

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

KALEIN BLACKWELL,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,  
  
Defendant.

No. 2:15-cv-388 AC

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for supplemental security income (“SSI”) under Title XVI of the Social Security Act (“the Act”), 42 U.S.C. § 1381-1383f.<sup>1</sup> For the reasons that follow plaintiff’s motion for summary judgment will be denied and defendant’s cross-motion for summary judgment will be granted.

////

<sup>1</sup> SSI is paid to financially needy disabled persons. 42 U.S.C. § 1382(a); Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371, 375 (2003) (Title XVI of the Act, § 1381 et seq., is the Supplemental Security Income (SSI) scheme of benefits for aged, blind, or disabled individuals, including children, whose income and assets fall below specified levels).

1 I. PROCEDURAL BACKGROUND

2 Plaintiff initially applied for DIB on February 16, 2012, Administrative Record (“AR”) at  
3 13 (ECF No. 12-3 at 14) (Decision)<sup>2</sup>, alleging disability beginning January 1, 1995. The claim  
4 was initially denied on July 15, 2012, and upon reconsideration on November 16, 2012. Id.  
5 Plaintiff then filed a request for hearing on November 19, 2012, 20 C.F.R. 415.1429, and  
6 appeared at the hearing held on June 27, 2103, presided over by ALJ Evangelina P. Hernandez  
7 and attended by Jose L. Chaparro, an Impartial Vocational Expert (“IVE”), plaintiff’s attorney  
8 Robert K. Kolber, and plaintiff’s mother. AR 28 (ECF No. 12-3 at 29).

9 On July 26, 2013, the ALJ found plaintiff “not disabled” under section 1614(a)(3)(A) of  
10 the Social Security Act. AR 22 (ECF No. 12-3 at 23). On December 19, 2014, after receiving a  
11 brief from plaintiff’s counsel as an additional exhibit, the Appeals Council denied plaintiff’s  
12 request for review, leaving the ALJ’s decision as the final decision of the Commissioner of  
13 Social Security. AR 1-5 (ECF No. 12-3 at 2-6) (decision and additional exhibit list).

14 Plaintiff filed this action on February 18, 2015. 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. 7, 9. The  
16 parties’ cross-motions for summary judgment, based upon the Administrative Record filed by the  
17 Commissioner, have been fully briefed. ECF No. 19 (plaintiff’s summary judgment motion  
18 dated December 6, 2015), 25 (Commissioner’s cross-motion for summary judgment dated  
19 February 25, 2016).

20 II. FACTUAL BACKGROUND

21 Plaintiff was born on November 21, 1985, was 10 years old on the alleged onset date of  
22 his disabilities, and was 26 years old on the date the application was filed. AR 20 (ECF No. 12-3  
23 at 21). Plaintiff has a limited education and can communicate in English. Id.

24 III. LEGAL STANDARDS

25 The Commissioner’s decision that a plaintiff is not disabled will be upheld “if it is  
26 supported by substantial evidence and if the Commissioner applied the correct legal standards.”  
27

---

28 <sup>2</sup> The AR is electronically filed in nine segments at ECF No. 12.

1 The Commissioner’s decision that a plaintiff is not disabled will be upheld “if it is  
2 supported by substantial evidence and if the Commissioner applied the correct legal standards.”  
3 Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9<sup>th</sup> Cir. 2003). “The findings of the  
4 Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . .”  
5 Andrews v. Shalala, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995) (quoting 42 U.S.C. § 405(g)).

6 Substantial evidence is “more than a mere scintilla,” but “may be less than a  
7 preponderance.” Molia v. Astrue, 674 F.3d 1104, 1111 (9<sup>th</sup> Cir. 2012). Substantial evidence  
8 “means such relevant evidence as a reasonable mind might accept as adequate to support a  
9 conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (internal quotation marks  
10 omitted). “While inferences from the record can constitute substantial evidence, only those  
11 ‘reasonably drawn from the record’ will suffice.” Widmark v. Barnhart, 454 F.3d 1063, 1066  
12 (9<sup>th</sup> Cir. 2006) (citation omitted). Although this court cannot substitute its discretion for that of  
13 the Commissioner, the court nonetheless must review the record as a whole, “weighing both the  
14 evidence that supports and the evidence that detracts from the [Commissioner’s] conclusion.”  
15 Derosiers v. Secretary of HHS, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988); Jones v. Heckler, 760 F.2d 993,  
16 995 (9<sup>th</sup> Cir. 1985) (“The court must consider both evidence that supports and evidence that  
17 detracts from the ALJ’s conclusion; it may not affirm simply by isolating a specific quantum of  
18 supporting evidence.”).

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

28 The court will not reverse the Commissioner’s decision if it is based on harmless error,

1 which exists only when it is “clear from the record that an ‘ALJ’s error was inconsequential to  
2 the ultimate nondisability determination.” Robbins v. SSA, 466 F.3d 880, 885 (9<sup>th</sup> Cir. 2005)  
3 (quoting Stout v. Comm’r, 454 F.3d 1050, 1055-1056 (9<sup>th</sup> Cir. 2006)); see also Burch v.  
4 Barnhart, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005).

#### 5 IV. RELEVANT LAW

6 Disability Insurance Benefits and Supplemental Security Income are available for every  
7 eligible individual who is “disabled.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A)0. The  
8 Commissioner uses a five-step sequential evaluation process to determine whether an applicant is  
9 disabled and entitled to benefits. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Barnhart v.  
10 Thomas, 540 U.S. 20, 24-25 (2003) (setting forth the “five-step sequential evaluation process to  
11 determine disability” under Title II and Title XVI. The following summarizes the sequential  
12 evaluation.

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

15 20 C.F.R. § 404.1520(a)(4)(i), (b).

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

18 Id. §§ 404.1520(a)(4)(ii), (c).

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

23 Id. §§ 404.1520(a)(4)(iii), (d).

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

27 Id. §§ 404.1520(a)(4)(iv), (e), (f).

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

Id. §§ 404.1520(a)(4)(v), (g).



1 not the plaintiff has transferable job skills (See SSR 92-41 and 20 C.F.R. Part  
2 404, Subpart P, Appendix 2).

3 9. [Step 5, continued] Considering the plaintiff's age, education, work  
4 experience, and residual functional capacity, there are jobs that exist in  
5 significant numbers in the national economy that the plaintiff can perform (20  
6 C.F.R. § 416.969 and 416.969(a)).<sup>3</sup>

7 10. The plaintiff has not been under a disability, as defined in the Social Security  
8 Act, since February 16, 2012, the date the application was filed (20 C.F.R. §  
9 416.920(g)).

10 AR 15-21 (ECF Nos. 12-3 at 16-22).

11 The ALJ concluded that plaintiff was "not disabled" under Section 1614(a)(3)(A) of the  
12 Social Security Act. AR 22 (ECF No. 12-3 at 23).

## 13 VI. ANALYSIS

14 Plaintiff alleges that the ALJ committed the following legal errors: (1) she failed to  
15 credit treating and examining psychiatric opinion evidence without articulating legitimate  
16 reasons for doing so; and (2) she failed to evaluate properly and to credit Mr. Blackwell's  
17 testimony regarding the functional limitations arising from his mental impairment. ECF No. 19  
18 at 4.

### 19 A. Medical Opinion Evidence

20 The ALJ supported her RFC finding with a detailed review of plaintiff's medical records  
21 and the opinion evidence of record. AR 17-20 (ECF No. 12-3 at 18-21). She gave significant  
22 weight to the opinion of Dr. Gauch, who completed a psychological consultative examination,  
23 because that opinion was consistent with plaintiff's activities of daily living and the longitudinal  
24 medical evidence of record. AR 18 (ECF No. 12-3 at 19); see AR 285-290 (ECF No. 12-8 at 12-  
25 17) (Gauch report). The ALJ rejected the opinions of examining physicians Dr. Richwerger and  
26 Dr. Weiss, and treating physician Dr. Smith. AR 19 (ECF No. 12-3 at 20).

27 Plaintiff argues that the ALJ erred in considering medical evidence by (a) failing to  
28 properly credit the conclusions and testing of Dr. Smith, plaintiff's treating physician; (b) giving

---

<sup>3</sup> Such jobs include industrial cleaner, housekeeping cleaner, and commercial cleaner. AR 21  
(ECF No. 12-3 at 22).

1 little weight to the opinion of consulting examiner Dr. Richwerger; (c) giving little weight to the  
2 opinion of consulting examiner Dr. Weiss; and (d) failing even to mention therapist Catherine  
3 Lee's assessment.

4 1. Opinion of Dr. Smith

5 Dr. Smith was plaintiff's treating physician, who completed two mental RFC assessments  
6 in 2012. AR 365-369 (ECF No. 12-8 at 92-96), AR 409-415 (ECF No. 12-9 at 41-47). Dr.  
7 Smith indicated that plaintiff was "unable to meet competitive standards" in most categories, and  
8 rated plaintiff's work-related abilities as "poor." Id. The ALJ gave "little weight" to these  
9 assessments, on the grounds that they were not supported by objective medical evidence and that  
10 Dr. Smith's own records indicate routine conservative treatment for the claimed impairments.  
11 AR 19 (ECF No. 12-3 at 20).

12 The ALJ did not err. Dr. Smith's report identified no objective evidence of impairment.  
13 Dr. Smith's records consist exclusively of check-off lists without analysis – merely descriptions  
14 of the symptoms that plaintiff reported. AR 365-369 (ECF No. 12-8 at 92-96); AR 409-415  
15 (ECF 12-9 at 41-47). Dr. Smith made no reference to any other medical records, clinical  
16 findings, or diagnostic assessments that would support her checklist of conclusions. Id. "The  
17 ALJ need not accept the opinion of any physician, *including a treating physician*, if that opinion  
18 is brief, conclusory, and inadequately supported by clinical findings. Thomas v. Barnhart, 278  
19 F.3d 947, 956-957 (9<sup>th</sup> Cir. 2002) (emphasis added).

20 2. Opinion of Dr. Richwerger

21 Dr. Richwerger was a Consulting Examiner commissioned by the Administration. AR  
22 372 (ECF No. 12-9 at 4). His report is found at AR 372-378 (ECF No. 12-9 at 4-10). It is based  
23 on a single evaluation in June 2012. The ALJ rejected Dr. Richwerger's opinions on grounds  
24 that he had no longstanding relationship with the plaintiff, and the findings were inconsistent and  
25 unsupported by the longitudinal medical evidence. AR 10 (ECF No. 12-3 at 20).

26 The ALJ did not err in rejecting Dr. Richwerger's opinions. Dr. Richwerger relied  
27 almost entirely on plaintiff's self-reporting and reviewed only limited records: an assessment  
28 form from San Joaquin County Mental Health, one check-off report from Dr. Smith, and a

1 handwritten report from 2010 in which he found the diagnosis to be illegible. AR 372-373 (ECF  
2 No. 12-9 at 4-5). In his functional assessment Dr. Richwerger found only slight and moderate  
3 impairments in most areas, with marked impairment only in plaintiff's ability to perform detailed  
4 and complex tasks, to perform work activities on a consistent basis, and to be able to complete a  
5 normal workday or workweek without interruption. AR at 377 (ECF No. 9-12 at 9). The only  
6 evidence he had for these opinions was plaintiff's self-reporting. AR at 376 (ECF No. 12-9 at  
7 8).<sup>4</sup> Dr. Richwerger provided no critical discussion or objective evidence to support any of his  
8 conclusions.

9 Those conclusions are inconsistent with the various treatment notes and other medical  
10 records identified by the ALJ that indicated a higher level of functioning during the same period.  
11 Accordingly, the ALJ's rejection of Dr. Richwerger's opinion is supported by substantial  
12 evidence and is therefore entitled to deference. Howard ex rel. Wolff v. Barnhart, supra, 341  
13 F.3d at 1011; Andrews v. Shalala, supra, 53 F.3d at 1039.

### 14 3. Opinion of Dr. Weiss

15 Wendy Weiss, Ph.D. performed a psychological evaluation of plaintiff in April 2013.  
16 AR 417-428 (ECF No.12-9 at 49-60). The ALJ rejected Dr. Weiss's opinion for the same  
17 reasons she rejected Dr. Richwerger's opinion: no longstanding treating relationship,  
18 inconsistency, and lack of support in the longitudinal medial evidence of record. AR 19 (ECF  
19 No. 12-3 at 20).

20 As with Dr. Richwerger, the ALJ permissibly rejected Dr. Weiss's opinion as  
21 inconsistent with other contemporaneous evidence of functioning. As with Dr. Richwerger, the  
22 findings of marked limitations are unsubstantiated by clinical findings or medical records. Id.  
23 Accordingly, for the same reasons that there was no error in the ALJ's rejection of Dr.  
24 Richwerger's opinion, there was no error in her rejection of Dr. Weiss's opinion.

25 ////

---

26  
27 <sup>4</sup> Plaintiff's inconsistent self-reports may explain certain inconsistencies between the reports of  
28 Dr. Richwerger and Dr. Weiss. This matter is addressed below in discussion of Dr. Weiss's  
report.



1 To the extent the ALJ rejected the Richwerger and Weiss opinions as inconsistent *with*  
2 *each other*, AR 19 (ECF No. 12-3 at 20), the differing findings appear to follow from the  
3 differing factual representations made by plaintiff. Compare AR 373-74 (ECF No. 12-9 at 5-6)  
4 (plaintiff's account to Dr. Richwerger of his history); AR 419-20 (ECF No. 12-9 at 51- 52)  
5 (plaintiff's account to Dr. Weiss of his history). Plaintiff was able to demonstrate abstract  
6 thinking with Dr. Weiss in April 2013, AR 421 (ECF No. 12-9 at 53), but was unable do so with  
7 Dr. Richwerger in June 2012. AR 376 (ECF No. 12-9 at 8). He told Dr. Weiss that he cooked  
8 and shopped and "likes to clean," AR 422 (ECF No. 12-9 at 54), contrary to his representations  
9 to Dr. Richwerger. AR 374 (ECF No. 12-9 at 6). He described himself as able to handle his  
10 finances and Dr. Weiss accepted this representation, AR 422 (ECF No. 12-9 at 54), yet he told  
11 Dr. Richwerger the opposite, and Dr. Richwerger accepted the representation made to him. AR  
12 374-375 (ECF No. 12-9 at 6-7). The ALJ was entitled consider these inconsistencies and  
13 discount both reports.

#### 14 4. Treatment Records of Catherine Lee

15 Plaintiff argues that the ALJ erred by ignoring the May 2012 assessment of therapist  
16 Catherine Lee, whose records are found at AR 393-399 (ECF No. 12-9 at 25-31).<sup>5</sup> To the extent  
17 if any that the ALJ's failure to expressly discuss Lee's progress notes constitutes error, it is  
18 harmless error. Ms. Lee noted that plaintiff was not taking his medication and had inconsistent  
19 explanations for failing to do so. AR 393, 398 (ECF No. 12-9 at 25, 30). The ALJ properly  
20 found that plaintiff's condition waxed and waned with treatment compliance, and that his history  
21 of noncompliance weighed against a finding of disability. AR 20 (ECF No. 12-3 at 21). In  
22 situations where medication has been shown to be effective but the patient refuses to avail  
23 himself of the treatment offered, that fact alone allows a determination that the impairments that  
24 could be so treated are not disabling. Warre v. Commissioner, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir.  
25 2006). Accordingly, consideration of Ms. Lee's progress notes would not have affected the  
26 disability determination.

27  
28 <sup>5</sup> These are treatment records. Therapist Lee did not provide an opinion.

1           B.     Evaluation of Plaintiff’s Testimony

2           Plaintiff argues that the ALJ erred by failing to credit plaintiff’s testimony regarding the  
3 severity of his symptoms and the functional limitations arising from his mental impairments. In  
4 assessing plaintiff’s credibility the ALJ noted that he was “able to participate in the hearing  
5 closely and fully without being distracted and was able to respond to questions in an appropriate  
6 manner, behavior which is inconsistent with his alleged mental impairments.” AR 17 (ECF No.  
7 12-3 at 18). She also observed that his testimony seemed exaggerated and that she found his  
8 “emotional display and tears” not to be credible. Id. She further commented on the inconsistent  
9 accounts of his past he gave to various providers the evaluators and treaters discussed above as  
10 well as jail personnel. Id. She found the daily activities to which he admitted, although  
11 somewhat limited, comprised “some of the physical and mental abilities and social interaction  
12 necessary to obtain and maintain employment.” Id. Finally, she found plaintiff’s credibility  
13 reduced “by the fact that despite impairment, the claimant has [admittedly] engaged in a  
14 somewhat normal level of daily activity and interaction . . . inconsistent with the presence of an  
15 incapacitating or debilitating condition.” AR 17 (ECF No. 12-3 at 18). These findings led her to  
16 determine that plaintiff’s claims and testimony were not credible overall.

17           An ALJ may rely on her observational powers to evaluate a plaintiff’s credibility.  
18 Thomas v. Barnhart, 278 F.3d 948, 959 (9<sup>th</sup> Cir. 2001); Verduzco v. Apfel, 188 F.3d 1087, 1090  
19 (9<sup>th</sup> Cir. 1999); Matney v. Sullivan, 981 F.2d 1016, 1020 (9<sup>th</sup> Cir. 1992). In this case, the ALJ’s  
20 own observation regarding plaintiff’s “emotional display” was also consistent with the report of  
21 an examining psychologist who found that plaintiff exaggerated the level of his distress,  
22 including by giving the appearance of crying. See AR 18 (ECF No. 12-3 at 19); AR 287, 289  
23 (ECF No. 12-8 at 14, 16) (report of Dr. Gauch).

24           The ALJ also looked at plaintiff’s inconsistent representations of his personal history to  
25 various examiners as discussed above. AR 17 (ECF No. 12-3 at 18). This is a permissible, and  
26 common, measure of credibility. The ALJ did consider the testimony of plaintiff’s mother, but  
27 found it less persuasive than the medical evidence she reviewed. AR 19-20 (ECF No. 12-3 at  
28 20-21). This was not error; the mere description of symptoms by lay witnesses may be

1 discounted in the absence of supporting medical evidence. Molina v Astrue, 674 F.3d 1104,  
2 1122 (9<sup>th</sup> Cir. 2012); Ukolov v. Barnhart, 420 F.3d 1002, 1006 n.6 (9<sup>th</sup> Cir. 2005).


3 The observation of a plaintiff's behavior by an ALJ, when coupled with an inconclusive  
4 medical record, is sufficient to discredit the plaintiff's claims. Carmickle v. Comissioner, Social  
5 Security Administration, 533 F.2d 1155, 1158, 1161 (9<sup>th</sup> Cir. 2008). Although the absence of  
6 objective medical evidence is not, standing alone, sufficient to make a negative credibility  
7 determination, when coupled with conflicts between testimony and conduct, or internal  
8 contradictions in plaintiff's representations, it provides a valid basis for denying coverage based  
9 on a lack of credibility. Robbins v. Social Security Administration, 466 F.3d 880, 883-884 (9<sup>th</sup>  
10 Cir. 2006). Overall, the ALJ's credibility determination here his supported by the "clear and  
11 convincing evidence" required by the law in the absence of direct evidence of malingering.  
12 Burch v. Barnhart, 400 F.3d 676, 681 (9<sup>th</sup> Cir. 2005).

13 V. CONCLUSION

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

- 15 1. Plaintiff's motion for summary judgment, ECF No. 19, is DENIED;
- 16 2. The Commissioner's cross-motion for summary judgment, ECF No. 25, is  
17 GRANTED.
- 18 3. The Clerk of the Court shall enter judgement for defendant and close the case.

19 DATED: September 7, 2016

20   
21 ALLISON CLAIRE  
22 UNITED STATES MAGISTRATE JUDGE  
23  
24  
25  
26  
27  
28