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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL DEMERS, JR.,  
Plaintiff,  
v.  
COMMISSIONER OF SOCIAL  
SECURITY,  
Defendant.

No. 2:13-cv-2096-KJN

ORDER

Plaintiff seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner”) denying plaintiff’s application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”).<sup>1</sup> In his motion for summary judgment, plaintiff principally contends that the Commissioner erred by finding that plaintiff was not disabled from September 1, 2010, the date that plaintiff’s SSI application was filed, through the date of the ALJ’s decision. (ECF No. 19.) The Commissioner filed an opposition to plaintiff’s motion and a cross-motion for summary judgment. (ECF No. 20.) No optional reply brief was filed by plaintiff.

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<sup>1</sup> This action was initially referred to the undersigned pursuant to E.D. Cal. L.R. 302(c)(15), and both parties voluntarily consented to proceed before a United States Magistrate Judge for all purposes. (ECF Nos. 7, 21.)

1 For the reasons discussed below, the court DENIES plaintiff's motion for summary  
2 judgment, GRANTS the Commissioner's cross-motion for summary judgment, and enters  
3 judgment for the Commissioner.

4 I. BACKGROUND

5 Plaintiff was born on November 17, 1988, has a high school diploma, is able to  
6 communicate in English, and has no past relevant work.<sup>2</sup> (Administrative Transcript ("AT") 51,  
7 67, 81.) On September 1, 2010, at the age of 21, plaintiff applied for SSI, alleging that his  
8 disability began on November 17, 1992, and that he was disabled primarily due to attention  
9 deficit hyperactivity disorder ("ADHD") and bipolar disorder. (AT 22, 67, 81, 132, 150.)<sup>3</sup> On  
10 December 24, 2010, the Commissioner determined that plaintiff was not disabled. (AT 22, 82-  
11 86.) Upon plaintiff's request for reconsideration, that determination was affirmed on September  
12 2, 2011. (AT 22, 89-94.) Thereafter, plaintiff requested a hearing before an administrative law  
13 judge ("ALJ"), which took place on May 22, 2012, and at which plaintiff, represented by a non-  
14 attorney representative, and a vocational expert ("VE") testified. (AT 22, 47-66.)

15 In a decision dated June 29, 2012, the ALJ determined that plaintiff had not been under a  
16 disability, as defined in the Act, from September 1, 2010, the date that plaintiff's SSI application  
17 was filed, through the date of the ALJ's decision. (AT 22-29.) The ALJ's decision became the  
18 final decision of the Commissioner when the Appeals Council denied plaintiff's request for  
19 review on August 21, 2013. (AT 1-6.) Thereafter, plaintiff filed this action in federal district  
20 court on October 10, 2013, to obtain judicial review of the Commissioner's final decision.

21 II. ISSUES PRESENTED

22 Plaintiff has raised the following issues: (1) whether the ALJ improperly rejected portions  
23 of the consultative psychologist's opinion; (2) whether the ALJ overstated the effect of plaintiff's

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25 <sup>2</sup> Because the parties are familiar with the factual background of this case, including plaintiff's  
26 mental health history, the court does not exhaustively relate those facts in this order. The facts  
27 related to plaintiff's impairments and treatment will be addressed insofar as they are relevant to  
28 the issues presented by the parties' respective motions.

<sup>3</sup> Regardless of the alleged disability onset date, SSI is not payable prior to the month following  
the month in which the application was filed. 20 C.F.R. § 416.335.

1 substance abuse on his psychiatric condition; and (3) whether the ALJ erroneously found that  
2 plaintiff did not meet a Listing.<sup>4</sup>

### 3 III. LEGAL STANDARD

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

### 15 IV. DISCUSSION

#### 16 A. Summary of the ALJ's Findings

17 The ALJ evaluated plaintiff's entitlement to SSI pursuant to the Commissioner's standard  
18 five-step analytical framework.<sup>5</sup> At the first step, the ALJ concluded that plaintiff had not

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19 <sup>4</sup> Plaintiff's briefing raised these issues in a somewhat different order.

20 <sup>5</sup> Disability Insurance Benefits are paid to disabled persons who have contributed to the Social  
21 Security program. 42 U.S.C. §§ 401 et seq. Supplemental Security Income is paid to disabled  
22 persons with low income. 42 U.S.C. §§ 1382 et seq. Both provisions define disability, in part, as  
23 an "inability to engage in any substantial gainful activity" due to "a medically determinable  
24 physical or mental impairment. . . ." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A parallel  
25 five-step sequential evaluation governs eligibility for benefits under both programs. See 20  
C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-  
42 (1987). The following summarizes the sequential evaluation:

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

28 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.

1 engaged in substantial gainful activity since September 1, 2010, the date that plaintiff's SSI  
2 application was filed. (AT 24.) At step two, the ALJ determined that plaintiff had the following  
3 severe impairments: bipolar disorder not otherwise specified; poly-substance abuse disorder;  
4 mood disorder; and borderline intellectual functioning. (Id.) However, at step three, the ALJ  
5 determined that plaintiff did not have an impairment or combination of impairments that met or  
6 medically equaled the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P,  
7 Appendix 1. (Id.)

8 Before proceeding to step four, the ALJ assessed plaintiff's residual functional capacity  
9 ("RFC") as follows:

10 After careful consideration of the entire record, the undersigned  
11 finds that the claimant has the residual functional capacity to  
12 perform a full range of work at all exertional levels but with the  
13 following non-exertional limitations: he is able to understand,  
14 remember and/or carry out simple instructions; make judgments on  
15 simple, work-related instructions; interact appropriately with  
16 supervisors and co-workers and only incidental contact with the  
17 public; he is also able to respond appropriately to usual work  
18 situations and changes in a routine work setting.

19 (AT 25.)

20 At step four, the ALJ found that plaintiff had no past relevant work. (AT 28.) Finally, at  
21 step five, the ALJ determined, based on the VE's testimony, that, considering plaintiff's age,  
22 education, work experience, and RFC, there were jobs that existed in significant numbers in the

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

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

28 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. The Commissioner bears the burden if the sequential evaluation process proceeds to step five. Id.

1 national economy that plaintiff could perform. (Id.)

2 Accordingly, the ALJ concluded that plaintiff had not been under a disability, as defined  
3 in the Act, from September 1, 2010, the date that plaintiff's SSI application was filed, through the  
4 date of the ALJ's decision. (AT 29.)

5 B. Plaintiff's Substantive Challenges to the Commissioner's Determinations

6 1. Whether the ALJ improperly rejected portions of the consultative psychologist's  
7 opinion

8 On June 15, 2011, plaintiff was evaluated by consultative psychologist, Dr. Troy Ewing,  
9 who reviewed plaintiff's records, performed a mental status examination, and conducted  
10 psychological testing. (AT 399-404.) Dr. Ewing diagnosed plaintiff with mood disorder not  
11 otherwise specified, cocaine abuse in reported remission, cannabis abuse in reported remission,  
12 rule out reading disorder not otherwise specified, and rule out borderline intellectual functioning,  
13 with a GAF of 60.<sup>6</sup> (AT 403.) Dr. Ewing offered the following opinion concerning plaintiff's  
14 work-related abilities:

15 The claimant had no difficulty understanding, remembering, and  
16 carrying out simple instructions. Claimant had mild difficulty with  
17 detailed and complex instructions. Claimant had moderate  
18 difficulty maintaining attention and concentration for the duration  
19 of the evaluation. Claimant's pace was mildly decreased. Claimant  
20 demonstrated mild difficulty with pace and persistence. The  
21 claimant had mild difficulty enduring the stress of the interview.  
22 Claimant is likely to have moderate difficulty adapting to changes  
23 in routine work-related settings. Based upon observations of  
24 current behavior and reported psychiatric history, the claimant's  
25 ability to interact with the public, supervisors, and coworkers there  
26 appears to be mild impairment. [sic]

27 (AT 404.)

28 Plaintiff contends that the ALJ improperly rejected Dr. Ewing's assessed moderate  
limitations in plaintiff's ability to maintain attention/concentration and adapt to changes in routine

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26 <sup>6</sup> GAF is a scale reflecting "psychological, social, and occupational functioning on a hypothetical  
27 continuum of mental health-illness." Diagnostic and Statistical Manual of Mental Disorders 34  
28 (4th ed. 2000). A GAF score of 51-60 indicates "[m]oderate symptoms (e.g., flat affect and  
circumstantial speech, occasional panic attacks) OR moderate difficulty in social, occupational, or  
school functioning (e.g., few friends, conflicts with peers or co-workers)." Id.

1 work-related settings, because such limitations were not expressly listed in the ALJ’s RFC or  
2 hypothetical to the VE. That argument is unpersuasive.

3 The Ninth Circuit has observed that an ALJ may properly synthesize and translate  
4 assessed limitations into an RFC assessment without repeating each functional limitation  
5 verbatim in the RFC assessment. Stubbs-Danielson v. Astrue, 539 F.3d 1169, 1173-74 (9th Cir.  
6 2008); see also 20 C.F.R. § 404.1545 (defining RFC as “the most you can still do despite your  
7 limitations”). In this case, plaintiff’s assessed RFC adequately captures the moderate functional  
8 limitations assessed by Dr. Ewing. For example, plaintiff’s moderate limitations with respect to  
9 attention and concentration are rationally accounted for by the restriction to simple tasks, which  
10 by their nature require less attention and concentration than complex tasks. Furthermore, it is  
11 reasonable to conclude that a position involving simple tasks would involve more predictability  
12 and a reduced amount of change in the work setting, thereby addressing plaintiff’s moderate  
13 limitations with respect to changes in the work environment. See Stubbs-Danielson, 539 F.3d at  
14 1174 (holding that an ALJ’s assessment of a claimant adequately captures restrictions related to  
15 concentration, persistence, or pace where the assessment is consistent with restrictions identified  
16 in the medical testimony). Notably, the ALJ’s translation of Dr. Ewing’s opinion is also  
17 consistent with the opinion of the state agency psychiatrist, Dr. Loomis, who reviewed plaintiff’s  
18 records and opined that plaintiff was able “to maintain concentration, persistence and pace  
19 throughout a normal workday/workweek as related to simple tasks” and could “make adjustments  
20 and avoid hazards in the workspace.” (AT 370.)

21 Thus, the ALJ did not reject the moderate mental limitations assessed by Dr. Ewing, but  
22 instead translated, synthesized, and incorporated them into the RFC. Moreover, any technical  
23 error regarding incorporation of such moderate mental limitations into the RFC was harmless,  
24 because the Ninth Circuit has held that moderate mental limitations do not even require  
25 vocational expert testimony. See Hoopai v. Astrue, 499 F.3d 1071, 1077 (9th Cir. 2007). In  
26 Hoopai, a medical source determined that the claimant was moderately limited in “his ability to  
27 maintain attention and concentration for extended periods; his ability to perform activities within  
28 a schedule, maintain regular attendance, and be punctual with customary tolerance; and his ability

1 to complete a normal workday and workweek without interruption from psychologically-based  
2 symptoms and to perform at a consistent pace without an unreasonable number and length of rest  
3 periods.” Id. After the ALJ, at step five, utilized the Grids (which take administrative notice of  
4 the number of unskilled jobs at different exertional levels) to determine that the claimant was not  
5 disabled, plaintiff contended on appeal that the ALJ was instead required to seek vocational  
6 expert testimony regarding the limitations assessed. Id. at 1075. The Ninth Circuit rejected this  
7 argument, holding that these moderate limitations were not sufficiently severe to prohibit the ALJ  
8 from relying on the Grids without the assistance of a vocational expert. Id. at 1077.

9 For these reasons, the court finds no error in the ALJ’s treatment of Dr. Ewing’s opinion.

10 2. Whether the ALJ overstated the effect of plaintiff’s substance abuse on his psychiatric  
11 condition

12 The record in this case indicates that plaintiff has a history of substance abuse involving,  
13 *inter alia*, crystal methamphetamine, cocaine, ecstasy, and cannabis. (See, e.g., AT 279, 297, 401,  
14 420.) During the consultative evaluation with Dr. Ewing, plaintiff denied current drug use, but  
15 Dr. Ewing stated that plaintiff “may not have been as forth right with drug use as he was  
16 protective when discussing drug use.” (AT 401.) Dr. Ewing further stated: “[Plaintiff] denied  
17 substance abuse but almost appeared to be under the influence of something and staggered when  
18 he walked.” (AT 402.) In discussing plaintiff’s psychological/behavioral functioning, Dr. Ewing  
19 again noted that it was “unclear if [plaintiff] was under the influence of a controlled substance or  
20 if a psychiatric process was contributing to his overall presentation.” (AT 403.) Nevertheless,  
21 Dr. Ewing ultimately issued a functional capacity assessment that accounted for plaintiff’s  
22 general condition and presentation, regardless of the cause(s) of the functional limitations. (AT  
23 404.)

24 The Act provides that “an individual shall not be considered to be disabled...if alcoholism  
25 or drug addiction would...be a contributing factor material to the Commissioner’s determination  
26 that the individual is disabled.” 42 U.S.C. § 1382c(a)(3)(J). Plaintiff contends that the ALJ  
27 overstated the effect of plaintiff’s substance abuse on his psychiatric condition by improperly  
28 weighing and interpreting various types of record evidence. However, the effect of plaintiff’s

1 substance abuse here is essentially a red herring, because substantial evidence shows that plaintiff  
2 was not disabled during the relevant period, regardless of the potential impact of substance abuse.  
3 Specifically, *whether arguably attributable to substance abuse or to independent mental*  
4 *impairments*, the functional limitations outlined in the opinions of consultative psychologist Dr.  
5 Ewing and state agency psychiatrist Dr. Loomis, on which the ALJ relied in formulating  
6 plaintiff's RFC, do not support a finding of disability under the Act, because the VE testified that  
7 plaintiff could nonetheless perform other work in the national economy.<sup>7</sup>

8 3. Whether the ALJ erroneously found that plaintiff did not meet a Listing

9 Finally, plaintiff appears to contend that the ALJ erred in finding that plaintiff did not  
10 meet or equal a Listing at step three. The claimant "bears the burden of proving that ... she has an  
11 impairment that meets or equals the criteria of an impairment listed in Appendix 1 of the  
12 Commissioner's regulations." Burch v. Barnhart, 400 F.3d 676, 683 (9th Cir. 2005). Here,  
13 plaintiff failed to articulate a plausible theory of how the specific criteria of any Listing is met or  
14 equaled. To the contrary, substantial evidence supports the ALJ's finding that plaintiff only  
15 suffers from mild to moderate mental limitations, insufficient to satisfy the criteria of a potentially  
16 applicable Listing. (AT 24-25.)<sup>8</sup>

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20 <sup>7</sup> In one portion of the decision, and in contradiction to the rest of her analysis, the ALJ  
21 confusingly suggested, in conclusory fashion, that plaintiff's chronic drug usage was material to a  
22 finding of disability, resulting in plaintiff having certain marked limitations and even meeting a  
23 Listing. (AT 28.) However, that cursory suggestion is unsupported by any meaningful rationale  
24 and is plainly inconsistent with the opinions of Drs. Ewing and Loomis, on which the ALJ  
25 substantially relied. In any event, the issue has no impact on the result in this case. If the ALJ's  
26 materiality finding were correct, plaintiff would be disqualified from benefits by statute. On the  
27 other hand, if the ALJ's materiality finding were erroneous, it would be harmless error, because,  
28 for the reasons discussed above, substantial evidence shows that plaintiff was not disabled during  
the relevant period, regardless of the potential impact of substance abuse.

<sup>8</sup> Based on plaintiff's past psychiatric hospitalizations as a child and teenager, it may well be that  
plaintiff met the childhood standard for disability for some period in the past. However,  
substantial evidence supports the ALJ's ultimate finding that plaintiff did not meet the adult  
standard for disability during the relevant period at issue in this appeal.



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V. CONCLUSION

For the foregoing reasons, the court finds that the ALJ's decision was free from prejudicial error and supported by substantial evidence in the record as a whole. Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (ECF No. 19) is DENIED.
2. The Commissioner's cross-motion for summary judgment (ECF No. 20) is GRANTED.
3. Judgment is entered for the Commissioner.
4. The Clerk of Court shall close this case.

IT IS SO ORDERED.

Dated: January 21, 2015

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE