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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 ROWLAND GENE PERRY,

No. 2:16-cv-01116 AC

12 Plaintiff,

13 v.

ORDER

14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,

16 Defendant.
17

18 Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security
19 (“Commissioner”), denying his application for disability insurance benefits (“DIB”) under Title II
20 of the Social Security Act (“the Act”), 42 U.S.C. §§ 401-34.¹ For the reasons that follow,
21 plaintiff’s motion for summary judgment will be GRANTED, and defendant’s cross-motion for
22 summary judgment will be DENIED. The matter will be reversed and remanded to the
23 Commissioner for an immediate award of benefits.

24 I. PROCEDURAL BACKGROUND

25 Plaintiff applied for DIB on January 5, 2013. Administrative Record (“AR”) 12-24

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27 ¹ DIB is paid to disabled persons who have contributed to the Disability Insurance Program, and
28 who suffer from a mental or physical disability. 42 U.S.C. § 423(a)(1); Bowen v. City of New York, 476 U.S. 467, 470 (1986).

1 (Decision).² The disability onset date was alleged to be March 1, 2011. AR 12. The application
2 was disapproved initially and on reconsideration. Id. On June 3, 2014, ALJ Mary M. French
3 presided over the hearing on plaintiff's challenge to the disapprovals. AR 31 – 46 (transcript).
4 Plaintiff, who appeared with his counsel Gail Stassinis, was present at the hearing. AR 12. Alan
5 E. Cummings, a Vocational Expert ("VE"), also testified at the hearing. Id.

6 On October 31, 2014 the ALJ found plaintiff "not disabled" under Sections 216(i) and
7 223(d) of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d). AR 12-24 (decision), 25-28 (exhibit
8 list). On March 22, 2016, after receiving a brief from plaintiff's counsel as an additional exhibit,
9 the Appeals Council denied plaintiff's request for review, leaving the ALJ's decision as the final
10 decision of the Commissioner of Social Security. AR 1-6 (decision and additional exhibit list).

11 Plaintiff filed this action on May 23, 2016. ECF No. 1; see 42 U.S.C. § 405(g). The
12 parties consented to the jurisdiction of the magistrate judge. ECF Nos. 6, 11. The parties' cross-
13 motions for summary judgment, based upon the Administrative Record filed by the
14 Commissioner, have been fully briefed. ECF Nos. 21 (plaintiff's summary judgment motion), 26
15 (Commissioner's summary judgment motion), 29 (plaintiff's reply).

16 II. FACTUAL BACKGROUND

17 Plaintiff was born on June 5, 1963, and accordingly was, at age 47, a younger person
18 under the regulations when he filed his application, but subsequently changed age category to
19 closely approaching advanced age.³ AR 22. Plaintiff has at least a high school education, and
20 can communicate in English. AR 23. Plaintiff previously worked in construction and as an
21 electrician, but has not been gainfully employed since March of 2011. AR 32-34.

22 III. LEGAL STANDARDS

23 The Commissioner's decision that a claimant is not disabled will be upheld "if it is
24 supported by substantial evidence and if the Commissioner applied the correct legal standards."
25 Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003). "The findings of the

26 ² The AR is electronically filed at ECF Nos. 10-3 to 10-17 (AR 1 to AR 824).

27 ³ See 20 C.F.R. § 404.1563(c) ("younger person"), and (d) ("person closely approaching
28 advanced age").

1 Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . .” Andrews
2 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (quoting 42 U.S.C. § 405(g)).

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

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

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

24 The court will not reverse the Commissioner’s decision if it is based on harmless error,
25 which exists only when it is “clear from the record that an ALJ’s error was ‘inconsequential to the
26 ultimate nondisability determination.’” Robbins v. SSA, 466 F.3d 880, 885 (9th Cir. 2006)
27 (quoting Stout v. Commissioner, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch v.
28 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

IV. RELEVANT LAW

Disability Insurance Benefits and Supplemental Security Income are available for every eligible individual who is “disabled.” 42 U.S.C. §§ 402(d)(1)(B)(ii) (DIB), 1381a (SSI). Plaintiff is “disabled” if she is “unable to engage in substantial gainful activity due to a medically determinable physical or mental impairment . . .” Bowen v. Yuckert, 482 U.S. 137, 140 (1987) (quoting identically worded provisions of 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A)).

The Commissioner uses a five-step sequential evaluation process to determine whether an applicant is disabled and entitled to benefits. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4); Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003) (setting forth the “five-step sequential evaluation process to determine disability” under Title II and Title XVI). The following summarizes the sequential evaluation:

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

20 C.F.R. § 404.1520(a)(4)(i), (b).

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

Id. §§ 404.1520(a)(4)(ii), (c).

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 disabled. If not, proceed to step four.

Id. §§ 404.1520(a)(4)(iii), (d).

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

Id. §§ 404.1520(a)(4)(iv), (e), (f).

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

Id. §§ 404.1520(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. §§ 404.1512(a) (“In general, you have to prove to us that you are blind or

1 disabled”), 416.912(a) (same); Bowen, 482 U.S. at 146 n.5. However, “[a]t the fifth step of the
2 sequential analysis, the burden shifts to the Commissioner to demonstrate that the claimant is not
3 disabled and can engage in work that exists in significant numbers in the national economy.” Hill
4 v. Astrue, 698 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. The claimant meets the insured status requirements of the Social
8 Security Act through March 31, 2016.
- 9 2. [Step 1] The claimant has not engaged in substantial gainful
10 activity since March 1, 2011, the alleged onset date (20 CFR
11 404.1571 *et seq.*).
- 12 3. [Step 2] The claimant has the following severe impairments:
13 osteoarthritis, status post right knee arthroscopy, right rotator cuff
14 tear, status post L4-S1 fusion in 1997, asthma, headaches, history of
15 tinnitus, depression, and posttraumatic stress disorder (PTSD) (20
16 CFR 404.1520(c)).
- 17 4. [Step 3] The claimant does not have an impairment or
18 combination of impairments that meets or medically equals the
19 severity of one of the listed impairments in 20 CFR Part 404,
20 Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525 and
21 404.1526).
- 22 5. [Residual Functional Capacity (“RFC”)] After careful
23 consideration of the entire record, the [ALJ] finds that the claimant
24 has the residual functional capacity to perform light work as
25 defined in 20 CFR 404.1567(b) except he can occasionally climb
26 ramps and stairs, kneel, crouch, and crawl. He cannot climb
27 ladders, ropes, or scaffolds. He can frequently balance and stoop.
28 He can occasionally reach overhead with the right upper extremity.
He must avoid concentrated exposure to noise, fumes, odors, dusts,
gases, poor ventilation, and hazards such as machinery and heights.
He can perform simple and detailed tasks in a non-public setting.
6. [Step 4] The claimant is unable to perform any past relevant
work (20 CFR 404.1565).
7. [Step 5] The claimant was born on June 5, 1963 and was 47 years
old, which is defined as a younger individual age 18-49, on the
alleged disability onset date. The claimant subsequently changed
age category to closely approaching advanced age (20 CFR
404.1563).
8. [Step 5, continued] The claimant has at least a high school
education and is able to communicate in English (20 CFR
404.1564).

1 9. [Step 5, continued] Transferability of job skills is not material to
2 the determination of disability because using the Medical-
3 Vocational Rules as a framework supports a finding that the
4 claimant is “not disabled,” whether or not the claimant has
5 transferrable job skills (See SSR 82041 and 20 CFR Part 404,
6 Subpart P, Appendix 2).

7 10. [Step 5, continued] Considering the claimant’s age, education,
8 work experience, and residual functional capacity, there are jobs
9 that exist in significant numbers in the national economy that the
10 claimant can perform (20 CFR 404.1569 and 404.1569(a)).

11 11. The claimant has not been under a disability, as defined in the
12 Social Security Act, from March 1, 2011, through the date of this
13 decision (20 CFR 404.1520(g)).

14 AR 14-24.

15 As noted, the ALJ concluded that plaintiff was “not disabled” under Sections 216(i) and
16 223(d) of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d). AR 24.

17 VI. ANALYSIS

18 Plaintiff alleges that the ALJ erred by (1) “failing to consider [his] Leiden Factor V
19 Mutation and Obesity to be severe medical determinable impairments” at Steps 2 and 5 of the
20 Sequential Evaluation and thus failing to “include limitations from them in the residual functional
21 capacity determination;” (2) failing to “give appropriate weight to [his] treating physicians” and
22 giving “misappropriate weight to the opinions of non-examining physicians;” and (3) “rejecting
23 the psychiatric opinions of Dr. Fealk and Dr. Mishra.” ECF No. 21-1 at 14. Plaintiff requests
24 that the matter be reversed and remanded to the Commissioner for an immediate award of
25 benefits. *Id.* at 15, 17. Because the undersigned agrees that reversal and remand for an
26 immediate award of benefits is appropriate based on the issue of weight given to Mr. Perry’s
27 examining physicians, only that argument is addressed here.

28 A. Opinions of Treating Physician Dr. Margaret Planta and Dr. James Mamone

The ALJ failed to provide specific and legitimate, let alone clear and convincing, reasons
for discounting portions of the opinions of treating physicians Dr. Planta and Dr. Mamone. The
Ninth Circuit distinguishes “among the opinions of three types of physicians: (1) those who treat
the claimant (treating physicians); (2) those who examine but do not treat the claimant
(examining physicians); and (3) those who neither examine nor treat the claimant (nonexamining

1 physicians). As a general rule, more weight should be given to the opinion of a treating source
2 than to the opinion of doctors who do not treat the claimant.” Lester v. Chater, 81 F.3d 821, 830
3 (9th Cir. 1995), as amended (Apr. 9, 1996). In general, “conflicts in the evidence are to be
4 resolved by the Secretary [their] determination must be upheld when the evidence is susceptible
5 to one or more rational interpretations.” Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987).
6 However, “where the treating doctor’s opinion is not contradicted by another doctor, it may be
7 rejected only for ‘clear and convincing’ reasons.” Lester, 81 F.3d at 830 (citing Baxter v.
8 Sullivan, 923 F.2d 1391, 1396 (9th Cir. 1991). The Ninth Circuit has “also held that ‘clear and
9 convincing’ reasons are required to reject the treating doctor’s ultimate conclusions.” Id. (citing
10 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir.1988).

11 a. The Opinion of Dr. Mamone

12 In relevant part, Dr. Mamone, M.D. opined that plaintiff is precluded from heavy lifting
13 and overhead work. AR 20, 731. He noted that plaintiff had pain deep in his shoulder possibly
14 related to arthritis, and that he told plaintiff he was not likely to respond well to a subacromial
15 injection for relief. AR 731. Dr. Mamone noted that MRI results showed a near full-thickness
16 rotator cuff tear and that Mr. Perry had degenerative changes of the posterior labrum as well as
17 some arthritis in the acromioclavicular joint. AR 735.

18 The ALJ gave Dr. Mamone’s opinion partial weight because it is “generally consistent
19 with the discussed treatment record” but discounted the limitation on overhead work because
20 there is “no diagnosed impairment involving the left upper extremity and treatment notes
21 demonstrate good range of motion in the right upper extremity with normal strength.” AR 20.
22 This is not a legitimate reason for discounting Dr. Mamone’s opinion. As a preliminary matter,
23 plaintiff is right-handed, and the ALJ does not explain how only having use of his non-dominant
24 left shoulder would render plaintiff able to do overhead work in any kind of meaningful way. AR
25 32. As to the limitations on plaintiff’s right shoulder, the Commissioner’s citations to the record⁴

27 ⁴ The ALJ does not make any citations to the record; the citations discussed above come from the
28 Commissioner’s motion. ECF No. 26 at 10.

1 allegedly demonstrating good range of motion and normal strength either (1) indicate good range
2 of motion and/or normal strength but also reference pain and degenerative or impingement issues
3 with the shoulder (AR 566, 619, 731, 792), or (2) are from examinations not specifically
4 examining plaintiff's shoulder and do not render any kind of detailed finding with respect to the
5 shoulder (AR 495, 653, 789, 808, 811). For these reasons, the ALJ improperly discounted Dr.
6 Mamone's opinion and reversal on this point is warranted.

7 b. The Opinion of Dr. Planta

8 Dr. Planta opined that plaintiff had difficulty kneeling, squatting, climbing ladders, and
9 working overhead; was limited to sedentary work with position changes every 30 to 45 minutes;
10 could never bend, climb, stoop, crouch, kneel, crawl, reach, flex, turn, or extend his neck; could
11 occasionally push and pull; could frequently handle and feel; required 20 minute rest periods
12 every 30 minutes; would be off task 50 percent of the work day; and would miss 4 or more days
13 of work per month. AR 20, 724-25, 727. Dr. Planta recorded a positive seated straight leg test,
14 and noted that plaintiff's limitations were "severe enough to interfere with attention or
15 concentration needed to perform even simple repetitive tasks." AR 724, 25.

16 The ALJ gave great weight to portions of Dr. Planta's opinion, but gave little weight to
17 the portion referenced above. AR 20. The ALJ asserts that this portion of Dr. Planta's opinion is
18 "inconsistent with the discussed clinical findings showing full range of motion, no joint
19 deformities or swelling, normal strength, sensation, reflexes and gait." Id. The ALJ states that
20 although Dr. Planta stated plaintiff could not sit for more than 45 minutes, "the treatment record
21 reveals few, if any, complaints or observations of difficulty sitting" and the opinion is
22 inconsistent with plaintiff's previously discussed functioning." Id. The record does not support
23 the ALJ's assertion that Dr. Planta's findings are "inconsistent" with clinical records. The
24 citations in the Commissioner's summary judgment motion are either from examinations related
25 to Mr. Perry's mental health, with no in-depth examination of his physical status (AR 495), or
26 when read in full do actually document pain and/or weakness consistent with Dr. Planta's
27 findings, though they may be concurrent with a finding such as full range of motion (AR 566,
28 619, 652-53, 731, 789-90, 792, 808-811). The ALJ does not provide specific, legitimate reasons

1 for rejecting portions of Dr. Planta's assessment, and her conclusion on this point therefore shall
2 be reversed.

3 B. Remand for Benefits or for Further Proceedings

4 As discussed above, the ALJ erred in discounting portions of two treating physicians'
5 opinions. That error was not harmless, because the treating physicians' reports, particularly the
6 report of Dr. Planta, directly conflict with the ALJ's RFC finding and her finding of non-
7 disability based on the hypotheticals provided to the VE. Accordingly, the court is authorized "to
8 'revers[e] the decision of the Commissioner of Social Security, with or without remanding the
9 cause for a rehearing.'" Treichler v. Comm'r of Soc. Sec. Admin., 775 F.3d 1090, 1099 (9th Cir.
10 2014). "[W]here the record has been developed fully and further administrative proceedings
11 would serve no useful purpose, the district court should remand for an immediate award of
12 benefits." Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004).

13 More specifically, the district court should credit evidence that was rejected during the
14 administrative process and remand for an immediate award of benefits if (1) the ALJ failed to
15 provide legally sufficient reasons for rejecting the evidence; (2) there are no outstanding issues
16 that must be resolved before a determination of disability can be made; and (3) it is clear from the
17 record that the ALJ would be required to find the claimant disabled were such evidence credited.
18 Benecke, 379 F.3d at 593 (citing Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000), cert.
19 denied, 531 U.S. 1038 (2000)).

20 1. Outstanding Issues

21 Under the second step in the remand analysis,⁵ the court must "review the record as a
22 whole and determine whether it is fully developed, is free from conflicts and ambiguities, and 'all
23 essential factual issues have been resolved.'" Dominguez v. Colvin, 808 F.3d 403, 407 (9th Cir.
24 2016) (quoting Treichler, 775 F.3d at 1101). This step is satisfied here.

25 First, unlike the situation in Dominguez, there is no internal conflict or ambiguity in the
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27 ⁵ As discussed above, the first step is satisfied because the ALJ failed to provide legally sufficient
28 reasons for giving little weight to portions of Dr. Mamone's and Dr. Planta's opinions.

1 treating physician's opinion or the limitations contained in it. To the contrary, Dr. Mamone's and
2 Dr. Planta's treatment notes fully support the functional limitations they found. As discussed
3 above, even in instances where full range of motion was noted or certain examinations showed
4 normal results, findings of pain and/or limited function were consistent. See, e.g., AR 566, 619,
5 652-53, 731, 789-90, 792, 808-811.

6 The only possible conflict arises with the opinions of agency non-examining physicians,
7 Jensine Wright, MD and M. Tambellini, M.D. See AR 20. The ALJ did not specify the weight
8 given to their opinions, but relied on them in her order. AR 20. It is true that those opinions
9 found that plaintiff could do light work, including lifting, "limited" right overhead reaching,
10 walking, sitting, pushing, and pulling (AR 54-61, 74-77). However, those opinions give only
11 partial credit to plaintiff's statements regarding his symptoms with no explanation for why they
12 are partially discounted, though presumably they found the allegations unsupported by medical
13 evidence. AR 54, 74. This does not constitute substantial evidence, sufficient to contradict the
14 treating doctors' opinions, because plaintiff is not required to produce objective medical evidence
15 of the pain or fatigue itself, or the severity thereof. Garrison v. Colvin, 759 F.3d 995, 1014 (9th
16 Cir. 2014). The Commissioner herself recognizes that "symptoms sometimes suggest a greater
17 severity of impairment than can be shown by objective medical evidence alone." See "Titles II &
18 XVI: Considering Allegations of Pain & Other Symptoms in Residual Functional Capacity &
19 Individualized Functional Assessments & Explaining Conclusions Reached," SSR 95-5p (S.S.A.
20 Oct. 31, 1995).

21 Accordingly, while the agency doctor opinions may well be valid as far as they go, those
22 opinions do not provide adequate explanation as to why plaintiff's reports of pain were
23 discounted, and they are not sufficient to override the opinions of treating physicians. See SSR
24 95-5p. The court knows of no other matters in the record regarding plaintiff's pain testimony that
25 need resolution, and the Commissioner has not identified any. The ALJ does not expressly rely
26 on the opinions of these non-treating physicians to discount the opinions of the treating
27 physicians, and to the extent the opinions conflict, the opinions of the treating physicians control

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1 as they are better supported by the objective medical evidence and plaintiff's allegations related
2 to his pain.

3 2. Crediting Dr. Mamone and Dr. Planta's Opinions as True

4 Under the third step, this court "must next consider whether the ALJ would be required to
5 find the claimant disabled on remand if the improperly discredited evidence were credited as
6 true." Dominguez, 808 F.3d at 407 (internal quotation marks omitted). If Dr. Mamone and Dr.
7 Planta's opinion were credited as true, plaintiff would necessarily be found disabled under the
8 applicable regulations.

9 Specifically, Dr. Mamone opined that plaintiff is precluded from heavy lifting and
10 overhead work due to his shoulder limitations. AR 730. Dr. Planta found that plaintiff could not
11 stand for more than 2-3 hours per day, and without interruption for 30-45 minutes. AR 724. She
12 found plaintiff's condition was likely to produce good days and bad days, and that he would
13 likely be absent more than 4 days per month. AR 725.

14 When plaintiff's limitations, particularly as described by Dr. Planta, were put to the VE at
15 the hearing, he testified that there were "no jobs" plaintiff could do. AR 44. Not surprisingly,
16 apart from everything else, there is no job available in which plaintiff could miss 4 days of work
17 every month. Id. Because the VE found that no jobs were available to plaintiff, under the
18 hypothetical taking Dr. Mamone and Dr. Planta's full opinions account, plaintiff is disabled under
19 the Act.

20 3. Discretion

21 Where the above steps are satisfied, this court must exercise its discretion in determining
22 whether to remand for further proceedings, or for the immediate calculation and award of
23 benefits. Dominguez, 808 F.3d at 407 (if disability finding would necessarily follow if
24 discredited evidence were credited as true, "the district court may exercise its discretion to
25 remand the case for an award of benefits"). If, despite satisfying the above steps, the "record as a
26 whole creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of
27 the Social Security Act," the court should remand for further proceedings. Burrell v. Colvin, 775
28 F.3d 1133, 1141 (9th Cir. 2014) (quoting Garrison, 759 F.3d at 1021). However, the court would

1 be “abus[ing] its discretion by remanding for further proceedings where the credit-as-true rule is
2 satisfied and the record afforded no reason to believe that [the plaintiff] is not, in fact, disabled.”
3 Garrison, 759 F.3d at 1021.

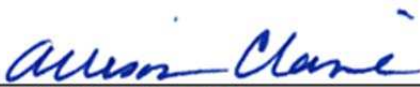
4 Here, the record leaves no doubt that the plaintiff is disabled within the meaning of the
5 Act. The VE was provided a hypothetical by the ALJ that included the limitation of missing
6 work three or more times per month. AR 44. Based on this hypothetical, the VE concluded that
7 such absences, in any of the fields in which an individual with plaintiff’s capabilities might
8 otherwise be able to work, would be precluded from full time work. Id. The “missed work”
9 hypothetical proposed by the ALJ includes fewer missed days per month than Dr. Planta found
10 plaintiff would be forced to miss due to his disabilities. Because the lesser included absences and
11 limitations would result in a finding of disability, the court finds that plaintiff is disabled within
12 the meaning of the Act and no further fact finding is necessary.

13 VII. CONCLUSION

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

- 15 1. Plaintiff’s motion for summary judgment (ECF No. 21), is GRANTED;
- 16 2. The Commissioner’s cross-motion for summary judgment (ECF No. 26), is DENIED;
- 17 3. This matter is REVERSED and REMANDED to the Commissioner for an immediate
18 award of benefits; and
- 19 4. The Clerk of the Court shall enter judgment for plaintiff, and close this case.

20 DATED: July 24, 2017

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22 ALLISON CLAIRE
23 UNITED STATES MAGISTRATE JUDGE
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