJ also may “draw
24 inferences logically flowing from the evidence.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9th
25 Cir. 1982).

26 **2. Analysis**

27 _____
28 ⁸ The factors include: (1) length of the treatment relationship; (2) frequency of examination; (3) nature and extent of
the treatment relationship; (4) supportability of diagnosis; (5) consistency; and (6) specialization. 20 C.F.R. §
404.1527.

1 **a. Treating Physician Dr. Kifune’s Opinions**

2 *i. August 7, 2012 Medical Source Statement*

3 On August 7, 2012, Plaintiff’s treating physician Dr. Kifune completed an “Assessment of
4 Ability to Do Work-Related Activities (Mental)” form, in which he opined, among other things,
5 that Plaintiff had a seriously limited ability to no useful ability to relate to co-workers, no useful
6 ability to deal with the public, a seriously limited ability to no useful ability to use judgment
7 depending on the situation, and no useful ability to deal with work stressors. (AR 693.) Dr.
8 Kifune further opined that Plaintiff had a seriously limited ability to no useful ability to
9 understand, remember, and carry out complex job instructions, and a seriously limited ability to
10 do the same for detailed, but not complex, job instructions so long as they were written. (AR
11 694.) He found that Plaintiff had a seriously limited ability to no useful ability to relate
12 predictably in social situations, and estimated Plaintiff would be absent from work two to three
13 times a week due to his impairments or treatment. (AR 694.) The ALJ assigned “little weight” to
14 this portion of Dr. Kifune’s opinion. (AR 34.)

15 Although not specifically identified by the ALJ as a basis for its rejection, this portion of
16 Dr. Kifune’s opinion regarding Plaintiff’s mental impairments is contradicted by the opinion
17 evidence of psychiatric medical consultant Dr. Warren, who found that Plaintiff has the ability to
18 attend and concentrate for periods of two hours as is required in the workplace, interact
19 appropriately with peers and supervisors, and adapt to routine workplace changes. (AR 676–77.)
20 Dr. Kifune’s opinion is also at odds with that of medical expert Dr. Cary, who testified at the
21 February 2016 hearing that Plaintiff would be capable of performing simple, routine tasks with
22 only occasional changes in work setting and occasional interaction with the general public, and
23 occasional interaction with coworkers and supervisors.⁹ (AR 171.) Thus, the ALJ was required
24 to state a “specific and legitimate reason,” supported by substantial evidence, for rejecting Dr.
25 Kifune’s opinion in part.

26 In giving only “little weight” to the above-described portion of Dr. Kifune’s opinion, the
27

28 ⁹ The ALJ accorded “significant weight” and “great weight” to the opinions of Drs. Warren and Cary, respectively.
(AR 34, 42.)

1 ALJ stated the findings are “not consistent with the record as a whole,” specifically Plaintiff’s
2 parental activities. (AR 34.) As set forth more fully above, Plaintiff attends his children’s
3 sporting events and singing recitals, helps them sell candy, and takes them to appointments. The
4 ALJ found that Plaintiff’s performance of these “fatherly duties” and the severe limitations
5 included in Dr. Kifune’s opinion, particularly regarding Plaintiff’s lack of ability in dealing with
6 the public and excessive absences from work, were inconsistent. (AR 34–35.) This
7 inconsistency is a valid specific and legitimate reason to reject Dr. Kifune’s opinion in part. *See*
8 *Morgan*, 169 F.3d at 600–02 (considering an inconsistency between a treating physician’s
9 opinion and a claimant’s daily activities a specific and legitimate reason to discount the treating
10 physician’s opinion); *Rollins*, 261 F.3d at 856 (finding that the ALJ gave specific and legitimate
11 reasons for rejecting the opinion of a treating physician where “the restrictions” included in the
12 opinion “appear [ed] to be inconsistent with the level of activity that [the claimant] engaged in”).

13 Plaintiff contends the ALJ erred in finding that Plaintiff’s activities are inconsistent with
14 Dr. Kifune’s opined limitations because “an ability to function among familiar people or family
15 members in structured environments does not necessarily translate to an ability to perform those
16 same types of tasks in a work setting.” (Doc. 19 at 15–16 (citing 20 C.F.R. pt. 404, subpt. P,
17 app’x 1, § 12.00 (“Listing 12.00”)).) It is not clear, and Plaintiff does not explain, how his
18 attendance at sporting events, singing recitals, and medical appointments, and his assistance with
19 selling candy—all of which presumably occur outside the home—demonstrates an ability to
20 function only among “*familiar people*” or “*family members in structured environments.*”
21 Plaintiff’s lack of explanation notwithstanding, the Court may neither reweigh the evidence nor
22 substitute its judgment for that of the Commissioner. *Thomas*, 278 F.3d at 954; *see also Batson*,
23 359 F.3d at 1196 (“When evidence reasonably supports either confirming or reversing the ALJ’s
24 decision, we may not substitute our judgment for that of the ALJ.”). When the evidence is
25 susceptible to more than one rational interpretation, it is the Commissioner’s conclusion that must
26 be upheld. *Thomas*, 278 F.3d at 954. As such, the Court finds that the ALJ provided a valid
27 specific and legitimate reason supported by substantial evidence for rejecting in part the August
28 7, 2012 opinion of Dr. Kifune regarding Plaintiff’s mental limitations as inconsistent with

1 Plaintiff's parental activities.

2 ***ii. December 3, 2012 Letter***

3 On December 3, 2012, Dr. Kifune wrote a letter stating that Plaintiff has been “unable to
4 maintain stable employment” and has been unemployed for several months “due to his inability
5 to control his anger and frustration.” (AR 704.) Dr. Kifune's opinion was that he did not
6 “foresee a permanent resolution of [Plaintiff's] health problem,” and he therefore supported
7 Plaintiff's application for permanent disability. (AR 704.) The ALJ assigned “little weight” to
8 Dr. Kifune's statements because they “touched upon subject matter reserved to the
9 Commissioner,” “did not provide a detailed function-by-function analysis,” and are “not
10 consistent” with the medical record, including Dr. Kifune's own treatment notes. (AR 37.)

11 To begin with, the fact that a treating physician's opinion is on a matter reserved for the
12 Commissioner is in itself not a specific and legitimate reason to reject the opinion. *See Ghanim*
13 *v. Colvin*, 763 F.3d 1154, 1161 (9th Cir. 2014) (The ALJ may not simply reject the treating
14 physician's opinion on the ultimate issue of disability.) *See also Lyon v. Comm'r of Soc. Sec.*,
15 No. 1:16-cv-01634-SAB, 2017 WL 6040422, at *5 (E.D. Cal. Dec. 6, 2017). However, the
16 ALJ's other reasons for discounting Dr. Kifune's opinion are specific and legitimate. The ALJ
17 properly rejected Dr. Kifune's opinion because it is not consistent with the objective medical
18 evidence, including his own treatment notes. *See Valentine v. Comm'r Soc. Sec. Admin.*, 574
19 F.3d 685, 692–93 (9th Cir. 2009) (contradiction between treating physician's opinion and his
20 treatment notes constitutes specific and legitimate reason for rejecting opinion); *Bayliss v.*
21 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (same); *Rollins*, 261 F.3d at 856 (ALJ properly
22 rejected the opinion of treating physician, where treating physician's opinion was inconsistent
23 with his own examination and notes of claimant); *Connett v. Barnhart*, 340 F.3d 871, 875 (9th
24 Cir. 2003) (a treating physician's opinion is properly rejected where the treating physician's
25 treatment notes “provide no basis for the functional restrictions he opined should be imposed on
26 [the claimant]”); *Tonapetyan*, 242 F.3d at 1149 (finding that the ALJ properly rejected the
27 opinion of a treating physician since it was not supported by treatment notes or objective medical
28 findings); *Johnson*, 60 F.3d at 1433 (ALJ properly rejected medical opinion where doctor's

1 opinion was contradicted by his own contemporaneous findings); *Teleten v. Colvin*, No. 2:14-
2 CV-2140-EFB, 2016 WL 1267989, at *5–6 (E.D. Cal. Mar. 31, 2016) (“An ALJ may reject a
3 treating physician’s opinion that is inconsistent with other medical evidence, including the
4 physician’s own treatment notes.”) (citing *Tommasetti*, 533 F.3d at 1041; *Bayliss*, 427 F.3d at
5 1216); *Khounesavatdy v. Astrue*, 549 F. Supp. 2d 1218, 1229 (E.D. Cal. 2008) (“[I]t is
6 established that it is appropriate for an ALJ to consider the absence of supporting findings, and
7 the inconsistency of conclusions with the physician’s own findings, in rejecting a physician’s
8 opinion.”) (citing *Johnson*, 60 F.3d at 1432–33). An ALJ may also properly discount a treating
9 physician’s opinion that is conclusory and not supported by the medical record. *Batson*, 359 F.3d
10 at 1195 (noting that “an ALJ may discredit treating physicians’ opinions that are conclusory,
11 brief, and unsupported by the record as a whole, . . . or by objective medical findings”) (citing
12 *Tonapetyan*, 242 F.3d at 1149); *Thomas*, 278 F.3d at 957 (“The ALJ need not accept the opinion
13 of any physician, including a treating physician, if that opinion is brief, conclusory, and
14 inadequately supported by clinical findings.”) (citing *Matney on Behalf of Matney v. Sullivan*,
15 981 F.2d 1016, 1019 (9th Cir. 1992)).

16 As the ALJ noted, Dr. Kifune’s treatment notes from May 2011 to April 2012 indicate
17 Plaintiff “behaved appropriately for his age.” (AR 37, 607, 656, 659, 682.) The ALJ further
18 noted that Dr. Kifune’s treatment notes from May 2011 to March 2013 (after Dr. Kifune opined
19 that Plaintiff’s ability to work was significantly impaired by his “inability to control his anger and
20 frustration”) showed Plaintiff was repeatedly observed as not being agitated, compulsive, and/or
21 anxious during examination. (AR 37, 607, 610, 613, 616, 619, 644, 650, 656, 659, 682, 832,
22 852–53.) Plaintiff was also noted as being “pleasant” and/or “cooperative” during his
23 examinations with the consultative examiners in 2012, 2013 and 2015. (AR 37, 700, 864, 888.)

24 Such observations are inconsistent with Dr. Kifune’s opinion that Plaintiff cannot work
25 because he is unable to control his anger and frustration. Although Plaintiff asserts Dr. Kifune’s
26 other treatment records are actually consistent with his opinion, *see* Doc. 19 at 13, this Court
27 finds the ALJ’s determination to the contrary reasonable and will not second-guess it, even if
28 such evidence could give rise to inferences more favorable to Plaintiff. *See Robbins*, 466 F.3d at

1 882 (citation omitted).

2 In sum, substantial evidence supports the ALJ's finding that treatment notes showed
3 Plaintiff exhibiting characteristics that are entirely inconsistent with Dr. Kifune's assessment that
4 Plaintiff is disabled due to anger and frustration issues. This inconsistency was a specific and
5 legitimate reason for the ALJ to discount Dr. Kifune's opinion. See *Bayliss*, 427 F.3d at 1216;
6 *Rollins*, 261 F.3d at 856; *Connett*, 340 F.3d at 875; *Tonapetyan*, 242 F.3d at 1149.

7 ***iii. November 11, 2014 Medical Source Statement***

8 Dr. Kifune completed a "Physical Residual Functional Capacity Questionnaire" on
9 November 11, 2014, in which he listed Plaintiff's diagnoses as PTSD, anxiety, ankle pain, and
10 low back pain. (AR 881.) Dr. Kifune indicated in the questionnaire that Plaintiff could walk two
11 city blocks without rest, could sit for one hour at one time, could stand for 30 minutes at one
12 time, could stand and walk less than two hours in an eight-hour workday, and could sit for about
13 two hours in an eight-hour workday. (AR 882–83.) According to Dr. Kifune, Plaintiff required a
14 job that permitted shifting positions at will from standing, standing, or walking, and that Plaintiff
15 would sometimes need to take unscheduled breaks of 15 to 30 minutes every two to three hours
16 of an eight-hour workday. (AR 883.) Dr. Kifune further found that Plaintiff could occasionally
17 lift 10 pounds and rarely 20 pounds, could rarely twist, stoop, crouch, and climb stairs, and could
18 never climb ladders. (AR 884.) He opined that Plaintiff would likely be absent from work as a
19 result of his impairments more than four days per month, and that Plaintiff was incapable of even
20 "low stress" jobs due to his "very significant negative reaction to stress." (AR 882, 885.)

21 Although not specifically identified by the ALJ as a basis for its rejection, Dr. Kifune's
22 opinion regarding Plaintiff's physical impairments is contradicted by the opinion evidence of
23 medical consultants Drs. Nasrabadi, Linder, and Harper, all of whom found that Plaintiff has the
24 ability to occasionally lift and/or carry 10 pounds and frequently 10 pounds; stand and/or walk
25 for four hours in an eight-hour workday; and sit for about six hours in an eight-hour workday.¹⁰
26 (AR 199–200, 210, 212–13, 678.) Thus, the ALJ was required to state "specific and legitimate
27 reasons," supported by substantial evidence, for rejecting Dr. Kifune's opinion.

28

¹⁰ The ALJ accorded "great weight" to the opinions of Drs. Nasrabadi, Linder, and Harper. (AR 32.)

1 In assigning “little weight” to Dr. Kifune’s questionnaire responses, the ALJ found it
2 “overly restrictive,” in that it is not consistent with both the “conservative treatment Dr. Kifune
3 administered on [Plaintiff] to address his ankle pain” and Plaintiff’s activities of daily living.
4 (AR 33.) As to the latter, the ALJ pointed to Plaintiff’s reported activities of lifting and carrying
5 his 50-pound daughter five times a day for about three minutes at a time; going fishing for “a
6 couple hours” at a time; taking care of his children from 2:30 p.m. to 11:30 p.m. while his wife is
7 at work; walking his children to school in the mornings; shopping for clothing, groceries, and
8 personal needs for up to four hours; helping his children with their homework; and watching 267
9 football games in 16 weeks. (AR 33.) The ALJ also noted that Plaintiff denied in his Adult
10 Function Reports having any difficulties with sitting. (AR 33, 408, 435.) The ALJ concluded
11 that these activities “reflect greater lifting, carrying, sitting, walking, standing, stress-tolerance,
12 and attention span abilities than generally reported by Dr. Kifune.” (AR 33.) The Court finds
13 this is a valid specific and legitimate reason to reject Dr. Kifune’s opinion and that it is based on
14 substantial evidence. *See Morgan*, 169 at 600–02; *Rollins*, 261 F.3d at 856. The Court will
15 therefore not disturb the ALJ’s finding on this basis, even if, as Plaintiff points out, *see* Doc. 19 at
16 12, some of the above-described evidence could be construed more favorably to him. *See*
17 *Robbins*, 466 F.3d at 882 (citation omitted).

18 Even assuming arguendo the Court found that the ALJ’s reliance on Plaintiff’s activities
19 of daily living in assigning little weight to Dr. Kifune’s opinion was erroneous, such error would
20 be harmless, *see Carmickle*, 533 F.3d at 1162, in view of the ALJ’s other, permissible reason for
21 discounting the opinion: that Dr. Kifune prescribed only a conservative treatment plan (*i.e.*,
22 medications and without physical therapy, injections, or braces). *See Butler v. Colvin*, No. 2:11–
23 cv–2802, 2013 WL 1281777, at *4 (E.D. Cal. Mar. 27, 2013) (“An ALJ may reject the opinion of
24 a treating physician who prescribed conservative treatment, yet opines that a claimant suffers
25 disabling conditions.”). *See also Harris v. Comm’r of Soc. Sec. Admin.*, No. CV-16-01994-PHX-
26 GMS, 2017 WL 2060418, at *5 (D. Ariz. May 15, 2017) (finding rejection of treating physician’s
27 opinions proper where they were “inconsistent with the medical evidence that demonstrated [the
28 plaintiff] improved while undergoing conservative treatment and medication.”). Plaintiff does

1 not dispute, and the record before the Court supports, the ALJ’s findings that Plaintiff received
2 only conservative treatment for his ankle pain.¹¹ (*See, e.g.*, AR 142, 150.) *See Miller v. Astrue*,
3 No. 10–cv–01307, 2011 WL 1935833, at *4 (C.D. Cal. May 20, 2011) (explaining that the
4 claimant’s treating physician “prescribed conservative treatment of yoga, exercise, and pain
5 medication”). Moreover, as the ALJ notes elsewhere in the decision, Dr. Kifune prescribed *no*
6 treatment for Plaintiff’s low back pain. (AR 23, 62.)

7 The Court therefore concludes, based on the foregoing, that the ALJ provided specific and
8 legitimate reasons for discounting Dr. Kifune’s opinion regarding Plaintiff’s physical limitations,
9 and those reasons are supported by substantial evidence.

10 *iv. December 8, 2015 Letter*

11 On December 8, 2015, Dr. Kifune wrote a brief letter in support of Plaintiff’s application
12 for disability benefits, in which he wrote that Plaintiff “suffers from bipolar disorder and post-
13 traumatic stress and likely has a component of organic brain syndrome as well.” (AR 899.) He
14 wrote that Plaintiff has “significant emotional and psychiatric disability stemming from past
15 history of physical and emotional abuse.” (AR 899.) Dr. Kifune concluded the letter by stating
16 that he did “not feel Plaintiff is employable as his social skills are almost non-existent.” (AR
17 899.)

18 The ALJ assigned “little weight” to Dr. Kifune’s statements because “they reflect little
19 reliance on objective medical evidence and are inconsistent with [Plaintiff’s] activities of daily
20 living.” (AR 41.) As set forth above, an ALJ may properly discount a treating physician’s
21 opinion that is conclusory and not supported by the medical record, *Batson*, 359 F.3d at 1195, or
22 that appears to be inconsistent with the level of activity the claimant engaged in, *Rollins*, 261
23 F.3d at 856. Here, the ALJ specifically identified medical evidence in the record, including Dr.
24 Kifune’s own treatment notes, describing Plaintiff as “pleasant,” “cooperative,” and “behaving
25 appropriately.” (AR 41–42, 607, 656, 659, 682, 700, 864, 888.) The ALJ also noted Plaintiff’s
26 ability to go shopping, to attend his children’s events (including as a chaperone for his son’s
27

28 ¹¹ Apart from identifying it as a reason given for discrediting Dr. Kifune’s opinion, *see* Doc. 19 at 12; Doc. 21 at 3, Plaintiff’s briefing does not address the propriety of the ALJ’s reliance on Plaintiff’s conservative treatment.

1 school field trip despite not being on any medications, which was “very overwhelming” and
2 caused him anger), and to sell candy, as detailed above. (AR 42, 397, 406, 421, 423, 433, 495–
3 588, 738.) This evidence, according to the ALJ, undermined Dr. Kifune’s allegations of
4 Plaintiff’s mental functioning limitations, particularly his opinion that Plaintiff’s social skills are
5 “non-existent.” (AR 41–42.) Again, the Court finds this is a valid specific and legitimate reason
6 to reject Dr. Kifune’s statements based on substantial evidence, and it may neither reweigh this
7 evidence—even where Plaintiff has identified reasons why this evidence could be reweighed in a
8 manner more favorable to him, *see* Doc. 19 at 13—nor substitute its judgment for that of the
9 Commissioner. *See Thomas*, 278 F.3d at 954; *Batson*, 359 F.3d at 1196.

10 **b. Treating Therapist Ms. Black’s Opinions**

11 *i. November 27, 2012 Letter*

12 The ALJ gave “little weight” to Plaintiff’s therapist Ms. Black’s opinion in her letter to
13 Plaintiff’s attorney that “between the PTSD and the Major Depression, [Plaintiff] is unable to
14 work in any type of occupation” and that “[Plaintiff] meets the diagnostic criterion for Federal
15 Disability” (AR 697) because Ms. Black was not an acceptable medical source. (AR 37.) This is
16 not a germane reason to discount other medical source testimony. *See, e.g., Haagenson v. Colvin*,
17 656 F. App’x 800, 803 (9th Cir. 2016) (“The ALJ also failed to provide germane reasons for
18 rejecting the opinions of Haagenson’s nurse and counselor, who constitute ‘other sources’ that
19 can provide evidence about the severity of Haagenson’s impairments and how they affect her
20 ability to work. The only reason that the ALJ offered for rejecting their opinions is that they are
21 not ‘acceptable medical sources’ within the meaning of the federal regulation. However, the
22 regulation already presumes that nurses and counselors are non-acceptable medical sources, yet
23 still requires the ALJ to consider them as ‘other sources.’”); *Atkinson v. Colvin*, No. 1:14-cv–
24 01268-AC, 2015 WL 5330794, at *6 (D. Or. Sept. 9, 2015) (“[T]he mere fact that [a
25 psychological counselor] is not a medical source is clearly not a valid or germane reason to
26 discount her assessments of plaintiffs functional limitations; if it were, the Commissioner’s
27 express provisions that ‘other sources’ such as licensed clinical social workers, and ‘non-medical
28 sources’ who assess or treat a claimant a professional capacity, are ‘valuable resources for

1 assessing impairment severity and functioning’ would be meaningless.”) (quoting SSR 06–03p at
2 *3).

3 The ALJ also discounted Ms. Black’s statements regarding Plaintiff’s ability to work
4 because they “touch[] upon subject matter reserved to the [C]ommissioner.” (AR 37.) This
5 reason is specifically germane to disregard Ms. Black’s statements.¹² See 20 C.F.R. §
6 416.927(d)(1) (medical source opinion that claimant is disabled concerns issue reserved to the
7 Commissioner and therefore does not mean that the claimant will be found disabled); *see also*,
8 *e.g.*, *Soria v. Colvin*, No. 1:12–cv–00424–SKO, 2013 WL 1820088, at *13 (E.D. Cal. Apr. 30,
9 2013) (ALJ properly assigned little weight to counselor’s opinion that the plaintiff “did not
10 demonstrate the worker traits of being consistent in his ability to sustain work activities on a full-
11 time basis” because it concerned an issue reserved to the Commissioner).

12 The other reason provided by the ALJ for discounting Ms. Black’s opinion is that it is
13 “conclusory,” in that it does not “provide a detailed function-by-function analysis of [Plaintiff’s]
14 mental abilities.” (AR 37.) This too is a specific and germane reason to give the statements less
15 weight. See, *e.g.*, *Pyl v. Colvin*, No. C13–1428–RAJ, 2014 WL 1671634, at *4 (W.D. Wash.
16 Apr. 28, 2014) (finding the ALJ’s reasons for rejecting naturopath’s opinion, *i.e.*, that it was
17 conclusory and was not probative of the plaintiff’s functional abilities, were germane reasons to
18 reject the opinion.).

19 In sum, the ALJ provided two specific and germane reasons to give little weight to the
20 November 27, 2012, opinion of Ms. Black, and the ALJ’s consideration of this evidence was
21 legally sufficient.

22 ***ii. November 11, 2014 Medical Source Statement***

23 On November 11, 2014, Ms. Black completed a “Mental Impairment Questionnaire” co-
24 signed by Dr. Kifune, in which she opined that Plaintiff would be absent from work more than
25 four days per month as a result of his impairments. (AR 879.) Other limitations she noted were
26 Plaintiff’s reports that his “legs give out,” he is “not able to maintain momentum,” symptoms of

27 ¹² Other than noting that the ALJ gave little weight to Ms. Black’s opinion because it “touched on subject matter
28 reserved to the Commissioner,” (Doc. 19 at 14), Plaintiff’s briefing does not address whether such reason was legally
appropriate.

1 numbness and low back pain. (AR 880.) As the ALJ noted (AR 41), there is some internal
2 inconsistency with Ms. Black’s opinion, which stated that Plaintiff would have four or more
3 repeated episodes of decompensation with a 12 month period, each of at least two weeks’
4 duration, but later noted that Plaintiff would only three episodes within 12 months, each lasting
5 only hours. (AR 879.) The ALJ also observed that no treatment notes from Ms. Black or Dr.
6 Kifune document any of the alleged episodes of decompensation. (AR 41.) This germane reason
7 alone is sufficient for discounting Ms. Black’s opinion. *See, e.g., Burkett v. Colvin*, No. C16-
8 5168-JPD, 2017 WL 6049435, at *4 (W.D. Wash. Jan. 20, 2017) (“The ALJ discounted Ms.
9 Nixon’s March 2011 opinion as inconsistent with her own treatment notes, which do not
10 document any psychological testing and instead suggest that Plaintiff’s symptoms responded well
11 to treatment . . . Plaintiff has failed to show that the ALJ’s reasoning was not germane.”); *Work v.*
12 *Colvin*, No. 6:13-cv-597-CL, 2014 WL 5325218, at *4 (D. Or. Oct. 17, 2014) (inconsistency
13 within counselor’s statements was a germane reason for rejecting her opinion).

14 However, the ALJ gives a further reason for assigning little weight to Ms. Black’s
15 opinion, that is, it relies on Plaintiff’s subjective reports of his limitations without supportive
16 medical treatment for these complaints, in particular, his complaints of leg numbness and low
17 back pain. (AR 41) As discussed above, Ms. Black’s (and Dr. Kifune’s) treatment records
18 overall fail to provide objective findings that would support the level of limitation assessed,
19 strongly indicating she relied primarily on Plaintiff’s subjective complaints and self-reporting of
20 symptoms. An ALJ may reject an opinion that is largely based on a claimant’s discredited
21 subjective reports. *Tommasetti*, 533 F.3d at 1041. Here, the Court found the ALJ properly gave
22 limited weight to Plaintiff’s credibility because of evidence in the record that conflicted with his
23 allegation of total disability. (*See* Section V.A.2, *supra*.) The fact that Ms. Black’s opinion was
24 based upon Plaintiff’s subjective symptom reporting, as noted in the questionnaire, and not the
25 medical record is supported by the record and thus an additional germane reason for rejecting her
26 opinion. *Tommasetti*, 533 F.3d at 1041. *See also Ellingson v. Berryhill*, No. 6:16-cv-01358-JR,
27 2017 WL 3718381, at *6 (D. Or. Aug. 29, 2017) (“[T]he ALJ discounted [plaintiff’s treating
28 mental health counselor’s] opinion because it was overly reliant on plaintiff’s non-credible

1 subjective complaints. This was a legally-sufficient reason for giving [the] opinion no weight.”);
2 *Figueroa v. Astrue*, No. 2:10-cv-01818 KJN, 2011 WL 4084852, at *4 (E.D. Cal. Sept. 13,
3 2011).

4 The ALJ’s final reason for discounting Ms. Black’s opinion regarding Plaintiff’s number
5 of likely absences from work is that his “activities of daily living and father duties reflect greater
6 mental functioning.” (AR 41.) As set forth above, the ALJ noted Plaintiff’s significant activities
7 of daily living, including shopping, paying bills, completing household chores, using public
8 transportation to travel, taking care of his children from 2:30 p.m. to 11:30 p.m. while his wife is
9 at work, getting his children dressed and walking them to school, helping his children with their
10 homework, and taking his children to their medical appointments. (AR 34, 39.) This was yet
11 another germane reason supporting the ALJ’s analysis. *See, e.g., Dodd v. Berryhill*, 708 F. App’x
12 452, 453 (9th Cir. 2018) (giving minimal weight to social worker’s and mental health counselor’s
13 opinion because of conflicts between these opinions and the plaintiff’s reported activities was a
14 germane reason.) (citing *Molina*, 674 F.3d at 1111). Based on the foregoing, the Court finds the
15 ALJ’s decision to discount the November 11, 2014, opinion of Ms. Black was without legal error.

16 **c. Consultative Examiner Dr. Rourke’s Opinion**

17 Plaintiff was evaluated by psychologist Dr. Rourke for approximately five hours on
18 October 19 and November 3, 2012, at the recommendation of Dr. Kifune and Ms. Black. (AR
19 698–702.) Based on his examination and neuropsychological testing of Plaintiff, Dr. Rourke
20 viewed Plaintiff “as manifesting moderate to severe levels of acute and chronic depression as
21 well as severe levels of anxiety (both in the form of social apprehension and trauma related
22 anxiety).” (AR 702.) Dr. Rourke found Plaintiff’s prognosis was “guarded” due to the “intensity
23 and severity of his subjective distress and objective behavioral dyscontrol [sic],” and opined that
24 Plaintiff’s level of distress and dysfunction was sufficient to expect that he will not meaningfully
25 improve sufficiently for gainful employment for at least a year. (AR 702.) Dr. Rourke concluded
26 his report with his view that he “sees [Plaintiff] as meeting the diagnostic criterion for federal
27 disability.” (AR 702.)

28 The ALJ discounted Dr. Rourke’s “conclusory, vague, and non-detailed opinion based on

1 a one-time evaluation of [Plaintiff]” because it “touched upon subject matter reserved to the
2 Commissioner and does not contain a useful function-by-function analysis of [Plaintiff’s] mental
3 abilities.” (AR 36.) As set forth above, the rejection of Dr. Rourke’s opinion because it is on a
4 matter reserved for the Commissioner is not specific or legitimate reason for its rejection. *See*
5 *Ghanim*, 763 F.3d at 1161; *Lyon*, 2017 WL 6040422, at *5.

6 The ALJ’s disregard of Dr. Rourke’s opinion because it does not contain a useful analysis
7 of Plaintiff’s abilities and limitations, is, however, a specific and legitimate reason. *See Batson*,
8 359 F.3d at 1195 (citing *Tonapetyan*, 242 F.3d at 1149); *Thomas*, 278 F.3d at 957 (citing *Matney*,
9 981 F.2d at 1019). Such reason is supported by substantial evidence, as Plaintiff himself
10 concedes that Dr. Rourke “did not provide a function-by-functional analysis” in his report. (Doc.
11 19 at 16.) Contrary to Plaintiff’s suggestion, however, Dr. Rourke never rendered any opinion as
12 to the imposition of a specific limitation on Plaintiff’s ability to work on a sustained basis.
13 Moreover, it is unclear what functional limitations Plaintiff believes Dr. Rourke actually endorsed
14 that were not accounted for in the ALJ’s RFC assessment. Plaintiff asserts that Dr. Rourke’s
15 “treatment notes focused on Plaintiff’s difficulties with social interaction,” *see id.*, but the ALJ’s
16 RFC finding incorporated such difficulties by limiting Plaintiff’s interaction with the general
17 public, coworkers, and supervisors to “occasional.” (*See* AR 28.) Therefore, any error in
18 assigning “little weight” to Dr. Rourke’s opinion is at most harmless because it was
19 inconsequential to the formulation of Plaintiff’s RFC assessment.¹³ *See Carmickle*, 533 F.3d at
20 1162; *Stout*, 454 F.3d at 1055.

21 **d. Consultative Examiner Dr. Kalman’s Opinions**

22 ***i. October 25, 2013 Evaluation***

23 Plaintiff was evaluated by Dr. Kalman on October 25, 2013. (AR 336–41.) Dr. Kalman

24 ¹³ Plaintiff appears to suggest the ALJ erred in his RFC finding by “ch[oo]sing] to rely on the opinions of the non-
25 examining state agency doctors and the non-examining medical expert, each of whom had zero contact with
26 Plaintiff” over Dr. Rourke. (Doc. 19 at 16.) While non-examining professionals do not and cannot “by [themselves]
27 constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating
28 physician,” *Revels v. Berryhill*, 874 F.3d 648, 664 (9th Cir. 2017) (quoting *Lester*, 81 F.3d at 831), such was not the
rejection of Dr. Rourke’s opinion that Plaintiff “meet[s] the diagnostic criterion for federal disability” because it was
conclusory and not accompanied by a function-by-function analysis of Plaintiff’s abilities and limitations. (*See* AR
36.)

1 found, among other things, Plaintiff had markedly limited ability to: understand, remember, and
2 carry out detailed instructions or tasks; work in coordination with or in proximity to others
3 without being unduly distracted by them; and get along with coworkers or peers without
4 distracted them or exhibiting behavioral excesses. (AR 868–70.) He opined Plaintiff’s ability to
5 interact appropriately with the general public or customers and to accept instructions and respond
6 appropriately to criticism from supervisors was extremely limited. (AR 868–70.) Dr. Kalman
7 found the following “work-related stressors” would “increase the level of impairment” beyond
8 that which he had already identified: unruly, demanding, or disagreeable customers, even on an
9 infrequent basis; production demands or quotas; a demand for precision; and a need to make
10 accurate, independent decisions in problem solving on a consistent basis. (AR 870.) He opined
11 Plaintiff would likely be absent from work as a result of his impairments five days or more a
12 month. (AR 870.) Dr. Kalman also found that Plaintiff would likely be unable to complete an
13 eight-hour workday five days or more a month. (AR 870.)

14 Like Dr. Kifune’s August 7, 2012 opinion, Dr. Kalman’s opinion is contradicted by the
15 medical opinion evidence of Disability Determinations Service medical consultant Dr. Warren
16 and medical expert Dr. Cary. (AR 171, 676–77.) Thus, the ALJ was required to state “specific
17 and legitimate” reasons, supported by substantial evidence, for rejecting Dr. Kalman’s opinion.

18 Here, the ALJ found that Dr. Kalman’s opinion was “overly restrictive, based on a one-
19 time evaluation of [Plaintiff], and based on subjective reports from [Plaintiff] that are not
20 consistent with [Plaintiff’s] actual activities of daily living.” (AR 39.) Simply stating that Dr.
21 Kalman’s opinion was “overly restrictive,” however, is not a specific and legitimate reason for
22 rejecting it. *See Bryant v. Colvin*, No. 15-cv-02982-JSC, 2016 WL 3405442, at *17 (N.D. Cal.
23 June 21, 2016); *Sweetin v. Colvin*, No. 2:13–CV–03091-WFN, 2014 WL 3640900, at *13 (E.D.
24 Wash. July 22, 2014). Nor is rejecting Dr. Kalman’s assessment because it was based on “a one-
25 time evaluation” proper: if a limited treating relationship constituted a legitimate reason for
26 rejecting an opinion from a treating or examining source, an opinion from an examining source
27 would always be rejected because the relationship between a claimant and an examining
28 physician is generally limited to a single examination, rendering that opinion worthless. *See*

1 *Grayson v. Astrue*, No. 2:11-cv-1656-EFB, 2012 WL 4468406, at *5 (E.D. Cal. Sept. 25, 2012)
2 (citing *Chapo v. Astrue*, 682 F.3d 1285, 1291 (10th Cir. 2012) (holding that while a limited
3 treating relationship may be a valid reason for not accord[ing] a treating physician’s “findings the
4 conclusive weight of a treating medical-source opinion, . . . it is not by itself a basis for rejecting
5 them—otherwise the opinions of consultative examiners would essentially be worthless . . .”).

6 An ALJ may, however, reject an opinion that is largely based on a claimant’s discredited
7 subjective reports, *Tommasetti*, 533 F.3d at 1041, or that conflicts with a claimant’s daily
8 activities, *Morgan*, 169 at 600–02; *Rollins*, 261 F.3d at 856. Here, Dr. Kalman’s report recited
9 Plaintiff’s statements regarding his level of functioning, including that he did not do his own
10 shopping, cooking, or housekeeping; could not manage his own transportation; and did not pay
11 his own bills. (AR 865.) The ALJ found these statements inconsistent with reports by Plaintiff
12 and his girlfriend that he was able to go shopping for groceries, pay bills, complete various
13 household chores, use public transportation to travel, take his children to their medical
14 appointments, walk his children to school, and heat a “Hot Pocket” in the microwave or make
15 sandwiches. (AR 39.) These are the same activities the ALJ found undermined Plaintiff’s
16 credibility as to his claims of disabling symptoms, which the Court affirmed. (*See* Section
17 IV.A.2.a, *supra*.) The ALJ further found that Dr. Kalman’s opinion that Plaintiff would likely be
18 absent from work as a result of his impairments five days or more a month and unable to
19 complete an eight-hour workday five days or more a month (*see* AR 870) conflicted with
20 Plaintiff’s reported activities of taking care of his children from 2:30 p.m. to 11:30 p.m. while his
21 wife is at work, helping them with their homework, getting them dressed, and walking them to
22 school, all of which Plaintiff performed without any evidence of truancy or discipline by the
23 school. (AR 39.)

24 Plaintiff asserts, based on *Ryan v. Commissioner*, 528 F.3d at 1199–1200, that the ALJ
25 erred in rejecting Dr. Kalman’s opinions by questioning Plaintiff’s credibility and that the ALJ
26 “has not cited any evidence that Dr. Kalman relied primarily on Plaintiff’s subjective reports
27 rather than the doctor’s own professional judgment.” (Doc. 19 at 13–14, 16.) In *Ryan*, the Ninth
28 Circuit stated that “an ALJ does not provide clear and convincing reasons for rejecting an

1 examining physician’s opinion by questioning the credibility of the [claimant’s] complaints
2 where the doctor does not discredit those complaints and supports his ultimate opinion with his
3 own observations.” 528 F.3d at 1199–1200. However, the Ninth Circuit goes on to state that
4 there was “nothing in the record to suggest” the examining physician in that case relied on the
5 claimant’s own “description of her symptoms . . . more heavily than his own clinical
6 observations.” *Id.* at 1200. Contrary to Plaintiff’s assertion, the same is not true with respect to
7 Dr. Kalman’s report.

8 Dr. Kalman’s report explicitly provides that its “sources of information” were “[*Plaintiff*]
9 *who was a fair historian* and accompanying records which included diagnoses of bipolar,
10 depression, and post traumatic [sic] stress disorder.” (AR 863 (emphasis added).) Dr. Kalman
11 wrote that Plaintiff “states he got [a scar on the left side of his head] as a toddler jumping off a
12 retaining wall and fracturing his head,” and from this concluded that his “poor performance on
13 the cognitive functioning scale may be in part due to the head trauma which he suffered in early
14 childhood.” (AR 864–65.) He relied on Plaintiff’s own history for his finding that Plaintiff is
15 “[s]ignificant for paranoid delusions with thought broadcasting”: “[*Plaintiff*] readily
16 acknowledged paranoid feelings.” (AR 865.)

17 It is true that Dr. Kalman also includes a handful of his own observations in his
18 assessment, but these observations do not particularly support the opinions he eventually offers.
19 He states that Plaintiff’s “speech was average rate and volume,” that his eye contact was “good,”
20 and he was “cooperative.” (AR 864.) He found Plaintiff’s abstract thinking to be intact, his
21 interpretations concrete, and his form of thought “logical and goal directed,” with no “mood
22 swings” or “emotional lability.” (AR 865.) Given these observations, it is unclear how Dr.
23 Kalman could reach his opinions regarding Plaintiff’s work limitations without also relying “to a
24 large extent” on Plaintiff’s own self-reports. *See, e.g., Bennett v. Colvin*, 202 F. Supp. 3d 1119,
25 1132 (N.D. Cal. 2016); *Verduzco v. Colvin*, No. 14–CV–02698–BLF, 2015 WL 4881201, at *6
26 (N.D. Cal. Aug. 14, 2015) (“Because Dr. Farr necessarily must have relied upon Plaintiff’s self-
27 reports as to the level of her pain . . .the ALJ properly could have rejected Dr. Farr’s opinion
28 based upon an appropriate adverse credibility finding with respect to Plaintiff.”); *Sampson v.*

1 *Colvin*, No. 1:14–CV–03136–JTR, 2015 WL 3970415, at *9 (E.D. Wash. June 29, 2015) (“The
2 fact that Dr. Mabee could not rely on psychological testing to assess Plaintiff’s impairments, and
3 did not personally observe Plaintiff suffering from any mental disorders, suggests that Dr. Mabee
4 instead relied mostly on Plaintiff’s self-reports.”).

5 Accordingly, the Court finds that ALJ’s assignment of “little weight” to Dr. Kalman’s
6 report because it was to a large extent based on Plaintiff’s subjective reports properly discredited,
7 *Tommasetti*, 533 F.3d at 1041, and also inconsistent with Plaintiff’s actual activities of daily
8 living are legitimate and specific reasons supported by substantial evidence showing that Plaintiff
9 may not have been as “fair” a historian as Dr. Kalman specified in his report, *Morgan*, 169 at
10 600–02; *Rollins*, 261 F.3d at 856.

11 ***ii. March 13, 2015 Evaluation***

12 On March 13, 2015, Plaintiff underwent a second consultative psychological evaluation
13 with Dr. Kalman. (AR 887–90.) Dr. Kalman’s opinion was, among other things, that Plaintiff is
14 not able to interact with supervisors and co-workers, that he cannot deal with the public, and that
15 he cannot maintain attention, concentration, and memory. (AR 890.) The ALJ assigned “little
16 weight” to these findings by Dr. Kalman because they were “again based on [Plaintiff]
17 underreporting his activities of daily living to Dr. Kalman as described above.” (AR 40.) As
18 with his prior evaluation, Dr. Kalman stated that he relied on Plaintiff as a “fair historian” (AR
19 887), yet Dr. Kalman’s recitation of Plaintiff’s daily activities and social functioning does not
20 include, for example, that Plaintiff attends his children’s sporting events and singing recitals,
21 helps them sell candy, takes them to medical appointments, and walks them to school. Nor does
22 it include the fact that Plaintiff goes shopping and uses public transportation to travel. The Court
23 finds that the ALJ articulated a specific and legitimate reason supported by substantial evidence
24 to disregard Dr. Kalman’s report in part. *Morgan*, 169 at 600–02; *Rollins*, 261 F.3d at 856.

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1 **C. Although the ALJ Erred in his RFC Finding by Not Addressing or**
2 **Accounting for the “Simple One- or Two-Step Instructions” Assessment by**
3 **Dr. Kalman, Such Error is Harmless.**

4 **1. Legal Standard**

5 At Step Five, the Commissioner considers the RFC assessment, the claimant’s age,
6 education, and work experience to determine if the claimant is able to perform other work. 20
7 C.F.R. § 416.920(a). The RFC assessment consists of the “physical and mental” limitations on
8 what a claimant can do as a result of his impairments. 20 C.F.R. § 416.945(a)(1). The ALJ then
9 evaluates potential occupations that a claimant can perform. *See* 20 C.F.R. § 416.966. The DOT
10 is used to determine what jobs exist in the national economy. *Zavalin v. Colvin*, 778 F.3d 842,
11 846 (9th Cir. 2015). The DOT lists the General Education Development (“GED”) Levels needed
12 for a job, such as the “aspects of education (formal and informal) . . . required of the worker for
13 satisfactory job performance.” *Id.*; DOT, App. C, 1991 WL 688702 (4th ed. 1991).

14 The GED Levels consist of “the reasoning ability required to perform the job, ranging
15 from Level 1 (which requires the least reasoning ability) to Level 6 (which requires the most).”
16 *Zavalin*, 778 F.3d at 846. Reasoning Level One is defined as ability to “[a]pply commonsense
17 understanding to carry out simple one–or two-step instructions. Deal with standardized situations
18 with occasional or no variables in or from these situations encountered on the job.” *Rounds v.*
19 *Comm’r Soc. Sec. Admin.*, 807 F.3d 996, 1002–03 (9th Cir. 2015). Reasoning Level Two is
20 defined as being able to “[a]pply commonsense understanding to carry out detailed but
21 uninvolved written or oral instructions. Deal with problems involving a few concrete variables in
22 or from standardized situations.” *Id.* The ALJ may also rely on the testimony of a VE for
23 information on what occupations a claimant can perform given his or her RFC. 20 C.F.R. §
24 416.966(e); *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). Lastly, the
25 ALJ takes all the information, including “the claimant’s [RFC], age, education, and work
26 experience” to determine if he or she can perform a job in the national economy. *Valentine*, 574
27 F.3d at 689; *see also* 20 C.F.R. § 416.920(g). If conflict arises between the VE’s testimony and
28 the DOT, the ALJ “is required to reconcile the inconsistency.” *Zavalin*, 778 F.3d at 846.

2. Analysis

1 Plaintiff's final assertion of error is that the ALJ's finding at Step Five was incorrect
2 because the occupations of hand bander (DOT code 920.687-030) and bag cutter (DOT code
3 789.687-010), two of the three jobs the VE identified and upon which the ALJ relied, have a
4 reasoning Level Two, which exceeds Plaintiff's limitation to tasks with one- to two-step
5 instructions. (See Doc. 19 at 19–20; Doc. 21 at 6–7.) In response, Defendant correctly points out
6 that "the ALJ never found that Plaintiff was limited to [one- to two-step] tasks; instead, he found
7 that Plaintiff retained the RFC to perform simple work." (Doc. 20 at 14.) The error lies,
8 however, in the ALJ's failure to address and account for this distinction.

9 The ALJ determined that Plaintiff had a RFC to "perform sedentary work . . . limited to
10 work that is defined as simple by the [DOT], [SVP] levels 1 and 2, routine and repetitive tasks . .
11 . ." (AR 28.) The ALJ also gave "significant weight" to the March 2015 opinion of consultative
12 examiner Dr. Kalman that Plaintiff could "understand, remember, and carry out simple one and
13 two-step job instructions." (AR 890.) The ALJ characterized this limitation as "consistent with
14 the findings of the State Agency medical consultant and the findings of [Plaintiff's] primary
15 treating physician." (AR 40.) The ALJ further found this limitation "account[s] for [Plaintiff's]
16 severe impairments and subjective complaints." (AR 40.)

17 Both parties appear to agree that there is a critical distinction between the "simple one- or
18 two-step instructions" assessment by Dr. Kalman and the "simple" work with "routine and
19 repetitive tasks" limitation adopted by the ALJ, and both cite *Rounds v. Commissioner Social*
20 *Security Administration* in support. (See Doc. 19 at 20; Doc. 20 at 14.) In *Rounds*, the ALJ's
21 RFC determination limited the plaintiff to "one to two-step tasks." 807 F.3d at 1003. A
22 vocational expert testified that the plaintiff could perform jobs like a kitchen helper, hand
23 packager, and recycler—all requiring Level Two reasoning on the GED scale. *Id.* at 1002. On
24 appeal, the plaintiff argued that the RFC limitation to "one to two-step tasks" matched Level One
25 reasoning ("ability to carry out simple one-or two-step instructions") and, therefore, she could
26 not as a matter of law perform the Level Two reasoning jobs identified by the vocational expert.
27 *Id.* at 1103. The Ninth Circuit agreed and found a conflict between the RFC limit to "one and
28 two step tasks" tasks and the Vocational Expert's selection of Level Two reasoning jobs, given

1 the “close similarity” between the RFC limitation and Level One reasoning. *Id.* The Ninth
2 Circuit remanded the case so that the ALJ could articulate a reasonable explanation to justify
3 relying on the vocational expert’s testimony and selection of Level Two reasoning jobs. *Id.* at
4 1004.

5 *Rounds* illustrates that an important distinction exists between Level One and Level Two
6 reasoning jobs, with Level One jobs typically aligning with the ability to perform one- or two-
7 step job instructions. However, *Rounds* differs from this case in a significant way. The conflict
8 in *Rounds* focused on the differences between the RFC-imposed limitation to one and two-step
9 jobs and the vocational expert’s identification of appropriate jobs falling at Level Two. *Id.* Here,
10 the conflict is *not* between the ALJ’s RFC-imposed limitation (“simple” work with “routine and
11 repetitive tasks”) and the VE’s testimony identifying Level Two jobs. Instead, the alleged
12 conflict is between Dr. Kalman’s assessment (that on its face potentially matches Level One
13 reasoning) and the ALJ’s RFC-imposed limitation to simple work with repetitive and routine
14 tasks.

15 A number of district courts in this Circuit, citing *Rounds*, have reversed ALJ decisions
16 imposing a “simple, repetitive tasks” RFC limit where the ALJs fail to address and distinguish
17 conclusions by doctors that claimants can perform one-and-two step instructions. *See Wilson v.*
18 *Colvin*, No. 16-CV-01971-WHO, 2017 WL 1861839, at *7 (N.D. Cal. May 9, 2017) (collecting
19 cases). Here, the Court finds, following *Rounds*, that there is a significant distinction between a
20 limitation to one-to two-step instructions and an RFC allowing performance of simple work with
21 repetitive and routine tasks. The ALJ’s assignment of “significant weight” to Dr. Kalman’s
22 functional assessment effectively limiting Plaintiff to carrying out simple one and two-step job
23 instructions, but subsequent failure to address or account for this assessment in the RFC finding
24 was therefore erroneous. *See Wilson*, 2017 WL 1861839, at *7.

25 The Commissioner points out that the ALJ “found that Plaintiff could do more than Dr.
26 Kalman indicated—indeed, he specifically rejected Dr. Kalman’s opinion that Plaintiff could not
27 maintain attention, concentration, or memory.” (Doc. 20 at 14.) While true, the ALJ was still
28 required to give a reasoned explanation of why he was apparently rejecting the *one-and-two step*

1 *instructions* limitation assessed Dr. Kalman, despite the ALJ’s assignment of significant weight
2 to it. The ALJ gave no reason accounting for his failure to include such limitation in his RFC
3 assessment. The Commissioner’s post-hoc attempts to buttress the ALJ’s decision are not
4 sufficient. *See, e.g., Hill v. Astrue*, 698 F.3d 1153, 1159–60 (9th Cir. 2012) (ALJ must give clear
5 and convincing reasons to “reject an examining physician’s opinion”).

6 However, in addition to the hand bagger and bag cutter jobs, the ALJ also adopted the
7 VE’s testimony that Plaintiff could perform the job of final assembler (optical) (DOT code
8 713.687-018), of which there are 7,000 jobs nationally. (AR 46–47.) Pursuant to the DOT, final
9 assembler (optical) is a Level One reasoning job, *see* 713.687-018 FINAL ASSEMBLER,
10 DICOT 713.687-018, 1991 WL 679271, which, as set forth above, is consistent with Dr.
11 Kalman’s assessment limiting Plaintiff to carrying out simple one and two-step job instructions.
12 *See Rounds*, 807 F.3d at 1003. Thus, even if the ALJ had included such limitation in Plaintiff’s
13 RFC, the ALJ met his burden at Step Five because the record contains substantial evidence
14 demonstrating that Plaintiff was capable of performing the Level One reasoning job of final
15 assembler (optical) and that it exists in significant numbers in the national economy.¹⁴ (*See* AR
16 46–47, 173, 175.) Accordingly, Plaintiff has not met his burden of showing that the ALJ’s error
17 was harmful.¹⁵ *See, e.g., De La Fuente v. Colvin*, No. CV 14–1112 AGR, 2014 WL 6630019, at
18 *2 (C.D. Cal. Nov. 21, 2014) (“Based on the vocational expert’s testimony that there are 2,600
19 such jobs in Los Angeles County, the shirt presser job alone existed in significant numbers in the
20 national economy. Accordingly, any error was inconsequential to the ultimate nondisability
21 determination.”) (internal citations omitted) (citing *Molina*, 674 F.3d at 1121–22); *Koller v.*
22 *Colvin*, No. 3:13–cv–05330–RBL–KLS, 2014 WL 868830, at *7 (W.D. Wash. Mar. 5, 2014)
23 (“[The ALJ also identified an unskilled job at step five, and this job alone exists in significant

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25 ¹⁴ Plaintiff’s argument that because “[t]he VE did not address whether the one remaining job, final assembler, exists
26 in significant numbers standing alone, [] the agency has failed to meet its step-five burden,” *see* Doc. 19 at 20; Doc.
27 21 at 7, is without merit. *See Gaston v. Astrue*, No. 3:11-CV-00339-JE, 2012 WL 3264547, at *10 (D. Or. Aug. 9,
28 2012) (“The Commissioner can satisfy his burden at step five by demonstrating that a claimant can perform a single
occupation.”) (citing 20 C.F.R. §§ 404.1566(b), 416.966(b)),

¹⁵ Plaintiff further alleges that the ALJ erred in finding that Plaintiff could perform the bag cutter job because the
DOT describes it as “light” instead of “sedentary” work. (*See* Doc. 19 at 19–20; Doc. 21 at 6–7.) Even assuming
(without deciding) that Plaintiff is correct, such error would be harmless for the same reason as set forth above.

1 numbers in the national and regional economy, which renders any error as to the semi-skilled jobs
2 harmless.”).

3 **VI. CONCLUSION AND ORDER**

4 After consideration of Plaintiff’s and Defendant’s briefs and a thorough review of the
5 record, the Court finds that the ALJ’s decision is supported by substantial evidence and is
6 therefore AFFIRMED. The Clerk of this Court is DIRECTED to enter judgment in favor of
7 Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, and against Plaintiff.

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9 IT IS SO ORDERED.

10 Dated: March 21, 2018

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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