

1 and based upon proper legal standards. Accordingly, this Court affirms the agency’s determination to
2 deny benefits.

3 **FACTS AND PRIOR PROCEEDINGS**

4 On February 11, 2014, Plaintiff filed an application for disability insurance benefits. AR 17.²
5 Plaintiff alleged that he became disabled on October 12, 2011, due to depression, anxiety, back pain,
6 bells palsy, plantar fasciitis, meniscus tear, arthritis, and obesity. AR 120, 217. Plaintiff’s application
7 was denied initially and on reconsideration. AR 120-23, 128-32. Subsequently, Plaintiff requested a
8 hearing before an Administrative Law Judge (“ALJ”). ALJ Kevin Gill held a hearing on April 27,
9 2016, and issued an order denying benefits on August 23, 2016. AR 14-30, 36-68. Plaintiff sought
10 review of the ALJ’s decision, which the Appeals Council denied, making the ALJ’s decision the
11 Commissioner’s final decision. AR 1-5. This appeal followed.

12 **Hearing Testimony**

13 The ALJ held a hearing on April 27, 2016, in Fresno, California. Plaintiff appeared with his
14 attorney, Robert Ishikawa. Impartial Vocational Expert (“VE”) Judith Najarian also appeared. AR 38.

15 In response to questioning by the ALJ, Plaintiff testified that he has a driver’s license and will
16 drive to doctor’s appointments. When asked about limits on his driving, Plaintiff reported that he has
17 road rage, which is almost constant when he drives. It is not hard for him “to get into confrontations
18 on the street, trying to initiate drag races, stupid stuff” when he gets angry at people. AR 41.

19 Plaintiff reported that he last worked in January 2012 as a cement mixer truck driver. He was
20 fired from that job because he delivered a load of concrete to the wrong address and employees were
21 frightened of his anger. Plaintiff also worked as a window tech, computer tech and concrete cutter.
22 AR 42-44.

23 When asked what prevented him from working, Plaintiff testified that he does not have any
24 drive or motivation, with wanting to die or not be here anymore. He also hears things and sees things
25 that are not there.

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² References to the Administrative Record will be designated as “AR,” followed by the appropriate page number.

1 When asked about pain, Plaintiff testified that he has issues with his back, knees, ankles and
2 left hand. He is not taking pain medications because of his psychiatric medications, which include
3 Prozac, Seroquel XR and Ambien. However, he does take Gabapentin for his aches and pains, along
4 with over the counter Naproxen. AR 45-49.

5 When asked about his mental health treatment, Plaintiff reported being in individual therapy.
6 He also attended group therapy one time. He sees his psychiatrist once a month, and his therapist four
7 to eight times a month. AR 50-51.

8 When asked about his abilities, Plaintiff testified that he could lift a gallon of milk and could
9 lift 25 pounds. Bending is difficult and he has problems getting in and out of a vehicle. He has a
10 handicapped placard because of his back and knees. He cannot stand for a long time in one spot. He
11 can walk about five minutes. He also has problems with his memory, such as recalling dates, times
12 and instructions. He watches quite a bit of TV, like the History Channel and Discovery Channel. He
13 has problems following an hour-long show, and he will sometimes fall asleep or wander off. AR 51-
14 53.

15 When asked about his anger problems, Plaintiff testified that he tries not to go out without his
16 wife or someone with him because he does stupid stuff on the road. Usually, he will have his wife or
17 daughter-in-law drive. He does not like taking the kids to school because he gets in confrontations
18 trying to drop them off. AR 53-54.

19 When asked about a typical day, Plaintiff reported that he will watch TV, be on Facebook or
20 plain a mindless video game. If he has the energy, he will load the dishwasher or throw a load of
21 clothes through the washing machine. He spends a lot of the day lying down on the couch or in the
22 recliner. He is not in charge of any household chores and he does not exercise. He will grocery shop
23 with his wife or daughter-in-law, but not by himself. He also does not keep money in his bank
24 account, and his wife pays the bills. AR 54-55.

25 In response to questions from his attorney, Plaintiff testified that he had trouble with his past
26 jobs. He had attendance issues and anger issues. He could not get to work on time and would call in
27 sick because he had to drive. Plaintiff also testified that he currently has problems getting out of bed.
28 He isolates most of the time, and his wife tries to draw him out. With his anger issues, he has punched

1 holes in the walls and broken furniture. He has been trying to deal with his anger issues through
2 therapy. He attends therapy twice a week. He has suicidal ideations, and although he does not have
3 plans, he has ideas. He also has auditory or visual hallucinations every day, which affect his ability to
4 concentrate. His wife looks after him and does not leave him unattended very much. AR 55-60.

5 Following Plaintiff's testimony, the ALJ elicited testimony from VE Judith Najarian. The VE
6 classified Plaintiff's past work as concrete mixing truck driver, material handler, window repairer,
7 electronics mechanic, and construction worker II. AR 60-63. The ALJ also asked the VE hypothetical
8 questions. For the first hypothetical, the ALJ asked the VE to assume an individual of Plaintiff's age,
9 education and past jobs who was limited to lifting and carrying 20 pounds occasionally, 10 pounds
10 frequently, and sit, stand, walk six hours in an eight-hour day. This individual also occasionally could
11 do right foot controls, frequent climbing of ramps and stairs, occasional climbing of ladders, ropes and
12 scaffolds, frequent balancing and stooping and occasional kneeling, crouching and crawling. This
13 individual also was limited to occasional exposure to dust, odors, fumes and pulmonary irritants. The
14 individual was further limited to performing simple, routine tasks, frequent interactions with
15 supervisors and interaction with coworkers and the public only on a brief, casual basis, no more than
16 10 percent of the time. The individual also was limited to simple, work related decisions. The VE
17 testified that this individual could not perform any of Plaintiff's past jobs, but there was other work
18 this individual could perform, such as marker, router, and checker I in a warehouse setting. AR 63-65.

19 For the second hypothetical, the ALJ asked the VE to consider the same individual from
20 hypothetical one who was further limited to only occasional interaction with supervisors. The VE
21 testified that this hypothetical individual could perform the other work described once the individual
22 learned the job past the training time. During the training time, there may be more than occasional
23 contact with the supervisor. AR 65.

24 For the third hypothetical, the ALJ asked the VE to consider the same person from hypothetical
25 two, but in addition to normal breaks, this person would be off task 15 percent of the time in an 8-hour
26 workday. The VE testified that this person could not perform any work. AR 65.

1 For the fourth hypothetical, the ALJ asked the VE to consider the same person from
2 hypothetical two with an additional limitation that the person would have two or more angry outbursts
3 at work each month. The VE testified that this person would not keep a job. AR 65-66.

4 For the fifth hypothetical, the ALJ asked the VE to consider the same person from hypothetical
5 two, but this person would be absent from work two days a month. The VE testified that this person
6 could not perform any work and would not keep the job. AR 66.

7 For the sixth hypothetical, Plaintiff's attorney asked the VE to consider a person who would be
8 off task 10 percent of an eight-hour workday. The VE testified that this person would not keep a job.
9 AR 67.

10 **Medical Record**

11 The relevant medical record was reviewed by the Court, and will be referenced below as
12 necessary to this Court's decision.

13 **The ALJ's Decision**

14 Using the Social Security Administration's five-step sequential evaluation process, the ALJ
15 determined that Plaintiff was not disabled under the Social Security Act. AR 14-30. Specifically, the
16 ALJ found that Plaintiff had not engaged in any substantial gainful activity since January 5, 2012, his
17 alleged onset date. The ALJ identified intermittent explosive disorder, depressive disorder not
18 otherwise specified, degenerative disc disease of the lumbar spine, status-post right knee arthroscopy,
19 degenerative arthritis of the right knee, obesity and asthma as severe impairments. AR 19-20.
20 Nonetheless, the ALJ determined that the severity of Plaintiff's impairments did not meet or equal any
21 of the listed impairments. AR 20-22. Based on a review of the entire record, the ALJ determined that
22 Plaintiff retained the residual functional capacity ("RFC") to perform light work, except that he was
23 limited to lifting and carrying 10 pounds frequently and 20 pounds occasionally, sitting 6 hours,
24 standing 6 hours, and walking 6 hours, could push/pull as much as he could lift and carry, limited to
25 right occasional foot control, limited to climbing ramps or stairs, balancing and stooping frequently,
26 limited to climbing ladders, ropes or scaffolds, kneeling, crouching and crawling occasionally, limited
27 to occasional exposure to dust, odors, fumes, and pulmonary irritants, limited to performing simple,
28 routine tasks, limited to occasional interactions with supervisors, limited to interaction with coworkers

1 and the public only on a brief, casual basis, no more than 10% of the time, and limited to simple work-
2 related decisions. AR 22-28. With this RFC, the ALJ found that Plaintiff could not perform any past
3 relevant work, but there were jobs existing in significant numbers in the national economy that
4 Plaintiff could perform, such as marker, router, and checker I. AR 28-30. The ALJ therefore
5 concluded that Plaintiff was not disabled under the Social Security Act. AR 30.

6 SCOPE OF REVIEW

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

21 REVIEW

22 In order to qualify for benefits, a claimant must establish that he or she is unable to engage in
23 substantial gainful activity due to a medically determinable physical or mental impairment which has
24 lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §
25 1382c(a)(3)(A). A claimant must show that he or she has a physical or mental impairment of such
26 severity that he or she is not only unable to do his or her previous work, but cannot, considering his or
27 her age, education, and work experience, engage in any other kind of substantial gainful work which
28 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989). The

1 burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th Cir.
2 1990).

3 Plaintiff argues that the Commissioner’s decision should be reversed because the ALJ accepted
4 testimony from the VE that would preclude Plaintiff from successfully completing the training period
5 for the work identified at step 5 of the sequential evaluation process. Plaintiff also argues that the ALJ
6 erred in evaluating Plaintiff’s social limitations in formulating the RFC.

7 **DISCUSSION**³

8 **A. VE Testimony - Training Period**

9 Plaintiff argues that because the ALJ accepted VE testimony that precludes completing the
10 successful training for the other work identified in the national economy, then the Court should reverse
11 the decision and award benefits. (Doc. No. 13 at 6-8.) In other words, Plaintiff contends reversal is
12 warranted because if the most that he can tolerate is occasional interaction with supervisors, then he
13 cannot complete the training time for the jobs identified at step five.

14 At step five of the sequential evaluation, the ALJ relied on VE testimony that a person with
15 Plaintiff’s RFC could perform the requirements of representative occupations such as marker (DOT
16 209.587-034), router (DOT 222.587-038) and checker 1 (DOT 222.687-010). AR 30. The VE
17 testified that such a person, limited to only occasional interaction with supervisors, could perform
18 those jobs “once one learns the job past the training time.” AR 65. The VE further testified that
19 “during the training timeframe, there may be more than occasional contact with the supervisor because
20 there’s a training timeframe. But once we’re past that, then it wouldn’t be more than occasional to do
21 those jobs.” *Id.*

22 In seeking reversal, Plaintiff claims that the VE testified that “an individual with [a limitation
23 to occasional interaction with supervisors] could not get past the training time either for some
24 significant portion of the jobs or all of them.” (Doc. No. 13 at 7.) However, this is not a proper
25 characterization of the VE’s testimony. The VE did not testify that someone with a limitation to
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27 ³ The parties are advised that this Court has carefully reviewed and considered all of the briefs, including
28 arguments, points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific argument or
brief is not to be construed that the Court did not consider the argument or brief.

1 occasional interaction with supervisors could not get past the training time for the representative jobs.
2 Rather, the VE suggested that during the training time, there *may be* more than occasional contact with
3 a supervisor.

4 Plaintiff next relies on the Program Operational Manual System (“POMS”) DI 25020.010 ¶
5 B.3 to assert that “the Commissioner describes mental abilities critical to performing unskilled work as
6 accepting instructions and responding appropriately to criticism from supervisors.” (Doc. No. 13 at 7.)
7 Plaintiff argues that the VE “recognized this concept as applicable at least during the period of
8 training, that training requires more than occasional interaction with supervisors because that person
9 must accept instructions and respond appropriately to criticism during the training process.” (*Id.*)
10 Plaintiff’s argument is unavailing.

11 There is no obvious corollary between the VE’s testimony regarding interactions with
12 supervisors and Plaintiff’s ability to accept instructions or respond appropriately to criticism from
13 supervisors, nor is there an obvious conflict between Plaintiff’s RFC for occasional interactions with
14 supervisors and the VE’s testimony that a person with such a limitation could perform other work.
15 The ALJ did not find that Plaintiff was unable to accept instructions or that he was unable to respond
16 appropriately to criticism from supervisors. Instead, the ALJ limited Plaintiff to occasional
17 interactions with supervisors to accommodate Plaintiff’s moderate social limitations. AR 22.
18 Critically, Plaintiff has not demonstrated that he is unable to tolerate criticism from supervisors or
19 accept instructions.

20 Moreover, the representative jobs of marker (DOT 209.587-034), router (DOT 222.587-038)
21 and checker I (DOT 222.687-010) are unskilled jobs all of which specify in the Dictionary of
22 Occupation Titles (“DOT”) that “Taking Instructions-Helping” is not a significant part of the job. *See*
23 *Marker*, DICOT 209.587-034 (G.P.O.), 1991 WL 671802; *Router*, DICOT 222.587-038 (G.P.O.),
24 1991 WL 672123; and *Checker I*, DICOT 222.687-010 (G.P.O.), 1991 WL 672130. Indeed, there is
25 no indication that the training period for any of these unskilled jobs would require more than
26 occasional interactions with supervisors. *See, e.g., Burtenshaw v. Berryhill*, No. 5:16-CV-02243-GJS,
27 2018 WL 550590, at *6-*7 (C.D. Cal. Jan. 23, 2018) (concluding that limitation to occasional,
28 superficial and non-intense interactions with coworkers and supervisors did not conflict with mental

1 demands for unskilled work in POMS DI 25020.010 ¶ B.3); *Losoya v. Berryhill*, No. CV 16-8967-
2 PLA, 2017 WL 4564701, at *5 (C.D. Cal. Oct. 11, 2017) (noting that unskilled jobs “ordinarily
3 involve dealing primarily with objects, rather than with data or people”).

4 Further, the POMS is not binding on either the ALJ or on a reviewing court. *Lockwood v.*
5 *Comm’r Soc. Sec. Admin.*, 616 F.3d 1068, 1073 (9th Cir. 2010); *Lowery v. Barnhart*, 329 F.3d 1019,
6 1023 (9th Cir. 2003) (holding that POMS is an internal procedure manual that does not impose
7 judicially enforceable duties on an ALJ).

8 For these reasons, the Court does not find reversible error at step five of the sequential
9 evaluation.

10 **B. Mental RFC - Social Interactions**

11 Plaintiff argues that the ALJ erred by failing to state a valid and reasonable basis for rejecting
12 the social interaction limitations specifically articulated by the state agency physicians, Dr. H. Amado
13 and Dr. D. Funkenstein. (Doc. No. 13 at 10.)

14 On March 26, 2014, Dr. Amado completed a Mental Residual Functional Capacity
15 Assessment. AR 90-92. With respect to social interaction limitations, Dr. Amado opined that Plaintiff
16 was moderately limited in the ability to interact appropriately with the general public, in the ability to
17 accept instructions and respond appropriately to criticism from supervisors and in the ability to get
18 along with coworkers or peers without distracting them or exhibiting behavioral extremes. AR 91. In
19 narrative form, Dr. Amado explained, “due to anger issues and irritability best limited to nonpublic
20 settings with superficial interactions with prospective coworkers and supervisors, but claimant retains
21 appropriate social skills and is able to keep emotions in check.” AR 91.

22 Similarly, on June 18, 2014, Dr. Funkenstein completed a Mental Residual Functional
23 Capacity Assessment. AR 108-10. With respect to social interaction limitations, Dr. Funkenstein
24 opined that Plaintiff was moderately limited in the ability to interact appropriately with the general
25 public, in the ability to accept instructions and respond appropriately to criticism from supervisors and
26 in the ability to get along with coworkers or peers without distracting them or exhibiting behavioral
27 extremes. AR 109. In narrative form, Dr. Funkenstein stated, “due to anger issues and irritability best
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1 limited to nonpublic settings with superficial interactions with prospective coworkers and supervisors,
2 but claimant retains appropriate social skills and is able to keep emotions in check.” AR 110.

3 In evaluating these opinions, the ALJ reasoned as follows:

4 As for the state agency psychological consultants, they found that the claimant’s affective
5 disorder was severe, resulting in moderate difficulties in activities of daily living, in
6 social interaction, and in concentration, persistence, and pace. Thus, they limited the
7 claimant to simple instructions on a consistent basis and nonpublic settings with
8 superficial interactions with prospective coworkers and supervisors. I place great weight
9 on their assessments, as the claimant’s treatment has remained largely unchanged. He
10 continues to receive medication and therapy, and, overall, he has improved with
11 treatment.

12 AR 26.

13 Plaintiff argues that the ALJ erred by failing to explain why he rejected the state agency
14 physicians’ limitation of Plaintiff to superficial interactions and instead limited Plaintiff to only
15 occasional interactions with supervisors. (Doc No. 13 at 10.) Plaintiff’s argument is not persuasive.

16 The ALJ was not required to explain how he translated each relevant medical opinion into an
17 RFC determination. *See Elkins v. Berryhill*, No. 5:17-cv-00248-KES, 2018 WL 294526, at *4 (C.D.
18 Cal. Jan. 4, 2018) (noting that “while ALJs are required to give specific, legitimate reasons for
19 rejecting relevant medical opinions, they are not required to explain how they translated each relevant
20 medical opinion into an RFC determination.”). An “ALJ’s RFC determination need not precisely
21 reflect any particular medical provider’s assessment.” *Holcomb v. Comm’r Soc. Sec.*, No. 2:17-cv-
22 02268-KJM-CKD, 2019 WL 176266, at *4 (E.D. Cal. Jan. 11, 2019) (citing *Turner v. Comm’r Soc.*
23 *Sec. Admin.*, 613 F.3d 1217, 1222-23 (9th Cir. 2010)). Rather, the ALJ may incorporate the opinions
24 of a physician by assessing RFC limitations entirely consistent with, but not identical to limitations
25 assessed by the physician. *See Turner*, 613 F.3d at 1222-23. Moreover, an ALJ may reasonably
26 decline to adopt the opinion of a physician “offered as a *recommendation*, not an imperative.”
27 *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008) (emphasis in original).

28 Here, the state agency physicians did not limit Plaintiff *only* to superficial interactions with
supervisors and coworkers. Rather, these physicians recommended that Plaintiff was “*best limited*” to
nonpublic settings with superficial interactions with prospective coworkers and supervisors. AR 91,
110 (emphasis added). And, while noting this “best” scenario, neither doctor indicated that this was

1 the *most* that Plaintiff could do, and both doctors expressly affirmed that Plaintiff “still retained
2 appropriate social skills” and “was able to keep his emotions in check.” *Id.* As noted above, the ALJ
3 was not required to adopt the portion of the opinion offered as a recommendation. *Carmickle*, 533
4 F.3d 1165. Moreover, Plaintiff does not explain how the limitation to occasional contact with
5 supervisors fails to account for the moderate limitations in social functioning identified by the state
6 agency physicians, who correspondingly opined that Plaintiff retained appropriate social skills.

7 Even assuming that the state agency physicians’ proposed restriction to superficial interactions
8 was significant and probative, the ALJ provided a reasoned explanation for omitting that restriction
9 from Plaintiff’s RFC.⁴ In evaluating the medical evidence to determine Plaintiff’s mental RFC, the
10 ALJ found Plaintiff “limited to simple, routine tasks involving only simple-work related decisions
11 because of his depressive symptoms . . . [and] that, because of his intermittent explosive disorder, i.e.,
12 issues with anger, he is limited to only brief and casual interaction no more than 10% of the workday
13 with coworkers and the public and to only occasional interaction with a supervisor.” AR 25. The ALJ
14 then tacitly rejected the state agency physicians’ opinions regarding superficial social interactions with
15 supervisors by expressly rejecting “any other [mental] residual functional capacity limits” after
16 “considering the improvements the [plaintiff] has realized with treatment over time.” AR 25. Plaintiff
17 has not challenged the ALJ’s findings with respect to improvement of his mental condition with
18 treatment over time.

19 Accordingly, the Court finds that the ALJ did not err in his evaluation of the state agency
20 physicians’ opinion and his determination of Plaintiff’s mental RFC.

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23 ⁴ At least one court in this circuit has questioned whether the difference between occasional interactions and
24 superficial interaction is significant or probative in evaluating a physician’s opinion. *See, e.g., Marks v. Berryhill*, No.
25 216CV03034APGNJK, 2018 WL 702835, at *6 (D. Nev. Jan. 7, 2018), report and recommendation adopted, No.
26 216CV03034APGNJK, 2018 WL 702888 (D. Nev. Feb. 2, 2018) (“Reasonable minds may differ as to whether or not
27 occasional interactions are or are not necessarily superficial interactions. Nonetheless, the Court finds that the difference
28 between an occasional interaction and a superficial interaction is not so great as to find that the ALJ’s evaluation and
explanation of Dr. Lark’s opinion is questionable.”).

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CONCLUSION

Based on the foregoing, the Court finds that the ALJ's decision is supported by substantial evidence in the record as a whole and is based on proper legal standards. Accordingly, this Court **DENIES** Plaintiff's appeal from the administrative decision of the Commissioner of Social Security. The Clerk of this Court is **DIRECTED** to enter judgment in favor of Defendant Nancy A. Berryhill, Acting Commissioner of Social Security, and against Plaintiff Howard Michael Dean, II.

IT IS SO ORDERED.

Dated: March 13, 2019

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE