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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COBB LAVERNE MUTTER,
Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:16-cv-02381-KJN

ORDER

Plaintiff Cobb Laverne Mutter seeks judicial review of a final decision by the Commissioner of Social Security (“Commissioner”) denying his applications for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act (“Act”).¹ In his motion for summary judgment, plaintiff principally argues that the decision of the administrative law judge (“ALJ”) is based upon legal error and is not supported by substantial evidence in the record. (See ECF No. 13.) The Commissioner opposed plaintiff’s motion and filed a cross-motion for summary judgment. (ECF No. 16.) Thereafter, plaintiff filed a reply brief. (ECF No. 17.)

After carefully considering the record and the parties’ briefing, the court DENIES plaintiff’s motion for summary judgment, GRANTS the Commissioner’s cross-motion for

¹ This action was referred to the undersigned pursuant to Local Rule 302(c)(15).

1 summary judgment, and AFFIRMS the Commissioner’s final decision.

2 I. BACKGROUND

3 Plaintiff was born on September 27, 1955.² (Administrative Transcript (“AT”) 178.) He
4 has received a GED, and is a veteran of the United States Army who served from October 29,
5 1974, through May 6, 1987. (AT 55, 470.) In 2004, plaintiff quit his job as “upper management”
6 for a sporting goods store, allegedly due to anxiety and panic attacks. (See AT 26, 55, 66–67.)
7 From approximately 2008 through 2014, plaintiff lived primarily in South Korea, where he did
8 missionary work and was, for some period of time, a pastor of a church. (See AT 26, 57–58, 371,
9 3779, 394, 446.) Plaintiff did not seek or receive any regular medical or mental health treatment
10 when he lived in South Korea. (AT 58.)

11 On September 4, 2013, plaintiff applied for DIB, alleging that his disability began on
12 April 27, 2004. (AT 19, 178.) Plaintiff claimed that he was disabled due to depression; mood
13 disorder; pain in his legs, knees, and back from military accidents; and heart problems. (AT 203.)
14 After plaintiff’s application was denied initially and on reconsideration, ALJ Peter F. Belli
15 conducted a hearing on November 5, 2014. (AT 40–49.) After learning that plaintiff’s last
16 psychological evaluation was in 2007, ALJ Belli stopped the hearing so that plaintiff could have a
17 current psychological evaluation. (AT 47–48.) Plaintiff then underwent two examinations—one
18 by Troy Ewing, Psy.D. on December 9, 2014, and another by Robert L. Morgan, Ph.D. on
19 December 16, 2014. (See AT 476–89, 517–29.) ALJ Belli conducted a second hearing on July 6,
20 2015. (AT 50–77.) At the hearing, plaintiff was represented, and the ALJ took testimony from
21 both the plaintiff and David Detmer, a vocational expert (“VE”). (Id.)

22 The ALJ subsequently issued a decision dated April 4, 2016, determining that plaintiff had
23 not been under a disability as defined in the Act, at any time from April 27, 2004, the alleged
24 onset date, through the date last insured. (AT 19–32.) The ALJ’s decision became the final
25 decision of the Commissioner when the Appeals Council denied plaintiff’s request for review on

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

1 August 2, 2016. (AT 1–3.) Plaintiff subsequently filed this action on October 5, 2016, to obtain
2 judicial review of the Commissioner’s final decision. (ECF No. 1.)

3 **II. ISSUES PRESENTED**

4 On appeal, plaintiff raises the following issues: (1) whether the ALJ improperly weighed
5 the medical opinion evidence; (2) whether the ALJ improperly discounted plaintiff’s credibility;
6 and (3) whether the ALJ’s residual functional capacity (“RFC”) determination was without
7 substantial evidence support.³

8 **III. LEGAL STANDARD**

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

20 “[A] reviewing court, in dealing with a determination or judgment which an
21 administrative agency alone is authorized to make, must judge the propriety of such action solely
22 by the grounds invoked by the agency.” Sec. & Exch. Comm’n v. Chenery Corp., 332 U.S. 194,
23 196 (1947). At the same time, in the context of Social Security appeals, “[a]s a reviewing court,
24 we are not deprived of our faculties for drawing specific and legitimate inferences from the ALJ’s
25 opinion. It is proper for us to read the . . . opinion, and draw inferences . . . if those inferences are
26 there to be drawn.” Magallanes v. Bowen, 881 F.2d 747, 755 (9th Cir. 1989).

27
28 ³ Plaintiff’s opening brief raises the issues in a somewhat different order.

1 IV. DISCUSSION

2 A. Summary of the ALJ's Findings

3 The ALJ evaluated plaintiff's entitlement to DIB pursuant to the Commissioner's standard
4 five-step analytical framework.⁴ Preliminarily, the ALJ determined that plaintiff last met the
5 insured status requirements of the Act on December 31, 2009. (AT 21.) At step one, the ALJ
6 concluded that plaintiff had not engaged in substantial gainful activity during the period from the
7 alleged onset date of April 27, 2004, through December 31, 2009. (Id.) At step two, the ALJ
8 found that plaintiff had the following severe impairments: depression, mood disorder, and
9 degenerative disc disease of the lumbar spine. (Id.) However, at step three the ALJ concluded
10 that plaintiff did not have an impairment or combination of impairments that met or medically

11 ⁴ Disability Insurance Benefits are paid to disabled persons who have contributed to the Social
12 Security program. 42 U.S.C. §§ 401 et seq. Supplemental Security Income is paid to disabled
13 persons with low income. 42 U.S.C. §§ 1382 et seq. Both provisions define disability, in part, as
14 an "inability to engage in any substantial gainful activity" due to "a medically determinable
15 physical or mental impairment. . . ." 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A). A parallel
16 five-step sequential evaluation governs eligibility for benefits under both programs. See 20
17 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S. 137, 140-
18 42 (1987). The following summarizes the sequential evaluation:

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

21 Step two: Does the claimant have a "severe" impairment? If so, proceed to step
22 three. If not, then a finding of not disabled is appropriate.

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

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

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

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

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

1 equaled the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix
2 1.” (AT 23.)

3 Before proceeding to step four, the ALJ assessed plaintiff’s RFC, and determined that
4 plaintiff could perform light work as defined in 20 C.F.R. § 404.1567(b) except that plaintiff:

5 could occasionally lift or carry twenty pounds and could frequently
6 lift or carry ten pounds; the claimant could sit for eight hours in an
7 eight hour workday; the claimant could stand/walk for six out of [f]
8 eight hours in a workday; could not climb ladders ropes scaffolds;
9 the claimant could frequently stoop, crouch, crawl, and kneel; the
10 claimant could receive, understand, remember, and carry out
11 simple job instructions; the claimant could frequently receive,
12 understand, remember, and carry out detailed job instructions; the
13 claimant could frequently receive, understand, remember, and
14 carry out complex instructions; the claimant could occasionally
15 interact with [the] general public; the claimant could frequently
16 interact with coworkers and supervisors; the claimant was able to
17 adjust [to] simple workplace changes; the claimant could make
18 workplace judgements.

13 (AT 25.) At step four, in light of plaintiff’s age, education, work experience, RFC, and the VE’s
14 testimony, the ALJ concluded that, through the date last insured, plaintiff was capable of
15 performing past relevant work as a retail manager (DOT 185.167-046, light, SVP 7) and as a fast
16 food manager (DOT 185.137-010, light, SVP 5) because these jobs would not require plaintiff to
17 perform any work-related activities precluded by his RFC. (AT 31–32.) Therefore, the ALJ did
18 not proceed to step five and concluded that plaintiff “was not under a disability, as defined in the
19 Social Security Act, at any time from April 27, 2004, the alleged onset date, through December
20 31, 2009, the date last insured.” (AT 32.)

21 B. Plaintiff’s Substantive Challenges to the Commissioner’s Determinations

22 While plaintiff raises several challenges to the ALJ’s decision, he conspicuously ignores
23 that, through the first four steps of the sequential evaluation process, he bears the burden of
24 proving that he was disabled during the relevant period. Bowen, 482 U.S. at 146 n.5. At the
25 same time, plaintiff admits that he did not receive any regular mental health treatment while he
26 lived in South Korea—a time that included approximately the last two years that plaintiff met the
27 insured status requirements of the Act. (See AT 19, 22, 26, 28, 58.) As the ALJ noted, plaintiff’s
28 failure to seek regular treatment caused his medical records to be “extremely limited” during this

1 timeframe. (AT 26.) Yet, plaintiff has not explained why he did not receive regular treatment,
2 for approximately six years, for the conditions he alleges entitle him to DIB, even though he
3 performed missionary work and acted as a pastor of a church during this same time. (See AT 26,
4 371, 379, 394, 446.) The ALJ questioned plaintiff directly regarding his failure to seek treatment,
5 affording plaintiff an opportunity to justify his inaction.

6 Q So from 2008 until 2014 you were not under the care of a mental
7 health provider?

8 A No, sir, I wasn't in this country.

9 Q Were you receiving it outside of this country?

10 A No, sir, I wasn't.

11 Q Why not?

12 A I was in Korea, sir.

13 Q Why couldn't you as a veteran attend the military bases there for
14 treatment?

15 A I just never did, sir. I just took my medication when I came
16 back. I came back to the states once a year sir, and I would see my
17 doctor . . .

18 (AT 57–58.)

19 Thus, plaintiff's own unexplained inaction created gaps in his medical record, leaving his
20 disability status ambiguous during the two years leading up to the date last insured. As explained
21 above, the ALJ is responsible for determining plaintiff's credibility and resolving ambiguities in
22 the record. Edlund, 253 F.3d at 1156. Because the record is ambiguous as to plaintiff's
23 longitudinal progress from 2008 through December 31, 2009, the date last insured, "[t]he court
24 will uphold the ALJ's conclusion when the evidence is susceptible to more than one rational
25 interpretation." Tommasetti, 533 F.3d at 1038.

26 With this context in mind, the court turns to plaintiff's substantive challenges to the
27 Commissioner's determinations.

28 1. *Whether the ALJ improperly weighed the medical opinion evidence*

The weight given to medical opinions depends in part on whether they are proffered by
treating, examining, or non-examining professionals. Holohan v. Massanari, 246 F.3d 1195,
1201-02 (9th Cir. 2001); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Generally speaking,
a treating physician's opinion carries more weight than an examining physician's opinion, and an

1 examining physician’s opinion carries more weight than a non-examining physician’s opinion.
2 Holohan, 246 F.3d at 1202.

3 To evaluate whether an ALJ properly rejected a medical opinion, in addition to
4 considering its source, the court considers whether (1) there are contradictory opinions in the
5 record; and (2) clinical findings support the opinions. An ALJ may reject an uncontradicted
6 opinion of a treating or examining medical professional only for “clear and convincing” reasons.
7 Lester, 81 F.3d at 830–31. In contrast, a contradicted opinion of a treating or examining
8 professional may be rejected for “specific and legitimate” reasons. Id. at 830. While a treating
9 professional’s opinion generally is accorded superior weight, if it is contradicted by a supported
10 examining professional’s opinion (supported by different independent clinical findings), the ALJ
11 may resolve the conflict. Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing
12 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)). The regulations require the ALJ to
13 weigh the contradicted treating physician opinion, Edlund, 253 F.3d at 1157,⁵ except that the ALJ
14 in any event need not give it any weight if it is conclusory and supported by minimal clinical
15 findings. Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999) (treating physician’s conclusory,
16 minimally supported opinion rejected); see also Magallanes, 881 F.2d at 751. The opinion of a
17 non-examining professional, by itself, is insufficient to reject the opinion of a treating or
18 examining professional. Lester, 81 F.3d at 831.

19 **i. Opinions of Troy Ewing, Psy.D. and Robert L. Morgan, Ph.D.**

20 During the November 5, 2014 hearing, the ALJ directed plaintiff to have a current
21 psychological evaluation so that the ALJ could determine if any medical improvement had been
22 made. (AT 47–48.) In December 2014, plaintiff was examined and evaluated by both Drs.
23 Ewing and Morgan. (AT 476–89, 517–29.) When determining plaintiff’s RFC, the ALJ gave
24 great weight to the opinion of Dr. Ewing, and little weight to the opinion of Dr. Morgan. (See AT
25 28–29.) Plaintiff asserts that the ALJ improperly weighed these opinions. (ECF No. 13 at 25–
26

27 ⁵ The factors include: (1) length of the treatment relationship; (2) frequency of examination;
28 (3) nature and extent of the treatment relationship; (4) supportability of diagnosis;
(5) consistency; and (6) specialization. 20 C.F.R. § 404.1527.

1 26.) Because these opinions contradicted one another, the ALJ was required to provide specific
2 and legitimate reasons for rejecting Dr. Morgan’s opinion. See Lester, 81 F.3d at 830–31.

3 Dr. Ewing opined that plaintiff was only minimally to moderately limited in his abilities to
4 perform various work-related activities, due to his anxiety and depression. (See AT 483–84.)

5 The ALJ summarized Dr. Ewing’s opinion and gave it great weight, explaining that

6 The claimant was assessed as having mild memory deficits [AT
7 483]. The mild memory difficulties for retention and immediate
8 auditory memory abilities appeared likely contributed to depressive
9 symptoms rather than an amnesic disorder. . . . The claimant
10 presented as cooperative but depressed [id.] The depression was
11 thought to likely contribute to missed days of work and social
12 avoidance throughout a forty-hour workweek until his depression
13 can be address[ed] with counseling and continued medication. The
14 test results indicated that the claimant had average to high average
15 intellectual functioning. . . . The evidence within the record
16 concerning the claimant’s mental health treatment was limited, but
17 based on the available evidence and the claimant’s allegations, the
18 opinion of Dr. Ewing demonstrated that, overall, the claimant’s
19 allegations of mental impairment were overstated. For this reason,
20 the opinion was given great weight.

21 (AT 28–29.)

22 Dr. Morgan opined that plaintiff had marked limitations in his abilities to complete
23 various work-related tasks.⁶ (See AT 523–25.) The ALJ summarized Dr. Morgan’s opinion and
24 gave it little weight, explaining that

25 the inconsistencies between [Dr. Morgan’s] report and the report of
26 Dr. Ewing made it seem like [Dr. Morgan] had provided more
27 weight to the claimant’s subjective complaints. The mental status
28 examination results from the VA repeatedly indicated that the
claimant’s memory and concentration were either intact or there
were no overt signs of problems observed. Dr. Morgan noted the
claimant had marked limits to his activities of daily living.
However, the claimant . . . drove himself to the hearing . . . [and]
was independent for basic activities of daily living, did not need
help preparing meals or doing light household chores [AT 478]. . . .
[and he] was reportedly active during the day. . . . Additionally, Dr.
Morgan seemed to provide too little weight to the claimant’s social
functioning. . . . Dr. Morgan was not a treating source and he relied
heavily on the claimant’s subjective allegations, such as the fact
that he was “home all day long.” Once again, this was undermined

⁶ Dr. Morgan also determined that plaintiff met the criteria for disability under listings 12.04 and 12.06. (AT 523.) However, plaintiff does not challenge the ALJ’s step three determination that plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of either listing.

1 by the fact that the claimant performed missionary work in Korea
2 and was even a pastor of a church prior to the date last insured. . . .
3 For these reasons, the opinion was given little weight.

4 (AT 30.)

5 The ALJ's reasoning is supported by substantial evidence in the record. For example, the
6 available objective findings undermine Dr. Morgan's findings of marked psychological
7 impairments. As the ALJ noted, "VA treatment records showed that either the claimant's
8 concentration or memory were intact or there were no overt signs of concentration or memory
9 problems observed on interview." (AT 24, 279–80, 283–84, 289–90, 310, 711, 714, 718–19, 722,
10 725, 728–29, 732.) While these cited records date from 2004 through 2005, and then again from
11 2014 through 2015, the ALJ appropriately relied on them, especially since this significant gap
12 was caused by plaintiff's unexplained failure to seek consistent treatment.

13 The ALJ also appropriately determined that Dr. Morgan's opinion was inconsistent with
14 plaintiff's social functioning—such as acting as a pastor (see AT 446)—and his statements to Dr.
15 Ewing, demonstrating that he was independent for basic activities of daily living. (See AT 478.)

16 Similarly, it was reasonable for the ALJ to determine that Dr. Ewing's opinion was more
17 consistent with the available medical evidence, while Dr. Morgan's opinion relied more upon
18 plaintiff's questionable subjective complaints, especially in light of plaintiff's activities in South
19 Korea and his failure to seek regular treatment, all of which casts doubt on the degree of
20 plaintiff's actual limitations.

21 Therefore, the ALJ gave specific and legitimate reasons, supported by substantial
22 evidence, for rejecting Dr. Morgan's opinion, and instead giving great weight to Dr. Ewing's
23 opinion.

24 However, plaintiff argues that the ALJ nonetheless erred in relying on Dr. Ewing's 2014
25 opinion to determine whether or not plaintiff was disabled on December 31, 2009, the date last
26 insured. (ECF No. 13 at 25.) This argument overlooks the burden of proof and it is not
27 persuasive. The ALJ's decision is based upon the available record, and it was plaintiff's failure to
28 seek consistent treatment that caused the extremely sparse record between 2008 and 2014. The
Commissioner is not compelled to find a claimant disabled when the claimant has failed to carry

1 his burden of proof through the first four steps. See Bowen, 482 U.S. at 146 n.5 (explaining that
2 the claimant bears the burden of proof in the first four steps of the sequential evaluation process).

3 **ii. VA disability rating decision**

4 Prior to December of 2014, plaintiff's last psychological evaluation was performed after
5 he filed a claim with the VA on November 2, 2007. (AT 470–72.) On January 17, 2008, the VA
6 issued a rating decision and concluded that plaintiff's "mood disorder (previously evaluated as
7 depression)" continued to be 100% disabling. (AT 470.) When explaining the reasons for the
8 decision, the VA discussed and analyzed plaintiff's mood disorder. (See AT 470–72.) The
9 decision also included a stand-alone assertion that various physical impairments were determined
10 to be "independently ratable at 60% or more from 5/12/2004." (AT 474.)

11 Plaintiff argues that the ALJ erred by failing to provide legally adequate reasons for
12 rejecting the VA's determination regarding plaintiff's mood disorder, and by failing to provide
13 any reason for rejecting the determination regarding his physical impairments. (ECF No. 13 at
14 21–24.)

15 The Ninth Circuit has held that

16 Because social security disability and VA disability programs
17 "serve the same governmental purpose—providing benefits to those
18 unable to work because of a serious disability," the ALJ must give
19 "great weight to a VA determination of disability." [. . .] An ALJ,
however, "may give less weight to a VA disability rating if he gives
persuasive, specific, valid reasons for doing so that are supported
by the record."

20 Turner v. Comm'r of Soc. Sec., 613 F.3d 1217, 1225 (9th Cir. 2010) (citing McCarty v.
21 Massanari, 298 F.3d 1072, 1076 (9th Cir.2002)).

22 a. 100% rating of mood disorder

23 The ALJ discussed the VA's disability rating and gave it little weight, explaining that

24 The 100% evaluation of mood disorder was continued in part
25 because the claimant's improvement with continued treatment
26 would be minimal at best. The claimant received a GAF score of
45.⁷ These assertions were not supported by adequate objective

27 ⁷ A GAF score reflects a clinician's rating, on a continuum of mental health-illness (0-100), of a
28 patient's overall functioning. Diagnostic and Statistical Manual of Mental Disorders, (4th Edition
1994) (DSM-IV), American Psychiatric Ass'n, pages 30–32.

1 examination notes and were conclusory in nature. While the
2 determination of disability from the VA is a factor in addressing the
3 frequency and severity of the claimant's reported symptoms, the
4 VA findings were non-binding. Furthermore the GAF score, as
5 well as the determination that the claimant's mood disorder was
6 disabling, which included reported episodes of panic attacks and
7 mood outbreaks, was undermined by the claimant's reported
8 activities with regard to his missionary work and travels to and
9 from South Korea, California, and Arizona. For these reasons, the
10 opinion was given little weight.

11 (AT 30.)

12 As the ALJ asserts, this rating is without substantial support from the objective medical
13 evidence in the record. First, plaintiff admits that "the examiner's report [that served as the basis
14 for this evaluation] is not in the record" (ECF No. 13 at 23), even though the ALJ afforded
15 plaintiff thirty days, after the July 6, 2015 hearing, to supplement the record with any missing
16 medical records from the VA. (See AT 76.) At the same time, as the ALJ explained, "[t]he
17 mental status examination results from the VA repeatedly indicated that the claimant's memory
18 and concentration were either intact or there were no overt signs of problems" (AT 30, 279–80,
19 283–84, 289–90, 310, 711, 714, 718–19, 722, 725, 728–29, 732), and the "evidence within the
20 record concerning the claimant's mental health treatment was limited" due to plaintiff's failure to
21 seek consistent treatment. (AT 29.)

22 Moreover, while plaintiff cites to portions of the record, prior to the date last insured, that
23 might support the VA's disability rating (see ECF No. 13 at 22), the record is not as clear as
24 plaintiff asserts. For example, on September 29, 2008, plaintiff presented to Dr. Geoffrey
25 Hutchinson and reported that he "has been in Korea for some time w[ith] his spouse, says his
26 depression is managed, he is compliant w[ith] citalopram." (AT 592.) During that visit, Dr.
27 Hutchinson determined that plaintiff's panic disorder was in remission and assessed plaintiff with
28 a GAF score of 65. (Id.) This record entry—one of plaintiff's few psychological progress notes
after the VA's disability decision, and before the date last insured—persuasively supports the
ALJ's conclusion that the objective medical evidence did not support the VA's 100% rating. At a
minimum, this record belies any assertion that the record conclusively supports the VA's 100%
rating—and when the record is ambiguous, the court will defer to the ALJ's reasonable

1 interpretation of the evidence. See Edlund, 253 F.3d at 1156; Tommasetti, 533 F.3d at 1038.

2 Furthermore, the ALJ explained that the VA’s reliance on plaintiff’s one-time GAF score
3 of 45 was misplaced because

4 . . . a GAF assessment is a one-time “snapshot” of mental
5 functioning that is not intended for forensic purposes, [and as such,]
6 the undersigned did not assign significant weight to any such
7 ratings wherever they appear in the record. [. . .]

8 The claimant’s GAF score in combination with the claimant’s
9 results from the consultative examination [with Dr. Ewing]
10 indicated that the claimant’s mental issues were not as severe as
11 alleged. His scores ranged from 45–60.

12 (AT 31.) This explanation is also supported by the record. Plaintiff presented on at least thirteen
13 occasions with a GAF score of 50 or more, during his documented treatment, which undermines
14 the VA’s reliance on a single GAF score of 45 as a reason to find plaintiff 100% disabled. (See
15 AT 280, 284, 289, 482, 523, 592, 597, 613, 650, 664, 666, 667, 672.)

16 Finally, the ALJ appropriately determined that the VA’s 100% evaluation was
17 undermined by plaintiff’s missionary work and travels out of the country, which the ALJ
18 thoroughly documented. Living in a foreign country, performing missionary work, and acting as
19 a pastor—all while not receiving regular mental health treatment—are persuasive and valid
20 reasons to discount a finding that such a person is 100% disabled due to his mental health
21 conditions.

22 Therefore, the ALJ gave “persuasive, specific, [and] valid reasons,” supported by
23 substantial evidence in the record, for dismissing the VA’s determination that plaintiff’s mood
24 disorder was 100% disabling. See Turner, 613 F.3d at 1225.

25 b. 60% rating of physical impairments

26 As to the VA’s statement that plaintiff was independently 60% disabled due to his
27 physical impairments, the ALJ was not required to discuss this unsupported conclusion. When
28 “interpreting the evidence and developing the record, the ALJ does not need to ‘discuss every
piece of evidence.’” Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)
(citations omitted). “[T]he ALJ is not required to discuss evidence that is neither significant nor
probative.” Id.

1 Here, this purported opinion is an unsupported conclusion that was clearly not central to
2 the VA’s decision, which focused its minimal discussion and analysis on plaintiff’s mood
3 disorder. (See AT 470–75.) There was no analysis whatsoever of plaintiff’s alleged physical
4 impairments, but rather a conclusory statement, buried in the middle of the report, indicating that
5 plaintiff was independently disabled due to his physical impairments. (AT 474 (“additional
6 service-connected disabilities of chondromalacia, arthritis, right knee, post operative, low back
7 pain with chronic strain and discomfort, sciatic pain, left leg, sciatic pain, right leg, tinnitus,
8 independently ratable at 60 percent or more from 5/12/2004”).)

9 Even if it were technically error for the ALJ to not discuss this purported opinion, any
10 such error was harmless, as such a conclusory statement does not warrant any weight. See
11 Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012) (“we may not reverse an ALJ’s decision
12 on account of an error that is harmless”); Meanel, 172 F.3d at 1114 (the ALJ “need not give [an
13 opinion] any weight if it is conclusory and supported by minimal clinical findings).

14 **iii. Opinion of Geoffrey T. Hutchinson, Ph.D.**

15 On September 18, 2007, Dr. Hutchinson entered a “psychological summary of vet’s
16 progress” into plaintiff’s medical file. (AT 601.) In relevant part, Dr. Hutchinson indicated that

17 More likely than not, with continued treatment, vet[’]s
18 improvement in depression symptoms would be minimal at best. It
19 is my clinical opinion that there is total social and total occupational
impairment due to depression.

20 (AT 601.)

21 According to plaintiff, the ALJ erred by failing to acknowledge or give any reasons for
22 rejecting this opinion from plaintiff’s treating psychologist. (ECF No. 13 at 20–21.)

23 First, while the ALJ may not have explicitly referenced this treatment note, it is not
24 accurate to conclude that the ALJ did not discuss or reject it. Importantly, the VA’s evaluation,
25 discussed above, incorporated Dr. Hutchinson’s opinion, noting that

26 the VA treatment records . . . document an assessment of total
27 occupational and social impairment due to depression . . . in
28 September 2007. The examiner stated that more likely than not,
with continued treatment, your improvement in depression
symptoms would be minimal at best.

1 (AT 471.) Therefore, when the ALJ rejected the VA's evaluation, he also rejected Dr.
2 Hutchinson's opinion because this opinion was explicitly adopted as part of the VA's evaluation.

3 Second, as explained, the ALJ is not required to discuss every piece of evidence. Howard
4 ex rel. Wolff, 341 F.3d at 1012. Dr. Hutchinson's September 2007 opinion is conclusory and
5 does not include any objective medical findings. (See AT 601.) Therefore, it was neither
6 significant nor probative, and the ALJ was not required to discuss it.

7 Third, even if the ALJ technically erred by not explicitly discussing this opinion
8 independently from his discussion of the VA evaluation, any such error was harmless, as this
9 conclusory and unsupported opinion does not warrant any weight. See Molina, 674 F.3d at 1111;
10 Meanel, 172 F.3d at 1114.

11 2. *Whether the ALJ improperly discounted plaintiff's credibility*

12 In Lingenfelter v. Astrue, 504 F.3d 1028 (9th Cir. 2007), the Ninth Circuit Court of
13 Appeals summarized the ALJ's task with respect to assessing a claimant's credibility:

14 To determine whether a claimant's testimony regarding subjective
15 pain or symptoms is credible, an ALJ must engage in a two-step
16 analysis. First, the ALJ must determine whether the claimant has
17 presented objective medical evidence of an underlying impairment
18 which could reasonably be expected to produce the pain or other
19 symptoms alleged. The claimant, however, need not show that her
20 impairment could reasonably be expected to cause the severity of
21 the symptom she has alleged; she need only show that it could
22 reasonably have caused some degree of the symptom. Thus, the
23 ALJ may not reject subjective symptom testimony . . . simply
24 because there is no showing that the impairment can reasonably
25 produce the degree of symptom alleged.

26 Second, if the claimant meets this first test, and there is no evidence
27 of malingering, the ALJ can reject the claimant's testimony about
28 the severity of her symptoms only by offering specific, clear and
convincing reasons for doing so. . . .

29 Lingenfelter, 504 F.3d at 1035-36 (citations and quotation marks omitted). "At the same time, the
30 ALJ is not required to believe every allegation of disabling pain, or else disability benefits would
31 be available for the asking. . . ." Molina v. Astrue, 674 F.3d 1104, 1112 (9th Cir. 2012).

32 "The ALJ must specifically identify what testimony is credible and what testimony
33 undermines the claimant's complaints." Valentine v. Comm'r of Soc. Sec. Admin., 574 F.3d 685,
34 693 (9th Cir. 2009) (quoting Morgan v. Comm'r of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.

1 1999)). In weighing a claimant’s credibility, an ALJ may consider, among other things, the
2 “[claimant’s] reputation for truthfulness, inconsistencies either in [claimant’s] testimony or
3 between [her] testimony and [her] conduct, [claimant’s] daily activities, [her] work record, and
4 testimony from physicians and third parties concerning the nature, severity, and effect of the
5 symptoms of which [claimant] complains.” Thomas v. Barnhart, 278 F.3d 947, 958–59 (9th Cir.
6 2002) (modification in original) (quoting Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.
7 1997)). If the ALJ’s credibility finding is supported by substantial evidence in the record, the
8 court “may not engage in second-guessing.” Id. at 959.

9 As an initial matter, the ALJ did not entirely discredit plaintiff’s allegations of limitations
10 due to his depression and mood disorder. Indeed, the ALJ limited plaintiff to only frequently
11 receiving, understanding, remembering, and carrying out detailed and complex instructions, as
12 well as only occasional interaction with the general public. (AT 25.) Nevertheless, to the extent
13 that the ALJ discounted plaintiff’s testimony regarding his symptoms and functional limitations,
14 the ALJ provided several specific, clear, and convincing reasons for doing so.

15 **i. Inconsistencies in the record**

16 The ALJ found that claimant was not entirely credible, in part, due to inconsistencies
17 between his assertions and his conduct, as well as inconsistencies between his statements and the
18 record. Specifically, the ALJ reasoned that

19 Though the claimant alleged that he left work due to his anxiety, he
20 quit his job after speaking with the district manager. It was not
21 clear whether the claimant could have moved to a less stressful
22 work position. However, once he left work, he made no attempts to
23 find employment in a position that was less stressful or that
24 required him to supervise fewer people. Additionally, the claimant
25 reported at the hearing that he was dealing with anxiety to the point
26 where he was having many attacks in December of 2009. Yet, the
27 record did not indicate that the claimant sought treatment for these
28 issues at the time. The claimant corrected himself and said that his
many panic attacks came about in 2007. He articulated that the VA
in Arizona prescribed his medication in 2009, but again this record
did not seem to be in the record. Most of the records were from
after 2009. The claimant did have a record of treatment for panic
attacks from the VA in 2005 [AT 584–85]. As time progressed,
however, the medical record had less information regarding the
claimant’s treatment leading up to a gap between 2008-2014 where
the claimant’s medical record was extremely limited.

1 (AT 26.)

2 This reasoning is supported by plaintiff's testimony and the record. (See AT 60–61, 66–
3 67, 584–585.) Thus, it was appropriate for the ALJ to point out these inconsistencies when
4 discounting plaintiff's credibility. See Thomas, 278 F.3d at 958–59.

5 **ii. Failure to consistently seek treatment**

6 Failure to seek consistent treatment is a proper consideration when evaluating credibility.
7 See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005). “We have long held that, in assessing
8 a claimant's credibility, the ALJ may properly rely on unexplained or inadequately explained
9 failure to seek treatment or to follow a prescribed course of treatment. . . . Moreover, a claimant's
10 failure to assert a good reason for not seeking treatment, or a finding by the ALJ that the proffered
11 reason is not believable, can cast doubt on the sincerity of the claimant's pain testimony.”
12 Molina, 674 F.3d at 1113-14 (citation and quotation marks omitted).

13 As explained, it is uncontroverted that plaintiff failed to seek consistent treatment for his
14 mental health issues while he lived in South Korea from 2008 until 2014. Therefore, the ALJ
15 appropriately reasoned that

16 The claimant's efforts to address his mental issues were not entirely
17 persuasive. . . . Of great concern was the fact that the claimant
18 testified that he received no formal mental health treatment while
19 he was traveling to and from Korea. He had his medications sent to
him. If the claimant's issues were as severe as alleged, active
methods to address his mental issues would have been appropriate.

20 (AT 26–27.)

21 **iii. Conservative treatment**

22 Relatedly, only taking medication and seeing a doctor once a year constitutes relatively
23 conservative treatment, and was a proper consideration for the ALJ when discounting plaintiff's
24 credibility. See Tommasetti v. Astrue, 533 F.3d 1035, 1039–40 (9th Cir. 2008) (reasoning that a
25 favorable response to conservative treatment undermines complaints of disabling symptoms);
26 Parra v. Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (“We have previously indicated that evidence
27 of conservative treatment is sufficient to discount a claimant's testimony regarding severity of an
28 impairment”); Fair v. Bowen, 885 F.2d 597, 604 (9th Cir. 1989).

1 evidence to craft the RFC determination, as was his responsibility. For all of the reasons
2 discussed above, the court finds that the ALJ appropriately evaluated the medical opinion
3 evidence and plaintiff's credibility. Therefore, the RFC determination is supported by substantial
4 evidence in the record.

5 Moreover, to the extent that reaching an RFC determination may have been complicated
6 by sparse medical records during the relevant period, it was plaintiff who created significant gaps
7 in the record—without explanation—when he took six years off of consistent treatment for his
8 allegedly disabling depression and mood disorder. (See AT 57–58.) Even so, the ALJ took
9 appropriate measures to ensure that he had the best possible record, before making the RFC
10 determination. First, he stopped the initial hearing to ensure that plaintiff had a current
11 psychological evaluation. (AT 47–48.) Then, during the second hearing, the ALJ gave plaintiff
12 an opportunity to explain why he did not seek consistent treatment for six years, to which plaintiff
13 replied, “I just never did.” (AT 58.) Finally, the ALJ provided plaintiff thirty days from the date
14 of the second hearing to supplement the administrative record with any missing medical records.
15 (AT 76.)


16 V. CONCLUSION

17 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 18 1. Plaintiff's motion for summary judgment (ECF No. 13) is DENIED.
- 19 2. The Commissioner's cross-motion for summary judgment (ECF No. 16) is
20 GRANTED.
- 21 3. The final decision of the Commissioner is AFFIRMED, and judgment is entered
22 for the Commissioner.
- 23 4. The Clerk of Court shall close this case.

24 IT IS SO ORDERED.

25 Dated: March 12, 2018

26 
27 _____
28 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE