

1 I. PROCEDURAL BACKGROUND

2 Plaintiff applied for supplemental security income on August 19, 2011. Administrative
3 Record (“AR”) 17 (Decision).² The disability onset date was alleged to be December 1, 2002,
4 and was later amended to August 18, 2011. Id. The applications were disapproved initially and
5 on reconsideration. Id. On April 2, 2013, ALJ L. Kalei Fong presided over the hearing on
6 plaintiff’s challenge to the disapprovals. AR 33-82 (transcript). Plaintiff, who was represented
7 by attorney Stephen Valizan, was present and testified at the hearing. Thomas Sartoris, a
8 vocational expert, also testified at the hearing.

9 On April 2, 2013, the ALJ issued an unfavorable decision, finding plaintiff “not disabled”
10 under Section 1614(a)(3)(A) of Title XVI of the Act, 42 U.S.C. § 1382c(a)(3)(A). AR 14-27
11 (decision), 28-31 (exhibits). On September 19, 2014, the Appeals Council denied plaintiff’s
12 request for review, leaving the ALJ’s decision as the final decision of the Commissioner of Social
13 Security. AR 1-5 (decision, additional evidence).

14 Plaintiff filed this action on November 13, 2014. ECF No. 1; see 42 U.S.C. §§ 405(g),
15 1383c(3). The parties consented to the jurisdiction of the magistrate judge. ECF Nos. 15, 16.
16 The parties’ cross-motions for summary judgment, based upon the Administrative Record filed by
17 the Commissioner, have been fully briefed. ECF Nos. 20 (plaintiff’s summary judgment motion),
18 24 (Commissioner’s summary judgment motion), 25 (plaintiff’s reply).

19 II. FACTUAL BACKGROUND

20 Plaintiff was born on February 4, 1971, and accordingly was 40 years old, and thus a
21 “younger” person under the regulations, when he filed his application.³ AR 26. Plaintiff has an
22 8th grade education, which is a “limited” education under the regulations.⁴ AR 26.

23 III. LEGAL STANDARDS

24 The Commissioner’s decision that a claimant is not disabled will be upheld “if it is
25 supported by substantial evidence and if the Commissioner applied the correct legal standards.”

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27 ² The AR is electronically filed at ECF Nos. 19-3 to 10-20 (AR 1 to AR 860).

28 ³ See 20 C.F.R. § 416.963(c) (“Younger person”).

⁴ See 20 C.F.R. § 416.964(b)(3) (“Limited education”).

1 Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003). “The findings of the
2 Secretary as to any fact, if supported by substantial evidence, shall be conclusive ...” Andrews v.
3 Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (quoting 42 U.S.C. § 405(g)).

4 Substantial evidence is “more than a mere scintilla,” but “may be less than a
5 preponderance.” Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). “It means such
6 evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v.
7 Perales, 402 U.S. 389, 401 (1971) (internal quotation marks omitted). “While inferences from the
8 record can constitute substantial evidence, only those ‘reasonably drawn from the record’ will
9 suffice.” Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).

10 Although this court cannot substitute its discretion for that of the Commissioner, the court
11 nonetheless must review the record as a whole, “weighing both the evidence that supports and the
12 evidence that detracts from the [Commissioner’s] conclusion.” Desrosiers v. Secretary of HHS,
13 846 F.2d 573, 576 (9th Cir. 1988); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985) (“The
14 court must consider both evidence that supports and evidence that detracts from the ALJ’s
15 conclusion; it may not affirm simply by isolating a specific quantum of supporting evidence.”).

16 “The ALJ is responsible for determining credibility, resolving conflicts in medical
17 testimony, and resolving ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th
18 Cir. 2001). “Where the evidence is susceptible to more than one rational interpretation, one of
19 which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” Thomas v. Barnhart,
20 278 F.3d 947, 954 (9th Cir. 2002). However, the court may review only the reasons stated by the
21 ALJ in his decision “and may not affirm the ALJ on a ground upon which he did not rely.” Orn
22 v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007); Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.
23 2003) (“It was error for the district court to affirm the ALJ’s credibility decision based on
24 evidence that the ALJ did not discuss”).

25 The court will not reverse the Commissioner’s decision if it is based on harmless error,
26 which exists only when it is “clear from the record that an ALJ’s error was ‘inconsequential to the
27 ultimate nondisability determination.”” Robbins v. SSA, 466 F.3d 880, 885 (9th Cir. 2006)

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1 (quoting Stout v. Commissioner, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch v.
2 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

3 IV. RELEVANT LAW

4 Supplemental Security Income is available for every eligible individual who is “disabled.”
5 42 U.S.C. § 1381a. Plaintiff is “disabled” if he is “unable to engage in substantial gainful
6 activity due to a medically determinable physical or mental impairment” Bowen v. Yuckert,
7 482 U.S. 137, 140 (1987) (quoting identically worded provisions of 42 U.S.C. § 1382c(a)(3)(A).

8 The Commissioner uses a five-step sequential evaluation process to determine whether an
9 applicant is disabled and entitled to benefits. 20 C.F.R. § 416.920(a)(4); Barnhart v. Thomas, 540
10 U.S. 20, 24-25 (2003) (setting forth the “five-step sequential evaluation process to determine
11 disability” under Title II and Title XVI). The following summarizes the sequential evaluation:

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

14 20 C.F.R. § 416.920(a)(4)(i), (b).

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

17 Id., § 416.920(a)(4)(ii), (c).

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

22 Id., § 416.920(a)(4)(iii), (d).

23 Step four: Does the claimant’s residual functional capacity make
24 him capable of performing his past work? If so, the claimant is not
25 disabled. If not, proceed to step five.

26 Id., § 416.920(a)(4)(iv), (e), (f).

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

Id., § 416.920(a)(4)(v), (g).

The claimant bears the burden of proof in the first four steps of the sequential evaluation
process. 20 C.F.R. § 416.912(a) (“In general, you have to prove to us that you are blind or

1 disabled”); Bowen, 482 U.S. at 146 n.5. However, “[a]t the fifth step of the sequential analysis,
2 the burden shifts to the Commissioner to demonstrate that the claimant is not disabled and can
3 engage in work that exists in significant numbers in the national economy.” Hill v. Astrue, 698
4 F.3d 1153, 1161 (9th Cir. 2012); Bowen, 482 U.S. at 146 n.5.

5 V. THE ALJ’S DECISION

6 The ALJ made the following findings:

7 1. [Step 1] The claimant has not engaged in substantial gainful
8 activity since August 19, 2011, the application date (20 CFR
416.971 *et seq.*).

9 2. [Step 2] The claimant has the following severe impairments:
10 cognitive disorder not otherwise specified (NOS) with history of
11 limited cognitive functioning diagnoses (by history), borderline
12 intellectual functioning, schizophrenia (by history), and history of
13 drug and alcohol addiction disorder (DAA) in remission under
14 treatment ([20] CFR 416.920(c)).

15 3. [Step 3] The claimant does not have an impairment or
16 combination of impairments that meets or medically equals the
17 severity of one of the listed impairments in 20 CFR Part 404,
18 Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926).

19 4. [Preparation for Step 4] After careful consideration of the entire
20 record, the undersigned finds that the claimant has the residual
21 functional capacity to perform a full range of work at all exertional
22 levels but with the following nonexertional limitations: limited to
23 simple, repetitive tasks (SRT), cannot perform complex or detailed
24 instructions, cannot perform tasks that involve numbers or written
25 work, less than occasional interaction with the public, occasional
26 interaction with co-workers and supervisors, and no fast paced
27 production work, e.g., competitive high stress jobs.

28 5. [Step 4] The claimant has no past relevant work (20 CFR
416.965).

6. [Step 5] The claimant was born on February 4, 1971 and was 40
years old, which is defined as a younger individual age 18-49, on
the date the application was filed (20 CFR 416.963).

7. [Step 5, continued] The claimant has a limited education and is
able to communicate in English (20 CFR 416.964).

8. [Step 5, continued] Transferability of job skills is not an issue
because the claimant does not have past relevant work (20 CFR
416.968).

9. [Step 5, continued] Considering the claimant’s age, education,
work experience, and residual functional capacity, there are jobs

1 that exist in significant numbers in the national economy that the
2 claimant can perform (20 CFR 416.969 and 416.969(a)).

3 10. The claimant has not been under a disability, as defined in the
4 Social Security Act, since August 19, 2011, the date the application
5 was filed (20 CFR 416.920(g)).

6 AR 19-27.

7 As noted, the ALJ concluded that plaintiff was “not disabled” under
8 Section 1614(a)(3)(A) of Title XVI of the Act, 42 U.S.C. § 1382c(a)(3)(A). AR 27.

9 VI. ANALYSIS

10 Plaintiff argues that the ALJ erred by finding that plaintiff did not meet or equal ¶ 12.05C
11 of the Listing of Impairments (“Listings”), 20 C.F.R. Part 404, Subpt. P, App. 1.

12 Plaintiff meets or equals Listings ¶ 12.05C (“intellectual disability”) if he has:
13 (1) significantly sub-average general intellectual functioning with deficits in adaptive functioning
14 initially manifested before age 22; (2) a valid “verbal, performance or full scale IQ” of 60 through
15 70; and (3) a physical or other mental impairment imposing an additional and significant work-
16 related limitation of function. Listings § 12.05C; Kennedy v. Colvin, 738 F.3d 1172, 1174 (9th
17 Cir. 2013) (same).

18 A. Intellectual functioning

19 The ALJ expressly found that plaintiff had “borderline intellectual functioning,” and that
20 it was one of his “severe impairments.” AR 19. Accordingly, the ALJ implicitly found that
21 plaintiff meets the first half of the first requirement of Listings ¶ 12.05C, in that he has
22 significantly sub-average general intellectual functioning. No one challenges this finding on
23 appeal.

24 B. Adaptive functioning

25 1. Defining “deficits” and “adaptive functioning”

26 Although Listings ¶ 12.05C requires that the plaintiff have “deficits” in “adaptive
27 functioning,” it neither defines what level of limitation or restriction gives a person a “deficit” in
28 this area, nor does it define what it means by “adaptive functioning.” There appears to be no
statute, regulation or binding case authority defining either term. Definitions and standards for

1 “adaptive functioning” are found in several sources, including the Diagnostic and Statistical
2 Manual of the American Psychiatric Association (“DSM”), the version offered by plaintiff, and
3 case law.⁵

4 The Fifth Edition of the DSM, DSM-V, defines the “B Criterion” for “Intellectual
5 Disability” to be: “Deficits in adaptive functioning that result in failure to meet developmental
6 and sociocultural standards for personal independence and social responsibility.”⁶ It goes on to
7 state: “Without ongoing support, the adaptive deficits limit functioning in one or more *activities*
8 *of daily life*, such as communication, social participation, and independent living, across multiple
9 environments, such as home, school, work, and community” (emphasis added).

10 Plaintiff suggests that the court should look at “circumstantial evidence” of such a deficit

11 _____
12 ⁵ Much of plaintiff’s briefing seems to assume that “deficits” in “adaptive functioning” is not a
13 separate requirement from “sub-average intellectual functioning.” Accordingly, plaintiff focuses
14 principally on whether the evidence of intellectual functioning shows that it manifested before
15 plaintiff turned 22 years old. However, the court will not ignore the regulation’s use of such a
16 specific, separate term, without authoritative interpretive guidance from the Commissioner, or
17 case authority, none of which has been brought to the court’s attention. Moreover, it appears that
18 the terms are distinct, and coincide with (and may well be derived from) the definition of
19 “intellectual disability” found in the American Association on Mental Retardation’s (“AAMR”) *Mental Retardation: Definition, Classifications, and Systems of Support* (9th ed.1992) (“AAMR
20 9th ed.”), and the DSM:

21 The AAMR defines intellectual disability as characterized by *two*
22 *clinical elements*: (1) “significantly subaverage intellectual
23 functioning,” (2) “existing concurrently with related limitations in
24 ... adaptive skill areas,” which must “manifest [themselves] before
25 age 18.” AAMR 9th ed., *supra*, at 1. The DSM-IV similarly defines
26 intellectual disability as consisting of (1) “significantly subaverage
27 general intellectual functioning,” (2) “accompanied by significant
28 limitations in adaptive functioning,” where “[t]he onset ... occurs[s]
before age 18 years....” DSM-IV, *supra*, at 41.

23 Smith v. Ryan, F.3d, 2016 WL 454337 at *23, 2016 U.S. App. LEXIS 1879 at *77 (9th Cir.
24 2016) (emphasis added). The current edition of the DSM defines intellectual disability as
25 consisting of “A. Deficits in intellectual functions . . . B. Deficits in adaptive functioning . . .
26 [and] C. Onset of intellectual *and* adaptive deficits during the developmental period.” DSM-V
27 (“Intellectual Disabilities”) (see
28 <http://dsm.psychiatryonline.org/doi/full/10.1176/appi.books.9780890425596.dsm01#BCFIFJBB>
(last visited by the court on March 23, 2016) (emphasis added).

⁶ See
27 <http://dsm.psychiatryonline.org/doi/full/10.1176/appi.books.9780890425596.dsm01#BCFIFJBB>
28 (last visited by the court on March 23, 2016).

1 – such as academic performance, special education classes, work history and dropping out of
2 school – as some courts have done. See Campbell v. Astrue, 2011 WL 444783 at *17, 2011 U.S.
3 Dist. LEXIS 13742 at *51 (E.D. Cal. 2011) (Austin, M.J.) (“Courts have found that circumstantial
4 evidence can [imply] a deficit in adaptive functioning prior to the age of 22. Examples of such
5 evidence include attendance in special education classes, dropping out of high school prior to
6 graduation, difficulties in reading, writing or math, and low skilled work history”).⁷

7 Another possibility is to look for “‘*significant* limitations in at least two of the following
8 skill areas: communication, self-care, home living, social/interpersonal skills, use of community
9 resources, self-direction, functional academic skills, work, leisure, health, and safety.’” Taylor v.
10 Astrue, 2011 WL 4055243 at *14, 2011 U.S. Dist. LEXIS 102435 at *40 (E.D. Cal. 2011)
11 (Oberto, M.J.) (quoting DSM–IV–TR at 49) (emphasis added).⁸ According to the Seventh
12 Circuit, “[t]he term denotes inability to cope with the challenges of ordinary everyday life.”
13 Novy v. Astrue, 497 F.3d 708, 710 (7th Cir. 2007) (citing American Psychiatric Association,
14 Diagnostic and Statistical Manual of Mental Disorders, Text Revision (DSM-IV-TR) 42 (4th
15 ed. 2000)).

16 The court believes that the Listings themselves provide the best source for the definition
17 of “adaptive functioning.” The introduction to the Mental Disorders Listings (§ 12.00) states:

18 Activities of daily living include *adaptive activities* such as
19 cleaning, shopping, cooking, taking public transportation, paying
20 bills, maintaining a residence, caring appropriately for your

21 ⁷ See also, Martinez v. Colvin, 2015 WL 4662620 at *6, 2015 U.S. Dist. LEXIS 102827 at *16
22 (E.D. Cal. 2015) (Oberto, M.J.) (“[w]hen determining whether a claimant demonstrates deficits in
23 adaptive functioning, courts consider a variety of factors, including a claimant’s poor academic
24 performance, participation in special education, and work history”); Reyna v. Astrue, 2011 WL
25 2441906 at *5, 2011 U.S. Dist. LEXIS 61624 at 14 (E.D. Cal. 2011) (Snyder, M.J.) (“evidence of
26 participation in special education classes permits an inference of an onset date for mental
27 retardation before age 22”).

28 ⁸ One difficulty with this last method is that the Social Security Administration proposed
replacing “deficits” with “significant” deficits in this area, because “the proposed requirement for
‘significant’ deficits in adaptive functioning is generally consistent with the diagnostic criteria
used in the clinical community.” See 75 Fed. Reg. 51336, 51339 (“Proposed Rules of the Social
Security Administration/Revised Medical Criteria for Evaluating Mental Disorders”). However,
it appears that that change was not made, as the current rule requires only “deficits,” not
“significant” deficits.

1 grooming and hygiene, using telephones and directories, and using
2 a post office.

3 Listings ¶ 12.00C(1) (emphasis added). This language indicates that the listed areas are among
4 the activities that make up adaptive functioning, although the “such as” language indicates that
5 there are other “adaptive” activities too. Indeed, another part of the introduction to the Mental
6 Disorder Listings explains what those other adaptive activities are. The regulation states that “a
7 loss of adaptive functioning” is:

8 manifested by difficulties in performing activities of daily living,
9 maintaining social relationships, or maintaining concentration,
persistence, or pace.

10 Listings ¶ 12.00C(4). Accordingly, “adaptive functioning” includes, at a minimum, (1) activities
11 of daily living, (2) maintaining social relationships, and (3) maintaining concentration,
12 persistence or pace.

13 2. The ALJ’s findings

14 The ALJ made no express finding regarding plaintiff’s “adaptive functioning,” nor
15 whether any deficits initially manifested before age 22. However, the ALJ did make findings that
16 are *related* to the constituent parts of this requirement. Specifically, the ALJ found that plaintiff
17 had “moderate difficulties” in social functioning and in maintaining concentration, persistence or
18 pace. AR 20. The ALJ also found that plaintiff had “mild restrictions” in activities of daily
19 living. Id.

20 The problem here is that neither the ALJ, nor the Commissioner on appeal, correlates
21 these findings with the required finding of “deficit,” for which the regulations specify no level of
22 severity. The ALJ’s finding of “moderate difficulties” (or even “mild restrictions”) could mean
23 that plaintiff has a “deficit” in that area, or it might mean that he does not. The ALJ does not
24 address the issue.

25 Moreover, the court cannot infer the ALJ’s view from her overall determination that
26 plaintiff does not meet 12.05C. The ALJ’s determination there is expressly *not* based upon the
27 absence of a deficit in adaptive functioning, but rather is based solely upon her findings that
28 (1) plaintiff did not have valid qualifying IQ score, and (2) plaintiff did not have another

1 impairment imposing an additional and significant work-related limitation of function. See
2 AR 21. As discussed below, those findings are erroneous. The error here is not harmless,
3 because as discussed above and further discussed below, there is substantial evidence that
4 plaintiff meets every other requirement of Listings ¶ 12.05C. Accordingly, the ALJ’s decision on
5 this matter could determine whether plaintiff is found to be disabled or not.

6 C. IQ from 60 through 70

7 On October 13, 2011, Ashley Zechender, Psy.D., and Andrew Mendonsa, Psy.D.,
8 completed a consultative evaluation of plaintiff. AR 696-703 (Exh. 9F). Plaintiff reported to the
9 evaluating doctors that he had a history of substance abuse that included alcohol abuse and
10 smoking methamphetamine. AR 697. Plaintiff reported that he had been sober for 16 years. Id.
11 The evaluating doctors administered several tests to plaintiff, including the Weschler Adult
12 Intelligence Scale – Fourth Edition (“WAIS-IV”). AR 699-700. From that test, the doctors’
13 opinion was that plaintiff’s Full Scale IQ (“FSIQ”) was 70, and his Verbal Comprehension Index
14 (“VCI”) was 66.⁹

15 If credited as true, these opinions show that plaintiff satisfies the IQ portion of this
16 requirement. Drs. Zechender and Mendonsa are examining physicians whose opinions were
17 specifically requested by the state agency as part of its evaluation of plaintiff. Accordingly, the
18 ALJ could reject these opinions only for “clear and convincing reasons,” or at a minimum, for
19 “specific and legitimate reasons.” Hill, 698 F.3d at 1159-60 (“In order to reject an examining
20 physician’s opinion, the ALJ has to give clear and convincing reasons Even if contradicted
21 by another doctor, the opinion of an examining doctor can be rejected only for specific and
22 legitimate reasons that are supported by substantial evidence in the record.”) (internal quotation
23 marks omitted).

24 ⁹ Both scores are important because “[i]n cases where more than one IQ is customarily derived
25 from the test administered, e.g., where verbal, performance, and full scale IQs are provided in the
26 Wechsler series, we use the lowest of these in conjunction with 12.05.” Listings ¶ 12.00D(6)(c);
27 Garcia v. Comm’r of Soc. Sec., 768 F.3d 925, 931-32 (9th Cir. 2014) (all portions of the IQ tests
28 “should be administered and reported in full,” so that “the ALJ will have multiple scores –
‘verbal, performance, and full scale’ – from which to ‘use the lowest’”).

1 The ALJ did reject these doctors' opinions, finding that plaintiff "does not have a valid
2 verbal, performance, or full scale IQ of 60 through 70." AR 21. In explanation, the ALJ stated
3 that he did not credit the IQ score, because "the claimant did not tell the evaluators about his
4 current history of substance use which could have affected his score." AR 24.

5 There is no evidence in the record to support the ALJ's finding that plaintiff had an
6 undisclosed "current history of substance abuse." At the time plaintiff's IQ test was given,
7 October 13, 2011, plaintiff had been released from prison a few months before, on August 12,
8 2011. Plaintiff reported to the doctors who administered the IQ test that point he had been sober
9 for 16 years. At the hearing, the ALJ seemed to agree that the parole records showed that at the
10 time of the IQ test, plaintiff was "clean and sober."¹⁰ The ALJ's own recitation of what "the
11 evidence shows" also clearly indicates that plaintiff did not start using drugs again until sometime
12 in March 2012, *after* the IQ test:

13 The evidence shows the claimant had a problem with drug/alcohol
14 abuse in March 2012. *Records up to that point indicate he was*
15 *doing well since his discharge from prison.* In April 2012, he
admits to using meth for the past month and he has significant
weight loss consistent with his statement.

16 AR 25 (emphasis added).

17 Accordingly, the ALJ's reason for rejecting the IQ test is not convincing or legitimate. If
18 the ALJ meant that plaintiff failed to disclose his *past* history of drug abuse, that is plainly belied
19 by the report itself, which states that plaintiff disclosed his past history of drug abuse. See AR
20 697.¹¹ If the ALJ meant that plaintiff had "current" or recent drug use when he took the IQ test,

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23 _____
24 ¹⁰ "Even when you were at parole outpatient it says here October 2011 you were smiling,
25 laughing, doing well, denied hearing voices, good energy, good sleep, and this is September,
26 October of 2011. Of course, at that point you were somewhat clean and sober prior to the
27 relapse." AR 60.

28 ¹¹ "Substance Abuse History: Mr. Flores has been sober now for 16 years. He reported he use[d]
to be an alcoholic and would drink a six-pack daily. He also would smoke methamphetamines
every three weeks or so, for around three years. He also smoked heroin every two to three
weeks . . ." AR 697.

1 there is no evidence for that in the record, and the ALJ's own findings refute such a finding. See
2 AR 25.¹²

3 Plaintiff argues that the ALJ erred by rejecting the IQ score for the further reason that it
4 conflicted with plaintiff's GAF score of 71. ECF No. 20-1 at 22-24. The court does not read the
5 decision as rejecting the IQ score for that reason. However, if this was a reason, it was plain error
6 because Drs. Zechender and Mendonsa were the ones who gave the GAF score to plaintiff, and
7 still found that his IQ scores were 70 and 66. See AR 701. Thus the ALJ could only use this
8 reason to reject the IQ score if she is substituting her own medical opinion for that of the doctors,
9 which she may not do. See Day v. Weinberger, 522 F.2d 1154, 1156 (9th Cir. 1975) ("the
10 Hearing Examiner, who was not qualified as a medical expert, should not have gone outside the
11 record to medical textbooks for the purpose of making his own exploration and assessment as to
12 claimant's physical condition").

13 With no convincing (or even legitimate) reason to reject the doctors' opinions, the court
14 credits their opinions as true.¹³

15 D. Other Impairments

16 The ALJ found that plaintiff has severe impairments at Step 2. An impairment is "severe"
17 if it "significantly limits" a person's ability to perform work-related functions. 20 C.F.R.

18
19 ¹² Since there is no evidence of recent drug use prior to plaintiff's IQ test, the court need not
20 consider the validity of the ALJ's medical conclusion that drug use would invalidate the IQ test.
21 Cf. Clark v. Astrue, 2012 WL 423635 at *5 n.5, 2012 U.S. Dist. LEXIS 15709 at *15 n.5 (E.D.
22 Cal. 2012) (Hollows, M.J.); ("with a life long history of drug abuse, one can validly question
23 whether the lower score was performed on a drug clouded day"); Forsythe v. Astrue, 2012 WL
24 217751 at *9, 2012 U.S. Dist. LEXIS 7744 at *26 (E.D. Cal. 2012) (Austin, M.J.) ("The record is
25 replete with references to Plaintiff's sobriety and *past* drug use. In light of the foregoing
26 discussion and this Court's findings regarding Plaintiff's IQ scores and the fact that IQ scores are
27 typically considered consistent throughout a person's lifetime, coupled with the significant
28 circumstantial evidence of Plaintiff's subaverage intellectual functioning prior to the age of
twenty-two, the Commissioner's argument is not well taken"), adopted, but remanding for further
proceedings, ECF No. 23, 1:10-cv-01515-AWI-GSA (March 15, 2012) (Ishii, J.).

¹³ Plaintiff argues that the ALJ further erred by failing to consider plaintiff's Verbal
Comprehensive Index score of 66. ECF No. 20-1 at 24-25. The court reads the ALJ's decision as
rejecting both IQ scores: "the 'paragraph C' criteria of listing 12.05 are not met because the
claimant does not have a valid verbal, performance, or full scale IQ of 60 through 70." AR 21.

1 § 416.920(c) (“[i]f you do not have any impairment or combination of impairments which
2 significantly limits your physical or mental ability to do basic work activities, we will find that
3 you do not have a severe impairment”); Fanning v. Bowen, 827 F.2d 631, 633 (9th Cir. 1987)
4 (“an impairment imposes a significant work-related limitation of function when its effect on a
5 claimant’s ability to perform basic work activities is more than slight or minimal”). Accordingly,
6 the ALJ implicitly found that plaintiff met the third requirement of Listings ¶ 12.05C. See
7 Hutnick v. Colvin, 2014 WL 880360 at *5, 2014 U.S. Dist. LEXIS 28398 at *14 (E.D. Cal. 2014)
8 (Claire, M.J.) (“[a] finding of a severe impairment at the second step is a per se finding of an
9 ‘impairment imposing additional and significant work-related limitations of function’ as defined
10 in the second prong of Listing 12.05(C)”)¹⁴

11 E. Remand

12 Plaintiff argues that the court should remand for the immediate calculation and award of
13 benefits. However, it is for the ALJ to determine in the first instance whether plaintiff satisfies
14 the requirements of Listings ¶ 12.05C. See Marsh v. Colvin, 792 F.3d 1170, 1173 (9th Cir. 2015)
15 (“the decision on disability rests with the ALJ and the Commissioner of the Social Security
16 Administration in the first instance, not with a district court”). Here, the ALJ failed to make a
17 determination of whether plaintiff had deficits in adaptive functioning, and whether those deficits
18 manifested before plaintiff turned 22 years old. Accordingly, the matter will be remanded for
19 further proceedings.

20 VII. CONCLUSION

21 The ALJ’s decision is incomplete. Specifically, the ALJ did not consider whether plaintiff
22 has deficits in adaptive functioning, manifesting before he turned 22 years old, sufficient to


23 ¹⁴ It is not entirely clear from the ALJ’s decision whether she separately found that plaintiff did
24 not have an additional significant impairment. See AR 21 (“the ‘paragraph C’ criteria of listing
25 12.05 are not met because the claimant does not have a valid verbal, performance, or full scale IQ
26 of 60 through 70 and a physical or other mental impairment imposing an additional and
27 significant work-related limitation of function”) (emphasis added). If that was a separate finding,
28 it was clear error, as it directly contradicts the ALJ’s finding that plaintiff has four separate
“severe impairments.” See AR 19. An impairment is “severe” only if it “significantly limits” a
claimant’s ability to do basic work activities. 20 C.F.R. § 416.920(c).

1 warrant a finding of disability under Listings ¶ 12.05C.

2 For the reasons set forth above, IT IS HEREBY ORDERED that:

- 3 1. Plaintiff's motion for summary judgment (ECF No. 20), is GRANTED;
- 4 2. The Commissioner's cross-motion for summary judgment (ECF No. 24), is DENIED;
- 5 3. This matter is REMANDED to the Commissioner for further proceedings consistent
6 with this opinion; and
- 7 4. The Clerk of the Court shall enter judgment for plaintiff, and close this case.

8 DATED: March 24, 2016

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10 ALLISON CLAIRE
11 UNITED STATES MAGISTRATE JUDGE
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