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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY M. HERRERA,

Plaintiff,

CIV S-10-1317 GGH

vs.

MICHAEL J. ASTRUE,

ORDER

Commissioner of Social Security,  
Defendant.

\_\_\_\_\_ /

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act (“Act”). For the reasons that follow, plaintiff’s Motion for Summary Judgment is denied, and the Commissioner’s Motion for Summary Judgment is granted. The Clerk is directed to enter judgment for the Commissioner.

BACKGROUND

Plaintiff, born August 5, 1956, applied for disability benefits on October 24, 2006. (Tr. at 106, 111.) Plaintiff alleged he was unable to work since September 27, 2006, due to personality disorders, substance addiction/dependence disorders, equilibrium problems, mood

1 swings, plastic jaw, anger issues, behavioral problems, forgetfulness, and plastic knee caps in  
2 both knees. (Tr. at 106, 64, 72, 80.) In a decision dated July 25, 2008, ALJ Daniel Heely  
3 determined that plaintiff was not disabled. The ALJ made the following findings:<sup>1</sup>

- 4 1. The claimant met the insured status requirements of the  
5 Social Security Act through June 30, 2006.
- 6 2. The claimant has not engaged in substantial gainful activity  
7 since October 1, 2005, the alleged onset date (20 CFR  
8 404.1520(b), 404.1571 *et seq.*, 416.920(b) and 416.971 *et*  
9 *seq.*).
- 10 3. The claimant has the following severe impairment:  
11 antisocial personality disorder (20 CFR 404.1520(c) and  
12 416.920(c)).
- 13 4. The claimant does not have an impairment or combination  
14 of impairments that meets or medically equals one of the  
15 listed impairments in 20 CFR Part 404, Subpart P,

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16 <sup>1</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the  
17 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to  
18 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in  
19 part, as an “inability to engage in any substantial gainful activity” due to “a medically  
20 determinable physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).  
21 A parallel five-step sequential evaluation governs eligibility for benefits under both programs.  
22 See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.  
23 137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

24 Step one: Is the claimant engaging in substantial gainful  
25 activity? If so, the claimant is found not disabled. If not, proceed  
26 to step two.

Step two: Does the claimant have a “severe” impairment?  
If so, proceed to step three. If not, then a finding of not disabled is  
appropriate.

Step three: Does the claimant’s impairment or combination  
of impairments meet or equal an impairment listed in 20 C.F.R., Pt.  
404, Subpt. P, App.1? If so, the claimant is automatically  
determined disabled. If not, proceed to step four.

Step four: Is the claimant capable of performing his past  
work? If so, the claimant is not disabled. If not, proceed to step  
five.

Step five: Does the claimant have the residual functional  
capacity to perform any other work? If so, the claimant is not  
disabled. If not, the claimant is disabled.

Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

The claimant bears the burden of proof in the first four steps of the sequential evaluation  
process. Bowen, 482 U.S. at 146 n.5, 107 S. Ct. at 2294 n.5. The Commissioner bears the  
burden if the sequential evaluation process proceeds to step five. Id.

1 Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526,  
2 416.920(d), 416.925 and 416.926.

- 3 5. After careful consideration of the entire record, the  
4 undersigned finds that the claimant has the residual  
5 functional capacity to perform a full range of work at all  
6 exertional levels but with the following exertional  
7 limitations: he can perform only simple, routine, repetitive  
8 tasks; he can have only occasional contact with the general  
9 public.
- 10 6. The claimant is unable to perform any past relevant work  
11 (20 CFR 404.1565 and 416.965).
- 12 7. The claimant was born on August 5, 1956 and was 49 years  
13 old, which is defined as a younger individual age 45-49, on  
14 the alleged disability onset date. The claimant attained age  
15 50, which is defined as approaching advanced age, on  
16 August 4, 2006 (20 CFR 404.1563 and 416.963).
- 17 8. The claimant has at least a high school education and is  
18 able to communicate in English (20 CFR 404.1564 and  
19 416.964).
- 20 9. Transferability of job skills is not material to the  
21 determination of disability because using the Medical-  
22 Vocational Rules as a framework supports a finding that the  
23 claimant is “not disabled,” whether or not the claimant has  
24 transferable job skills (See SSR82-41 and 20 CFR Part 404,  
25 Subpart P, Appendix 2).
- 26 10. Considering the claimant’s age, education, work  
experience, and residual functional capacity, there are jobs  
that exist in significant numbers in the national economy  
that the claimant can perform (20 CFR 404.1560(c),  
404.1566, 416.960(c), and 416.966).
11. The claimant has not been under a disability, as defined in  
the Social Security Act, from October 1, 2005 through the  
date of this decision (20 CFR 404.1520(g) and 416.920(g)).

22 (Tr. at 14-21.)

23 ISSUES PRESENTED

24 Plaintiff has raised the following issues: A. Whether the ALJ Improperly  
25 Rejected the Examining Psychologist’s Opinion Without Articulating a Legitimate Basis; B.  
26 Whether the Appeals Council Failed to Properly Evaluate Dr. Forehand’s Treating Psychiatric

1 Opinion; C. Whether the ALJ Improperly Rejected Plaintiff's and Lay Witness Testimony; and  
2 D. Whether the ALJ Failed to Credit the Vocational Expert's Testimony in Response to a  
3 Hypothetical Which Accurately Reflected Plaintiff's Functional Limitations.

4 This case involves plaintiff's alleged mental health issues only.

#### 5 LEGAL STANDARDS

6 The court reviews the Commissioner's decision to determine whether (1) it is  
7 based on proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in  
8 the record as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).  
9 Substantial evidence is more than a mere scintilla, but less than a preponderance. Connett v.  
10 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means "such relevant evidence  
11 as a reasonable mind might accept as adequate to support a conclusion." Orn v. Astrue, 495 F.3d  
12 625, 630 (9th Cir. 2007), *quoting* Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). "The ALJ  
13 is responsible for determining credibility, resolving conflicts in medical testimony, and resolving  
14 ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).  
15 "The court will uphold the ALJ's conclusion when the evidence is susceptible to more than one  
16 rational interpretation." Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

#### 17 ANALYSIS

##### 18 A. Rejection of Examining Psychologist's Opinion

19 Plaintiff contends that the ALJ rejected the November 29, 2006 opinion of Dr.  
20 Morse (actually Deborah Von Bolschwing, Ph.D) without a legitimate basis.

21 The opinion of an examining physician is, in turn, entitled to  
22 greater weight than the opinion of a nonexamining physician.  
23 Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir.1990); Gallant v.  
24 Heckler, 753 F.2d 1450 (9th Cir.1984). As is the case with the  
25 opinion of a treating physician, the Commissioner must provide  
26 "clear and convincing" reasons for rejecting the uncontradicted  
opinion of an examining physician. .... And like the opinion of a  
treating doctor, the opinion of an examining doctor, even if  
contradicted by another doctor, can only be rejected for specific  
and legitimate reasons that are supported by substantial evidence in  
the record.

1 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996).

2 This case centers around plaintiff's mental impairment, antisocial personality  
3 disorder, as there are no physical ailments at issue. The mental health records consist of  
4 plaintiff's California Department of Corrections ("CDC") records from 2000 through 2005, a  
5 mental health evaluation by Deborah Von Bolschwing, Ph.D.,<sup>2</sup> a mental RFC assessment by Dr.  
6 Middleton, an SSA state agency psychologist, and a report by Dr. Forehand, M.D., submitted  
7 only to the Appeals Council. Not having this last report before him, the ALJ relied primarily on  
8 the non-examining report of the state agency psychologist who in turn had not given Dr. Von  
9 Bolschwing great weight.

10 Dr. Middleton assessed plaintiff's residual functional capacity on December 19,  
11 2006, diagnosing plaintiff with anti-social personality disorder. (Tr. at 204.) He found that  
12 plaintiff was "capable of understanding, remembering and carrying out simple and less complex  
13 tasks. He could interact appropriately with supervisors but needed reduced coworker and public  
14 contact. There was no limitation in maintaining attention, persistence and pace, and plaintiff  
15 could adapt to changes in the work setting. This state agency psychologist did not give great  
16 weight to Dr. Von Bolschwing's report "as not supported by normal exam, with lack of  
17 corroborating evidence." (Tr. at 198.)

18 Dr. Von Bolschwing's report diagnosed plaintiff with heroin dependence in  
19 sustained full remission (Axis I) and antisocial personality disorder (Axis II). (Id. at 194.) This  
20 diagnosis was based on plaintiff's view that violence was the way for him to survive, having  
21 spent most of his adult life in prison. (Id. at 195.) The psychological assistant had no medical  
22 records for review but instead relied on plaintiff for all information. She did, however, provide  
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24 <sup>2</sup> This examiner is listed as a Ph.D., and also as a psychological assistant. (Tr. at 192,  
25 195.) Her report is referred to by the ALJ as having been completed under the supervision of Dr.  
26 Morris, a Ph.D. (Id. at 17.) Plaintiff refers to this psychologist by her correct name, Dr. Morse.  
Although it is unclear whether Von Bolschwing examined plaintiff in her capacity as a Ph.D., she  
will be referred to as Dr. Von Bolschwing in this analysis.

1 the following caveat to her exam: “[I]t should be noted that the present evaluation was limited in  
2 scope. It was based on only one session of client contact, in a structured environment, with pre-  
3 authorized tests. Background and correlative information was considered to be limited. With  
4 these restrictions in mind, the following clinical and functional impressions are offered.” (Id. at  
5 195.)

6 Various tests were administered to plaintiff, including the WAIS-III, WMS-III,  
7 Trail Making Test, and the Bender-Gestalt Test-II, all of which yielded normal results. (Id. at  
8 193-94.) Plaintiff “appeared to” be able to understand, remember, and carry out simple one or  
9 two step instructions, as well as complex instructions. “He may have moderate to marked  
10 difficulty relating to and interacting with supervisors and co-workers and the public in general  
11 due to personality volatility, anger and lack of behavioral control.” He “appear[ed]” to be  
12 incapable of functioning well under the stress of work. He “appear[ed] to be unable to function  
13 satisfactorily during an eight-hour work day and five day work week.” (Id. at 195.) Dr. Von  
14 Bolschwing used the aforementioned conditional and qualifying words as quoted to describe  
15 plaintiff’s functional capacity, which fails to instill confidence in the reader of the report.  
16 Furthermore, the fact that this evaluator was a Ph.D. but also a psychological assistant is  
17 confusing. The subject area of her doctorate degree is not clear. If Dr. Von Bolschwing was not  
18 a licensed psychologist, her opinion would be entitled to lesser weight, despite the fact that she  
19 was supervised by a licensed psychologist, Dr. Morse.<sup>3</sup> See also Armstrong v. Astrue, 2010 WL  
20 1643238, n. 5 (C.D. Cal. 2010) (relying on state agency psychiatrist who opined that there had  
21 been no real psychological testing because evaluator was not licensed psychologist but only  
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23 <sup>3</sup> The regulations differentiate between opinions from “acceptable medical sources” and  
24 “other sources.” See 20 C.F.R. §§ 404.1513 (a),(e); 416.913 (a), (e). For example, licensed  
25 psychologists are considered “acceptable medical sources,” and social workers are considered  
26 “other sources.” Id. Medical opinions from “acceptable medical sources,” have the same status  
when assessing weight. See 20 C.F.R. §§ 404.1527 (a)(2), (d); 416.927 (a)(2), (d). No specific  
regulations exist for weighing opinions from “other sources.” Opinions from “other sources”  
accordingly are given less weight than opinions from “acceptable medical sources.”

1 psychological assistant).

2           The ALJ was correct in relying on Dr. Middleton’s opinion that the  
3 aforementioned report was not supported by normal examination results and the lack of  
4 corroborating evidence. (Tr. at 20.) First, Dr. Von Bolschwing had no medical records at her  
5 disposal for review, but rather relied solely on plaintiff’s subjective statements regarding his  
6 condition. (Tr. at 192.) Although she found him to be a valid historian, the ALJ did not. See  
7 discussion *infra*. See also Dr. Jackson’s evaluation, finding plaintiff not credible. (Id. at 215.)  
8 In any event, an opinion on an allegedly long-standing mental problem given after only a one-  
9 shot examination, *without recourse to the medical records*, is not one which can generally be  
10 relied upon.

11           Additionally, this evaluation is based for the most part on plaintiff’s subjective  
12 complaints. “An ALJ may reject a treating physician’s opinion if it is based ‘to a large extent’ on  
13 a claimant’s self-reports that have been properly discounted as incredible.” Tommasetti v.  
14 Astrue, 533 F.3d 1035, 1041 (9<sup>th</sup> Cir. 2008), *citing* Morgan v. Comm’r Soc. Sec. Admin., 169  
15 F.3d 595, 602 (9<sup>th</sup> Cir. 1999) (*citing* Fair V. Bowen, 885 F.2d 597, 605 (9<sup>th</sup> Cir. 1989)).  
16 Furthermore, “the ALJ is the final arbiter with respect to resolving ambiguities in the medical  
17 evidence.” Id.

18           Historically, the courts have recognized conflicting medical  
19 evidence, the absence of regular medical treatment during the  
20 alleged period of disability, and the lack of medical support for a  
21 doctor's report based substantially on a claimant's subjective  
22 complaints as specific, legitimate reasons for disregarding the  
23 treating physician's opinion. Flaten, 44 F.3d at 1463-64; Fair v.  
Bowen, 885 F.2d 597, 604 (9<sup>th</sup> Cir.1989). The ALJ is not required  
to accept the opinion of a treating or examining physician if that  
opinion is brief, conclusory and inadequately supported by clinical  
findings. Thomas v. Barnhart, 278 F.3d 947, 957 (9<sup>th</sup> Cir.2002).

24 Morehead v. Astrue, 2008 WL 3891464, \*5 (E.D. Wash. 2008). This source’s opinion is so  
25 unreliable that the ALJ was correct in rejecting it.

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1           The only other mental health evidence in the record are the CDC records, dated  
2 2000 to 2005, which predate the other mental health opinions, and the belated treating  
3 psychiatrist opinion of Dr. Forehand, submitted only to the Appeals Council.

4           CDC records indicate that plaintiff had reported two previous psychiatric  
5 hospitalizations; however, there is no record of such admissions. To the contrary, plaintiff  
6 denied psychiatric problems while in prison and in late 2001 requested to discontinue his  
7 medication so that he could be transferred to a farm instead. He seemed to do well without  
8 medication at the farm. (*Id.* at 17, 18, 187-89.)

9           Dr. Forehand's report, dated March 7, 2008, was submitted to the Appeals  
10 Council after the ALJ's decision. This psychiatrist was plaintiff's treating source since  
11 November, 2007, according to his report; however, *there are no mental health treatment records*  
12 *in the record by him or any other treating source.* This boilerplate form is the sole submission  
13 by this doctor. See Murray v. Heckler, 722 F.2d 499, 501 (9th Cir.1983) (expressing preference  
14 for individualized medical opinions over check-off reports). It states that plaintiff was rated poor  
15 for dealing with the public, dealing with stress, and maintaining attention and concentration. He  
16 was rated fair at relating to co-workers, using judgment, and interacting with supervisors. (*Id.* at  
17 246.) Plaintiff was rated in the poor category for understanding, remembering and carrying out  
18 complex instructions, but fair at understanding, remembering and carrying out detailed  
19 instructions. He was rated poor at relating predictably in social situations, and fair at  
20 demonstrating reliability. Plaintiff could behave in an emotionally stable manner if he is on  
21 medication. (*Id.* at 247.)

22           Plaintiff bears the burden of proving he suffers from a physical or mental  
23 impairment that makes him unable to perform "past relevant work." Andrews v. Shalala, 53 F.3d  
24 1035, 1040 (9th Cir.1995). The aforementioned records are simply inadequate to meet plaintiff's  
25 burden to show that his mental impairment limits his ability to work. See Anderson v. Astrue,  
26 2010 WL 2525370, \* 6 (C.D. Cal. 2010). In fact, the SSA examiner noted that although plaintiff

1 was taking medication for his mental impairment, his prescribing doctor did not indicate any  
2 significant psychiatric problems in the chart notes. Plaintiff had not been seen by any formal  
3 treating mental health source. (Tr. at 236.) Further, although the ALJ gave plaintiff's counsel  
4 time to submit additional records, the attorney submitted only Dr. Forehand's form report to the  
5 Appeals Council. (Id. at 62.)

6 It is true that "[t]he opinion of a nonexamining medical advisor cannot by itself  
7 constitute substantial evidence that justifies the rejection of the opinion of an examining or  
8 treating physician." Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 602 (9th  
9 Cir. 1999). Nevertheless, plaintiff must come forward with some substantial [reliable] evidence  
10 to meet his burden, and he has utterly failed in this regard. In fact, plaintiff's main problem is  
11 that he cannot get along with people due to his learned "prison lifestyle" which promotes  
12 violence as a solution to problems; however, this apparent manipulation of his criminal  
13 proclivities should not stand as a basis to substantiate an award of permanent disability benefits.

#### 14 B. Additional Evidence Submitted to Appeals Council

15 Plaintiff alleges that the Appeals Council should have granted review to consider  
16 the previously discussed report by Dr. Forehand. The Appeals Council denied plaintiff's request  
17 for review on April 1, 2010. (Tr. at 1-4.)

18 Because the question on judicial review is whether the final decision of the  
19 Commissioner is supported by substantial evidence, the status of new evidence in a case such as  
20 this one is curious. 42 U.S.C. § 405(g). When the Appeals Council denies review, *the decision*  
21 *of the ALJ is the final decision.* See O'Dell v. Shalala, 44 F.3d 855, 858 (10th Cir. 1994); Keeton  
22 v. Dep't of Health and Human Services, 21 F.3d 1064, 1066 (11th Cir. 1994); Browning v.  
23 Sullivan, 958 F.2d 817, 822 (8th Cir. 1992); Russell v. Brown, 856 F.2d 81, 83-84 (9th Cir.  
24 1988); 20 C.F.R. §§ 404.955; 404.967 et seq.; 416.1455; 416.1467 et seq.; cf. Falge v. Apfel, 150  
25 F.3d 1320, 1323 (11th Cir. 1998) (stating the District Court nevertheless may review the Appeals  
26 Council's denial of review if based on Appeals Council's determination that new evidence was

1 not “new” and “material.”); accord Eads v. Secretary of Dep’t of Health and Human Servs., 983  
2 F.2d 815, 817 (7th Cir. 1993).<sup>4</sup>

3 Because the Commissioner does not contest whether the evidence submitted to the  
4 Appeals Council should be considered by this court, based on Ramirez v. Shalala, 8 F.3d 1449,  
5 1452 (9th Cir. 1993), this new evidence will become part of the record on review, even though  
6 that evidence was never before the ALJ. “We properly may consider the additional materials  
7 because the Appeals Council addressed them in the context of denying Appellant’s request for  
8 review.” Harman v. Apfel, 211 F.3d 1172, 1180 (9th Cir.2000).

9 The additional evidence submitted to the Appeals Council is the aforementioned  
10 form report by Dr. Forehand, plaintiff’s treating psychiatrist. As already discussed, this check-  
11 off form contained little in the way of findings, and was not accompanied by any treating records  
12 or any other objective evidence in support.

13 Furthermore, it is well established that retrospective opinions are even less  
14 persuasive in the specialty of mental health. “The opinion of a psychiatrist who examines the  
15 claimant after the expiration of his disability insured status, however, is entitled to less weight  
16 than the opinion of a psychiatrist who completed a contemporaneous exam.” Macri v. Chater, 93  
17 F.3d 540, 545 (9<sup>th</sup> Cir. 1996); Vincent v. Heckler, 739 F.2d 1393, 1395 (9<sup>th</sup> Cir. 1984)  
18 (“After-the-fact psychiatric diagnoses are notoriously unreliable”); Weetman v. Sullivan, 877  
19 F.2d 20, 23 (9th Cir.1989) (new medical report following adverse administrative decision  
20 denying benefits carries little, if any, weight) (citing Key v. Heckler, 754 F.2d 1545, 1550 (9th  
21 Cir.1985)). Here, Dr. Forehand’s report is dated March 7, 2008, almost two years after plaintiff’s  
22 last insured date of June 30, 2006.

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25 <sup>4</sup> Only if the Appeals Council grants review, and then issues a decision on the merits  
26 does the Appeals Council’s decision become the final decision of the Commissioner. Russell,  
856 F.2d at 83-84; Browning, 958 F.2d at 822.

1           The Appeals Council did not err in denying plaintiff's request for review on this  
2 basis. This report adds no probative value to the record.

3           C. Whether the ALJ Improperly Rejected Plaintiff's Testimony

4           Plaintiff contends that the ALJ rejected his statements of functional limitations  
5 without clear and convincing reasons.

6           The ALJ determines whether a disability applicant is credible, and the court defers  
7 to the ALJ who used the proper process and provided proper reasons. See, e.g., Saelee v. Chater,  
8 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make an explicit  
9 credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad v.  
10 Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be  
11 supported by "a specific, cogent reason for the disbelief").

12           In evaluating whether subjective complaints are credible, the ALJ should first  
13 consider objective medical evidence and then consider other factors. Vasquez v. Astrue, 572  
14 F.3d 586, 591 (9<sup>th</sup> Cir. July 8, 2009); Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir.1991) (en  
15 banc). The ALJ may not find subjective complaints incredible solely because objective medical  
16 evidence does not quantify them. Bunnell at 345-46. If the record contains objective medical  
17 evidence of an impairment reasonably expected to cause pain, the ALJ then considers the nature  
18 of the alleged symptoms, including aggravating factors, medication, treatment, and functional  
19 restrictions. See Vasquez, 572 F.3d at 591. The ALJ also may consider the applicant's: (1)  
20 reputation for truthfulness or prior inconsistent statements; (2) unexplained or inadequately  
21 explained failure to seek treatment or to follow a prescribed course of treatment; and (3) daily  
22 activities.<sup>5</sup> Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61  
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24           <sup>5</sup> Daily activities which consume a substantial part of an applicants day are relevant.  
25 "This court has repeatedly asserted that the mere fact that a plaintiff has carried on certain daily  
26 activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in  
any way detract from her credibility as to her overall disability. One does not need to be utterly  
incapacitated in order to be disabled." Vertigan v. Halter, 260 F.3d 1044, 1049 (9th Cir. 2001)

1 FR 34483-01; SSR 95-5P, 60 FR 55406-01; SSR 88-13. Work records, physician and third party  
2 testimony about nature, severity, and effect of symptoms, and inconsistencies between testimony  
3 and conduct, may also be relevant. Light v. Social Security Administration, 119 F.3d 789, 792  
4 (9th Cir. 1997). The ALJ may rely, in part, on his or her own observations, see Quang Van Han  
5 v. Bowen, 882 F.2d 1453, 1458 (9th Cir. 1989), which cannot substitute for medical diagnosis.  
6 Marcia v. Sullivan, 900 F.2d 172, 177, n.6 (9th Cir. 1990). Plaintiff is required to show only that  
7 her impairment “could reasonably have caused some degree of the symptom.” Vasquez, 572  
8 F.3d at 591, quoting Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9<sup>th</sup> Cir. 2007), Smolen, 80 F.3d  
9 at 1282. Absent affirmative evidence demonstrating malingering, the reasons for rejecting  
10 applicant testimony must be specific, clear and convincing. Vasquez, 572 F.3d at 591.

11 Plaintiff’s credibility was properly questioned for the reasons pointed out by the  
12 ALJ. He first noted that despite apparent difficulty in getting along with people, plaintiff was  
13 able to get along fine with other prisoners during his more than 25 years in prison. He added that  
14 despite his claim that he had been psychiatrically hospitalized while in prison, he stopped taking  
15 psychiatric medication in August, 2001, and did well without it until August, 2002. (Tr. at 18.)  
16 Elsewhere, it is indicated that plaintiff was motivated to go off medication so he could be housed  
17 at a farm rather than prison. He was reported to be doing well without medication. (Id. at 189.)  
18 Furthermore, there are no records supporting plaintiff’s claim of two psychiatric hospitalizations.  
19 Although plaintiff refers to a CDC record which notes two hospitalizations, the form is based on  
20 plaintiff’s statements to the transcriber. (Id. at 184.) There is no independent source for the  
21 record of hospitalizations. Furthermore, plaintiff’s prison records do not indicate any problems  
22 getting along with fellow inmates or staff. (Id. at 174-89.)

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25 \_\_\_\_\_

26 (quotation and citation omitted).

1           The ALJ further explained that plaintiff was entrusted with watching and taking  
2 23 grandchildren to the park, as well as supervising his 17 year old daughter,<sup>6</sup> who was enrolled  
3 in a home study program during the day. The ALJ also focused on plaintiff’s lack of mental  
4 health treatment over the years and during the time he was able to work in the concrete business,  
5 which lasted almost two years. (Id. at 19.) Plaintiff points to his own testimony wherein he  
6 stated that he had been in therapy twice a week for six months preceding the hearing. (Id. at 47.)  
7 There are no records indicating such treatment, but even if true, this belated therapy with little  
8 else in the way of treatment is not helpful to plaintiff’s case. See [www.mayoclinic.com](http://www.mayoclinic.com) (noting  
9 recommended treatment includes psychotherapy, stress and anger management skills,  
10 medications, and hospitalization, depending on the severity of symptoms). The absence of  
11 regular medical treatment during the alleged period of disability is a factor to be considered.  
12 Morehead v. Astrue, 2008 WL 3891464, \*5 (E.D. Wash. 2008). See Meanel v. Apfel, 172 F.3d  
13 1111, 1114 (9th Cir. 1999) (plaintiff’s claim of extreme pain inconsistent with “minimal,  
14 conservative treatment” received); Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995) (ALJ  
15 correctly considered conservative nature of treatment in determining credibility).

16           Along with the few medical records discussed in the previous section, plaintiff’s  
17 prison records fail to demonstrate violent behavior as plaintiff suggests. A November 30, 2005  
18 exam was normal, indicating normal psychiatric status, but a psychiatric consult was indicated.  
19 (Id. at 179.) There are no records indicating that such a consult was conducted.

20           In addition to the aforementioned activities, plaintiff’s other activities belie his  
21 claim of mental health impairment to the degree alleged. For example, in addition to household  
22 chores, which did not require interaction with others, plaintiff went grocery shopping unattended,  
23 which did require such interaction. (Id. at 17, 193.) He also showed his kids how to change the  
24 oil in the car. His grandchildren visited “a lot.” (Id. at 40.) He has also been in two fistfights in

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25           <sup>6</sup> Plaintiff denies that he supervised this daughter, but concedes that he was at home with  
26 her during the day and kept an eye on her, without consequence. (Id. at 33.)

1 his neighborhood, but both times, the police came and did not arrest him, presumably because he  
2 was able to control his behavior when interacting with them. (Id. at 42.)

3 “Credibility determinations are the province of the ALJ.” Andrews v. Shalala, 53  
4 F.3d 1035, 1043 (9th Cir.1995). In this regard, questions of credibility and resolutions of  
5 conflicts in the testimony are functions solely of the [Commissioner]. See Yuckert v. Bowen,  
6 841 F.2d 303, 307 (9th Cir. 1988); Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982).”  
7 Morgan v. Apfel, 169 F. 3d at 599. The ALJ properly analyzed the evidence in relation to the  
8 appropriate factors required by the Bunnell line of cases.

#### 9 D. Lay Witness Testimony

10 Plaintiff makes another assertion, that the ALJ improperly rejected the lay opinion  
11 of plaintiff’s wife, Sylvia Ramirez, who testified regarding plaintiff’s functional limitations.

12 An ALJ is required to “consider observations by non-medical sources as to how  
13 an impairment affects a claimant’s ability to work.” Sprague v. Bowen, 812 F.2d 1226, 1232  
14 (9th Cir. 1987). “Lay testimony as to a claimant’s symptoms is competent evidence that an ALJ  
15 must take into account, unless he or she expressly determines to disregard such testimony and  
16 gives reasons germane to each witness for doing so.” Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.  
17 2001) (citing Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996)). Similar to the ALJ’s role  
18 in evaluating the testimony of a claimant, when evaluating the testimony of a lay witness “[t]he  
19 ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for  
20 resolving ambiguities.” Sousa v. Callahan, 143 F.3d 1240, 1243 (9th Cir. 1998) (quoting  
21 Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)).

22 The Ninth Circuit has held that the ALJ must properly discuss lay witness  
23 testimony, and that any failure to do so is not harmless unless no reasonable ALJ, when fully  
24 crediting the testimony, could have come to a different disability determination. Stout v.  
25 Commissioner, 454 F.3d 1050 (9th Cir. 2006). This standard is extremely high and rivals, if not  
26 surpasses, the Chapman harmless error standard in criminal law (error harmless only if no

1 reasonable doubt about its lack of effect).

2 Here, the ALJ did discuss the testimony of Mrs. Ramirez, which was that she and  
3 the children had been to counseling to learn how to understand plaintiff's condition, and to have  
4 patience with it. (Id. at 19.) The ALJ then explained why he gave testimony of plaintiff's wife  
5 little weight:

6 Even if it is very difficult for Ms. Ramirez and the children to deal  
7 with the claimant, their coping with the claimant's impairment is  
8 not an impairment in and of itself. Ms. Ramirez trusts the claimant  
9 around to take care of the children alone. Even if the claimant is  
very difficult to live with, that does not necessarily mean that the  
claimant would be unable to perform work activity with limited  
personal contact.

10 (Id. at 19.) These reasons for rejecting Mrs. Ramirez's testimony are germane and specific to this  
11 witness. Plaintiff asserts that the ALJ failed to address certain parts of her testimony. For  
12 example, Mrs. Ramirez stated that plaintiff could be around their kids unsupervised because they  
13 were older.<sup>7</sup> This statement does not conflict with plaintiff's ability to work around others, as co-  
14 workers would be even older than plaintiff's children. Plaintiff fails to mention his wife's  
15 testimony that plaintiff recently switched medication and it was doing some good. (Id. at 52.)

16 Plaintiff also asserts that the ALJ failed to mention his failed work attempt after  
17 he got out of prison. Mrs. Ramirez had testified that he worked with the church minister, but that  
18 he got into trouble and had to stop. (Id. at 54.) Nevertheless, she also testified that plaintiff's  
19 symptoms were even worse prior to going to prison, and that was during the time he was able to  
20 hold a concrete job for almost two years. (Id. at 52, 131.) As these points raised by plaintiff are  
21 refuted by Mrs. Ramirez's other statements or other evidence, it was not error for the ALJ to fail  
22 to mention every single statement in her testimony. The ALJ's finding that plaintiff could  
23 perform jobs involving simple, routine, and repetitive tasks, with limited public contact, more  
24 than compensated for the limitations supported by the other evidence of record.

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25  
26 <sup>7</sup> Plaintiff and his wife had seventeen year old twins.

1 E. Hypothetical to the Vocational Expert

2 Plaintiff's last claim is that the ALJ failed to credit the expert's testimony in  
3 response to the hypothetical which accurately reflected plaintiff's limitations.

4 Hypothetical questions posed to a vocational expert must include all the  
5 substantial, supported physical and mental functional limitations of the particular claimant.

6 Flores v. Shalala, 49 F.3d 562, 570-71 (9th Cir.1995); see Light v. Social Sec. Admin., 119 F.3d  
7 789, 793 (9th Cir.1997). If a hypothetical does not reflect all the functional limitations, the  
8 expert's testimony as to available jobs in the national economy has no evidentiary value.

9 DeLorme v. Sullivan, 924 F.2d 841, 850 (9th Cir. 1991). But see Thomas v. Barnhart, 278 F.3d  
10 947 (9th Cir. 2002) (approving hypothetical directing VE to credit specific testimony which VE  
11 had just heard); Matthews v. Shalala, 10 F.3d 678 (9th Cir. 1993) (failing to include all  
12 limitations in a hypothetical may be harmless error if the ALJ's conclusions are supported by  
13 other reliable evidence). While the ALJ may pose to the expert a range of hypothetical questions,  
14 based on alternate interpretations of the evidence, substantial evidence must support the  
15 hypothetical which ultimately serves as the basis for the ALJ's determination. Embrey v. Bowen,  
16 849 F.2d 418, 422 (9th Cir. 1988).<sup>8</sup>

17 The hypothetical upon which the ALJ should have relied, according to plaintiff,  
18 was such that plaintiff "could never interact appropriately with supervisors, could never work  
19 around the public, and could not handle any normal work stress." With these limitations, the VE  
20 responded that there were no available jobs. Plaintiff bases his argument in favor of these  
21 limitations on the medical opinions of Drs. Von Bolschwing and Forehand. Both of these  
22 opinions were found to have been properly rejected by the ALJ and/or Appeals Council. See  
23 discussion *supra*. As these limitations are not supported by substantial evidence in the record,

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24  
25 <sup>8</sup> Similarly, "[t]he ALJ is not bound to accept as true the restrictions presented in a  
26 hypothetical question propounded by a claimant's counsel." Magallanes v. Bowen, 881 F.2d  
747, 756 (9<sup>th</sup> Cir. 1989). The ALJ is free to accept them if they are supported by substantial  
evidence or reject them if they are not. Id. at 756-757.

1 the ALJ was not required to include them in the hypothetical.

2           Instead, the ALJ relied on the hypothetical which permitted plaintiff to do a full  
3 range of work at all levels, with only occasional contact with the general public, and limited to  
4 simple, routine and repetitive tasks. (Id. at 16, 61.) The vocational expert concluded that  
5 plaintiff could do the jobs of industrial cleaner, kitchen helper, and warehouse worker. (Id. at  
6 61.) The undersigned finds that substantial evidence supports these limitations.

7 CONCLUSION

8           Accordingly, the court finds the ALJ's assessment is fully supported by  
9 substantial evidence in the record. Plaintiff's Motion for Summary Judgment is denied, the  
10 Commissioner's Cross Motion for Summary Judgment is granted, and the Clerk is directed to  
11 enter Judgment for the Commissioner.

12 DATED: June 9, 2011

/s/ Gregory G. Hollows

13  
14 \_\_\_\_\_  
GREGORY G. HOLLOWES  
U.S. MAGISTRATE JUDGE

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