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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RODERICK M. OLIVER, JR.,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

Defendant.

No. 2:16-cv-01846 CKD

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”). For the reasons discussed below, the court will deny plaintiff’s motion for summary judgment and grant the Commissioner’s cross-motion for summary judgment.

BACKGROUND

Plaintiff, born February 19, 1978, applied on July 13, 2012 for SSI, alleging disability beginning March 1, 2012. Administrative Transcript (“AT”) 153-163. Plaintiff alleged he was unable to work due to depression and anxiety. AT 92. In a decision dated December 15, 2014,

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1 the ALJ determined that plaintiff was not disabled.<sup>1</sup> AT 31-42. The ALJ made the following  
2 findings (citations to 20 C.F.R. omitted):

- 3 1. The claimant has not engaged in substantial gainful activity  
4 since June 28, 2012, the application date.
- 5 2. The claimant has the following severe impairments: left arm  
6 pain likely secondary to past laceration with likely nerve damage  
7 status post-surgical repair, mood disorder, and cannabis  
8 dependence.
- 9 3. The claimant does not have an impairment or combination of  
10 impairments that meets or medically equals one of the listed  
11 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 12 4. After careful consideration of the entire record, the undersigned

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

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

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

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

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

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

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

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

1 finds that the claimant has the residual functional capacity to  
2 perform medium work, except he is limited to simple unskilled jobs  
with only occasional public and fellow employee contact.

3 5. The claimant has no past relevant work.

4 6. The claimant was born on February 19, 1978 and was 34 years  
5 old, which is defined as a younger individual age 18-49, on the date  
the application was filed.

6 7. The claimant has a limited education and is able to communicate  
7 in English.

8 8. Transferability of job skills is not an issue in this case because  
the claimant does not have past relevant work.

9 9. Considering the claimant's age, education, work experience, and  
10 residual functional capacity, there are jobs that exist in significant  
numbers in the national economy that the claimant can perform.

11 10. The claimant has not been under a disability, as defined in the  
12 Social Security Act, since June 28, 2012, the date the application  
was filed.

13 AT 33-42.

14 ISSUES PRESENTED

15 Plaintiff argues that the ALJ committed the following errors in finding plaintiff not  
16 disabled: (1) the ALJ improperly weighed the medical evidence; (2) the ALJ improperly  
17 discredited the lay evidence, consisting of plaintiff's and his wife's testimony; and (3) the ALJ  
18 was required to obtain Vocational Expert testimony rather than relying on the grids.

19 LEGAL STANDARDS

20 The court reviews the Commissioner's decision to determine whether (1) it is based on  
21 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record  
22 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial  
23 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340  
24 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means "such relevant evidence as a reasonable  
25 mind might accept as adequate to support a conclusion." Orn v. Astrue, 495 F.3d 625, 630 (9th  
26 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). "The ALJ is  
27 responsible for determining credibility, resolving conflicts in medical testimony, and resolving  
28 ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).

1 “The court will uphold the ALJ’s conclusion when the evidence is susceptible to more than one  
2 rational interpretation.” Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

3 The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th  
4 Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ’s  
5 conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not  
6 affirm the ALJ’s decision simply by isolating a specific quantum of supporting evidence. Id.; see  
7 also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the  
8 administrative findings, or if there is conflicting evidence supporting a finding of either disability  
9 or nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226,  
10 1229-30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in  
11 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

## 12 ANALYSIS

### 13 A. Medical Evidence

14 Plaintiff asserts that the ALJ failed to give legally adequate reasons for rejecting the  
15 opinion of Dr. Richard Hicks, a psychiatrist who in August 2013 performed a comprehensive  
16 psychiatric evaluation of plaintiff at the request of the state agency. See AT 299-302.

17 At the outset of his report, Dr. Hicks noted that there were no medical records available.  
18 AT 299. Based on his interview and evaluation of plaintiff, Dr. Hicks diagnosed him with  
19 depressive disorder and anger control disorder at Axis I, possible bipolar disorder at Axis II, and a  
20 GAF of 55-60.<sup>2</sup> AT 301. In his functional assessment, Dr. Hicks stated that plaintiff would have  
21 difficulty “interacting with coworkers and the public” and “being consistent and regular.” AT  
22 301.

23 He would have difficulty doing regular work activities. He could  
24 easily lose his temper and get into a fight on the job. He needs a  
25 protective environment for work like a thrift store or something  
where there is an allowance for the psychiatric issues of the person

26 <sup>2</sup> GAF is a scale reflecting the “psychological, social, and occupational functioning on a  
27 hypothetical continuum of mental health-illness.” Diagnostic and Statistical Manual of Mental  
28 Disorders at 34 (4th ed. 2000) (“DSM IV-TR”). A GAF of 51-60 indicates moderate symptoms  
(e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in  
social, occupational, or school function (e.g., few friends, conflicts with peers or co-workers).

1 working there.

2 AT 301.

3 In determining residual functional capacity (RFC), the ALJ found that plaintiff's  
4 allegations were "not entirely credible." AT 40. The ALJ next noted that these allegations were  
5 consistent with Dr. Hicks's report, which he summarized. AT 40. The ALJ then discounted Dr.  
6 Hicks's functional assessment, reasoning:

7 The undersigned gives this opinion little weight as it is not  
8 supported by the medical record. The record lacks longitudinal  
9 evidence to support these limitations. Furthermore, this opinion  
10 appears based upon the claimant's subjective complaints as Dr.  
11 Hicks reported that there were no medical records available.  
12 Furthermore, the record reveals that the claimant had not received  
13 recent mental health treatment.

14 AT 40.

15 The weight given to medical opinions depends in part on whether they are proffered by  
16 treating, examining, or non-examining professionals. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.  
17 1995). Ordinarily, more weight is given to the opinion of a treating professional, who has a  
18 greater opportunity to know and observe the patient as an individual. Id.; Smolen v. Chater, 80  
19 F.3d 1273, 1285 (9th Cir. 1996).

20 To evaluate whether an ALJ properly rejected a medical opinion, in addition to  
21 considering its source, the court considers whether (1) contradictory opinions are in the record;  
22 and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted opinion of a  
23 treating or examining medical professional only for "clear and convincing" reasons. Lester, 81  
24 F.3d at 831. In contrast, a contradicted opinion of a treating or examining professional may be  
25 rejected for "specific and legitimate" reasons. Lester, 81 F.3d at 830. While a treating  
26 professional's opinion generally is accorded superior weight, if it is contradicted by a supported  
27 examining professional's opinion (supported by different independent clinical findings), the ALJ  
28 may resolve the conflict. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing  
Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). In any event, the ALJ need not give  
weight to conclusory opinions supported by minimal clinical findings. Meanel v. Apfel, 172 F.3d  
1111, 1113 (9th Cir. 1999) (treating physician's conclusory, minimally supported opinion

1 rejected); see also Magallanes, 881 F.2d at 751. The opinion of a non-examining professional,  
2 without other evidence, is insufficient to reject the opinion of a treating or examining  
3 professional. Lester, 81 F.3d at 831.

4 Here, plaintiff argues that the ALJ failed to give specific and legitimate reasons for  
5 discounting the opinion of examining psychiatrist Dr. Hicks. (ECF No. 15 at 9.) Plaintiff asserts  
6 that the ALJ's basis for rejecting Dr. Hicks's opinion "boils down to Plaintiff's lack of consistent  
7 psychiatric treatment, which is contrary to established Ninth Circuit law" in Nguyen v. Chater,  
8 100 F.3d 1462, 1465 (9th Cir. 1996), which held that the ALJ erroneously rejected an examining  
9 psychologist's opinion based on a lack of mental health treatment records. In Nguyen, the court  
10 reasoned that

11 depression is one of the most underreported illnesses in the country  
12 because those afflicted often do not recognize that their condition  
13 reflects a potentially serious mental illness. . . . Thus, the fact that  
14 claimant may be one of millions of people who did not seek  
15 treatment for a mental disorder until late in the day is not a  
16 substantial basis on which to conclude that Dr. Brown's assessment  
of claimant's condition is inaccurate. . . . "[A]ppellant may have  
failed to seek psychiatric treatment for his mental condition, but it  
is a questionable practice to chastise one with a mental impairment  
for the exercise of poor judgment in seeking rehabilitation."

17 100 F.3d at 1465, quoting Blankenship v. Bowen, 874 F.2d 1116, 1124 (6th Cir. 1989). But see  
18 Acosta v. Berryhill, 2017 WL 1090160, \*5 (E.D. Cal. March 22, 2017) (no error under Nguyen  
19 where "plaintiff has not cited any evidence suggesting that he was unaware of his potential mental  
20 illness or that his failure to secure mental health treatment was attributable to his mental illness  
21 rather than his own preference.").

22 Defendant argues that, rather than being based on a mere lack of records, the ALJ's  
23 rejection of Dr. Hicks's opinion was based on a consideration of the record as a whole, which  
24 showed that plaintiff's mental symptoms "were generally mild." AT 37. Citing Dr. Hicks's  
25 report and other medical records, the ALJ elaborated:

26 Mental status examinations revealed that the claimant was fully  
27 oriented. . . . He was cooperative. His thought process was logical  
28 and linear. His thought content was normal. His attention and  
concentration was normal. His recent and remote memory was  
intact. His fund of knowledge was age appropriate. He had fair

1 impulse control, insight, and judgment. He denied perceptual  
2 symptoms. . . . There was no history of hallucinations, illusions,  
depersonalization, or derealization.

3 AT 38. The ALJ also considered evidence that both plaintiff and his wife reported that Prozac  
4 helped plaintiff, and he was more “calm and stable” on the medication. AT 38. Thus, defendant  
5 argues, the ALJ reasonably rejected Dr. Hicks’s conclusions about functional limitations as  
6 inconsistent with the objective evidence. As to the ALJ’s reasoning that Dr. Hicks’s report was  
7 based on plaintiff’s subjective complaints, the ALJ reasonably found plaintiff not entirely  
8 credible, as discussed below. See Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008)  
9 (holding that ALJ may reject a treating physician’s opinion if it is based “to a large extent” on a  
10 claimant’s self-reports that have been properly discounted as incredible).

11 Considering the record as a whole and the reasoning of the ALJ, the court finds that the  
12 ALJ did not err in discounting the functional limitations assessed by Dr. Hicks.

### 13 B. Lay Evidence

14 Plaintiff next contends that the ALJ gave inadequate reasons for finding the testimony of  
15 plaintiff and his wife not credible in determining RFC.

16 The ALJ determines whether a disability applicant is credible, and the court defers to the  
17 ALJ’s discretion if the ALJ used the proper process and provided proper reasons. See, e.g.,  
18 Saelee v. Chater, 94 F.3d 520, 522 (9th Cir. 1995). If credibility is critical, the ALJ must make an  
19 explicit credibility finding. Albalos v. Sullivan, 907 F.2d 871, 873-74 (9th Cir. 1990); Rashad v.  
20 Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990) (requiring explicit credibility finding to be  
21 supported by “a specific, cogent reason for the disbelief”).

22 In evaluating whether subjective complaints are credible, the ALJ should first consider  
23 objective medical evidence and then consider other factors. Bunnell v. Sullivan, 947 F.2d 341,  
24 344 (9th Cir. 1991) (en banc). If there is objective medical evidence of an impairment, the ALJ  
25 then may consider the nature of the symptoms alleged, including aggravating factors, medication,  
26 treatment and functional restrictions. See id. at 345-47. The ALJ also may consider: (1) the  
27 applicant’s reputation for truthfulness, prior inconsistent statements or other inconsistent  
28 testimony, (2) unexplained or inadequately explained failure to seek treatment or to follow a

1 prescribed course of treatment, and (3) the applicant's daily activities. Smolen v. Chater, 80 F.3d  
2 1273, 1284 (9th Cir. 1996); see generally SSR 96-7P, 61 FR 34483-01; SSR 95-5P, 60 FR 55406-  
3 01; SSR 88-13. Work records, physician and third party testimony about nature, severity and  
4 effect of symptoms, and inconsistencies between testimony and conduct also may be relevant.  
5 Light v. Social Security Administration, 119 F.3d 789, 792 (9th Cir. 1997). A failure to seek  
6 treatment for an allegedly debilitating medical problem may be a valid consideration by the ALJ  
7 in determining whether the alleged associated pain is not a significant nonexertional impairment.  
8 See Flaten v. Secretary of HHS, 44 F.3d 1453, 1464 (9th Cir. 1995). The ALJ may rely, in part,  
9 on his or her own observations, see Quang Van Han v. Bowen, 882 F.2d 1453, 1458 (9th Cir.  
10 1989), which cannot substitute for medical diagnosis. Marcia v. Sullivan, 900 F.2d 172, 177 n.6  
11 (9th Cir. 1990). "Without affirmative evidence showing that the claimant is malingering, the  
12 Commissioner's reasons for rejecting the claimant's testimony must be clear and convincing."  
13 Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

14 At step four, the ALJ discussed the issue of plaintiff's credibility, in light of the overall  
15 record, at length. AT 36-40. After reciting plaintiff's allegations, the ALJ concluded that his  
16 statements about intensity, persistence, and limiting effects of these symptoms were not entirely  
17 credible for reasons explained below. AT 36-37.

18 First, "these allegations are inconsistent with the claimant's discussed clinical history  
19 showing that the claimant's condition is controlled." AT 37, citing, e.g., AT 299 (plaintiff's  
20 report to Dr. Hicks that Prozac helped keep him calm and stable). See Warre v. Comm'r of the  
21 SSA, 439 F.3d 1001, 1006 (9th Cir. 2006) (impairments that can be controlled effectively with  
22 medication are not disabling for the purpose of determining eligibility for SSI benefits).

23 The ALJ cited some of plaintiff's reported daily activities – including dressing himself,  
24 doing the dishes, mopping, sweeping, going shopping, fishing, and riding his bike – as consistent  
25 with his clinical history. AT 37. See Burch, 400 F.3d at 681 (ALJ may consider daily living  
26 activities in credibility analysis). The ALJ further noted that "findings on physical and mental  
27 status examination were generally mild." AT 37. He noted that plaintiff's arm pain was treated  
28 with over-the-counter medication. AT 37. See Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007)

1 (evidence of conservative treatment is sufficient to discount a claimant’s testimony regarding  
2 severity of an impairment).

3 “Second, [plaintiff’s] allegations are inconsistent with medical opinions that show that the  
4 claimant is functional in spite of his condition.” AT 38, citing, e.g., AT 78-90 (opinion of state  
5 agency psychologist that plaintiff had moderate limitations but was not psychologically incapable  
6 of working or interacting with others). As discussed above, the court found no error in the ALJ’s  
7 weighing of medical opinions.

8 Additionally, the ALJ found that plaintiff’s “general credibility is questionable as the  
9 record reveals inconsistencies.” AT 39. Plaintiff takes issue with this portion of the decision,  
10 which concerns (1) plaintiff’s failure to appear at a rescheduled consultative examination, (2)  
11 plaintiff’s conflicting reports about how many grades of school he attended, and (3) plaintiff’s  
12 conflicting reports as to how often he smoked marijuana. AT 39. Plaintiff contends these are  
13 inadequate reasons to find plaintiff not credible. However, these relatively minor factors are  
14 merely one part of the ALJ’s discussion of credibility.

15 Turning to the third-party report of plaintiff’s wife, Ms. Oliver, the ALJ found her  
16 statements were inconsistent with plaintiff’s medical history and record exhibits. AT 39-40; see  
17 AT 187-195. “The severe limitations described by them are simply not borne out by the record  
18 from treating sources and consultative examinations.” AT 40. The ALJ further stated that Ms.  
19 Oliver’s statement could not be considered unbiased, as she “lived with the claimant and is likely  
20 to agree with the claimant’s alleged symptoms and limitations.” AT 40. “Where the ALJ has  
21 first found a claimant not credible, the ALJ may subsequently reject lay testimony because it  
22 essentially reproduces the claimant’s testimony.” Lee v. Astrue, 2010 WL 5662964, \*8 (D. Or.  
23 Oct. 27, 2010), citing Valentine v. Comm’r, 574 F.3d 685, 694 (9th Cir. 2009).

24 In light of the medical record and evidence of plaintiff’s daily activities, discussed above,  
25 the undersigned concludes that the ALJ used the proper process and provided proper reasons in  
26 finding plaintiff and his wife not entirely credible about the limiting effects of his symptoms.

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1 C. Vocational Expert

2 Lastly, plaintiff claims the ALJ was required to have a vocational expert (VE) testify at  
3 step five. Specifically, plaintiff contends that, while plaintiff's RFC specified that he was limited  
4 to "only occasional public and fellow employee contact" (AT 36), the ALJ failed to obtain VE  
5 testimony on the impact of these limitations on his ability to perform otherwise suitable jobs.

6 The Medical-Vocational Guidelines ("the grids") are in table form. The tables present  
7 various combinations of factors the ALJ must consider in determining whether other work is  
8 available. See generally Desrosiers v. Sec'y of Health and Human Servs., 846 F.2d 573, 577-78  
9 (9th Cir. 1988). The factors include residual functional capacity, age, education, and work  
10 experience. For each combination, the grids direct a finding of either "disabled" or "not  
11 disabled."

12 There are limits on using the grids, an administrative tool to resolve individual claims that  
13 fall into standardized patterns: "[T]he ALJ may apply [the grids] in lieu of taking the testimony  
14 of a vocational expert only when the grids accurately and completely describe the claimant's  
15 abilities and limitations." Jones v. Heckler, 760 F.2d 993, 998 (9th Cir. 1985); see also Heckler  
16 v. Campbell, 461 U.S. 458, 462 n.5 (1983). The ALJ may rely on the grids, however, even when  
17 a claimant has combined exertional and nonexertional limitations, if nonexertional limitations are  
18 not so significant as to impact the claimant's exertional capabilities. Bates v. Sullivan, 894 F.2d  
19 1059, 1063 (9th Cir. 1990), overruled on other grounds, Bunnell v. Sullivan, 947 F.2d 341 (9th  
20 Cir. 1991); Polny v. Bowen, 864 F.2d 661, 663-64 (9th Cir. 1988); see also Odle v. Heckler, 707  
21 F.2d 439 (9th Cir. 1983) (requiring significant limitation on exertional capabilities in order to  
22 depart from the grids).

23 "The ALJ can use the [G]rids without vocational expert testimony when a non-exertional  
24 limitation is alleged because the [G]rids provide for the evaluation of claimants asserting both  
25 exertional and non-exertional limitations. But the [G]rids are inapplicable when a claimant's  
26 non-exertional limitations are sufficiently severe so as to significantly limit the range of work  
27 permitted by the claimant's exertional limitations." Hoopai v. Astrue, 499 F.3d 1071, 1075 (9th  
28 Cir. 2007) (citations and quotation marks omitted). In such instances, the testimony of a

1 vocational expert is required.

2 In his decision, the ALJ discussed Hoopai, 499 F.3d 1071, in which the Ninth Circuit held  
3 that a claimant's depression was "not a sufficiently severe non-exertional limitation that required  
4 the assistance of a vocational expert." AT 39. Having reviewed the record, the ALJ found that  
5 "although the residual functional capacity dictates that the claimant can have occasional public or  
6 fellow employee contact, this does not qualify as a substantial loss of ability to meet the basic  
7 requirement of being able to respond appropriately to supervision and coworkers." AT 41-42.  
8 The ALJ further found that plaintiff's limitations on contact "have little or no effect on the  
9 occupational base of unskilled medium work." AT 41. See Garcia v. Comm'r of Soc. Sec., 587  
10 Appx 367 (9th Cir. 2014) (unpublished) (ALJ properly declined to call a vocational expert where  
11 claimant's non-exertional limitations, including a "limited capacity to work with others," "did not  
12 significantly erode the base of unskilled light work with limited or no public contact for which  
13 [claimant] was otherwise qualified.").

14 Here, the ALJ properly considered plaintiff's limitations in determining whether the  
15 unskilled medium work base was eroded and concluded, consistent with applicable law, that it  
16 was not. The court finds no error in the ALJ's reliance on the grids.

17 CONCLUSION

18 For the reasons stated herein, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff's motion for summary judgment (ECF No. 15) is denied;  
20 2. The Commissioner's cross-motion for summary judgment (ECF No. 16) is granted;

21 and

- 22 3. Judgment is entered for the Commissioner.

23 Dated: September 13, 2017

24   
25 CAROLYN K. DELANEY  
26 UNITED STATES MAGISTRATE JUDGE