

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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JOHN N. BYRNE,	)	No. 08-4136 SC
	)	
Plaintiff,	)	ORDER DENYING
	)	PLAINTIFF'S MOTION
v.	)	FOR SUMMARY JUDGMENT
	)	AND GRANTING
MICHAEL J. ASTRUE,	)	DEFENDANT'S CROSS-
Commissioner of Social Security,	)	MOTION FOR SUMMARY
	)	<u>JUDGMENT</u>
Defendant.	)	
	)	
_____	)	

**I. INTRODUCTION**

This matter is before the Court on Plaintiff's Motion for Summary Judgment ("Motion"). Docket No. 18. Defendant Michael J. Astrue, Commissioner of Social Security, filed a Cross-Motion for Summary Judgment ("Cross-Motion") and Plaintiff filed an Opposition to the Cross-Motion. Docket Nos. 29, 30. For the reasons set forth below, the Court DENIES Plaintiff's Motion and GRANTS Defendant's Cross-Motion.

**II. BACKGROUND**

**A. Procedural History**

In September 2004, Plaintiff filed applications for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act

1 (the "Act"). Administrative Record ("AR") at 142, 483. The  
2 Commissioner denied the applications initially and upon  
3 reconsideration. Id. at 100-04, 108-13. Plaintiff requested a  
4 hearing and, on June 19, 2007, the Administrative Law Judge  
5 ("ALJ") found that Plaintiff was not disabled within the meaning  
6 of the Act. Id. at 18-27. The Appeals Council denied Plaintiff's  
7 request for review. Id. at 5-9. Plaintiff subsequently commenced  
8 this action for review pursuant to 42 U.S.C. §§ 405(g) and  
9 1383(c)(3).

10 **B. Plaintiff's Medical History**

11 Plaintiff was born in Ireland in 1970. Id. at 83-84, 332-33.  
12 He emigrated to the United States as an adult, attended some  
13 college, and worked as a house cleaner, nanny, and as a self-  
14 employed aesthetician or skin-care specialist. Id.

15 1. Evaluation by Dr. Meisner

16 On August 18, 2004, psychiatrist Marc R. Meisner, MD,  
17 evaluated Plaintiff. Id. at 332-33. Plaintiff informed Dr.  
18 Meisner he had been in psychotherapy since 1993, and that he had  
19 been taking Prozac since 1997. Id. Plaintiff complained to Dr.  
20 Meisner of obsessive compulsive disorder ("OCD") and intrusive  
21 thoughts, stating that therapy and Prozac had helped in the past.  
22 Id.

23 Dr. Meisner increased Plaintiff's Prozac dose and noted an  
24 impression (but not diagnosis) of OCD and major recurrent  
25 depression. Id. Shortly thereafter, Plaintiff began taking  
26 Seroquel. Id. at 329. On September 12, 2004, Plaintiff was  
27 admitted to a hospital emergency room due to a drug reaction. Id.

1 at 320-23. The emergency room physician noted palpitations, and  
2 made a discharge diagnosis of tachycardia, medication reaction and  
3 anxiety. Id.

4 2. Evaluation by Dr. Wechsler

5 In connection with Plaintiff's claims for DIB and SSI,  
6 neurologist Robert Wechsler, MD, performed a comprehensive  
7 neurologic evaluation on January 30, 2005. Id. at 277-80. Dr.  
8 Wechsler reviewed notes from Drs. Peckler, Denham, and Weiner  
9 regarding Plaintiff's complaints of depression and OCD symptoms,  
10 including the emergency room discharge diagnosis. Id. According  
11 to Dr. Wechsler, Plaintiff appeared "tremulous" and his symptoms  
12 were "consistent" with Tourette's syndrome. Id. at 278-79. Dr.  
13 Wechsler noted that Plaintiff would benefit from psychiatric  
14 evaluation. Id. at 280. He found that Plaintiff "might" be  
15 limited in fine manipulation due to intermittent tremors, and  
16 Plaintiff "might" have communicative problems due to intrusive  
17 thoughts. Id.

18 3. Evaluation by Dr. Schwimmer

19 On April 30, 2005, clinical psychologist William Schwimmer,  
20 PhD, examined Plaintiff. Id. at 289-93. After administering  
21 tests and reviewing records, Dr. Schwimmer determined that  
22 Plaintiff's scores on the administered tests (which indicated mild  
23 retardation) were invalid and inconsistent with Plaintiff's  
24 presentation. Id. at 289-90. Dr. Schwimmer noted some jerking  
25 movements, but no behavioral disturbances, and that Plaintiff was  
26 in an upbeat mood. Id. He diagnosed Plaintiff as a malingerer.  
27 Id. at 291. Dr. Schwimmer considered Plaintiff competent to

1 manage funds in his own behalf. Id.

2 4. Treatment by Dr. Miller and Dr. Kahn

3 Psychiatrist Michael Miller, MD, in Santa Rosa, examined  
4 Plaintiff. Id. at 386-91. Plaintiff complained of "intrusive  
5 thoughts" and feared hurting himself or others. Id. Dr. Miller  
6 observed pressured speech and occasional stuttering and noted  
7 severe impairment. Id. His diagnoses were OCD, social anxiety  
8 disorder and histrionic personality, and he set a goal of lowering  
9 Plaintiff's anxiety enough to be able to work. Id. Dr. Miller  
10 referred Plaintiff to an OCD group, noting diagnoses of OCD and  
11 Tourette's syndrome, and he described Plaintiff as histrionic with  
12 numerous obsessions but no compulsions. Id. at 384.

13 Before meeting with Dr. Miller, Plaintiff completed a  
14 Psychiatry Department Patient Questionnaire. Id. at 463-68. He  
15 also answered D-Arkansas Scale questions on September 28, 2005.  
16 Id. at 469-70. He said he felt depressed, suffered from  
17 decreased appetite and some weight change, had difficulty  
18 sleeping, was very tired, and felt guilt nearly every day. Id.  
19 He had trouble thinking and thought of suicide on a daily basis.  
20 Id. His total D-Arkansas depression score was 31 out of a  
21 possible 33. Id. at 470.

22 Dr. Miller referred Plaintiff to psychologist Jeffrey Kahn,  
23 PhD, who examined Plaintiff on November 21, 2005. Id. at 449-50.  
24 Dr. Kahn noted that Plaintiff presented "near disabling" symptoms  
25 and mental compulsions. Id. Dr. Kahn diagnosed Plaintiff with  
26 OCD and referred him to his OCD group. Id. Dr. Kahn completed a  
27 Yale-Brown Obsessive Compulsive Scale checklist of Plaintiff's

1 symptoms. Id. at 451. Dr. Kahn noted Plaintiff's "aggressive"  
2 sexual and religious obsessions, and a history of childhood  
3 molestation. Id.

4 Plaintiff continued seeing Dr. Miller, who diagnosed  
5 Plaintiff with OCD, social anxiety disorder and histrionic  
6 personality disorder. Id. at 454-55, 446-47. Plaintiff told Dr.  
7 Miller that he "felt depressed a lot" and, although he was jogging  
8 and working out, Plaintiff felt he couldn't work due to his  
9 anxiety. Id. at 424-25. In a Change of Provider Request Form,  
10 dated May 8, 2006, Plaintiff complained that Dr. Miller "does not  
11 listen to me." Id. at 356-57. Dr. Miller did not agree with  
12 Plaintiff that he was disabled. Id. Dr. Miller believed that  
13 Plaintiff was capable of working and should be working as part of  
14 treatment. Id.

15 5. Clinical Questionnaires

16 On May 30 and June 1, 2006, Plaintiff completed  
17 questionnaires for psychiatrist Thomas Lowe, MD, and the  
18 Tourette's & Tic Disorders Clinic (TTDC) at the University of  
19 California, San Francisco. Id. at 209-73. Plaintiff wrote that  
20 he suffered a head injury at age five and developed subsequent  
21 speech difficulties with signs of Tourette's syndrome. Id. at  
22 233-37. He recounted his background, including a family history  
23 of depression and OCD/Tourette's syndrome. Id. Plaintiff listed  
24 his current symptoms as upper body tics, compulsive eye-rubbing  
25 and stuttering. Id. at 209-32.

26 On a Tourette's syndrome questionnaire, Plaintiff wrote that  
27 the medications he was currently taking made him fatigued. Id. at  
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1 238-73. He wrote that he was diagnosed with OCD and chronic  
2 depression at age twenty-one, and listed his doctors' past  
3 possible diagnoses of his Tourette's syndrome symptoms as chronic  
4 depression, OCD and post-traumatic stress disorder ("PTSD"). Id.

5 6. Treatment by Dr. Kagan

6 On July 10, 2006, Plaintiff completed a questionnaire before  
7 his appointment in Santa Rosa with psychiatrist Alice Kagan, MD,  
8 again answering D-Arkansas Scale questions. Id. at 408-15.  
9 Listing fewer symptoms than he did on September 28, 2005,  
10 Plaintiff stated he had muscle spasms, tremors/tics, low energy,  
11 crying spells, negative thoughts, chronic depression over several  
12 years, panic attacks, fear, phobias, repetitive behaviors,  
13 intrusive thoughts, and was anxious. Id. at 408-13. He stated  
14 that he was abused for seven years, had a traumatic head injury at  
15 age six, listed his medications and recounted his family history  
16 of mental illness and Tourette's syndrome. Id. Plaintiff's D-  
17 Arkansas Scale answers indicated less intense symptoms than the  
18 previous year, resulting in a depression score of 15 out of a  
19 possible 33. Id. at 414-15.

20 Dr. Kagan's report from her initial exam listed diagnoses of  
21 OCD, social phobia, personality disorder, and fatigue due to  
22 medication. Id. at 416-19. On July 25, 2006, Dr. Kagan called  
23 Plaintiff several times and attempted to leave a message, noting  
24 diagnoses of OCD and social phobia on the patient contact form.  
25 Id. at 406-07. Other than one in-person meeting in May 2007, most  
26 of Plaintiff's conversations with Dr. Kagan were by telephone  
27 between December 2006 and June 2007. Id. at 396-405.

1           On July 24, 2006, Plaintiff completed a food stamp  
2 verification of disability form for Lake County Social Services.  
3 Id. at 392. On the form, Dr. Kagan diagnosed Plaintiff with major  
4 depression and PTSD, with a prognosis for a very slow recovery.  
5 Id.

6           Plaintiff spoke to Dr. Kagan by telephone on December 19,  
7 2006. Id. at 404-405. Plaintiff wanted her to write a letter  
8 stating he was unable to work, but Dr. Kagan refused to do so.  
9 Id. She did not believe Plaintiff was permanently disabled,  
10 though she believed he would have difficulty with full-time  
11 permanent work due to his Tourette's, OCD, social phobia and  
12 depression. Id. She felt he might need to go through vocational  
13 rehabilitation. Id.

14           Between March 19 and May 3, 2007, Plaintiff consulted several  
15 times with Dr. Kagan by telephone. Id. at 396-403. When  
16 Plaintiff stated he couldn't visit her because he had moved to San  
17 Jose, she advised him to transition his care to San Jose. Id. at  
18 398-99. In June, 2007, Dr. Kagan completed a medical opinion form  
19 regarding Plaintiff's ability to do work-related activities, based  
20 on her treatment, recent multiple phone contacts, a meeting on May  
21 3, 2007, and a review of his records from 2004 to present. Id.  
22 at 394-95. Dr. Kagan indicated diagnoses of Tourette's syndrome,  
23 OCD and depression and she observed tics, obsessions and emotional  
24 instability with poor stress tolerance and easy frustration. Id.  
25 She evaluated his level of impairments, listing abilities ranging  
26 from "good" for certain skills and tasks to "poor or none" for  
27 concentration, appropriate interaction, consistent pace, regular

1 attendance, and carrying out detailed instructions. Id. She  
2 indicated anticipating three or more absences from work per month  
3 caused by impairments. Id.

4 7. San Jose Evaluations

5 On May 7, 2007, a social worker at Kaiser Permanente's Santa  
6 Teresa Psychiatry Adult Unit in San Jose listed diagnostic  
7 impressions of OCD and Tourette's syndrome. Id. at 513-516. The  
8 social worker noted some stuttering, depression, anxiety and  
9 obsessions. Id. On May 21, 2007, Plaintiff saw psychiatrist  
10 Jacob Roth, MD, in San Jose. Id. at 517. The visit with Dr. Roth  
11 was for medication management with minimal/no psychotherapy. Id.  
12 Dr. Roth noted that Plaintiff was on disability and was taking  
13 Prozac and Seroquel. Id. Dr. Roth noted that Plaintiff had  
14 obsessions and exhibited moderate symptoms of depression, anxiety,  
15 OCD and Tourette's syndrome. Id. He observed almost no  
16 persisting tics. Id.

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18 **III. LEGAL STANDARD**

19 To qualify for disability benefits, a claimant must show that  
20 he or she is unable "to engage in any substantial gainful activity  
21 by reason of any medically determinable physical or mental  
22 impairment which can be expected to result in death or which has  
23 lasted or can be expected to last for a continuous period of not  
24 less than twelve months . . . ." 42 U.S.C. § 423(d)(1)(A). In  
25 making this determination, "an ALJ conducts a five step inquiry.  
26 20 C.F.R. §§ 404.1520, 416.920." Lewis v. Apfel, 236 F.3d 503,  
27 508 (9th Cir. 2001).

1 The ALJ first considers whether the claimant  
2 is engaged in substantial gainful activity; if  
3 not, the ALJ asks in the second step whether  
4 the claimant has a severe impairment (i.e.,  
5 one that significantly affects his or her  
6 ability to function); if so, the ALJ asks in  
7 the third step whether the claimant's  
8 condition meets or equals one of those  
9 outlined in the Listing of Impairments in  
10 Appendix 1 of the Regulations [20 C.F.R. §§  
11 404.1520(d) & 416.920(d)]; if not, then in the  
12 fourth step the ALJ asks whether the claimant  
13 can perform in his or her past relevant work;  
14 if not, finally, the ALJ in the fifth step  
15 asks whether the claimant can perform other  
16 jobs that exist in substantial numbers in the  
17 national economy. 20 C.F.R. §§ 404.1520(b)-  
18 404.1520(f)(1).

11 Id.

12 Courts may set aside a decision of the ALJ if it is not  
13 supported by substantial evidence or if the decision is not based  
14 on the correct legal standards. 42 U.S.C. § 405(g); Holohan v.  
15 Masanari, 246 F.3d 1195, 1201 (9th Cir. 2001). "Substantial  
16 evidence" is relevant evidence which a reasonable person might  
17 accept as adequate to support the ALJ's conclusion. Reddick v.  
18 Chater, 157 F.3d 715, 720 (9th Cir. 1998). In order to be  
19 "substantial," the evidence must amount to "more than a  
20 scintilla," but need not rise to the level of a preponderance.  
21 Holohan, 246 F.3d at 1201. Where the evidence could reasonably  
22 support either affirming or reversing the ALJ's decision, a court  
23 may not substitute its judgment for the ALJ's decision. Id.

24  
25 **IV. DISCUSSION**

26 Plaintiff contends that the ALJ's final decision is not  
27 supported by substantial evidence and contains reversible legal

1 errors. Mot. at 2.

2 **A. The ALJ's Five Step Inquiry**

3 At step one, the ALJ found that Plaintiff had not engaged in  
4 substantial gainful activity ("SGA") since the alleged onset date.  
5 AR at 20. At step two, the ALJ found that Plaintiff had the  
6 following severe impairments: affective disorder, OCD, anxiety  
7 disorder and Tourette's syndrome. Id. The ALJ found at step  
8 three that Plaintiff did not have an impairment or combination of  
9 impairments that met or medically equaled one of the impairments  
10 outlined in the Appendix 1 Listing of Impairments. Id. at 21-22.  
11 The ALJ found that Plaintiff's impairments presented a "mild"  
12 restriction in daily activities, and "moderate" difficulty in  
13 social functioning, concentration, persistence or pace. Id.  
14 However, the ALJ also found that none of Plaintiff's impairments  
15 amounted to "marked" restrictions, complete inability to function  
16 outside the home, or more than minimal limitation of ability to do  
17 basic work activities. Id. at 21-22. There were also no episodes  
18 of decompensation or psychiatric hospitalization. Id.

19 The ALJ found that Plaintiff had the residual functional  
20 capacity ("RFC") to perform a full range of work at all exertional  
21 levels, though limited to simple repetitive tasks with no public  
22 contact and occasional supervisor and co-worker contact. Id. at  
23 22. The ALJ's RFC finding was based on his evaluation of  
24 Plaintiff's credibility, the testimony of neurologist David  
25 Huntley, MD, the opinions of Drs. Wechsler and Schwimmer, the  
26 State agency assessments, and the reports and diagnoses of  
27 treating physicians Drs. Miller and Kagan. Id. at 24-25. At step  
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1 four, the ALJ concluded that Plaintiff was unable to perform his  
2 past relevant work. Id. at 25. At step five, after considering  
3 Plaintiff's age, education, work experience and RFC, and based  
4 upon the testimony of a Vocational Expert ("VE"), the ALJ  
5 concluded that there are jobs Plaintiff could perform, such as  
6 Kitchen Helper or Hand Packager, and that such jobs exist in  
7 substantial numbers in the national economy. Id. at 26-27. The  
8 ALJ concluded that Plaintiff had not been under a disability from  
9 his onset date of August 23, 2004, through the date of the  
10 decision. Id. at 27.

11 **B. The Parties' Contentions**

12 Plaintiff contends that the ALJ failed to consider a fine  
13 manipulation limitation, and also improperly failed to consider  
14 the VE's testimony that Plaintiff would not be able to find an  
15 employer that would tolerate more than three absences per month,  
16 as anticipated by Dr. Kagan. Mot. at 4-6. Plaintiff contends  
17 that the ALJ improperly declined to give substantial weight to Dr.  
18 Kagan's diagnoses and opinions, improperly found Plaintiff's  
19 testimony not credible, and failed to consider the severe side  
20 effects of Plaintiff's medication in determining Plaintiff's RFC.  
21 Id. at 6-13. Finally, Plaintiff asserts that the Appeals Council  
22 was presented with new and material evidence but either did not  
23 properly consider that evidence or make the necessary findings  
24 concerning the evidence. Id. at 13-14.

25 Defendant responds that the ALJ properly considered and  
26 rejected the fine manipulation limitation noted by Dr. Wechsler.  
27 Cross-Mot. at 2-4. Defendant asserts that the ALJ properly

1 weighed all of the psychiatric evidence, including Plaintiff's  
2 testimony and evidence of the side effects of his medication. Id.  
3 at 4-10. Defendant contends that the Appeals Council properly  
4 considered the additional evidence and concluded that it was not a  
5 basis for changing the ALJ's decision. Id. at 10-11.

6 **C. Fine Manipulation Limitation**

7 The Court agrees with Defendant that the ALJ did not fail to  
8 consider Dr. Wechsler's conclusion that Plaintiff "might" have a  
9 fine manipulation limitation. See AR at 24, 280. The ALJ  
10 specifically took note of Dr. Wechsler's statement that Plaintiff  
11 might have such a limitation. See id. at 24. Contrary to  
12 Plaintiff's contention, Dr. Wechsler did not actually conclude  
13 that Plaintiff "was limited in his ability for fine manipulation."  
14 Mot. at 5. Although the diagnoses of Drs. Miller and Kagan  
15 included Tourette's syndrome, and the ME, Dr. Huntley, agreed that  
16 there was some symptom evidence including tics to support those  
17 diagnoses, see AR at 69-70, there is no medical opinion in the  
18 record that establishes such a fine manipulation limitation as Dr.  
19 Wechsler contemplated "might" exist. Id. at 280.

20 In his Opposition, Plaintiff contends that the ALJ failed to  
21 consider Dr. Bianchi's opinion concerning a fingering limitation.  
22 See Opp'n at 3-4. Plaintiff is incorrect. The ALJ explicitly  
23 took into account the opinions of the state agency medical  
24 consultants. See AR at 25. Having considered all of the relevant  
25 testimony and evidence, the ALJ concluded that Plaintiff had  
26 sufficient RFC to perform a full range of work, with certain  
27 nonexertional limitations. Id. at 22-25. The Court finds that

1 the ALJ's decision was supported by substantial evidence.

2 **D. Plaintiff's Credibility**

3 In determining Plaintiff's RFC, the ALJ considered all of the  
4 evidence, including side effects of medication, as required by 20  
5 C.F.R §§ 404.1529 and 416.929. AR at 22-23. The ALJ considered  
6 the full record, including the testimony of the Plaintiff and the  
7 ME, Dr. Huntley, the opinions of Drs. Wechsler and Schwimmer, the  
8 state agency assessments, and the reports and diagnoses of Drs.  
9 Miller and Kagan. Id. at 24-25. The ALJ found Plaintiff's  
10 allegations as to the "intensity, persistence and limiting  
11 effects" of his symptoms to be "not entirely credible." Id. at  
12 24.

13 Absent evidence suggesting malingering, an ALJ may still  
14 reject the claimant's testimony about the severity of his symptoms  
15 when the rejection is supported by specific, clear and convincing  
16 reasons for doing so. Lingenfelter v. Astrue, 504 F.3d 1028,  
17 1035-36 (9th Cir. 2007). Here, in assessing Plaintiff's  
18 credibility, there was evidence of malingering, see AR at 24, 289-  
19 91. The ALJ also relied on the specific fact that Plaintiff had  
20 infrequent or irregular treatment, and he noted an absence of  
21 physical, occupational, or other rehabilitative therapy. Id. at  
22 23. The ALJ observed that during the hearing Plaintiff "did not  
23 manifest a noticeable stutter" and gave audible, understandable  
24 answers to questions. Id. at 24. The Court takes particular note  
25 of the fact that both of Plaintiff's treating physicians did not  
26 believe Plaintiff was disabled. Id. at 357, 404, 420. It was  
27 reasonable for the ALJ to reach the same conclusion as the

1 treating physicians. The Court therefore affirms the ALJ's  
2 decisions concerning Plaintiff's credibility.

3 **E. Residual Functional Capacity and Dr. Kagan's Opinion**

4 At the hearing, the ALJ questioned the VE concerning the  
5 result of applying Plaintiff's actual or potential limitations to  
6 several different hypothetical employment situations. Id. at 87-  
7 94. In responding to a hypothetical question that took into  
8 account Dr. Kagan's opinion that Plaintiff could anticipate three  
9 or more absences per month, the VE stated that on the basis of  
10 that hypothetical the job market for Plaintiff would completely  
11 erode. Id. at 93.

12 The ALJ concluded, based on consideration of all the VE's  
13 testimony, as well as Plaintiff's background and RFC, that work  
14 exists that Plaintiff could perform. Id. at 27. In determining  
15 Plaintiff's RFC, the ALJ explained that, because of contradictions  
16 in the record as well as Dr. Kagan's own contradictory opinion  
17 that plaintiff was not permanently disabled, little weight was  
18 given to Dr. Kagan's opinion that Plaintiff was likely to miss  
19 three days of work per month. Id. at 25.

20 The opinions of treating doctors should be given more weight  
21 than the opinions of doctors who do not treat the claimant. 20  
22 C.F.R § 404.1527(d); see also Reddick, 157 F.3d at 725. However,  
23 if a treating physician's opinion is contradicted by the opinions  
24 of other doctors, the ALJ must provide specific and legitimate  
25 reasons supported by substantial evidence in the record for  
26 rejecting the treating physician's opinion. Rollins v. Massanari,  
27 261 F.3d 853, 856 (9th Cir. 2001).



1 diagnoses.

2 **F. Additional Evidence Presented to the Appeals Council**

3 On appeal from the ALJ's decision, Plaintiff submitted  
4 additional materials, including his records from Kaiser  
5 Permanente's Santa Teresa Psychiatry Adult Unit in San Jose. Id.  
6 at 498-517. Plaintiff contends that the Appeals Council did not  
7 adequately consider the new evidence or make findings concerning  
8 the materiality of that evidence. Mot. at 13-14. However, the  
9 Appeals Council stated that it reviewed the additional evidence,  
10 but "found that this information does not provide a basis for  
11 changing the Administrative Law Judge's decision." AR at 6. The  
12 Appeals Council correctly noted that the additional evidence did  
13 not apply to the DIB appeal period. Id. at 6. With regard to  
14 Plaintiff's SSI claim, the Court agrees with Defendant that Dr.  
15 Roth's note merely consists of Plaintiff's self-reported history  
16 and does not contain findings. See id. at 517. To the extent  
17 that Plaintiff intends to rely on the intake form filed out by a  
18 social worker, see id. at 513-16, this form is not an acceptable  
19 medical source for purposes of establishing an impairment. See 20  
20 C.F.R. §§ 404.1513(a), 416.913(a). Consequently, there is no  
21 basis to remand the decision based on the Appeals Council's  
22 handling of the additional evidence.

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**V. CONCLUSION**

For the foregoing reasons, the Court DENIES Claimant's Motion for Summary Judgment and GRANTS Defendant's Cross-Motion for Summary Judgment.

IT IS SO ORDERED.

Dated: January 14, 2010

  
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UNITED STATES DISTRICT JUDGE