

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LESLIE FILLMORE,

No. C-10-03655 JCS

Plaintiff,

v.

MICHAEL J. ASTRUE,

Defendant.

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT, GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT, REVERSING DECISION
OF THE COMMISSIONER AND
REMANDING FOR FURTHER
PROCEEDINGS** [Docket Nos. 13, 15]**I. INTRODUCTION**

Leslie Fillmore ("Plaintiff") seeks review of the final decision of the Commissioner of the Social Security Administration ("Commissioner") denying his Application for disability insurance and Supplemental Security Income ("SSI") benefits under the Social Security Act ("SSA"). Plaintiff asks the Court to reverse the Commissioner's denial of benefits and remand with instructions to award benefits or, in the alternative, for additional administrative proceedings. For the reasons stated below, the Court GRANTS Plaintiff's Motion for Summary Judgment, DENIES Defendant's Motion for Summary Judgment, reverses the decision of the Commissioner and remands for further proceedings.¹

II. BACKGROUND**A. Procedural Background**

Plaintiff applied for disability benefits on September 12, 2007, alleging he became unable to work because of diabetes on January 31, 2007. Administrative Record ("AR") 85. The claim was

¹ The parties have consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c).

1 initially denied on November 6, 2007 and denied upon reconsideration on March 14, 2008. AR 97.
2 Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”) and a hearing was
3 scheduled for August 11, 2009 in Oakland, California before ALJ Richard Laverdure (“the August
4 11 hearing”). *Id.* at 27-51. Although Plaintiff did not appear at the August 11 hearing, testimony
5 was taken from vocational expert Jeff Nelson at that time. *Id.* at 27-51 (hearing transcript). A
6 supplemental hearing was held on November 5, 2009, at which time Plaintiff appeared and testified.
7 *Id.* at 52-84. Vocational expert Dr. Gerald Belchick also testified. *Id.* at 54-55. Plaintiff was
8 represented at the hearing by Roger Lin, an attorney with Homeless Action Center. On January 22,
9 2010, the ALJ issued a decision denying benefits, finding that Plaintiff was not disabled as defined
10 by the Social Security Act because he could perform jobs that existed in significant numbers in the
11 national economy. *Id.* at 6. The ALJ’s decision became final when the Appeals Council declined
12 review on July 28, 2010. *Id.* at 1-3.

13 Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) , which gives the Court jurisdiction
14 to review the final decision of the Commissioner. The parties have filed cross-motions for summary
15 judgment.

16 **B. Plaintiff’s Background**

17 Plaintiff was 58 years old as of the alleged onset date of his disability, January 31, 2007. AR
18 162 (date of birth 10/10/1948). Plaintiff’s previous work experience included serving in the Navy
19 for five years, the Army for ten years, and as a deckhand for the U.S. military for 18 years. *Id.* at
20 167-174, 333. He received his GED while working for the U.S. Navy. *Id.* at 45, 351. Between
21 2001 and early 2007, Plaintiff worked for United Parcel Service (“UPS”) loading and unloading
22 trucks. *Id.* at 172-174. In October of 2007, Plaintiff reported to a treating physician that he was
23 homeless. *Id.* at 292.

24 **C. Medical Evidence**

25 **1. Physical Health**

26 In December 2006, Plaintiff visited the Veterans Affairs Clinic (“VA Clinic”) in Martinez,
27 California, complaining of “numbness” and “tingling” in his feet and hands. AR 289. He was seen
28

1 by RN Clifford Flores. *Id.* at 288-290. Lab tests were performed and Plaintiff was diagnosed with
2 diabetes mellitus. *Id.* at 286-288.

3 Plaintiff had a diabetic consultation with Nurse Practitioner Ada Suzuki (“Nurse Practitioner
4 Suzuki”) on December 27, 2006. *Id.* During this appointment, Nurse Practitioner Suzuki reviewed
5 Plaintiff’s laboratory results with him, issued him a glucose monitor and showed him how to use it.
6 *Id.* at 287. She directed Plaintiff to use Accu-Chek glucose test strips two to three times a week, and
7 to take one tablet of Metformin daily for diabetes management. *Id.* at 286. In the notes for this visit,
8 Nurse Practitioner Suzuki described Plaintiff as an “[a]lert, pleasant MALE in [no apparent
9 distress].” *Id.* at 287. Neurologically, she described him as “[a]lert and oriented to time, place and
10 person.” *Id.* She noted that he walked with a “normal gait” and that his mood and affect were
11 “normal.” *Id.*

12 On January 25, 2007, Plaintiff was seen at the VA Clinic for an optometry consultation in
13 connection with his diabetes. *Id.* at 284-286.

14 Nurse Practitioner Suzuki also referred Plaintiff to a dietician, Ruth Knittel, and Plaintiff
15 attended a diabetes management class with Ms. Knittel on February 6, 2007. *Id.* at 266-67. The
16 class presented Plaintiff with a variety of information on how to eat and exercise properly. *Id.*

17 Plaintiff was seen by Nurse Practitioner Suzuki again on April 5, 2007 for evaluation and lab
18 review. AR 281-284. During this visit he complained of hearing loss. *Id.* A notation for
19 “extremities” stated only “no edema.” Nurse Practitioner Suzuki again described Plaintiff as “[a]lert
20 and oriented to time, place, and person.” *Id.* at 283. Nurse Practitioner Suzuki offered a referral for
21 a colonoscopy but Plaintiff declined the referral. *Id.* at 284.

22 On May 31, 2007, Nurse Practitioner Suzuki saw Plaintiff for a scheduled primary care visit.
23 *Id.* at 277. During this visit, Plaintiff told Nurse Practitioner Suzuki that he was under “increased
24 stress, his building was sold [and that] he ha[d] no job.” *Id.* He complained of “chronic foot pain.”
25 *Id.* Nurse Practitioner Suzuki referred Plaintiff to the radiology department, where x-rays of
26 Plaintiff’s feet were taken on the same day. *Id.* at 248. The films were reviewed by Dr. Stanley
27 Reich, M.D., who reported:

28 The left foot shows mild spurring about the talonavicular joint. The right foot shows a
minimal plantar spur. No other significant findings revealed.

1 *Id.* at 248. He noted that the “primary diagnostic code” was “MINOR ABNORMALITY.” *Id.*

2 On October 20, 2007, Dr. Frank Chen performed a comprehensive internal medicine
3 evaluation of Plaintiff in connection with Plaintiff’s application for social security disability
4 benefits. *Id.* at 291. Dr. Chen listed Plaintiff’s complaints as “1. Diabete mellitus. 2. Painful feet. 3.
5 Shaking of the right hand when he writes. 4. Insomnia. 5. Hypertension.” *Id.* at 291. In describing
6 the “[h]istory of present illness,” he noted that Plaintiff experienced “[s]ymptoms of pain in his feet
7 that is affecting his balance when he gets up too quick.” *Id.* He also noted that Plaintiff was
8 homeless. *Id.* at 292. Dr. Chen found that during the examination Plaintiff was in no acute distress,
9 walked “without any difficulty” and “sat comfortably.” *Id.* at 292. Dr. Chen found that Plaintiff
10 suffered from no abnormal neurological deficit affecting his coordination, that he was able to
11 perform the finger-to-nose test and heel-to-knee test, and that his gait was “normal and steady.” *Id.*
12 at 293. He noted that Plaintiff did not use any assistive devices. *Id.* Dr. Chen reported that
13 Plaintiff had normal muscle bulk and tone, and full strength (5/5) in upper and lower extremities. *Id.*
14 at 294. Dr. Chen noted that Plaintiff’s diabetes was under control. *Id.* Dr. Chen’s “functional
15 assessment/ medical source statement” included the following: no restrictions on the number of
16 hours Plaintiff could stand, walk, or sit during an eight-hour work day; the ability to lift and carry
17 100 pounds occasionally and 50 pounds frequently with no postural limitations on bending, stooping
18 or crouching, and no manipulative limitations on reaching, handling, feeling, grasping or fingering.
19 *Id.*

20 State agency physician C. Richard Dann, M.D., who apparently reviewed Plaintiff’s medical
21 records but did not examine Plaintiff, agreed with Dr. Chen’s medical source statement, concluding
22 in an entry dated October 31, 2007 that Plaintiff’s complaints of pain in his feet and hands were not
23 credible and that therefore that this impairment was “nonsevere.” *Id.* at 295-296.

24 On February 4, 2008, Nurse Practitioner Suzuki spoke to Plaintiff on the telephone and noted
25 as follows:

26 Signed employability medical statement stating to employable, no work restrictions [as stated
27 in original]. Last seen 5-31-07, canceled podiatry consult for chronic foot pain. Patient has
not made f/u appt with this PCP since then. Sent form back to ROI.

28 *Id.* at 316.

1 On February 14, 2008, Nurse Practitioner Suzuki examined Plaintiff, who came in for a
2 same-day visit complaining of chronic bilateral foot pain. *Id.* at 313. She noted that Plaintiff told
3 her he had not been able to make it to some past appointments, including a podiatry appointment to
4 which Nurse Practitioner Suzuki had previously referred him, due to “eviction problems.” *Id.* at
5 313, 315. According to Nurse Practitioner Suzuki, Plaintiff reported that his foot pain was “worse
6 than last year” and that he was “unable to stand.” *Id.* at 314. She ordered new x-rays and another
7 podiatry referral. *Id.* at 415. The x-rays were completed on the same day and showed no change
8 from the previous year’s x-rays. *Id.* at 302.

9 On March 4, 2008, Plaintiff saw Podiatry Surgical Specialist Dr. Stephen Silver. *Id.* at 329.
10 Dr. Silver described Plaintiff’s complaint as follows:

11 constant foot pain present for about one year, throbbing aching and tingling of feet. he has
12 sensation of feeling he is wearing a shoe that is too small, currently unable to jog. his hands
also have tingling.

13 *Id.* at 329. Dr. Silver noted that “past treatment – medication for diabetes, and x-rays” – had “not
14 helped [Plaintiff’s] feet.” *Id.* Dr. Silver observed that Plaintiff’s gait was “antalgic” but found “no
15 gross foot deformity.” *Id.* He found that Plaintiff’s muscle groups had normal tone and strength.
16 *Id.* Dr. Silver recommended that Plaintiff return to his primary care physician “for medical
17 management of painful small fiber sensory neuropathy.” *Id.* at 330.

18 On March 15, 2008, another state agency physician, Dr. Corazon C. David, M.D., who also
19 did not examine Plaintiff, found that there had been no change as to Plaintiff’s feet and therefore,
20 that Dr. Dann’s finding that Plaintiff’s impairment was non-severe remained appropriate. *Id.* at 317.

21 On July 18, 2008, Plaintiff returned to Dr. Silver for a follow-up visit, complaining of
22 “constant pain of hand and feet which keeps him awake at night.” *Id.* at 325. Dr. Silver noted that
23 Plaintiff had not followed up with his primary physician for medical management of his pain and
24 again recommended that Plaintiff do so. *Id.*

25 On July 15, 2009, Nurse Practitioner Suzuki completed a Medical Source Statement for
26 Plaintiff (“the July 2009 Medical Source Statement”), stating that she had last seen Plaintiff on
27 March 14, 2008 and that his prognosis was “painful small fiber sensory neuropathy.” *Id.* at 324.
28 She found that Plaintiff could lift and carry 25 pounds occasionally and ten pounds frequently and

1 could stand and walk for at least two hours in an eight hour day. *Id.* at 323. She referenced “foot
2 films and podiatry visits” as the medical findings that supported her assessment. *Id.* Nurse
3 Practitioner Suzuki further indicated that Plaintiff could frequently climb, balance, stoop, kneel,
4 crouch, and crawl throughout the day and would have no problem reaching, handling, fingering, and
5 feeling. *Id.* at 324. The July 2009 Medical Source Statement is signed not only by Nurse
6 Practitioner Suzuki but also by Dr. Nguyen-Dinh.²

7 2. Mental Health

8 Plaintiff’s only consultation with a mental health expert reflected in the record took place on
9 June 4, 2009. AR 332-40. Licensed clinical psychologist Dr. Ede Thomsen, Ph.D., to whom
10 Plaintiff was referred by his attorney, performed a full clinical evaluation of Plaintiff and diagnosed
11 him with Adjustment Disorder with Mixed Anxiety and Depressed Mood, Obsessive-Compulsive
12 Personality Traits, and Anti-Social and Narcissistic Personality Features. *Id.* at 340. Dr. Thomsen
13 stated in her assessment that Plaintiff’s “current symptoms of anxiety and depression began when he
14 ‘lost everything’ and became homeless in 2005/2006.” *Id.* at 332. She further opined that “[h]e has
15 features and traits of personality disorder that were most likely present since he was in his late
16 teens/early 20’s.” *Id.* According to Dr. Thomsen, Plaintiff denied ever participating in any prior
17 psychological assessments. *Id.* at 333.

18 Under the heading “Functional Exam,” Dr. Thomsen stated that Plaintiff had been
19 experiencing “symptoms of anxiety and mild depression” since he became homeless, in 2005/2006;
20 that his hygiene was good; and that he has “impaired attention/concentration, executive functioning,
21 immediate memory abilities, and visuospatial abilities.” *Id.* at 334. She further stated that he has
22 “somewhat poor decision making abilities currently due to his anxiety [and that] [t]his may
23 negatively impact his ability to manage his personal affairs, think clearly, and make well informed
24 decisions.” In addition, she found that [h]e may have some difficulty accomplishing his activities of
25 daily living due to his difficulty ambulating and his severe anxiety.” *Id.*

26
27 ²Although the signature on the Medical Source Statement is illegible, the parties agree that the
28 signature is that of a medical doctor. *See* Defendant’s Motion for Summary Judgment at 12 n. 1 (stating
that although the record includes no reference to Dr. Nguyen-Dinh other than references to him by
Plaintiff’s attorney and the illegible signature, the “Commissioner gives Plaintiff the benefit of the
doubt and treats this July 2009 form as an acceptable medical source’s opinion”).

1 Under the heading “Behavioral Observations and Mental Status,” Dr. Thomsen opined that
2 Plaintiff “appeared sad but cooperative throughout the assessment . . . [and that] [h]is interview
3 behavior was friendly and open.” *Id.* She also stated that Plaintiff had limited insight into his
4 feelings and psychiatric symptoms. *Id.* Nonetheless, Dr. Thomsen found that Plaintiff “appears to
5 have good judgment.” *Id.*

6 Dr. Thomsen listed the following procedures administered during Plaintiff’s examination: 1)
7 Clinical Interview; 2) Repeatable Battery for Assessment of Neuropsychological Status (RBANS) -
8 Form A; 3) Trail Making A & B; 4) Clock Drawing Task; 5) Mini Mental Status Examination
9 (MMSE); 6) Barona Estimate (IQ); 7) Beck Depression Inventory (BDI-II); 8) Beck Anxiety
10 Inventory (BAI); 9) Millon Clinical Multiaxial Inventory – III (MCMI0III); and 10) Mental
11 Status/Psychiatric Symptoms Sheet. *Id.*

12 Based on the cognitive functioning tests, Dr. Thomsen found that Plaintiff had severe
13 impairments in the areas of attention/concentration and executive functioning, and a moderate
14 impairment in memory. *Id.* at 335. In terms of Plaintiff’s “Overall Intellectual Functioning,” Dr.
15 Thomsen found that Plaintiff’s premorbid IQ was in the average range, though he scored a 30/30 on
16 the mini-mental status exam. *Id.* at 334.

17 In the area of attention/concentration, Dr. Thomsen found that Plaintiff had a “severe
18 deficit.” *Id.* at 335. She found that Plaintiff was able to successfully repeat a string of five digits
19 and subtract a string of sevens starting from 100 but that it took him an abnormally long period time
20 to do so, which placed him in the “moderately/severely impaired range of functioning.” *Id.* at 335.
21 Dr. Thomsen reported that Plaintiff’s performance on the RBANS Attention Index placed him “in
22 the borderline range of functioning at the 5th percentile.” *Id.* Dr. Thomsen opined that overall,
23 Plaintiff’s difficulties in the domain of attention/concentration “are due to his psychiatric symptoms
24 and high stress level.” *Id.*

25 In the area of executive functioning, which entails the ability to plan, sequence, and organize,
26 Dr. Thomsen found that Plaintiff “is functioning in the severely impaired range.” *Id.* Plaintiff’s
27 performance on the Trails B, “a set shifting task,” placed Plaintiff in the moderately/severely
28 impaired range due to the amount of time it took Plaintiff to complete the task. *Id.* Dr. Thomsen

1 also noted that Plaintiff “evidenced several self-corrected set shifting errors while completing the
2 task” and that although he “did not evidence any concrete errors on his clock drawing task . . . he
3 drew the hour hand longer than the minute hand resulting in the clock showing the wrong time.”
4 Finally, she found that Plaintiff was capable of performing a three-step command. *Id.*

5 In the area of memory, Dr. Thomsen found that Plaintiff was moderately impaired. *Id.* In
6 particular, Plaintiff’s performance on the RBANS Immediate Memory Index placed him in the
7 borderline range at the seventh percentile; Dr. Thomsen noted that Plaintiff “struggled” with the list
8 learning task and the story memory task. *Id.* Dr. Thomsen further reported that Plaintiff’s
9 performance on the RBANS Delayed Memory Index was in the average range at the 50th percentile.
10 *Id.* Dr. Thomsen assessed Plaintiff’s recognition memory and determined that overall, “his
11 performance suggests that he [is] able to learn new information but needs a great deal of practice and
12 repetition to do so due to his poor attention/concentration abilities.” *Id.*

13 With respect to Plaintiff’s emotional functioning, Dr. Thomsen determined that Plaintiff’s
14 results on the Beck Depression Inventory indicate that he was experiencing minimal to mild
15 depression. *Id.* at 336. Plaintiff’s Beck Anxiety Inventory results indicate to Dr. Thomsen that
16 Plaintiff was experiencing “severe” anxiety. *Id.* Specifically, Dr. Thomsen noted that Plaintiff’s
17 responses to the anxiety test included “numbness or tingling” and “wobbliness in his legs” and that
18 he was “unable to relax,” “dizzy or lightheaded,” “experiencing having his heart pound or race,”
19 “feeling unsteady, nervous, and shaky,” had “feelings of choking,” and was “experiencing having
20 his hands tremble.” *Id.*

21 Based on the results of Plaintiff’s MCMI-II, an “objective test of psychiatric functioning,”
22 Dr. Thomsen found that Plaintiff has a “need for social approval or a naivete about psychological
23 matters” and “a fear a public humiliation, a rigid and tense compliance with social conventions and
24 propriety, and receptivity to the beliefs and values of institutional authorities (e.g., church,
25 business).” *Id.* at 337. Moreover, Dr. Thomsen opined that “[u]nless [Plaintiff] receives clear
26 guidance as to what is correct or proper, he may be quite indecisive and easily upset. Deviations
27 from his routine often produce anxiety.” *Id.* at 338. Plaintiff’s most prominent personality features,
28 according to Dr. Thomsen, include:

1 his inclination to exhibit an unusual adherence to social conventions and propriety,
2 leading to a preference for polite, formal, dutiful, and 'correct' personal relationships.
3 He is deferential, ingratiating, and even obsequious with superiors, going out of his
4 way to impress them with his efficiency and serious-mindedness. He may seek the
5 reassurance and approval of authority figures, experiencing considerable anxiety
6 when he is unsure of their wishes or expectations. This contrasts markedly with his
7 treatment of subordinates, with whom he is quite autocratic and condemnatory, often
8 appearing pompous and self-righteous. This haughty and deprecatory manner is
9 usually cloaked by so-called regulations and legalities.

10 *Id.* From the MCMI-III test, Dr. Thomsen concluded that Plaintiff's "Obsessive-Compulsive
11 Personality Traits, Antisocial Personality Features, and Narcissistic Personality Features" are "long-
12 term or chronic traits that are likely to have persisted for several years prior to the present
13 assessment." *Id.* at 338-39.

14 In the conclusion section of her report, Dr. Thomsen noted that Plaintiff was "currently
15 staying with a friend who is in a wheelchair whom he assists in exchange for having a place to stay
16 temporarily." *Id.* at 339. She stated that based on the assessment, Plaintiff had a "severe deficit in
17 attention/concentration, executive functioning, visual spatial abilities, and a moderate deficit in
18 memory functioning and sensory/motor functioning." *Id.* She stated that Plaintiff's "psychiatric
19 symptoms interfere with his ability to make decisions, resolve problems, and effectively manage his
20 daily affairs currently. His cognitive problems seem to be the result of his psychological symptoms.
21 He is under a great deal of stress, which makes him vulnerable to decompensation if demands are
22 placed upon him; this makes his ability to be successful at a job site severely limited." *Id.* She
23 further stated that Plaintiff "avoids social involvement because of his low energy and anxiety,"
24 which "may create difficulties in a work environment, especially when he needs to interact with
25 coworkers or supervisors." *Id.* She continued, "[h]is relationships are limited and he is socially
26 isolated." Finally, Dr. Thomsen concluded that as a result of Plaintiff's difficulty with
27 attention/concentration, "[h]e could not sustain simple or complex tasks for up to eight hours and
28 would be fatigued while attempting to do so." *Id.*

29 Finally, Dr. Thomsen concluded that Plaintiff was not malingering based on his results on the
30 MCMI-III. *Id.* at 337. She further noted that Plaintiff was a "reliable and credible source of
31 information throughout the evaluation given the depth of information he shared about his life along
32 with his lack of symptom exaggeration and his openness during the interview." *Id.* at 339.

D. The Administrative Hearing

The ALJ held an administrative hearings on August 11, 2009 (“the August 11 hearing”), at which Plaintiff did not appear, and a supplemental hearing on November 5, 2009 (“the November 5 hearing”), at which Plaintiff did appear. At the November 5 hearing, Plaintiff told the ALJ that he had been unable to attend the previous hearing because he was caring for his roommate, who suffers from multiple sclerosis and had fallen in the bathroom that morning. *Id.* at 56. Plaintiff testified that he currently lives in Oakland, California with this individual, who is elderly. *Id.* Plaintiff described his roommate as his “buddy” with whom he spends most of his time “hanging around.” *Id.* at 59. Plaintiff testified that in exchange for free housing he sat with his roommate, sometimes “fixed him coffee or something to eat” and performed a “little minor clean up,” which he completed “in sections,” working a little while then sitting down to rest. *Id.* at 60.

Plaintiff testified that he stopped working because of the constant pain in his feet, ankles, legs, knees, and hands. *Id.* at 59-60. He further testified that his finger tips were “real sore where [he couldn’t] really work with them” and that he frequently dropped things. *Id.* at 59-60. Plaintiff testified that his balance had deteriorated, that he had fallen a few times, and that his feet dragged. *Id.* at 60.

The ALJ questioned Plaintiff about why he had not had sought any medical treatment since March 2008 and in particular, why Plaintiff had not followed Dr. Silver’s instructions that he return to his primary care physician for medical management of his neuropathy. *Id.* at 64-65. Plaintiff testified that he was unable to get a ride to the VA Clinic and that he couldn’t ride the shuttle because he had been told in connection with a recommended procedure that required sedation that he had to have someone who would take him to the VA Clinic and pick him up. *Id.* at 57-59. He also testified that he did “not have the finance” to get to the VA Clinic and that his daughter was unable to drive him there because of her job. *Id.* at 74-75. Finally, he testified that when he goes to the VA Clinic, he always has to wait to see the doctor, that when x-rays are done, the doctors always “say they can’t find nothing,” and that the doctors refused to give him medicine for his pain. *Id.* at 74.

Plaintiff testified that he takes his diabetes medication, which he receives in the mail, regularly. *Id.* at 73.

1 Plaintiff's attorney elicited testimony from Plaintiff about his ability to lift. *Id.* at 76-77.
2 Plaintiff testified that he could not lift 50 pounds for about two hours of the work day if he had to
3 walk while lifting because his "feet and legs ain't going to let that work," and that he if he were
4 required to lift 25 pounds for eight hours, he would be "one miserable person at the end of the . . .
5 day." *Id.*

6 At the conclusion of the hearing, the ALJ told Plaintiff's counsel that he would leave the
7 record open to allow Plaintiff to submit additional evidence addressing the ALJ's concerns. *Id.* at
8 83; *see also* AR 72 (statement by ALJ suggesting to Plaintiff's counsel that he obtain further
9 information from Plaintiff's treating sources addressing whether Plaintiff's impairment would have
10 improved if he had obtained further treatment of his neuropathy, as recommended, and regarding the
11 availability of transportation to the VA Clinic in Martinez).

12 **i. Supplemental Letter Submitted Following the November 5 Hearing**

13 On November 17, 2009, within the two weeks allowed by the ALJ to supplement the record,
14 Plaintiff's attorney submitted a letter from Nurse Practitioner Suzuki that stated as follows:

15 Leslie Fillmore has been a patient at the Veterans Affairs Clinic since December 13,
16 2006.

17 The VA Clinic diagnosed Mr. Fillmore with diabetes and painful small fiber sensory
18 neuropathy. Mr. Fillmore frequently refills and takes his medications (which include Accu-
19 Check Comfort CV (Glucose) Test Strips, Dextrose and Glipizides) to treat these disorders.

20 Mr. Fillmore was last seen at the VA Clinic on March 14, 2008. At that time, despite
21 his ongoing treatment with the Clinic, his condition had not improved. Thereafter, on July
22 15, 2009, I assessed his maximum ability to lift objects frequently at 10 lbs and occasionally
23 at 20 lbs. Further, based on foot films and podiatry visits, I also determined that his
24 maximum ability to stand and/or walk with normal breaks was for at least 2 hours but under
25 6 hours, in an 8 hour workday.

26 Given Mr. Fillmore's age, diabetes and painful small fiber sensory neuropathy, his
27 ability to lift/carry objects and to stand/walk will *not* improve with medical treatment. As
28 Mr. Fillmore consistently takes his prescribed medication and monitors his glucose levels,
even if Mr. Fillmore came into the VA Clinic between the dates of March 14, 2008 and July
15, 2009, our medical staff could not make his ability to lift/carry objects or stand/walk
improve.

Please contact me at the VA Clinic if you have any additional questions.

Id. at 359.

E. The ALJ's Five-Step Analysis and Findings of Fact

Disability insurance benefits are available under the Social Security Act when an eligible claimant is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 423(a)(1). A claimant is only found disabled if his physical or mental impairments are of such severity that he is not only unable to do his previous work but also “cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A). The claimant bears the burden of proof in establishing a disability. *Gomez v. Chater*, 74 F.3d 967, 970 (9th Cir.), *cert. denied*, 519 U.S. 881 (1996).

The Commissioner has established a sequential five-part evaluation process to determine whether a claimant is disabled under the Social Security Act. 20 C.F.R. § 404.1520(a). At Step One, the Commissioner considers whether the claimant is engaged in “substantial gainful activity.” 20 C.F.R. § 404.1520(a)(4)(I). If he is, the Commissioner finds that the claimant is not disabled, and the evaluation stops. If the claimant is not engaged in substantial gainful activity, the Commissioner proceeds to Step Two and considers whether the claimant has “a severe medically determinable physical or mental impairment,” or combination of such impairments, which meets the duration requirement in 20 C.F.R. § 404.1509. An impairment is severe if it “significantly limits [the claimant’s] physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1520(c). If the claimant does not have a severe impairment, disability benefits are denied at this step. If it is determined that one or more impairments are severe, the Commissioner will next perform Step Three of the analysis, comparing the medical severity of the claimant’s impairments to a compiled listing of impairments that the Commissioner has found to be disabling. 20 C.F.R. § 404.1520(a)(4)(iii). If one or a combination of the claimant’s impairments meet or equal a listed impairment, the claimant is found to be disabled. Otherwise, the Commissioner proceeds to Step Four and considers the claimant’s residual functional capacity (“RFC”) in light of his impairments and whether the claimant can perform past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv); 20 C.F.R.

§ 404.1560(b) (defining past relevant work). If the claimant can still perform previous work, he is found not to be disabled. If the claimant cannot perform past relevant work, the Commissioner performs the fifth and final step of the analysis. 20 C.F.R. § 404.1520(a)(4)(v). At Step Five, the burden shifts to the Commissioner to show that the claimant, in light of his impairments, age, education, and work experience, can perform other jobs in the national economy. *Johnson v. Chater*, 108 F.3d 178, 180 (9th Cir. 1997). A claimant who is able to perform other jobs that are available in significant numbers in the national economy is not considered disabled, and will not receive disability benefits. 20 C.F.R. § 404.1520(f). Conversely, where there are no jobs available in significant numbers in the national economy that the claimant can perform, the claimant is found to be disabled. *Id.*

Where there is evidence of a mental impairment that allegedly prevents a claimant from working, the Social Security Administration has supplemented the five-step sequential evaluation process with additional regulations to assist the ALJ in determining the severity of the mental impairment. *Clayton v. Astrue*, 2011 WL 997144, at * 3 (E.D. Cal. Mar. 17, 2011) (citing 20 C.F.R. §§ 404.1520a 416.920a). These regulations provide, in relevant part, as follows:

(a) General. The steps outlined in § 404.1520 apply to the evaluation of physical and mental impairments. In addition, when we evaluate the severity of mental impairments for adults (persons age 18 and over) and in persons under age 18 when Part A of the Listing of Impairments is used, we must follow a special technique at each level in the administrative review process.

Using the technique helps us:

- (1) Identify the need for additional evidence to determine impairment severity;
 - (2) Consider and evaluate functional consequences of the mental disorder(s) relevant to your ability to work; and
 - (3) Organize and present our findings in a clear, concise, and consistent manner.
- (b) Use of the technique.

(1) Under the special technique, we must first evaluate your pertinent symptoms, signs, and laboratory findings to determine whether you have a medically determinable mental impairment(s). See § 404.1508 for more information about what is needed to show a medically determinable impairment. If we determine that you have a medically determinable mental impairment(s), we must specify the symptoms, signs, and laboratory findings that substantiate the presence of the impairment(s) and document our findings in accordance with paragraph (e) of this section.

(2) We must then rate the degree of functional limitation resulting from the impairment(s) in accordance with paragraph (c) of this section and record our findings as set out in paragraph (e) of this section.

(c) Rating the degree of functional limitation.

(1) Assessment of functional limitations is a complex and highly individualized process that requires us to consider multiple issues and all relevant evidence to obtain a longitudinal picture of your overall degree of functional limitation. We will consider all relevant and available clinical signs and laboratory findings, the effects of your symptoms, and how your functioning may be affected by factors including, but not limited to, chronic mental disorders, structured settings, medication, and other treatment.

(2) We will rate the degree of your functional limitation based on the extent to which your impairment(s) interferes with your ability to function independently, appropriately, effectively, and on a sustained basis. Thus, we will consider such factors as the quality and level of your overall functional performance, any episodic limitations, the amount of supervision or assistance you require, and the settings in which you are able to function. See 12.00C through 12.00H of the Listing of Impairments in appendix 1 to this subpart for more information about the factors we consider when we rate the degree of your functional limitation.

(3) We have identified four broad functional areas in which we will rate the degree of your functional limitation: Activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation. See 12.00C of the Listing of Impairments.

(4) When we rate the degree of limitation in the first three functional areas (activities of daily living; social functioning; and concentration, persistence, or pace), we will use the following five-point scale: None, mild, moderate, marked, and extreme. When we rate the degree of limitation in the fourth functional area (episodes of decompensation), we will use the following four-point scale: None, one or two, three, four or more. The last point on each scale represents a degree of limitation that is incompatible with the ability to do any gainful activity.

(d) Use of the technique to evaluate mental impairments. After we rate the degree of functional limitation resulting from your impairment(s), we will determine the severity of your mental impairment(s).

(1) If we rate the degree of your limitation in the first three functional areas as “none” or “mild” and “none” in the fourth area, we will generally conclude that your impairment(s) is not severe, unless the evidence otherwise indicates that there is more than a minimal limitation in your ability to do basic work activities (see § 404.1521).

(2) If your mental impairment(s) is severe, we will then determine if it meets or is equivalent in severity to a listed mental disorder. We do this by comparing the medical findings about your impairment(s) and the rating of the degree of functional limitation to the criteria of the appropriate listed mental disorder. We will record the presence or absence of the criteria and the rating of the degree of functional limitation on a standard document at the initial and reconsideration levels of the administrative review process, or in the decision at the administrative law judge hearing and Appeals Council levels (in cases in which the Appeals Council issues a decision). See paragraph (e) of this section.

(3) If we find that you have a severe mental impairment(s) that neither meets nor is equivalent in severity to any listing, we will then assess your residual functional capacity.

1 20 C.F.R. § 404.1520a(a) - (d). Under the regulations, the ALJ is required to incorporate the
2 pertinent findings and conclusions based on the technique outlined above in his or her decision. 20
3 C.F.R. § 404.1520a(e)(4). As part of this requirement, the ALJ must “include a specific finding as to
4 the degree of limitation in each of the functional areas” described above. *Id.*

5 At Step One, the ALJ found no evidence that the Plaintiff has engaged in substantial gainful
6 activity since the alleged disability onset date of January 31, 2007. AR 11.

7 At Step Two, the ALJ determined that Plaintiff’s history of diabetes mellitus with mild
8 peripheral neuropathy was “a severe medically determinable physical . . . impairment” because it
9 significantly limits Plaintiff’s ability to perform basic work activities. *Id.* With respect to Plaintiff’s
10 mental impairment, the ALJ found that the objective medical evidence supported Plaintiff’s
11 diagnosis of adjustment disorder but that the impairment was “non-severe” because it only
12 minimally limited Plaintiff’s ability to perform “basic mental work activities.” *Id.* The ALJ
13 discounted Plaintiff’s testimony that his homelessness and severe physical condition had “caused
14 him to become depressed and anxious” and as a result had worsened his ability to maintain the
15 activities of daily living, pointing to Plaintiff’s admission to Dr. Thomsen that he had never been in
16 therapy or taken psychotropic medication. *Id.*

17 The ALJ also did not credit Dr. Thomsen’s opinions because: 1) Plaintiff had obtained Dr.
18 Thomsen’s opinion “solely for purposes of pursuing this claim;” 2) Plaintiff had no history of
19 treatment or medication, even though he had access to VA facilities; and 3) Dr. Thomsen had no
20 particular relationship with Plaintiff that would warrant giving her opinion significant weight. *Id.* at
21 11-12. The ALJ went on to address the four functional areas that are set forth in the regulations for
22 evaluating mental disorders, that is: 1) activities of daily living; 2) social functioning; 3)
23 concentration, persistence and pace; and 4) episodes of decompensation. *Id.* (citing 20 C.F.R., Part
24 404, Subpart B, Appendix 1).

25 First, with respect to activities of daily living, the ALJ found that Plaintiff had no limitations
26 on the activities of daily living, citing Plaintiff’s testimony that he was caring for his roommate. *Id.*
27 at 12. The ALJ reasoned that Plaintiff’s “ability to take care of another disabled person [was]
28 inconsistent with his allegations that his mental impairment interferes with his activities of daily

1 living.” *Id.* Second, the ALJ found that Plaintiff had no limitations as to social functioning. In
2 particular, the ALJ rejected Plaintiff’s testimony that he had no social life due to his depression,
3 citing Plaintiff’s testimony that he had been “hanging out with his buddy” since he stopped working.
4 Based on this testimony, the ALJ found that Dr. Thomsen’s opinion that Plaintiff would have
5 difficulty in a work environment due to his tendency to avoid social involvement was overstated. *Id.*
6 Third, the ALJ found that in the area of concentration, persistence or pace, Plaintiff would only
7 have mild limitations, if any, because he was able to pay attention throughout the entire
8 administrative hearing. *Id.* In connection with this functional area, the ALJ also noted that Dr.
9 Thomsen had characterized Plaintiff as “friendly and open” and “oriented to person, place and time.”
10 *Id.* Finally, the ALJ found no episodes of decompensation that would satisfy the fourth area. *Id.*

11 At Step Three, the ALJ found that Plaintiff did not have an impairment or combination of
12 impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404,
13 Subpart P, Appendix 1. *Id.* at 13. The ALJ considered Plaintiff’s diabetes mellitus under Listing
14 9.08. *Id.* Under that Listing, diabetes mellitus is disabling if it is experienced in conjunction with
15 neuropathy evidenced by “significant and persistent disorganization of motor function in two
16 extremities resulting in sustained disturbance of gross and dexterous movements,” or one of two
17 other physical manifestations not applicable to Plaintiff. *Id.* The ALJ found that there was “no
18 evidence from an acceptable medical source” that Plaintiff’s neuropathy was severe enough to
19 satisfy the Listing’s requirement. *Id.*

20 At Step Four, the ALJ determined that Plaintiff has the RFC to perform the full range of
21 medium work as defined in 20 C.F.R. §§ 404.1567(c)³ and 416.967(c). *Id.* In support of this
22

23 ³Section 404.1567(c) provides as follows:

24 To determine the physical exertion requirements of work in the national economy, we classify jobs as
25 sedentary, light, medium, heavy, and very heavy. These terms have the same meaning as they have in
26 the Dictionary of Occupational Titles, published by the Department of Labor. In making disability
determinations under this subpart, we use the following definitions:

27 (a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally
28 lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined
as one which involves sitting, a certain amount of walking and standing is often necessary in carrying
out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary
criteria are met.

1 conclusion, the ALJ first determined that Plaintiff had an underlying medically determinable
2 physical or mental impairment that could reasonably be expected to produce the Plaintiff's claimed
3 pain. He then addressed the intensity, persistence, and limiting effects of the Plaintiff's symptoms to
4 determine the extent to which they limited his ability to perform basic work activities. *Id.* The ALJ
5 stated that whenever Plaintiff's statements about the limiting effects of his pain were not
6 substantiated by objective medical evidence, he determined the credibility of Plaintiff's statements
7 based on consideration of the entire case record. *Id.* at 14.

8 The ALJ did not find Plaintiff's statements about the intensity, persistence and limiting
9 effects of his symptoms to be "entirely credible." *Id.* In particular, the ALJ did not find credible
10 Plaintiff's statement that he cannot work with his hands; his legs, ankles and knees hurt constantly;
11 he cannot do any prolonged lifting, sitting or standing; and any exertion causes him considerable
12 pain. *Id.* The ALJ cited Plaintiff's ability to take care of another disabled person, including his
13 ability to do "small chores" for his friend such as "light cleaning or getting him some coffee." *Id.*
14 The ALJ also based his conclusion on the fact that Plaintiff had not received "any medical care"
15 since July 2008. The ALJ found unpersuasive Plaintiff's testimony that he had not been able to
16 obtain transportation to the VA Clinic, noting that Plaintiff had provided no verification for his
17 testimony that he was not permitted to ride the shuttle to the VA. *Id.* at 15.

18
19
20 (b) Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or
21 carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job
22 is in this category when it requires a good deal of walking or standing, or when it involves sitting most
23 of the time with some pushing and pulling of arm or leg controls. To be considered capable of
24 performing a full or wide range of light work, you must have the ability to do substantially all of these
activities. If someone can do light work, we determine that he or she can also do sedentary work, unless
there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of
time.

25 (c) Medium work. Medium work involves lifting no more than 50 pounds at a time with frequent lifting
26 or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that
he or she can also do sedentary and light work.

27 (d) Heavy work. Heavy work involves lifting no more than 100 pounds at a time with frequent lifting
28 or carrying of objects weighing up to 50 pounds. If someone can do heavy work, we determine that he
or she can also do medium, light, and sedentary work.

1 Finally, the ALJ found that the objective medical evidence was consistent with his
2 conclusion that Plaintiff could perform medium work, and *inconsistent* with the disabling levels of
3 pain alleged by Plaintiff. *Id.* The ALF cited evidence that Plaintiff's diabetes mellitus was "well
4 controlled with medication," that the 2007 x-rays of Plaintiff's feet showed only a "mild
5 abnormality," and that podiatrist Stephen Silver found that there was no evidence of a deformity,
6 even though Plaintiff's gait was antalgic. *Id.* The ALJ also found that the treatment Plaintiff
7 received for his peripheral neuropathy was "essentially routine and conservative," suggesting that
8 Plaintiff's symptoms were not as severe as Plaintiff alleged. *Id.* In addition, the ALJ cited the
9 findings of examining physician Frank Chen, who noted that Plaintiff was in "no acute distress" and
10 walked without an assistive device during his visit. *Id.*

11 The ALJ acknowledged that Nurse Practitioner Suzuki found that Plaintiff had the maximum
12 ability to lift 10 pounds frequently and 20 pounds occasionally in the July 2009 Medical Source
13 Statement, but declined to give it controlling weight. *Id.* at 16. He also rejected the opinion
14 expressed by Nurse Practitioner Suzuki in her November 6, 2009 letter, that even if Plaintiff had
15 come in to the VA Clinic between March 14, 2008 (when she last saw Plaintiff) and July 15, 2009
16 for treatment, his ability to lift/carry objects or stand/walk would not have improved. *Id.* at 16. The
17 ALJ stated, "Ms. Suzuki, a nurse practitioner who did not treat the claimant on a regular basis,
18 lacked the expertise and the objective medical findings to support her conclusion that the claimant's
19 condition or pain *would not improve*, even if he had sought continuous treatment, as he was urged to
20 do. . . . If that were the case, one must wonder why the treatment and follow-ups were recommended
21 by the claimant's specialists." *Id.*

22 The ALJ also did not credit the opinion of Dr. Chen to the extent that Dr. Chen found that
23 Plaintiff would be able to occasionally lift and carry 100 pounds and frequently lift and carry 50
24 pounds. *Id.* Rather, the ALJ found that the "medical evidence as a whole" indicated that Plaintiff's
25 abilities were more limited. *Id.*

26 At Step Five, the ALJ found that Plaintiff was unable to perform any of his past relevant
27 work because his work loading and unloading freight is classified as a semi-skilled job that is
28 generally and actually performed at a heavy level, thus exceeding Plaintiff's RFC. *Id.* at 16-17.

1 The ALJ then considered whether there were jobs existing in significant numbers in the national
2 economy that Plaintiff could perform in light of his age, education, past work experience and RFC.
3 *Id.* at 17. Applying Medical-Vocational Guideline 203.04, which directs a finding of “not disabled”
4 for claimants who are “closely approaching retirement age” on the alleged disability onset date, have
5 limited education but can speak English, and have an RFC that permits medium-level work, the ALJ
6 found that Plaintiff was not disabled. *Id.*

7 **D. The Summary Judgment Motions**

8 **1. Plaintiff’s Contentions**

9 Plaintiff contends that the ALJ erred at Steps Two, Three, Four and Five of his analysis and
10 therefore, that his decision should be reversed and the case remanded to the Commissioner for award
11 of benefits, or, in the alternative, further proceedings.

12 At Step Two, Plaintiff challenges the ALJ’s conclusion that Plaintiff’s mental impairment is
13 not severe. Plaintiff’s Motion for Summary Judgment (“Plaintiff’s Motion”) at 12-14; Plaintiff’s
14 Reply in Opposition to Defendant’s Cross- Motion for Summary Judgment (“Reply”) at 2-6.
15 Plaintiff argues that the ALJ’s failure to credit Dr. Thomsen’s opinion constitutes legal error because
16 the ALJ did not provide clear and convincing reasons for doing so, as required when an examining
17 physician’s opinion is uncontradicted, as is Dr. Thomsen’s. Plaintiff’s Motion 12-13. In particular,
18 Plaintiff argues that the ALJ’s reliance on the fact that Dr. Thomsen’s opinion was solicited by
19 counsel was improper. *Id.* at 13. Plaintiff further asserts that the ALJ’s reliance on Plaintiff’s lack
20 of mental health treatment is not a clear and convincing reason for rejecting Dr. Thomsen’s
21 opinions. *Id.* (citing *Van Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996)). Finally, Plaintiff
22 contends that the ALJ erred when he found that: a) Plaintiff’s ability to spend time with and care for
23 a disabled friend meant that he had no limitations in daily activities or social functioning; and b)
24 Plaintiff’s ability to pay attention without difficulty during the administrative hearing meant that he
25 had only a mild impairment in concentration, persistence, and pace. *Id.* at 14.

26 At Step Three, Plaintiff contends that the ALJ did not provide legally sufficient reasons in
27 support of his conclusion that Plaintiff’s physical impairment does not meet the criteria in Listing
28 9.08 of the Social Security regulations, instead making only a “boilerplate finding” that there was no

1 evidence from an acceptable medical source that Plaintiff's diabetes mellitus satisfied the
2 requirements of that listing. Plaintiff's Motion at 20. Plaintiff asserts that in "failing to address Dr.
3 Nguyen-Dinh as an Acceptable Medical Source in regards to Listing 9.08," the ALJ erred. *Id.*
4 (citing *Lewis v. Apfel*, 236 F.3d503, 512 (9th Cir. 2001)).

5 With respect to the determination of Plaintiff's RFC at Step Four, Plaintiff argues that the
6 ALJ committed legal error in rejecting the VA team's opinion, as stated in the July 2009 Medical
7 Source Statement, for the following reasons: 1) he did not offer specific and legitimate reasons
8 supported by substantial evidence; and 2) he failed to recontact Plaintiff's treatment team to resolve
9 any discrepancies he found in the medical records as required by *Smolen v. Chater*. Plaintiff's
10 Motion at 9-12, 19-20 (citing 80 F.3d 1273, 1279 (9th Cir. 1996)).

11 Plaintiff argues that pursuant to *Winans v. Bowen*, the ALJ should have accorded the
12 opinions of those who treated him – that is, the VA Clinic team, including Nurse Practitioner Suzuki
13 and Dr. Nguyen Dinh – more weight than the opinions of non-examining physicians, such as the
14 contrary opinions of the State Agency Medical Consultants. Plaintiff's Motion at 10 (citing 853
15 F.2d 643, 647 (9th Cir. 1987)). Plaintiff further contends that the reasons offered by the ALJ for
16 failing to give controlling weight to the opinions of the VA Clinic team do not constitute substantial
17 evidence. *Id.* First, Plaintiff argues, the ALJ erred in relying on Plaintiff's lack of treatment at the
18 VA Clinic between March 14, 2008 and July 15, 2009, upon which he based his conclusion that
19 Plaintiff's condition would have improved had he sought follow-up treatment for his pain from his
20 primary care provider, as Dr. Silver recommended. *Id.* Plaintiff argues that the ALJ erred in failing
21 to consider that the July 2009 Medical Source Statement was based, in part, on Dr. Silver's records,
22 which showed that Plaintiff continued to experience pain in March 2008, despite receiving treatment
23 and medications for his diabetes. *Id.* at 11. Dr. Silver's records, Plaintiff contends, provided Nurse
24 Practitioner Suzuki with medical evidence showing that Plaintiff's condition would *not* have
25 improved if he had obtained treatment between March 2008 and July 2009. *Id.*

26 Second, Plaintiff argues, the ALJ erred in dismissing the opinions of Nurse Practitioner
27 Suzuki on the basis that she was not an acceptable medical source, arguing that even if the ALJ did
28 not give the Medical Source Statement controlling weight, he should have addressed the appropriate

1 weight to be given Nurse Practitioner Suzuki's opinion in light of the factors set forth in the
2 regulations, namely, "length of the treatment relationship and the frequency of examination, nature
3 and extent of the treatment relationship, supportability, consistency and specialization." *Id.* (citing
4 20 C.F.R. §§ 404.157(d)(2), 416.927(d)(2). Considering these factors, Plaintiff contends, the ALJ
5 should have given Nurse Practitioner Suzuki's opinion significant weight. *Id.* Moreover, Plaintiff
6 argues, the Medical Source Statement was signed by Dr. Nguyen-Dinh, who is an acceptable
7 medical source. *Id.*

8 Third, Plaintiff asserts, if the ALJ found that there was a discrepancy between the opinion
9 stated in Nurse Practitioner Suzuki's November 6, 2009 letter (that Plaintiff's symptoms would not
10 have improved with treatment) and the notes from Dr. Silver (recommending that Plaintiff return to
11 his primary care team for further treatment of his symptoms), he had a duty to develop the record by
12 contacting the VA Clinic team to learn more about the basis for Nurse Practitioner Suzuki's opinion
13 that Plaintiff's symptoms would not have improved with treatment. *Id.* at 12. In discounting the
14 opinion of the VA Clinic team without further inquiry, Plaintiff asserts, the ALJ failed to meet the
15 requirement that he conduct an appropriate inquiry. *Id.* (citing *Smolen v. Chater*, 80 F.3d 1273,
16 1288 (9th Cir. 1996)).

17 Plaintiff argues that the ALJ also erred at Step Four in rejecting Plaintiff's testimony about
18 the severity of his symptoms because: 1) Plaintiff's daily activities in connection with caring for his
19 roommate was not a clear and convincing reason for concluding that Plaintiff was capable of
20 medium work; and 2) Plaintiff's failure to seek medical treatment since July 2008 was not a clear
21 and convincing reason for discounting Plaintiff's testimony in light of Plaintiff's testimony
22 regarding his difficulties in getting to the VA Clinic, as well as Plaintiff's mental impairment, which
23 makes deviations from Plaintiff's normal routine difficult. *Id.* at 14-18.

24 At Step Five, Plaintiff argues that the ALJ should have applied Medical-Vocational
25 Guideline 201.06 (which applies where a claimant can perform only sedentary work), rather than
26 203.04 (which applies where a claimant can perform medium work), because substantial evidence in
27 the record establishes that Plaintiff was able to perform only sedentary work. *Id.* at 21-22.

28

2. Defendant's Contentions

Defendant counters that the ALJ did not err at Step Two because he had “good reasons” for rejecting the opinion of Dr. Thomsen and that finding that Plaintiff’s mental impairment is non-severe was supported by substantial evidence. Defendant’s Motion for Summary Judgment (“Defendant’s Motion”) at 6-9. According to Defendant, under the regulations, a mental impairment that causes no more than mild limitations in activities of daily living, maintaining social functioning, and maintaining concentration, persistence, or pace, and that does not cause any episodes of decompensation is “generally not severe.” *Id.* at 6 (citing 20 C.F.R. §§ 404.1520(c), 416.920(c)). The ALJ offered substantial evidence of non-severity under this standard, Defendant contends, because he cited evidence that: 1) Plaintiff was open and friendly with Dr. Thomsen; and 2) Plaintiff was able to pay attention throughout the hearing. Further, to the extent that the ALJ rejected the opinion of Dr. Thomsen as to the severity of Plaintiff’s mental impairment, Defendant argues that he offered legally sufficient reasons for doing so, based on the entire record. *Id.* at 7 (citing 20 C.F.R. §§ 404.1527, 416.927). These reasons included the fact that Dr. Thomsen’s opinion was solicited by counsel and Plaintiff’s lack of prior treatment for any mental impairment. *Id.* at 8-9. As to the former, Defendant asserts that the ALJ was permitted to consider the circumstances under which Dr. Thomsen’s opinion was obtained and to give it less weight because it was obtained only to support Plaintiff’s disability claim after the Commissioner had denied Plaintiff’s claim initially and on reconsideration. *Id.* (citing *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998); *Saelee v. Chater*, 94 F.3d 520, 522-23 (9th Cir. 1996); *Macri v. Chater*, 93 F.3d 540, 544 (9th Cir. 1996)). Defendant argues that the ALJ properly considered Plaintiff’s lack of treatment for any mental health impairment because Plaintiff’s “excellent work history” was inconsistent with Dr. Thomsen’s suggestion that Plaintiff had suffered from his mental impairment his entire life. *Id.* at 8.

At Step Three, Defendant claims that the ALJ’s conclusion that Plaintiff does not meet or equal Listing 9.08, the listing for diabetes mellitus, was supported by substantial evidence because Plaintiff did not show that he had “significant and persistent disorganization of motor functioning in two extremities resulting in sustained disturbance of gross and dextrous movements, or gait and station,” as required under Listing 9.08. *Id.* at 9 (citing *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990);

1 *Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999)). According to Defendant, sustained
2 disturbance of gross and dextrous movements is the same as “inability to perform fine and gross
3 movements effectively.” *Id.* at 10 (citing 20 C.F.R., pt. 404, subpt. P, app. 1, § 1.00B(2)(c)).
4 Defendant further asserts that sustained disturbance of gait and station is the same as “inability to
5 ambulate effectively,” which in turn, requires that an individual use a hand-held assistive device that
6 “limits the functioning of both upper extremities, e.g., a walker, two canes, or two crutches. *Id.*
7 (citing 20 C.F.R., pt. 404, subpt. P, app. 1, § 1.00B(2)(b)). According to Defendant, the medical
8 evidence does not show that these requirements are met. *Id.* at 10-11.

9 With respect to Plaintiff’s feet, Defendant points out that: 1) Nurse Practitioner Suzuki
10 observed that Plaintiff walked with a normal gait (AR 271, 279); 2) the July 2009 Medical Source
11 Statement found that Plaintiff could work, even though his functional capabilities were more limited
12 than the ALJ found; and 3) Dr. Chen noted that Plaintiff walked without difficulty and did not use an
13 assistive device (AR 292). *Id.* As to Plaintiff’s gross and dextrous movements, Defendant points
14 out that the July 2009 Medical Source Statement found that Plaintiff could reach, handle, finger and
15 feel without limitations. *Id.* Defendant further cites evidence that Plaintiff was able to care for a
16 friend with multiple sclerosis, including performing light chores such as preparing a meal or coffee,
17 which shows that his diabetes mellitus was not accompanied by sustained disturbance in gross or
18 dextrous movements. *Id.* According to Defendant, this evidence is sufficient to show that the ALJ
19 did not err in finding that Plaintiff did not meet the requirements of Listing 9.08. *Id.*

20 At Step Four, Defendant contends that the ALJ’s RFC was supported by substantial evidence
21 and that he gave “good reasons” for deciding not to give the opinions expressed by Nurse
22 Practitioner Suzuki and Dr. Nguyen-Dinh’s in the July 2009 Medical Source Statement much
23 weight. *Id.* at 12. Defendant cites the ALJ’s finding that Nurse Practitioner Suzuki did not treat
24 Plaintiff regularly and had not seen him in over a year when she completed the Medical Source
25 Statement. *Id.* at 13. According to Defendant, this limited treating relationship with Plaintiff is a
26 legitimate reason for discounting Nurse Practitioner Suzuki’s opinion. *Id.* (citing 20 C.F.R. §§
27 404.1527(d)(2), 416.927(d)(2)). In addition, Defendant argues, the ALJ properly found that Nurse
28 Practitioner Suzuki failed to identify medical evidence that supported her conclusion; in particular,

1 although she cited the x-rays and notes from Plaintiff's podiatry visits, those records simply
2 documented Plaintiff's complaints and did not contain any significant findings. *Id.* In contrast,
3 Defendant argues, Dr. Chen's report – which the ALJ credited at least to some degree – contained a
4 more detailed discussion of his medical findings, including range of motion and neurological test
5 results such as reflexes, motor strength, and sensation. *Id.* at 13. Defendant also points to the
6 notation by Nurse Practitioner Suzuki in her notes from February 2008, which Defendant contends
7 state that Plaintiff was employable with no work restrictions, arguing that this inconsistent earlier
8 opinion provides another legitimate reason for discounting the July 2009 Medical Source Statement.
9 *Id.*

10 Defendant contends that the ALJ also did not err in rejecting the opinion expressed in Nurse
11 Practitioner Suzuki's November 2009 letter, that Plaintiff's capabilities would not have improved if
12 he had obtained treatment from his primary care physician after March 2008. *Id.* at 14. In
13 particular, because the letter was not signed by a doctor, the ALJ was entitled to give less weight to
14 the letter because it was not from an acceptable medical source. *Id.* Defendant further contends that
15 the ALJ properly disregarded the letter because of Nurse Practitioner Suzuki's limited treatment
16 relationship with Plaintiff and because of the lack of objective findings supporting her opinion. *Id.*

17 Defendant rejects Plaintiff's argument that the ALJ erred by failing to recontact the VA
18 Clinic team to obtain further information because that duty only applies when there is ambiguous
19 evidence or when the record is inadequate to allow for proper evaluation of the evidence. *Id.* at 15
20 (citing *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001)). The evidence in the record is
21 not ambiguous, Defendant contends, and therefore, the ALJ did not have a duty to further develop
22 the record. In any event, the ALJ satisfied any such duty, according to Defendant, by leaving the
23 record open for the submission of additional evidence by the claimant. *Id.* (citing *Tonapetyan v.*
24 *Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001)).

25 Finally, Defendant argues that the ALJ provided valid reasons for finding that Plaintiff's
26 testimony about the severity of his disability was not credible in light of the objective medical
27 evidence in the record. *Id.* at 15-18. Specifically, the ALJ cited the findings of Dr. Chen that
28 Plaintiff could stand, walk and sit without limitation, the observation by both Dr. Chen and Nurse

1 Practitioner Suzuki that Plaintiff had normal muscle strength (indicating an absence of atrophy that
2 often results from inactivity related to debilitating pain, Defendant argues), and Plaintiff's treatment
3 history, including Plaintiff's failure to receive medical care after July 2008. *Id.* at 17. Defendant
4 argues that Plaintiff's testimony that he lacked transportation to the VA Clinic for treatment was not
5 persuasive because his counsel did not obtain verification from the VA Clinic that transportation was
6 not available, even though the ALJ raised this issue at the hearing. *Id.* Further, Defendant argues,
7 Plaintiff's testimony that he had been told he could not ride the shuttle to the VA Clinic related to a
8 procedure involving sedation and therefore has no bearing on whether Plaintiff could take the shuttle
9 to obtain treatment for his feet. *Id.*

10 At Step Five, Defendant argues that the ALJ did not err in applying Medical-Vocational
11 Guideline 203.04 because he correctly determined that Plaintiff's RFC renders him capable of
12 medium work. Motion at 19-20. Defendant asserts that because that guideline directs a finding of
13 "not disabled," the Commissioner's denial of benefits should be upheld.

14 **III. ANALYSIS**

15 **A. Legal Standard**

16 When asked to review the Commissioner's decision, the Court takes as conclusive any
17 findings of the Commissioner which are free from legal error and supported by "substantial
18 evidence." 42 U.S.C. § 405(g). Substantial evidence is "such evidence as a reasonable mind might
19 accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).
20 Substantial evidence means "more than a mere scintilla," *id.*, but "less than a preponderance."
21 *Desrosiers v. Sec'y of Health and Human Servs.*, 846 F.2d 573, 576 (9th Cir.1988). Even if the
22 Commissioner's findings are supported by substantial evidence, they should be set aside if proper
23 legal standards were not applied when weighing the evidence and in reaching a decision. *Benitez v.*
24 *Califano*, 573 F.2d 653, 655 (9th Cir. 1978). In reviewing the record, the Court must consider both
25 the evidence that supports and detracts from the Commissioner's conclusion. *Smolen v. Chater*, 80
26 F.3d 1273, 1279 (9th Cir. 1996) (citing *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985)).

B. Whether the ALJ Erred at Step Two in Finding Plaintiff's Mental Impairment was Non-Severe

Plaintiff contends that the ALJ erred at Step Two because he failed to provide clear and convincing reasons for rejecting the uncontroverted opinions of Dr. Thomsen that Plaintiff's mental impairment was severe. The Court agrees.

In the Ninth Circuit, courts "distinguish among the opinions of three types of physicians: 1) those who treat the claimant (treating physicians); 2) those who examine but do not treat the claimant (examining physicians); and 3) those who neither examine nor treat the claimant (nonexamining physicians)." *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). In *Lester v. Chater*, the court set forth the general standards that are applied in determining the relative weight to be given to the medical opinions of these three types of physicians:

As a general rule, more weight should be given to the opinion of a treating source than to the opinion of doctors who do not treat the claimant. *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir.1987). At least where the treating doctor's opinion is not contradicted by another doctor, it may be rejected only for "clear and convincing" reasons. *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir.1991). We have also held that "clear and convincing" reasons are required to reject the treating doctor's ultimate conclusions. *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir.1988). Even if the treating doctor's opinion is contradicted by another doctor, the Commissioner may not reject this opinion without providing "specific and legitimate reasons" supported by substantial evidence in the record for so doing. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir.1983).

The opinion of an examining physician is, in turn, entitled to greater weight than the opinion of a nonexamining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir.1990); *Gallant v. Heckler*, 753 F.2d 1450 (9th Cir.1984). As is the case with the opinion of a treating physician, the Commissioner must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of an examining physician. *Pitzer*, 908 F.2d at 506. And like the opinion of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.1995).

Id. However, even where the opinions of an examining doctor are uncontradicted, the ALJ may reject those opinions or give them only minimal weight if they "are conclusory, brief, and unsupported by the record as a whole, . . . or by objective medical findings." *Batson v. Commissioner of Soc. Security*, 359 F.3d 1190, 1195 (9th Cir. 2004)(citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir.2001) (holding that ALJ can reject the opinion of a treating physician whether or not that opinion is contradicted)).

1 The burden at Step Two is relatively light. In particular, the Ninth Circuit has held that “the
2 step two inquiry is a de minimis screening device to dispose of groundless claims.” *Smolen v.*
3 *Chater*, 80 F.3d 1273, 1290 (9th Cir.1996) (citing *Bowen v. Yuckert*, 482 U.S. 137 at 153-54 (1987)).
4 Thus, “[a]n impairment or combination of impairments can be found ‘not severe’ only if the
5 evidence establishes a slight abnormality that has ‘no more than a minimal effect on an individuals
6 ability to work.’” *Id.* (citing SSR 85-28; *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988)
7 (adopting SSR 85-28)).

8 Here, the ALJ rejected the opinions of Dr. Thomsen, which show that Plaintiff’s mental
9 impairment is severe. Because Dr. Thomsen is an examining physician and she is the *only* physician
10 who evaluated Plaintiff’s mental impairment, the ALJ was required to provide clear and convincing
11 reasons for rejecting her opinion and make specific findings supported by substantial evidence as to
12 the degree of limitation in each of the functional areas listed above. In light of the low threshold for
13 establishing that an impairment is severe at Step Two, and for the reasons stated below, the Court
14 finds that the reasons offered by the ALJ for rejecting Dr. Thomsen’s opinions are not clear and
15 convincing and further, that his findings as to the functional areas set forth in the regulations for
16 determining the severity of a mental impairment are not supported by substantial evidence.

17 **1. Circumstances under Which Dr. Thomsen’s Opinion Was Obtained**

18 The ALJ found that Dr. Thomsen’s opinion should not be given controlling weight based, in
19 part, on the fact that the opinion was solicited by counsel in connection with Plaintiff’s social
20 security claim. Because the Court finds that Dr. Thomsen’s opinion is consistent with the other
21 medical evidence in the record and there is no indication of any improprieties in connection with her
22 opinion, the Court concludes that the circumstances under which the report was obtained do not
23 provide a legitimate reason – much less a clear and convincing reason – for rejecting her opinion.

24 In *Reddick v. Chater*, the Ninth Circuit addressed the question of whether an ALJ may reject
25 a medical opinion on the basis that it was solicited by counsel in connection with the claimant’s
26 disability claim. 157 F.3d 715, 726 (9th Cir. 1998). Addressing an apparent tension in the Ninth
27 Circuit’s case law, the court stated:

28 In *Burkhart v. Bowen*, 856 F.2d 1335 (9th Cir.1988), we rejected a doctor's opinion in a letter
requested by counsel where the opinion was unsupported by medical findings, personal

1 observations, or test reports. *Id.* at 1339-40. We noted in *Burkhart* that “given the evidence
2 before the ALJ, [the fact that the letter had been solicited by counsel] was not the only reason
3 the ALJ gave for rejecting (the doctor’s) statements.” *Id.* at 1339. However, in *Lester*, where
4 there was no sound basis for rejecting a doctor’s opinion that had been solicited by counsel,
5 we stated that “the purpose for which medical reports are obtained does not provide a
6 legitimate basis for rejecting them.” 81 F.3d at 832. In *Saelee v. Chater*, 94 F.3d 520 (9th
Cir.1996), citing *Lester*, we rejected a doctor’s opinion letter where “actual improprieties”
7 had been found. *Id.* at 523. In *Saelee*, the doctor’s opinion letter varied from his treatment
8 notes and “was worded ambiguously in an apparent attempt to assist [the claimant] in
obtaining social security benefits.” *Id.* at 522. In that case, the ALJ found that there was “no
objective medical basis for the opinion.” *Id.* at 523.

7 We clarify here that, in the absence of other evidence to undermine the credibility of a
8 medical report, the purpose for which the report was obtained does not provide a legitimate
basis for rejecting it.

9 *Id.* Conversely, “[e]vidence of the circumstances under which the report was obtained and its
10 consistency with other records, reports, or findings could . . . form a legitimate basis for evaluating
11 the reliability of the report.” *Id.*

12 In *Reddick*, the court held that the ALJ had erred in rejecting a letter written by the
13 claimant’s treating physician in response to questions from the claimant’s counsel and disability
14 insurance carrier, finding that the opinions stated in the letter were based on three years of treatment
15 and were consistent with the opinions expressed by the physician over that time. *Id.* Similarly, in
16 *Nguyen v. Chater*, cited by Plaintiff, the court found that the ALJ had erred in rejecting an
17 examining psychologist’s opinion on the basis that it was solicited by the claimant’s attorney,
18 finding that there was no indication of “actual impropriety” and, in contrast to *Saelee*, the
19 psychologist’s report was based on an examination and a battery of tests. 100 F.3d 1462, 1464 (9th
20 Cir. 1996). The court concluded, “[t]hat does not mean that [the examining psychologist] was
21 correct or that his report must prevail, but it does mean that [his] credibility is not subject to attack
22 on the basis of the source of his patient’s referral.” *Id.*

23 In this case, as in *Reddick* and *Nguyen*, the opinion expressed by Dr Thomsen was supported
24 by a battery of tests and an extensive examination. Her findings are not conclusory or ambiguous
25 but rather, are clearly stated and supported by her observations and test results. Nor is there any
26 indication that Dr. Thomsen engaged in impropriety with respect to her report. Finally, as discussed
27 below, the medical record does not contradict Dr. Thomsen’s opinion, contrary to the assertions of
28

1 the Commissioner. Therefore, the Court concludes that the ALJ erred to the extent that he rejected
2 Dr. Thomsen's opinion on the basis of the circumstances under which it was obtained.

3 **2. Plaintiff's Failure to Obtain Mental Health Treatment**

4 The ALJ further cited in support of his rejection of Dr. Thomsen's opinion Plaintiff's lack of
5 treatment for his mental impairment, including his failure to participate in any therapy or receive any
6 prescriptions for psychotropic medications. In *Nguyen*, however, the Ninth Circuit cautioned that in
7 the case of mental impairments, it may not be appropriate to infer based on failure to obtain
8 treatment that a claimant's impairment is not severe. The Court finds that the concerns expressed in
9 *Nguyen* are particularly salient here.

10 In *Nguyen*, the ALJ rejected the opinion of an examining psychologist who examined the
11 claimant at the request of his counsel and found, based on the examination and the results of a
12 battery of tests, that the claimant suffered from severe depression and therefore met a listing
13 establishing disability. 100 F.3d at 1464. The ALJ implicitly rejected the opinion of the examining
14 psychologist (although he did not expressly state that he was rejecting his opinion), relying instead
15 on the opinion of a consulting physician (who did not examine the claimant) that the claimant's
16 impairment did *not* meet the listing. *Id.* The ALJ appeared to rely, in part, on the fact that there was
17 no record of the claimant having sought any treatment for his mental impairments in the three years
18 prior to the examination by the examining psychologist. *Id.* Applying the "specific and legitimate"
19 standard that applies when the examining physician's opinion is contradicted by the opinion of
20 another physician, the court concluded that the claimant's failure was not a specific and legitimate
21 reason for giving greater weight to the opinion of the consulting physician than that of the examining
22 physician, reasoning as follows:

23 it is common knowledge that depression is one of the most underreported illnesses in the
24 country because those afflicted often do not recognize that their condition reflects a
25 potentially serious mental illness. See, e.g., Warren E. Leavy, Hidden Depression, Chi. Trib.,
26 Feb. 1, 1996 at 7 (noting that nearly 17 million adult Americans suffer from depression in a
27 given year and that two-thirds of them do not get treatment). Thus, the fact that claimant may
28 be one of millions of people who did not seek treatment for a mental disorder until late in the
day is not a substantial basis on which to conclude that [the examining psychologist's]
assessment of claimant's condition is inaccurate. As the Sixth Circuit has noted in finding
invalid an ALJ's reasons for rejecting claimant's assertions about his depression, '[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.' *Blankenship v. Bowen*, 874 F.2d 1116, 1124 (6th Cir.1989).

1 *Id.* at 1465.

2 *Nguyen* does not set forth a bright-line rule that failure to receive treatment for a mental
3 impairment can *never* provide a legitimate reason for rejecting the opinions of an examining or
4 treating physician. Indeed, several district courts have distinguished *Nguyen* where the medical
5 record showed that a claimant had received a diagnosis or some limited treatment for a mental
6 impairment but failed to follow up on treatment recommendations. *See, e.g., King v. Astrue*, 2010
7 WL 5300856, at * 10 (E.D.Cal. Dec. 17, 2010) (holding that ALJ did not err in considering
8 claimant’s failure to seek treatment for mental impairment where she had received treatment for
9 mental impairment from primary care physician but had failed to follow recommendation from
10 primary care physician that she obtain treatment for mental impairment from mental health
11 specialist); *Beasley v. Astrue*, 2010 WL 4717108, at *5 n.1 (E.D. Wash., Nov. 15, 2010) (holdings
12 that ALJ did not err in considering claimant’s failure to seek treatment for anxiety where “Plaintiff
13 was advised consistently to seek treatment for his reported anxiety symptoms” and offered no
14 explanation for failing to follow those recommendations). In this case, however, the facts of *Nguyen*
15 are on point. There is no evidence or testimony in the record that Plaintiff had ever participated in
16 any psychological assessment, much less been diagnosed with a mental impairment, before he was
17 examined by Dr. Thomsen. Nor is there any evidence in the record that anyone had ever
18 recommended that Plaintiff receive treatment for such an impairment. Moreover, Dr. Thomsen
19 found that Plaintiff had “limited insight into his feelings and psychiatric symptoms,” further
20 weakening any inference that might be drawn that Plaintiff’s failure to seek mental health treatment
21 was because his mental impairment was not severe. AR 351, 352. Under these circumstances,
22 Plaintiff’s failure to obtain prior treatment for his mental impairment is not a clear and convincing
23 reason (or even a legitimate reason) for failing to credit Dr. Thomsen’s opinions regarding the
24 severity of his mental impairment.

1 **3. Whether Dr. Thomsen’s Opinion Was Inconsistent With the Record**

2 The ALJ also discredited Dr. Thomsen’s opinion on the basis that it was inconsistent with the
3 record, addressing the functional areas set forth in the regulations for determining the severity of a
4 mental impairment. The Court addresses the four functional areas below.⁴

5 **a. Activities of Daily Living**

6 The ALJ found that Plaintiff had no limitations on his activities of daily living, citing
7 Plaintiff’s testimony that he took care of his roommate, who has multiple sclerosis. AR 12. The
8 Court concludes that the ALJ did not provide clear and convincing reasons supported by substantial
9 evidence for rejecting Dr. Thomsen’s conclusion that Plaintiff would have “some difficulty
10 accomplishing his activities of daily living.” AR 334.

11 Dr. Thomsen’s opinion is supported by an examination and a battery of tests that were
12 performed to evaluate Plaintiff’s mental impairment; moreover, she reached this conclusion despite
13 the fact that Plaintiff cared for his roommate – a fact that she acknowledge in her report. AR 339.
14 The ALJ’s opinion that Plaintiff’s ability to care for his roommate supported a contrary conclusion is
15 supported by no medical evidence, in contrast to the cases cited by the Commissioner, in which the
16 ALJ discounted the opinion of a treating or examining physician based on conflicting medical
17 evidence in the record, such as the opinion of a consultative physician who reached a contrary
18 conclusion. *See, e.g., Batson v. Comm’r of Soc. Security*, 359 F. 3d 1190, 1195 (9th Cir. 2004)
19 (holding that ALJ properly declined to credit opinion of treating physician that was in the form of a
20 checklist, was not supported by medical evidence *and* was contradicted by the opinion of a physician
21 who conducted a consultative medical evaluation); *Andrews v. Shalala*, 53 F3d. 1035, 1042 (9th Cir.
22 1995) (holding that ALJ properly declined to credit opinion of examining psychologist where

23
24 ⁴In Defendant’s Motion, the Commissioner asserts that the ALJ properly rejected Dr. Thomsen’s
25 opinion based on a possible contradiction that the ALJ mentioned at the August 11 hearing but did not
26 cite in his written decision, namely, Plaintiff’s “excellent work history.” Defendant’s Motion at 8.
27 According to Defendant, this statement is inconsistent with Dr. Thomsen’s statement that Plaintiff likely
28 exhibited certain “features and traits” of his personality disorder in his teens or early twenties. The
Court may not rely on a reason that was not offered by the ALJ in his decision. *Pinto v. Massanari*, 249
F.3d 840, 847-848 (9th Cir. 2001). In any event, the record does not reflect any inconsistency on this
question. Although Dr. Thomsen noted that “features and traits” of Plaintiff’s personality disorders
were likely present in his teens or early twenties, she clearly stated that “[h]is current symptoms of
anxiety and depression began when . . .he became homeless in 2005/2006.” AR 333. Thus, Plaintiff’s
ability to work before that time is not inconsistent with Dr. Thomsen’s diagnosis.

1 opinion was solicited by counsel, plaintiff admitted to the psychologist that he had no interest in
2 pursuing treatment for his alleged impairment and that he “manipulated situations to his advantage,”
3 *and* where a non-examining psychologist who had reviewed the record and whose opinion the court
4 found could be credited because of her expertise had testified at the administrative hearing and
5 offered specific reasons for concluding that the opinion of the examining psychologist was
6 unreliable). In this case, there is no evidence that any psychologist other than Dr. Thomsen
7 addressed the severity of Plaintiff’s mental impairment. The Commissioner did not seek the opinion
8 of a medical expert, either to conduct an examination or to evaluate Dr. Thomsen’s opinion in light
9 of the entire record, although the regulations permitted him to do so. *See* 20 C.F.R. §
10 404.1520a(e)(5).

11 Therefore, the Court finds that the ALJ failed to provide clear and convincing reasons
12 supported by substantial evidence that Plaintiff suffered no impairment as to his activities of daily
13 living.

14 **b. Social Functioning**

15 The ALJ found that Plaintiff had no limitations in the area of social functioning, again citing
16 that fact that Plaintiff was able to “spend time with and care for his disabled friend.” AR at 12. The
17 Court concludes that the ALJ did not provide clear and convincing reasons supported by substantial
18 evidence for rejecting Dr. Thomsen’s conclusion that Plaintiff was impaired as to social functioning.

19 Dr. Thomsen found that Plaintiff would have “difficulties in a work environment, especially
20 when he needs to interact with co-workers or supervisors accomplishing his activities of daily
21 living.” AR 339. She found that “Plaintiff’s relationships are limited and he is socially isolated,” and
22 that this “social alienation would make working effectively with others difficult currently.” *Id.* As
23 noted above, Dr. Thomsen’s opinion is based on an examination and a battery of tests. Further, Dr.
24 Thomsen reached this conclusion even though she was aware of Plaintiff’s relationship with his
25 roommate, acknowledging that his relationships were “limited.” Thus, the ALJ’s opinion that
26 Plaintiff had no difficulty with social functioning because he could spend time with a single friend is
27 directly contrary to Dr. Thomsen’s opinion. Given that the ALJ’s opinion is supported by no
28

1 medical evidence, the Court finds that this reason is not a clear and convincing reason supported by
2 substantial evidence that Plaintiff has no impairment as to social functioning.

3 **c. Concentration, Persistence and Pace**

4 The ALJ found that Plaintiff would have “only mild limitations” as to concentration,
5 persistence and pace, “if any.” AR at 12. In doing so, he relied on the fact that Plaintiff was “able to
6 pay attention without any difficulties during the entire hearing” and Dr. Thomsen’s observation that
7 Plaintiff was “open and friendly” during his examination. *Id.* The Court concludes that the ALJ did
8 not provide clear and convincing reasons supported by substantial evidence for rejecting Dr.
9 Thomsen’s conclusion as to this area of functioning.

10 Dr. Thomsen conducted extensive tests and concluded, *inter alia*, that in light of Plaintiff’s
11 severe impairments as to his attention/concentration, executive functioning, visuospatial abilities,
12 and sensory/motor functioning, as well as his moderate impairment of memory functioning, Plaintiff
13 “could not sustain simple or complex tasks for up to eight hours and would be fatigued while
14 attempting to do so.” AR at 339. The ALJ offers no medical evidence in support of his conclusion
15 that Dr. Thomsen’s opinion was incorrect. He fails to explain why Dr. Thomsen’s observation that
16 Plaintiff was “open and friendly” and “oriented as to person, place and time” is inconsistent with Dr.
17 Thomsen’s other findings, including those relating to attention/concentration. Nor does he explain
18 how Plaintiff’s ability to “pay attention” for the entire hearing conflicted with Dr. Thomsen’s
19 finding that Plaintiff is severely impaired in this functional area. Indeed, the ALJ’s reasoning is
20 flawed, on its face, given that the hearing did not last anywhere close to eight hours and during the
21 hearing the only task Plaintiff was asked to complete was to answer questions about his activities
22 and symptoms. The ALJ failed to provide clear and convincing reasons supported by
23 substantial evidence that Plaintiff was not severely limited as to attention, persistence and pace.

24 **d. Decompensation**

25 Plaintiff does not contest the ALJ’s finding that his medically determinable mental
26 impairment causes “no episodes of decompensation,” which is the fourth functional area of
27 assessment. AR 12 (quotation omitted).
28

1 **e. Conclusion**

2 Because the ALJ failed to provide clear and convincing reasons for rejecting the findings and
3 opinions of Dr. Thomsen and because the ALJ's finding that Plaintiff's mental impairment is not
4 severe is not supported by substantial evidence in the record, the ALJ erred at Step Two.

5 **C. Whether the ALJ Erred at Step Three in Finding that Plaintiff's Symptoms Do**
6 **Not Meet Listing 9.08**

7 Plaintiff contends that the ALJ's finding at Step Three, that Plaintiff did not meet Listing
8 9.08, was not supported by substantial evidence and that the evidence in the record shows that
9 Plaintiff's neuropathy in his hands and feet is sufficient to establish that Plaintiff is disabled under
10 this Listing. The Court disagrees.

11 Listing 9.08 establishes that an individual with diabetes mellitus is disabled if his symptoms
12 include "[n]europathy demonstrated by significant and persistent disorganization of motor
13 functioning in two extremities resulting in sustained disturbance of gross and dexterous movements,
14 or gait and station," 20 C.F.R. Part 404 Subpt. P § 9.08A. Sustained disturbances of gross and
15 dexterous movements involve an inability to effectively perform fine and gross movements such as
16 preparing meals or feeding and cleaning oneself. 20 C.F.R. Part 404 Subpt. P Appendix 1 §
17 1.00B(2)(c). Sustained disturbances of gait and station involve an inability to ambulate effectively
18 without the use of assistive devices that require the use of two hands. 20 C.F.R. Part 404 Subpt. P
19 Appendix 1 § 1.00 B(2)(b).

20 Here, the ALJ stated that "[t]here is no evidence from an acceptable medical source that the
21 claimant's diabetes mellitus satisfies the requirements" of the Listing. AR 13. The Court finds that
22 there is substantial evidence to support this conclusion. *See* AR 324 (July 2009 Medical Source
23 Statement stating that Plaintiff could reach, handle, finger, and feel without limitation); AR 56,60
24 (Plaintiff's testimony that he prepares meals, feeds and cleans himself and assists his friend with
25 multiple sclerosis in some of these daily tasks); AR 271, 279 (Nurse Practitioner Suzuki's report that
26 Plaintiff walked without difficulty during examination); AR 291 -294 (Dr. Chen's report that
27 Plaintiff had "normal muscle bulk and tone," that this "gait was normal and steady," that he was
28 "walking without any difficulty," that Plaintiff did not use an assistive device during the exam and

1 that Plaintiff would be able to occasionally lift and carry 100 pounds and frequently lift and carry 50
2 pounds); AR 329 (Dr. Silver's report that Plaintiff had normal muscle tone). Further, to the extent
3 that the ALJ found that Plaintiff's testimony about his neuropathy symptoms was not fully credible,
4 the Court finds that the ALJ's conclusion is supported by substantial evidence, as discussed below.

5
6 **D. Whether the ALJ Erred at Step Four in Determining that Plaintiff's RFC
Renders Him Capable of Medium-Level Work**

7 Plaintiff contends that the ALJ erred at Step Four in finding that Plaintiff could perform
8 medium work because: 1) he did not offer specific and legitimate reasons supported by substantial
9 evidence for rejecting the opinions of the VA Clinic team who treated him, as reflected in the July
10 2009 Medical Source Statement; 2) he did not provide clear and convincing evidence for rejecting
11 Plaintiff's pain testimony; and 3) he failed to recontact the VA Team to resolve any ambiguities in
12 the record. The Court finds that the ALJ offered legally sufficient reasons, supported by substantial
13 evidence, for finding that Plaintiff could perform medium work and that the ALJ did not have a duty
14 to recontact the VA Clinic team to resolve ambiguities.

15
16 **1. Whether the ALJ Erred in Rejecting the Finding of the July 2009
Medical Source Statement that Plaintiff is Limited to Light Work**

17 In the July 2009 Medical Source Statement, signed by Dr. Nguyen-Dinh, Nurse Practitioner
18 Suzuki found that Plaintiff was capable of lifting 10 pounds frequently and 25 pounds occasionally,
19 placing him in the "light work" range. *See* 20 C.F.R. §§ 404.1567(c). In contrast, the examining
20 physician, Dr. Chen, found that Plaintiff had *no* limitations on lifting and therefore was capable of
21 heavy work. In light of the conflicting medical opinions, the ALJ was required to provide "specific
22 and legitimate reasons" based on substantial evidence in the record, in support of his conclusion that
23 Plaintiff was able to perform medium work. *See Lester*, 81 F.3d at 830 (citation omitted). Here, the
24 ALJ declined to give controlling weight to the opinion of Nurse Practitioner Suzuki on the basis that
25 she did not meet with Plaintiff with much frequency and had not seen Plaintiff for over a year when
26 she completed the July 2009 Medical Source Statement, and because her opinion was not supported
27 by medical evidence and was contradicted by the medical record. These are specific and legitimate
28

1 reasons for rejecting the opinion stated in the Medical Source Statement that Plaintiff was limited to
2 light work.

3 In determining the weight to which a treating physician's opinion is entitled, the duration of
4 the treatment relationship and the frequency and nature of the contact, should be considered. 20
5 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). Here, the record reflects that at the time Nurse
6 Practitioner Suzuki completed the Medical Source Statement, in July 2009, she had not treated
7 Plaintiff since March 2008. She had seen Plaintiff one other time in 2008, twice in 2007 and once in
8 2006. The relative lack of frequency of treatment provided by Nurse Practitioner Suzuki is a
9 specific and legitimate reason for declining to give great weight to her opinion.⁵

10 The ALJ also found that Nurse Practitioner Suzuki's opinion was not supported by the other
11 medical evidence in the record. In particular, the ALJ cited the findings of other physicians, as well
12 as the conservative treatment of Plaintiff's neuropathy. The Court does not find that the ALJ's
13 reliance on the "conservative treatment" Plaintiff received to offer a specific and legitimate reason
14 for rejecting the opinions stated in the July 2009 Medical Source Statement. Although Dr. Silver
15 referred Plaintiff back to his primary care physician (twice) for medical management of his
16 neuropathy, Plaintiff did not follow up on this recommendation, making it is impossible to determine
17 what kind of treatment might have been recommended. Nonetheless, the Court concludes that the
18 findings of other physicians that were cited by the ALJ *do* offer a legally sufficient basis on which
19 the ALJ could find that Plaintiff's neuropathy did not limit Plaintiff as severely Nurse Practitioner

23
24 ⁵Because the ALJ gave specific and legitimate reasons for rejecting the opinions stated in the
25 Medical Source Statement, the Court need not address whether the ALJ could properly reject the opinion
26 stated in the Medical Source Statement on the grounds that it was completed by a nurse practitioner
27 rather than a physician. In any event, the Commissioner concedes that the July 2009 Medical Source
28 Statement was completed by an acceptable medical source because it was signed by Dr. Nguyen-Dinh.
Further, because the Court finds that the ALJ could properly conclude that the July 2009 Medical Source
Statement overstated Plaintiff's exertional limitations, the Court need not reach the question of whether
the ALJ should have credited Nurse Practitioner's November 17, 2009 Letter stating that Plaintiff's
symptoms would not have improved even if he had obtained further treatment. Even if the ALJ credited
this opinion, it would only mean that Plaintiff would not have been able to perform anything above
medium-level work, regardless of whether he obtained treatment.

1 Suzuki stated in the July 2009 Medical Source Statement, as discussed above in connection with
2 Step Three.⁶

3 Finally, the ALJ offered a specific and legitimate reason for rejecting Nurse Practitioner
4 Suzuki's opinion to the extent that he pointed to the medical evidence on which she relied in support
5 of her conclusion, namely, the x-rays and reports of the podiatrist, which indicated that Plaintiff had
6 only a "minor abnormality" and that there was no evidence of a foot deformity.

7 Therefore, the Court finds that the ALJ offered specific and legitimate reasons supported by
8 substantial evidence for rejecting the opinions expressed in the 2009 Medical Source Statement.

9 **2. Whether the ALJ Erred in his Evaluation of Plaintiff's Credibility**

10 Plaintiff argues that the ALJ committed legal error in rejecting Plaintiff's testimony about the
11 severity of his symptoms because: 1) he failed to consider the entire case record in reaching his
12 conclusion; and 2) he did not provide clear and convincing reasons for finding Plaintiff lacked
13 credibility. The Court finds that the ALJ offered sufficient reasons to support his finding that
14 Plaintiff's testimony about the severity of his neuropathy symptoms was not entirely credible.

15 Unless there is affirmative evidence showing that a claimant is malingering, the
16 Commissioner's reasons for rejecting the claimant's testimony must be "clear and convincing."
17 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995). In making a credibility determination, the ALJ
18 must, in addition to assessing the objective medical evidence, consider the claimant's daily
19 activities, the "type, dosage, effectiveness, and side effects of any medication the claimant takes or
20 has taken to alleviate pain," treatment the claimant has received for relief of pain, and other factors
21 concerning the claimant's functional limitations and restrictions due to pain or other symptoms. 20
22 C.F.R. §§ 404.1529(c)(4); SSR 96-7p. Failure to seek treatment of a condition for which a claimant
23 has sought some treatment is "powerful evidence" that a claimant may be overstating the extent of
24 his or her pain. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). However, the ALJ is also
25 required to consider any reasons offered by the claimant for the failure to obtain treatment in

26
27 ⁶The Court does not consider the cryptic notation by Nurse Practitioner Suzuki that may (or may
28 not) indicate that she filled out a form stating that Plaintiff could work without limitations, which is
cited by Defendant in its Motion. This reason was not cited by the ALJ and therefore it is not
appropriate for the Court to consider it here in determining whether the ALJ offered specific and
legitimate reasons in support of his decision.

determining the weight that should be given such evidence. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

Here, the ALJ found that Plaintiff's specific testimony regarding pain in his hands, feet and fingertips was not credible because he has been taking care of a friend with multiple sclerosis, including performing light chores. In addition, he cited Plaintiff's failure to seek treatment for his neuropathy for over a year, despite the recommendation of the podiatrist that he return to his primary care practitioner for medical management of his neuropathy. Finally, he noted that Plaintiff's testimony that he could not arrange for transportation to the VA Clinic was not credible, especially in light of his failure to produce any verification for this claim in response to the ALJ's request at the hearing.

The Court finds that the reasons cited by the ALJ for declining to credit Plaintiff's pain testimony are clear and convincing and therefore the ALJ did not err in concluding that Plaintiff could perform medium work. The Court finds that Plaintiff's failure to follow the recommendations of Dr. Silver that he return to his primary care physician for treatment of his neuropathy to be particularly powerful evidence supporting the ALJ's conclusion. Although Plaintiff offered reasons for failing to obtain further treatment for his neuropathy, he did not supplement the record (as he was invited to do by the ALJ) with further information showing that he could not use a VA Clinic shuttle; nor does Dr. Thomsen's report provide support for the contention that Plaintiff's mental impairment precluded him from seeking treatment. Indeed, Plaintiff obtained treatment at the VA Clinic a number of times after he began to experience the severe anxiety caused by becoming homeless.

3. Whether ALJ Erred by not Recontacting Nurse Practitioner Suzuki to Clarify Her Conclusions on the Medical Source Statement

An ALJ in a social security disability case has "a special duty to fully and fairly develop the record and to assure that the claimant's interests are considered." *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983). Thus, if an ALJ thinks he needs to know "the basis of [the physician's] opinions in order to evaluate them," the ALJ must "conduct an appropriate inquiry" into the medical evidence in question by recontacting the source. *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996). This

1 requirement is only triggered, however, when there is ambiguous evidence or the record is
2 inadequate to allow for proper evaluation of the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-
3 60 (9th Cir. 2001). Further, an ALJ may “discharge this duty in several ways, including:
4 subpoenaing the claimant’s physicians, submitting questions to the claimant’s physicians, continuing
5 the hearing, or keeping the record open after the hearing to allow supplementation of the record.”
6 *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001).

7 Here, the record was sufficient to evaluate Plaintiff’s physical capabilities in light of his
8 neuropathy because it contained reports by the consultative examiner and the agency doctors that
9 allowed the ALJ to determine Plaintiff’s limitations. Further, the ALJ left the record open to allow
10 Plaintiff to address concerns expressed by the ALJ at the administrative hearing. Therefore, the
11 Court concludes that the ALJ did not err by failing to fully develop the record.

12 **E. Whether the ALJ Erred in His Step Five Determination that Plaintiff Can**
13 **Perform Jobs That Exist In Significant Numbers in the National Economy**

14 Plaintiff contends that the ALJ erred in finding that Plaintiff was not disabled under Medical-
15 Vocational Guideline 203.04 because that Grid rule is applicable only where a claimant can perform
16 medium work. Although the Court has found that the ALJ did not err in concluding that Plaintiff’s
17 neuropathy limits him only to medium work, reliance on the Grids to find that Plaintiff is not
18 disabled is not appropriate in this case for another reason, namely, because Plaintiff has both
19 exertional *and* nonexertional impairments.⁷ See *Lounsbury v. Barnhart*, 468 F.3d 1111, 1116 (9th
20 Cir. 2006) (“Because the grids are not designed to establish automatically the existence of jobs for
21 persons with both severe exertional and non-exertional impairments, they may not be used to direct a
22 conclusion of nondisability”). In *Lounsbury*, the court explained:

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25 ⁷“Exertional limitations” are those that only affect the claimant’s “ability to meet the strength
26 demands of jobs.” 20 C.F.R. § 404.1569a(b). “Nonexertional limitations” only affect the claimant’s
27 “ability to meet the demands of jobs other than the strength demands.” 20 C.F.R. § 404.1569a(c)(1).
28 Specific examples of non-exertional limitations offered in the regulations include “difficulty functioning
because [the claimant is] nervous, anxious, or depressed,” “difficulty maintaining attention or
concentrating,” and “difficulty understanding or remembering detailed instructions.”

1 Because the grids are not designed to establish automatically the existence of jobs for
2 persons with both severe exertional and non-exertional impairments, they may not be used to
3 direct a conclusion of . . . In other words, where a person with exertional and non-exertional
4 limitations is “disabled” under the grids, there is no need to examine the effect of the
non-exertional limitations. But if the same person is not disabled under the grids, the
non-exertional limitations must be examined separately.

5 *Id.* Because the Grids do not cover all of Plaintiff’s limitations, and in particular, fail to take into
6 account his severe mental impairment, the ALJ’s reliance on the Grids was improper. Rather,
7 testimony of a vocational expert was required to establish that jobs existed in significant number in
8 the national economy that Plaintiff could perform in light of his exertional *and non-exertional*
9 impairments. *See Tackett v. Apfel*, 180 F.3d 1094, 1102 (9th Cir. 1999).

10 **F. Remedy**

11 “The decision whether to remand a case for additional evidence or simply to award benefits
12 is within the discretion of the court.” *Reddick v. Chater*, 157 F.3d 715, 728 (9th Cir. 1998).
13 “Remand for further administrative proceedings is appropriate if enhancement of the record would
14 be useful.” *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). Conversely, “where the record
15 has been developed fully and further administrative proceedings would serve no useful purpose, the
16 district court should remand for an immediate award of benefits.” *Id.* With respect to an ALJ’s
17 improper disregard of evidence:

18 [T]he district court should credit evidence that was rejected during the administrative process
19 and remand for an immediate award of benefits if (1) the ALJ failed to provide legally
20 sufficient reasons for rejecting the evidence; (2) there are no outstanding issues that must be
resolved before a determination of disability can be made; and (3) it is clear from the record
that the ALJ would be required to find the claimant disabled were such evidence credited.

21 *Id.* *See also Lester v. Chater*, 81 F.3d 821, 834 (9th Cir.1995) (Where the ALJ “fails to provide
22 adequate reasons for rejecting the opinion of a treating or examining physician, we credit that
23 opinion ‘as a matter of law’” (citation omitted)).

24 In this case, the Court credits the opinions expressed by Dr. Thomsen in her report, including
25 her opinions that: 1) Plaintiff has severe impairments as to attention/concentration, executive
26 functioning and visuospatial abilities; 2) he has moderate impairment of memory; 3) he suffers from
27 severe anxiety; and 4) that due to his mental impairment he “could not sustain simple or complex
28 tasks for up to eight hours and would become fatigued attempting to do so.” Based on the current

1 record, however, the Court is unable to determine, whether there are jobs available in the national
2 economy in significant number that Plaintiff could perform in light of his exertional and non-
3 exertional impairments. Accordingly, further proceedings are required.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court GRANTS Plaintiff's Motion and DENIES Defendant's
6 Motion. The Court reverses the ALJ's decision and remands Plaintiff's claim for further
7 administrative proceedings consistent with this opinion. Upon remand, the Commissioner shall
8 credit the findings of Dr. Thomsen and consider whether Plaintiff is disabled in light of his
9 exertional and non-exertional impairments.

10 IT IS SO ORDERED.

11 Dated: February 1, 2012

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JOSEPH C. SPERO
United States Magistrate Judge
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