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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

BRYAN G. PADILLA,  
Plaintiff,  
v.  
COMMISSIONER OF SOCIAL  
SECURITY,  
Defendant.

No. 2:18-CV-2803-DMC

MEMORANDUM OPINION AND ORDER

Plaintiff, who is proceeding with retained counsel, brings this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Pursuant to the written consent of all parties (ECF Nos. 7 and 8), this case is before the undersigned as the presiding judge for all purposes, including entry of final judgment. See 28 U.S.C. § 636(c). Pending before the court are the parties’ briefs on the merits (ECF Nos. 11 and 16).

The court reviews the Commissioner’s final decision to determine whether it is: (1) based on proper legal standards; and (2) supported by substantial evidence in the record as a whole. See Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). “Substantial evidence” is more than a mere scintilla, but less than a preponderance. See Saelee v. Chater, 94 F.3d 520, 521 (9th Cir. 1996). It is “. . . such evidence as a reasonable mind might accept as adequate to support

1 a conclusion.” Richardson v. Perales, 402 U.S. 389, 402 (1971). The record as a whole,  
2 including both the evidence that supports and detracts from the Commissioner’s conclusion, must  
3 be considered and weighed. See Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986); Jones  
4 v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not affirm the Commissioner’s  
5 decision simply by isolating a specific quantum of supporting evidence. See Hammock v.  
6 Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the administrative  
7 findings, or if there is conflicting evidence supporting a particular finding, the finding of the  
8 Commissioner is conclusive. See Sprague v. Bowen, 812 F.2d 1226, 1229-30 (9th Cir. 1987).  
9 Therefore, where the evidence is susceptible to more than one rational interpretation, one of  
10 which supports the Commissioner’s decision, the decision must be affirmed, see Thomas v.  
11 Barnhart, 278 F.3d 947, 954 (9th Cir. 2002), and may be set aside only if an improper legal  
12 standard was applied in weighing the evidence, see Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th  
13 Cir. 1988).

14 For the reasons discussed below, the Commissioner’s final decision is affirmed.

## 16 I. THE DISABILITY EVALUATION PROCESS

17 To achieve uniformity of decisions, the Commissioner employs a five-step  
18 sequential evaluation process to determine whether a claimant is disabled. See 20 C.F.R. §§  
19 404.1520 (a)-(f) and 416.920(a)-(f). The sequential evaluation proceeds as follows:

- |    |        |   |
|----|--------|---|
| 20 | Step 1 | Determination whether the claimant is engaged in<br>21 substantial gainful activity; if so, the claimant is presumed<br>not disabled and the claim is denied;   |
| 22 | Step 2 | If the claimant is not engaged in substantial gainful activity,<br>23 determination whether the claimant has a severe<br>impairment; if not, the claimant is presumed not disabled<br>24 and the claim is denied;   |
| 25 | Step 3 | If the claimant has one or more severe impairments,<br>26 determination whether any such severe impairment meets<br>or medically equals an impairment listed in the regulations;<br>27 if the claimant has such an impairment, the claimant is<br>presumed disabled and the claim is granted; |

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1 Step 4 If the claimant's impairment is not listed in the regulations,  
2 determination whether the impairment prevents the  
3 claimant from performing past work in light of the  
4 claimant's residual functional capacity; if not, the claimant  
5 is presumed not disabled and the claim is denied;

6 Step 5 If the impairment prevents the claimant from performing  
7 past work, determination whether, in light of the claimant's  
8 residual functional capacity, the claimant can engage in  
9 other types of substantial gainful work that exist in the  
10 national economy; if so, the claimant is not disabled and  
11 the claim is denied.

12 See 20 C.F.R. §§ 404.1520 (a)-(f) and 416.920(a)-(f).

13 To qualify for benefits, the claimant must establish the inability to engage in  
14 substantial gainful activity due to a medically determinable physical or mental impairment which  
15 has lasted, or can be expected to last, a continuous period of not less than 12 months. See 42  
16 U.S.C. § 1382c(a)(3)(A). The claimant must provide evidence of a physical or mental  
17 impairment of such severity the claimant is unable to engage in previous work and cannot,  
18 considering the claimant's age, education, and work experience, engage in any other kind of  
19 substantial gainful work which exists in the national economy. See Quang Van Han v. Bower,  
20 882 F.2d 1453, 1456 (9th Cir. 1989). The claimant has the initial burden of proving the existence  
21 of a disability. See Terry v. Sullivan, 903 F.2d 1273, 1275 (9th Cir. 1990).

22 The claimant establishes a prima facie case by showing that a physical or mental  
23 impairment prevents the claimant from engaging in previous work. See Gallant v. Heckler, 753  
24 F.2d 1450, 1452 (9th Cir. 1984); 20 C.F.R. §§ 404.1520(f) and 416.920(f). If the claimant  
25 establishes a prima facie case, the burden then shifts to the Commissioner to show the claimant  
26 can perform other work existing in the national economy. See Burkhart v. Bowen, 856 F.2d  
27 1335, 1340 (9th Cir. 1988); Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); Hammock  
28 v. Bowen, 867 F.2d 1209, 1212-1213 (9th Cir. 1989).

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1 **II. THE COMMISSIONER’S FINDINGS**

2 Plaintiff applied for social security benefits on August 1, 2012. See CAR 376.<sup>1</sup> In  
3 the application, plaintiff claims disability began on October 1, 2008. See id. Plaintiff’s claim  
4 was initially denied. Following denial of reconsideration, plaintiff requested an administrative  
5 hearing. After the hearing, an Administrative Law Judge (ALJ) issued an unfavorable decision  
6 dated May 15, 2015. See id. at 177-87. The Appeals Council accepted review and remanded the  
7 matter for further proceedings. See id. at 193-96. On remand, another administrative hearing was  
8 held on June 8, 2017, before ALJ Carol A. Eckersen. In an October 4, 2017, decision, the ALJ  
9 noted the following regarding the Appeals Council’s remand order:

10 In its remand order, the Appeal Council directed me to give further  
11 consideration to the claimant’s ability to perform past relevant work and  
12 obtain evidence from a vocational expert to clarify the effect of the  
13 assessed limitations on the claimant’s occupational base.

14 Id. at 15.

15 In her October 4, 2017, decision, the ALJ concluded plaintiff is not disabled based  
16 on the following relevant findings:

- 17 1. The claimant has the following severe impairment(s): history of  
18 bilateral carpal tunnel release, bilateral ulnar compression and  
19 tendinitis at the elbows, aortic dissection status post grafting and  
20 valve replacement, and hepatitis C;
- 21 2. The claimant does not have an impairment or combination of  
22 impairments that meets or medically equals an impairment listed in  
23 the regulations;
- 24 3. The claimant has the following residual functional capacity: light  
25 work except he can occasionally handle and finger with the right  
26 upper extremity;
- 27 4. Considering the claimant’s age, education, work experience,  
28 residual functional capacity, and vocational expert testimony, there  
are jobs that exist in significant numbers in the national economy  
that the claimant can perform.

See id. at 17-29.

After the Appeals Council declined further review on August 30, 2018, this appeal followed.

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<sup>1</sup> Citations are the to the Certified Administrative Record (CAR) lodged on February 6, 2019 (ECF No. 10).

1 **III. DISCUSSION**

2 In his opening brief, plaintiff raises one issue and argues the ALJ “improperly  
3 determined that Padilla did not suffer from any severe mental health impairments.”

4 To qualify for benefits, the plaintiff must have an impairment severe enough to  
5 significantly limit the physical or mental ability to do basic work activities. See 20 C.F.R. §§  
6 404.1520(c), 416.920(c).<sup>2</sup> In determining whether a claimant’s alleged impairment is sufficiently  
7 severe to limit the ability to work, the Commissioner must consider the combined effect of all  
8 impairments on the ability to function, without regard to whether each impairment alone would be  
9 sufficiently severe. See Smolen v. Chater, 80 F.3d 1273, 1289-90 (9th Cir. 1996); see also 42  
10 U.S.C. § 423(d)(2)(B); 20 C.F.R. §§ 404.1523 and 416.923. An impairment, or combination of  
11 impairments, can only be found to be non-severe if the evidence establishes a slight abnormality  
12 that has no more than a minimal effect on an individual’s ability to work. See Social Security  
13 Ruling (SSR) 85-28; see also Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir. 1988) (adopting  
14 SSR 85-28). The plaintiff has the burden of establishing the severity of the impairment by  
15 providing medical evidence consisting of signs, symptoms, and laboratory findings. See 20  
16 C.F.R. §§ 404.1508, 416.908. The plaintiff’s own statement of symptoms alone is insufficient.  
17 See id.

18 **A. The ALJ’s Findings**

19 At Step 2, the ALJ evaluated the severity of plaintiff’s alleged impairments. See  
20 CAR 17-20. Regarding mental impairments, the ALJ stated:

21 The claimant’s medically determinable mental impairment of depressive  
22 disorder does not cause more than minimal limitations in the claimant’s  
ability to perform basic mental work activities and is therefore nonsevere.

23 The claimant’s treatment record for his depression is very limited. He  
24 occasionally reported feeling anxious and depressed in 2011 and was  
prescribed antidepressant medication from his primary care physician (Ex.  
25 5F/61, 64). However, there was no further evidence in the record  
concerning his mental impairments.

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26 <sup>2</sup> Basic work activities include: (1) walking, standing, sitting, lifting, pushing,  
27 pulling, reaching, carrying, or handling; (2) seeing, hearing, and speaking; (3) understanding,  
28 carrying out, and remembering simple instructions; (4) use of judgment; (5) responding  
appropriately to supervision, co-workers, and usual work situations; and (6) dealing with changes  
in a routine work setting. See 20 C.F.R. §§ 404.1521, 416.921.

1 Because the record was devoid of any mental health treatment, the State  
2 agency obtained a consultative psychiatric evaluation in January 2013  
3 conducted by Wendy M. McCray, Ph.D. During the examination, the  
4 claimant reported overdosing on “pills” in 2008 or 2009. At that time, he  
5 was struggling with depression due to his new hepatitis C diagnosis. The  
6 claimant reported problems with sustaining attention and concentration.  
7 He had interrupted sleep. He felt hopeless regarding his future and a high  
8 level of stress due to family. During the mental status evaluation, the  
9 claimant was cooperative and polite. He was intermittently tearful. He  
10 was oriented to person, place, and time. He displayed adequate attention  
11 and concentration for conversation. He was able to spell a word correctly  
12 forward but made an error in reverse. His recent and remote memory  
13 appeared grossly intact. He was able to recall three out of three items  
14 immediately and three out of three items after a short delay. He was able  
15 to complete simple oral calculations. He indicated that his mood was  
16 depressed and his affect was tearful and dysphoric. He admitted to current  
17 suicidal ideation but denied any plan or intent to act. His thought process  
18 and content were unremarkable. The examiner only noted subjective  
19 cognitive complaints, diminished motivation, low energy, and disrupted  
20 sleep. He was diagnosed with major depressive disorder and  
21 polysubstance abuse in reported four-year remission (Ex. 6F).

22 CAR 18-19.

23 The ALJ also noted the record contained no evidence of abnormal mental findings from any  
24 treating source. See id. at 19. Further, the ALJ observed that, despite being prescribed  
25 medications in late 2015 – after the first unfavorable decision – plaintiff refused to take them and  
26 instead self-medicated with marijuana. See id.

27 Finally, with respect to the medical opinion evidence concerning the severity of  
28 plaintiff’s mental impairment, the ALJ stated:

Based on her evaluation, Dr. McCray opined that the claimant’s ability to  
relate to others, including co-workers, supervisory personnel, and the  
general public in an appropriate manner is unimpaired. His ability to  
maintain his attention and concentration for simple and one and two-step  
tasks appears to be unimpaired. His ability to perform multi-step and  
higher level cognitive tasks appears to be grossly unimpaired from a  
cognitive point of view based upon brief mental status examination. The  
claimant’s ability to withstand the stress and pressure associated with  
interview and mental status testing was mildly impaired due to his current  
level of depression (Ex. 6F).

State agency psychiatric consultant Karen Ying, M.D., (Ex. 1A) agreed  
with Dr. McCray’s assessment and found the claimant had no severe  
mental impairment.

Id. at 19.

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1           **B.     Plaintiff's Contentions**

2           Plaintiff argues:

3                     . . . [T]he ALJ found Padilla did not suffer from a severe mental  
4           health impairment. AR 18. Specifically the ALJ found that the depressive  
5           disorder did not cause more than minimal limitation in Padilla's ability to  
6           perform basic mental work activities. *Id.* The ALJ reasoned that the  
7           medical record was devoid of any mental health treatment and that the  
8           State Agency obtained a consultative examination in January 2013. AR  
9           18. However, Padilla did not state that he was seeking mental health  
10          treatment nor that he was disabled because of a mental health reason –  
11          rather he reported that he was to die because he cannot do anything in  
12          2013. AR 430. Padilla's mental health deteriorated to the point which is  
13          why there was a lack of mental health records in 2013. The ALJ noted that  
14          there was no evidence from his treating sources of abnormal mental  
15          findings on examination in the relevant period, citing to the entire Exhibits  
16          3F, 5F, 8F, 11F, 13F, 15F, 16F, 17F, 19F, 26F, 28F, 29F, 30F, 32F, and  
17          33F.

18                     Not so. On October 21, 2015, mental status examination revealed  
19          that Padilla exhibited agitated behavior; slowed speech; depressed mood;  
20          and a sad flat affect. AR 1009, 1031-1032. On December 3, 2015, again  
21          mental status examination was not normal and in fact revealed an agitated  
22          and labile behavior; slowed and pressured speech; a depressed mood; and  
23          a sad flat affect. AR 1036-1037. On January 25, 2016, Padilla exhibited on  
24          mental status examination pressured behavior; an anxious affect and  
25          mood; with minimal understanding of own issues as insight. AR 1041-  
26          1042. Inaccurate characterization of evidence warrants remand:  
27          *Regennitter v. Commissioner*, 166 F.3d 1294, 1297 (9th Cir. 1999)  
28          (materially "inaccurate characterization of the evidence" warrants  
                remand).

                   Second, the ALJ notes that Padilla reported that despite having  
antidepressant medications, Padilla did not take them and denied  
psychiatric illness. AR 19. The ALJ misconstrued that treatment note  
where Padilla denied having mental illness. Padilla did deny that he was  
not depressed, however, Padilla continued to talk in a loud voice using  
expletives words; and indicated that he is not depressed however cannot  
control his anger. AR 1035-1036. Common sense dictates that if a person  
is angry, then the common behavior is anger not depression. Further,  
despite stating that, the mental status examination still revealed an agitated  
and labile behavior; slowed and pressured speech; a depressed mood; and  
a sad flat affect. AR 1036-1037.

                   Third, the ALJ focuses on a treatment note that showed that it was  
not until September 2015, after receiving an unfavorable decision that  
Padilla complained of mental health symptoms of "feeling depressed  
merely 'for a couple of months' due to being unemployed, finances, and  
recent death in the family." AR 19. The lack of mental health treatment  
does not mean Padilla does not have a mental illness. In *Olmstead v. L.C.*,  
527 U.S. 581, 608 (1999), Justice Kennedy, filing an opinion concurring

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1 in the judgment, recognized the stigma attached to individuals who suffer  
2 from mental illness:

3 [d]uring the course of a year, about 5.6 million Americans  
4 will suffer from severe mental illness. E. Torrey, *Out of the  
5 Shadows* 4 (1997). Some 2.2 million of these persons  
6 receive no treatment. *Id.*, at 6.

7 The Ninth Circuit itself has held in *Nguyen v. Chater*, 100 F.3d  
8 1462, 1467 (9th Cir. 1996) that it is common knowledge that depression is  
9 one of the most underreported illnesses in the country because those  
10 afflicted often do not recognize that their condition reflects a potentially  
11 serious mental illness. The fact that it took Padilla until 2015 to seek help  
12 does not mean that his mental illness is not severe. The ALJ is obligated to  
13 review the record as a whole. *See Gallant v. Heckler*, 753 F.2d 1450, 1456  
14 (9th Cir.1984) (error for an ALJ to ignore or misstate the competent  
15 evidence in the record in order to justify his conclusion).

16 Fourth, the ALJ focused that Padilla did not take his antidepressant  
17 medications and was found as an unreliable historian with his story too  
18 convoluted. AR 19. Padilla did not take his antidepressant medication  
19 because he was taking marijuana to treat it instead. AR 1046. As to the  
20 unreliable historian claim, doctor's "observations must be 'read in context  
21 of the overall diagnostic picture' the provider draws." *Ghanim*, 763 F.3d at  
22 1162 (quoting *Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir.  
23 2001). Despite such statement by the nurse, the mental status examinations  
24 that followed continued to show abnormal findings.

25 Fifth, the ALJ found that as of January 2016, Padilla endorsed not  
26 being depressed, having improved, having mild symptoms, with no mental  
27 health treatment following such. AR 19. However, the remaining  
28 treatment notes following that date, all have as an active problem - bipolar  
affective disorder, clinical depression, mood disorder, and anxiety  
disorder. AR 1139. Finally, statements of improvement must be  
interpreted with an awareness that improved functioning while being  
treated and while limiting environmental stressors does not always mean  
that a claimant can function effectively in a workplace. *Garrison v.  
Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014).

29 Fifth [sic], the ALJ relied on Dr. McCray's opinion that Padilla  
30 had mild mental limitations in 2013, and the state agency physician Karen  
31 Ying, M.D., opined that in 2013 that Padilla did not suffer from a severe  
32 impairment. These opinions occurred in 2013. It is legal error for the ALJ  
33 to isolate portions of the record. *Reddick v. Chater*, 157 F.3d at 720  
34 (requiring that the Commissioner and her ALJs view the record as a whole  
35 rather than parceling out a quantum of evidence here and there); *Day v.  
Weinberger*, 522 F.2d 1154, 1156 (9th Cir. 1975) (an ALJ is not permitted  
36 to reach a conclusion "simply by isolating a specific quantum of  
37 supporting evidence."); *see also Edlund v. Massanari*, 253 F.3d 1152,  
38 1159 (9th Cir. 2001) (error for ALJ to "selectively focus[ ] on ...  
[evidence] which tend[s] to suggest non-disability"); *Gallant v. Heckler*,  
753 F.2d 1450, 1456 (9th Cir. 1984) (error for ALJ to ignore or misstate  
competent evidence in order to justify his conclusion). The ALJ simply  
focused on two 2013 opinions, rather than [sic] the entire medical record  
that shows a worsening of mental health, and Dr. Lin opinion that Padilla  
suffers from depression, anxiety, personality disorder, and psychological  
facts affecting sex. AR 835.



1 The issues materialize because the vocational expert testified that  
2 person with the same limitations assessed by the ALJ's residual functional  
3 capacity, coupled with mental health limitation of simple repetitive tasks  
4 Padilla could not perform the jobs identified under step five. AR 140.  
5 Since the ALJ found that depression was a non-severe impairment, he did  
6 not go through the symptom testimony analysis required under Social  
7 Security Ruling 16-3p, thus such issue is not waived by Padilla. The ALJ's  
8 assessment under step two contains material legal error. *Stout v. Comm'r*  
9 *Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006) (reasonable ALJ  
10 could reach a different conclusion makes the error material). The court  
11 should reverse and remand.

12 **C. Disposition**

13 The gravamen of plaintiff's argument is that the ALJ's residual functional capacity  
14 assessment coupled with a mental limitation to simple repetitive tasks renders him unemployable.  
15 While plaintiff has referenced numerous objective findings indicating some kind of mental  
16 impairment, he has not pointed to specific objective findings or medical opinions indicating his  
17 mental impairment poses more than a minimal limitation on his ability to work in general or his  
18 ability to engage in other than simple repetitive work-related tasks in particular. Notably, Dr.  
19 McCray's opinion indicates just the opposite – that plaintiff's ability to engage in the mental  
20 demands of work are unimpaired.<sup>3</sup>

21 The court finds plaintiff has not met his burden of showing his mental impairment  
22 is severe.

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<sup>3</sup> Plaintiff does not challenge the ALJ's evaluation of the medical opinion evidence.

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#### IV. CONCLUSION

Based on the foregoing, the court concludes that the Commissioner's final decision is based on substantial evidence and proper legal analysis. Accordingly, IT IS HEREBY

ORDERED that:

1. Plaintiff's motion for summary judgment (ECF No. 11) is denied;
2. Defendant's motion for summary judgment (ECF No. 16) is granted;
3. The Commissioner's final decision is affirmed; and
4. The Clerk of the Court is directed to enter judgment and close this file.

Dated: October 2, 2019



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DENNIS M. COTA  
UNITED STATES MAGISTRATE JUDGE