UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GUY CRISTMAN ABSHER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

Case No.: 16cv00614-WQH-KSC

REPORT AND RECOMMENDATION RE CROSS-MOTIONS FOR SUMMARY JUDGMENT

[Doc. Nos. 12 and 15]

Pursuant to 42 U.S.C. § 405(g) of the Social Security Act ("SSA"), plaintiff filed a Complaint to obtain judicial review of a final decision by the Commissioner of Social Security ("Commissioner") denying his disability insurance benefits and supplemental security income. [Doc. No. 1.] Pursuant to 28 U.S.C. § 636(b)(1)(B), and Civil Local Rules 72.1(c)(1)(c) and 72.2(a), this matter was assigned to the undersigned Magistrate Judge for a Report and Recommendation.

Presently before the Court are: (1) plaintiff's Motion for Summary Judgment [Doc. No. 12]; (2) defendant's Cross-Motion for Summary Judgment and Response in Opposition to plaintiff's Motion for Summary Judgment [Doc. Nos. 15 and 16]; (3) plaintiff's Response in Opposition to defendant's Cross-Motion for Summary Judgment [Doc. No. 17]; and (4) the Administrative Record [Doc. No. 10].

Plaintiff's Motion for Summary Judgment challenges the denial of disability benefits and supplemental security income benefits on the basis that the decision of the Administrative Law Judge ("ALJ") is not supported by substantial evidence and is legal error. [Doc. No. 12-1, at pp. 4-9, 10-14.]. Plaintiff argues that the ALJ allegedly: (1) mischaracterized plaintiff's past relevant work as a painter, and then erred in finding that plaintiff could return to this past relevant work as generally and actually performed; (2) erred in an alternative finding that plaintiff could perform three other occupations because plaintiff's residual functional capacity does not conform with those job requirements; and (3) erred in considering a job that is part-time as "other work" that plaintiff can perform. *Id.*

Plaintiff seeks an Order from this Court reversing the decision to deny benefits and remanding for further administrative proceedings. *Id.* Defendant contends that the decision to deny benefits should be upheld because it is based on substantial evidence and is free of reversible legal error. [Doc. No. 15-1, at p. 12.] After careful consideration of the moving and opposing papers, as well as the Administrative Record and the applicable law, this Court RECOMMENDS that the District Court DENY plaintiff's Motion for Summary Judgment [Doc. No. 12] and GRANT defendant's Cross-Motion for Summary Judgment [Doc. No. 15].

I. Background and Procedural History.

Plaintiff worked as a painter from January 1986 through January 1993, and then from January 1994 through June 2010. [AR 251.][1] On April 15, 2014, the date of plaintiff's hearing before the ALJ, plaintiff was 49 years old. [AR 46, 51.]

On February 10, 2012, plaintiff completed an application for social security disability benefits. [AR 109, 199.] On February 13, 2012, plaintiff applied for supplemental security income. [AR 110, 224.] Plaintiff's applications stated that he was born on January

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[1] Citations to the Administrative Record ("AR") refer to Docket Number 10.

1, 1965. [AR 199, 224.] Plaintiff claimed in these applications that his disability began on June 1, 2010, and he was unable to work because of amputation of his left arm, head injury, depression, anxiety, headaches, blood clots, suicidal thoughts, right hand shattered, nerve damage, and trouble sleeping. [AR 94-95, 199, 203.]

On June 25, 2012, the Social Security Administration ("SSA") denied plaintiff's applications. [AR 147-51.] The SSA found that although plaintiff's condition limited his ability to perform work-related activities, it was not severe enough to keep him from working. [AR 147-51.] The SSA's decision noted that there was insufficient vocational information to determine whether plaintiff could perform any of his past relevant work, but there was evidence in the file indicating that he could adjust to other work. [AR 147-148.] It also stated that although plaintiff was experiencing some depression and anxiety, there was no indication that it was a major limitation on his ability to think, communicate, follow basic instructions, or to function adequately in his usual daily activities. [AR 147.]

On August 2, 2012, plaintiff filed a request for reconsideration. [AR 153.] In plaintiff's request for reconsideration, he indicated that he alleged worsening of his mental condition beginning in May 2012. [AR 112, 127.] The medical evidence indicated a suicide attempt by plaintiff on December 8, 2012. [AR 116, 131.] On February 15, 2013, the SSA reconsidered plaintiff's applications and affirmed the initial decision of denial, finding that plaintiff's condition was not severe enough to keep him from working. [AR 154.] The determination included a finding that although plaintiff may be anxious and depressed at times, he was able to perform work that requires the ability to remember, follow, and carry out simple instructions at jobs that do not require public contact. [AR 155.]

On April 4, 2013, plaintiff submitted additional evidence in support of his claim for benefits and requested a hearing before an ALJ. [AR 161.] A hearing was held on April 15, 2014. [AR 46.] Plaintiff, who was represented by an attorney, appeared and testified at the hearing. [AR 48.] A vocational expert, Harlan Stock, also testified at the hearing. *Id.*

On July 18, 2014, the ALJ issued a written decision and concluded that plaintiff was not disabled within the meaning of the Social Security Act from June 1, 2010 through the date of the decision. [AR 29-40.] The ALJ found that plaintiff did not qualify for disability insurance benefits or supplemental security income benefits. *Id.*

On August 25, 2014, plaintiff requested review of the ALJ's decision by the Appeals Council. [AR 24-25.] On January 11, 2016, the Appeals Council denied review of the ALJ's July 18, 2014 decision. [AR 1-3.] As a result, the ALJ's decision became the final decision of the Commissioner. [AR 1.] The Complaint in this action was filed on March 10, 2016. [Doc. No. 1.]

II. Standards of Review.

The final decision of the Commissioner must be affirmed if it is supported by substantial evidence and if the Commissioner has applied the correct legal standards. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004) (citing *Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1035 (9th Cir. 2003)). Under the substantial evidence standard, the Commissioner's findings are upheld if supported by inferences reasonably drawn from the record. *Id.* If there is evidence in the record to support more than one rational interpretation, the District Court must defer to the Commissioner's decision. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). "In determining whether the Commissioner's findings are supported by substantial evidence, we must consider the evidence as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985)).

Pursuant to Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment motions, as defined by [Federal Rule of Civil Procedure] 56, contemplate the use

of evidentiary material in the form of affidavits, depositions, answers to interrogatories, and admissions. In Social Security appeals, however, the Court may 'look no further than the pleadings and the transcript of the record before the agency,' and may not admit additional evidence." *Kenney v. Heckler*, 577 F. Supp. 214, 216 (N.D. Ohio 1983) (quoting *Morton v. Califano*, 481 F. Supp. 908, 914 n.2 (E.D. Tenn. 1978); *see also* 42 U.S.C. § 405(g); *Beane v. Richardson*, 457 F.2d 758, 759 (9th Cir. 1972) (finding judicial review of an administrative decision regarding disability benefits that presents only an issue of law and not a question of fact to be a proper issue to raise by summary judgment). "[A]lthough summary judgment motions are customarily used [in social security cases], and even requested by the Court or Magistrate, such motions merely serve as vehicles for briefing the parties' positions, and are not a prerequisite to the Court's reaching a decision on the merits." *Id.*

III. Evidence in the Administrative Record.

A. Relevant Education, Work History, and Medical Information

The record includes a form titled "Disability Report – Adult – Form SSA-3368." [AR 249.] This form states it was completed by an attorney. [AR 250.] The form is undated, but based on the Court Transcript Index for the Administrative Record, it appears to have been completed on February 15, 2012. [Doc. No. 10, Ex. 1 at p. 2.]

The "Medical Conditions" section of the form includes the following conditions that plaintiff claims limit his ability to work: left arm amputee, head injury, depression, anxiety, blood clots in brain, suicidal thoughts, right hand shattered, nerve damage, and trouble sleeping. [AR 250.] The "Work Activity" section states that plaintiff stopped working on June 1, 2010 because of his medical conditions. *Id.* The "Education and Training Information" section states that twelfth grade was the highest grade of school plaintiff completed, and that he attended special education classes for two years in middle school. [AR 251.] The "Job History" section states that plaintiff worked as a painter from January 1986 through January 1993 for one business, and then from January 1994 through June 2010 for a different business. *Id.* The "Medicines" section states that plaintiff was taking

three prescribed medications for pain, depression, and sleep. [AR 252-53.] The "Medical Treatment" section states that plaintiff was in an accident[2] in 2007 that resulted in amputation of his left arm, the shattering of his right hand, loss of his spleen, and major nerve damage. [AR 255-56.]

The "Remarks" section states that after plaintiff's accident in 2007 and recovery of several months, he returned to painting because it was his only job and he needed to support himself. [AR 258.] Plaintiff further explained on the form:

> [Painting] was a lot harder with one arm. I was having phantom pain in the missing arm and my other arm was having to [sic] all of the work. I started getting severe cramping in my arm after using it for an hour or two. Then the depression and suicidal thoughts started. Finally, in 2010, I stopped working all together. I am on medications and go to group and individual therapy, but often feel suicidal and depressed. I have been thru [sic] the Department of Rehab and they said I could not be rehabilitated. I have blood clots in my brain and my doctor advised me to avoid stressful situations.

Id.

B. Relevant Testimony at the April 15, 2014 Administrative Hearing

At the beginning of the administrative hearing, the ALJ asked plaintiff's attorney if he wanted to submit any additional documents in connection with the hearing. [AR 49.] Plaintiff's attorney replied that he had additional medical records regarding plaintiff's new diagnosis of congestive heart failure. *Id.* The ALJ asked plaintiff's attorney to submit them as soon as possible. *Id.*

1. Plaintiff

Plaintiff testified at the hearing that he did not have a driver's license, and most of the time, he received rides from friends or his mother; otherwise, he took public transportation. [AR 52.] When the ALJ asked where he went, plaintiff replied that he went to doctor's appointments and Alcoholics Anonymous meetings. *Id.* Plaintiff stated that he

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[2] According to medical records in the Administrative Record, plaintiff was in a severe motor vehicle accident on August 2, 2007. [AR 293.]

attended the meetings three to four times a week, that they lasted about an hour, and there were usually ten to twenty people at each meeting. *Id.* When asked how he got along with the other people at the meetings, plaintiff responded, "Okay most of the time." *Id.* He explained that it was usually the same set of people at each meeting, plus new people coming in and out. *Id.*

Plaintiff testified that he was not working at the time of the hearing. [AR 53.] The ALJ asked plaintiff about an exhibit in the record from February 2014 indicating that plaintiff feels depressed when he is not working and his desire to "work at whatever job that [he] can find." *Id.* Plaintiff explained that at the time of the hearing he "was trying" to find work, but that he was unable to find any work recently. [AR 53-54.] Plaintiff further explained that two months prior to the hearing, he did some yard work for his mother and her neighbors in the trailer park, such as trimming bushes and roses or plucking flowers. *Id.* The yard owners paid him by cooking for him or giving enough money to pay for his phone. [AR 55.]

Plaintiff stated that after he lost his left arm in the motorcycle accident in 2007, he went back to work as a painter. *Id.* The ALJ commented that plaintiff's earnings after the accident were similar to earnings prior to the accident; plaintiff earned a little under $10,000.00 in 2001, approximately $10,000.00 in 2004, and $11,000.00 in 2008.[3] [AR 56.] When the ALJ asked plaintiff how his missing arm affected him, plaintiff responded that "[i]t was really hard, because of the back giving me spasms and not being able to bend over, and, you know, carry the tools with me." *Id.* Plaintiff said that he compensated for the missing arm by doing a lot of brush work, and when the brush work ran out, he did not work. *Id.*

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[3] The Administrative Record contains a document titled "Summary FICA Earnings for Years Requested" that includes plaintiff's earnings for years 1995 through 2013. [AR 234.] Plaintiff's earnings between 2004 and 2011 are as follows: $10,073.00 in 2004; $17,643.50 in 2005; $16,840.20 in 2006; $2,688.00 in 2007; $11,137.51 in 2008; $5,149.50 in 2009; $6,721.00 in 2010; and $0 in 2011. *Id.*

The ALJ asked plaintiff to explain what type of "brush work" that he did. *Id.* at 56-57. Plaintiff explained that he used a paint brush and could not use a roller because it was too difficult to do with his one arm. [AR 57.] He explained that two arms were needed to work the roller. *Id.* The ALJ asked, "when you talk about brush work, would you mainly be doing like door frames, just a small section?" *Id.* Plaintiff answered, "Yes sir." *Id.*

The ALJ asked plaintiff about his work as a painter after the 2007 motorcycle accident, including duties plaintiff had in addition to brush work. [AR 70.] Plaintiff replied that he "just push[ed] the cart around" and "that was pretty much it." *Id.* Plaintiff said that the company he worked for after the accident was the same one he had worked for before the accident. *Id.* When asked about duties that he could not perform after the accident, plaintiff said that he could not get up on a ladder because it was not safe for him, but he did get on a lift. *Id.* The ALJ asked, "[s]o, obviously, you were able to do some of the work, otherwise they wouldn't have kept you around, right?" [AR 71.] Plaintiff answered, "[i]t was more like a – the guy I know was a friend, helping me. But the – he kept me there just to help me out so I can live." *Id.*

2. Vocational Expert

At the hearing, the ALJ asked the vocational expert ("VE") to classify plaintiff's past work history. [AR 72.] The VE explained:

> The only job in the record in [Exhibit] 2-E is that of a painter. Maintenance, DOT[4] 840.381-010, which has an SVP of 7, which is medium per the DOT, and per Mr. Absher's testimony today, it was much less than medium as he's been – as he had been working at recently. . . . [Plaintiff's recent work] would be at the light level.

[AR 72.]

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[4] The Social Security Administration relies primarily on the Dictionary of Occupational Titles ("DOT") for information about work requirements in the national economy. SSR 00-04p, 2000 WL 1898704 (Dec. 4, 2000). Exertion levels of jobs are classified as sedentary, light, medium, heavy, and very heavy. *Id.* The DOT lists a specified vocational preparation (SVP) time for each occupation. *Id.* An SVP of 1-2 corresponds to unskilled work; an SVP of 3-4 corresponds to semi-skilled work; and an SVP of 5-9 corresponds to skilled work. *Id.*

The ALJ asked the VE if the DOT has a "job description for somebody that just does brush work." *Id.* The VE responded, "[t]hey do, Your Honor. There [sic] are a touch-up painter, DOT 740.684-026, has an SVP of 2. It's light, per the DOT." *Id.* The ALJ asked whether it would be accurate to say that the "touch-up painter position" was part of plaintiff's past work. *Id.* The VE replied, "[w]ell, I believe, [plaintiff] testified to that today that he was doing touch-up work." *Id.* The ALJ stated, "Okay. Well it looks like [for plaintiff's] past work that we have a couple positions, the painter maintenance and also the touch-up painter." [AR 72-73.]

The ALJ asked the VE if either the painter maintenance or touch-up painter position would be available to a hypothetical individual of plaintiff's age, education, and work experience who could perform work at the light level of exertion, with certain work restrictions.[5] [AR 73.] The VE responded that the touch-up painter job would be available. *Id.* When the ALJ asked if the touch-up painter position, "per the DOT," can be performed by a hypothetical individual with one extremity, the VE answered, "[w]ell, he was performing it—he testified today that he has been performing it with one extremity." [AR 73-74.]

The ALJ asked the VE if there are other occupations available for the same hypothetical individual, and the VE replied that there would be the following positions: (1) school bus monitor; (2) barker; and (3) host. [AR 74-75.] When plaintiff's attorney asked for a description of "barker," the VE explained, "[a] barker is a carn[ey], a stealer, attempts to attract patrons for entertainment by talking to the passing public, describing attractions

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[5] The work restrictions discussed were as follows: "[H]e has no functional use of the left upper extremity, and that would be the non-dominant. He can never climb ladders, ropes and scaffolds. He can frequently balance, stoop, kneel, crouch and crawl. He should avoid working around unprotected heavy machinery or unprotected heights. He can understand, remember and carry out simple job instructions. He can maintain attention and concentration to perform simple, routine or repetitive tasks. He can have frequent interaction with coworkers, supervisors and occasional interaction with the general public. And he can work in an environment with occasional changes in the work setting and occasional work-related decision making." [AR 73.]

of the show, emphasizing variety, novelty, beauty for some other feature." [AR 75.] After this description, the ALJ asked the VE if the barker position would be precluded for a hypothetical individual who was limited to "occasional interaction with the general public." *Id.* The VE agreed that the barker, host, and school bus monitor positions would be precluded for a hypothetical individual with that limitation. *Id.* The VE did not have alternate positions available for that hypothetical individual. *Id.*

The ALJ asked the VE whether the positions of school bus monitor, barker and host would be available for a hypothetical individual who could have "frequent" as opposed to "occasional" interaction with the general public. [AR 76.] The VE replied that they would. *Id.* When the ALJ asked the VE if his testimony was consistent with the DOT, the VE replied that it was. *Id.*

At the end of the hearing, the ALJ stated that he would not make his final decision until after he reviewed the medical records from plaintiff's attorney regarding plaintiff's new heart condition. [AR 77.]

IV. The ALJ's Five-Step Disability Analysis.

To qualify for disability benefits under the SSA, an applicant must show that he or she is unable to engage in any substantial gainful activity because of a medically determinable physical or mental impairment that has lasted or can be expected to last at least 12 months. 42 U.S.C. § 423(d). The SSA regulations establish a five-step sequential evaluation for determining whether an applicant is disabled under this standard. 20 C.F.R. § 404.1520(a); *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

At step one, the ALJ must determine whether the applicant is engaged in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i). "Substantial gainful activity is work activity that is both substantial and gainful." 20 C.F.R. § 404.1572. Here, the ALJ determined that the occasional yard work plaintiff did after the alleged onset date of plaintiff's alleged impairments did not rise to the level of substantial gainful activity. [AR 31.] Therefore, the ALJ concluded plaintiff had not engaged in substantial gainful activity since June 1, 2010, the alleged onset date of plaintiff's alleged impairments. *Id.*

At step two, the ALJ must determine whether the applicant is suffering from a medically determinable impairment that is "severe" within the meaning of Social Security regulations. 20 C.F.R. § 404.1520(a)(4)(ii). An impairment or combination of impairments is not severe if it does not significantly limit the applicant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c).

The ALJ concluded that plaintiff had the following severe impairments: status-post left arm amputation, thrombocytosis, osteoarthritis of the left hip, chronic pain syndrome, degenerative disc disease of the lumbar spine with radiculopathy, hypertension, degenerative disc disease of the cervical spine, history of anterior cervical fusion, pitting edema, congestive heart failure, adjustment disorder with mixed anxiety and depressed mood, major depressive disorder, posttraumatic stress disorder, and dysthymic disorder. [AR 31-32.] The ALJ found the impairments severe because they are "more than slight abnormalities and have more than a minimal effect on the claimant's ability to do basic physical or mental work activities." [AR 32.]

If there is a severe impairment, the ALJ must then determine at step three whether it meets or equals one of the "Listing of Impairments" in the Social Security regulations. 20 C.F.R. § 404.1520(a)(4)(iii). If the applicant's impairment meets or equals a listed impairment, he or she must be found disabled. *Id.* In this case, the ALJ concluded that plaintiff's impairments or combinations of impairments did not meet or equal the criteria of any listed impairment. [AR 32.]

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If an impairment does not meet or equal a listed impairment, the ALJ must make a step four determination of the claimant's residual functional capacity based on all impairments, including impairments that are not severe. 20 C.F.R. §§ 404.1520(e), 404.1545(a)(2). "Residual functional capacity" is "the most [an applicant] can still do despite [his or her] limitations." 20 C.F.R. § 404.1545(a)(1). Here, the ALJ found that plaintiff had the residual functional capacity to perform light work as defined in the regulations.[6] The ALJ stated the following:

> Specifically, he does not have any functional use of the non-dominant left upper extremity; he is precluded from climbing ladders, ropes, and scaffolds; he can frequently balance, stoop, kneel, crouch, and crawl; he should avoid working around unprotected heavy machinery, or unprotected heights; he can understand, remember, and carry out simple job instructions; he can maintain attention and concentration to complete simple, routine, repetitive tasks; he can have frequent interaction with coworkers, supervisors, and the general public; he can work in an environment with occasional changes in the work setting and occasional work related decision making.

[AR 33.]

Then the ALJ must determine whether the applicant retains the residual functional capacity to perform his or her past relevant work. 20 C.F.R. § 404.1520(a)(4)(iv). To do so, the ALJ must compare the residual functional capacity assessment with the physical and mental demands of the applicant's past relevant work. 20 C.F.R. § 404.1520(f). Past

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[6] Light work is defined in the regulations as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of 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.

20 C.F.R. § 404.1567(b).

relevant work is work that the applicant has done within the past fifteen years, that was substantial gainful activity, and lasted long enough for him or her to learn to do it. 20 C.F.R. § 404.1560(b)(1). If the applicant has the residual functional capacity to perform his or her past relevant work, then the applicant will be found not disabled. 20 C.F.R. § 404.1520(f).

In this case, the ALJ cited the VE's testimony in finding that plaintiff's past relevant work included (1) work as a painter, maintenance, DOT number 840.381-010, medium, and skilled, but performed at the light level, and (2) touch-up painter, DOT number 740.684-026, light and unskilled. [AR 38.] The ALJ then stated the following:

> In comparing the claimant's residual functional capacity with the physical and mental demands of this work, the undersigned finds that the claimant is able to perform the job of touch-up painter as actually and generally performed. The vocational expert testified that the demands of this job do not exceed the residual functional capacity assessed here.

Id. Here, the ALJ determined at step four that plaintiff can perform his past relevant work of touch-up painter and is, therefore, not disabled. The ALJ also proceeded to step five of the sequential evaluation process and made alternative findings. *Id.*

At step five, the ALJ considers whether the applicant can perform any other work that exists in the national economy. 20 C.F.R. § 404.1520(a)(4)(v). In doing so, the ALJ considers the applicant's residual functional capacity and his or her age, education, and work experience. *Id.* If the ALJ determines that the claimant cannot make an adjustment to other work, then the claimant will be found to be disabled. *Id.* Although the applicant carries the burden of proving eligibility at steps one through four, the burden at step five rests on the agency. *Celaya v. Halter*, 332 F.3d 1177, 1180 (9th Cir. 2003).

Here, the ALJ found in step five that based on the testimony of the VE and considering plaintiff's age, education, work experience, and residual functional capacity, plaintiff is "capable of making a successful adjustment to other work that exists in significant numbers in the national economy" and is therefore not disabled. [AR 40.] Specifically, the ALJ cited the VE's testimony that plaintiff would be able to perform the

requirements of representative occupations such as school bus monitor, barker, and host. [AR 39.] The ALJ also determined that in accordance with Social Security Ruling 00- 4p, ". . . the vocational expert's testimony is consistent with the information contained in the *Dictionary of Occupational Titles*."[7] *Id.* Accordingly, the ALJ concluded that plaintiff has not been under a disability, as defined in the Social Security Act, from June 1, 2010, the alleged onset of his disability, through July 18, 2014, the date of the ALJ's decision denying eligibility for disability insurance benefits and supplemental security income. [AR 40.]

*V. **Discussion.***

A. Past Relevant Work in Step Four

Plaintiff argues that the ALJ's determination that plaintiff is able to perform past relevant work as a touch-up painter both as generally and actually performed is not supported by substantial evidence and is a result of legal error. [Doc. No. 12-1, at p. 4.] Plaintiff argues that the description of touch-up painter as generally performed is not representative of the job that plaintiff described as his past relevant work. *Id.* at 7-8. Plaintiff also argues that the ALJ failed to make the required specific factual findings about the physical and mental demands of plaintiff's past work as a painter as actually performed. *Id.* at 8-9.

Defendant argues that plaintiff waived his contention upon appeal that the ALJ and the VE wrongly characterized plaintiff's past relevant work as touch-up painter because plaintiff's counsel failed to dispute the VE's testimony on the subject at the administrative

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[7] A Social Security Ruling is binding on the ALJ. *Smith v. Astrue*, 252 F. App'x 820, 823 (9th Cir. 2007). However, in the District Court, "[Social Security Rulings] reflect the official interpretation of the [Social Security Administration] and are entitled to 'some deference' as long as they are consistent with the Social Security Act and regulations." *Massachi v. Astrue*, 486 F.3d 1149, 1152 n.6 (9th Cir. 2007) (quoting *Avenetti v. Barnhart,* 456 F.3d 1122, 1124 (9th Cir.2006)). The relevant portion of Social Security Ruling 00-4p states that before an ALJ relies on evidence from a vocational expert, the ALJ must "identify and obtain a reasonable explanation for any conflicts between occupational evidence provided" by the vocational expert and the Dictionary of Occupational Titles. SSR 00-4p, 2000 WL 1898704, at *1 (Dec. 4, 2000). The ALJ must explain how any identified conflict was resolved. *Id.*

hearing. [Doc. No. 15-1, at p. 10.] Alternatively, defendant argues that the ALJ's finding that plaintiff could perform past relevant work as a touch-up painter as generally performed was supported by substantial evidence. *Id.* at 10-11. Also, defendant argues that it is not necessary for the ALJ to find that plaintiff could perform his past relevant work as actually performed; the ability to do work as generally performed is sufficient. *Id.* at 12.

As explained in more detail below, the Court finds herein that the ALJ failed to make specific factual findings to substantiate his decision at step four of the sequential evaluation. Notwithstanding this legal error, the ALJ's step five determination that plaintiff retains the residual functional capacity to perform other work as a school bus monitor is supported by substantial evidence. Accordingly, the ALJ's ultimate conclusion that plaintiff did not qualify for disability benefits is sufficiently substantiated.

1. Waiver

As a threshold matter, defendant's argument that plaintiff waived his contention upon appeal that the ALJ and the VE wrongly characterized plaintiff's past relevant work as touch-up painter because plaintiff's counsel failed to dispute the VE's testimony on the subject at the administrative hearing is unfounded. A failure to raise an argument before the Social Security Appeals Council does not waive that argument in District Court. *See Sims v. Apfel*, 530 U.S. 103, 112 (2000) ("Claimants who exhaust administrative remedies need not also exhaust issues in a request for review by the Appeals Council in order to preserve judicial review of those issues.") Additionally, evidence submitted to and considered by the Appeals Council becomes part of the administrative record and is properly before the District Court. *See Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012) ("[W]hen the Appeals Council considers new evidence in deciding whether to review a decision of the ALJ, that evidence becomes part of the administrative record, which the district court must consider when reviewing the Commissioner's final decision for substantial evidence.")

Here, plaintiff's counsel submitted a brief to the Social Security Appeals Council that essentially raised the same issues as those in the instant action. [AR 286-87.] Plaintiff's

counsel also presented additional evidence to the Social Security Appeals Council regarding the three jobs[8] that the VE opined that plaintiff could perform. *Id.* The Appeals Council considered the brief, which therefore becomes part of the Administrative Record. [AR 1-4]; *Brewes*, 682 F.3d at 1163.

Notwithstanding that a plaintiff is not required to raise an argument before the Appeals Council in order to raise it before the District Court, here, plaintiff submitted the issues and evidence to the Appeals Council. Accordingly, plaintiff's arguments are part of the Administrative Record, and this Court finds that plaintiff has not waived his argument that the ALJ and VE mischaracterized his past relevant work. *See Sims*, 530 U.S. at 112; *Brewes*, 682 F.3d at 1163.

2. Specific Factual Findings about Physical and Mental Demands about Plaintiff's Past Work as a Painter

At step four of the sequential evaluation, the ALJ may deny benefits if a claimant can still perform either (1) a particular past relevant job *as actually performed*; or (2) the same kind of work *as generally performed* throughout the national economy. *Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (citing SSR 82-61, 1982 WL 31387, at *2 (1982)); *see also Stacy v. Colvin*, 825 F.3d 563, 569 (9th Cir. 2016). "Although the burden of proof lies with the claimant at step four, the ALJ still has a duty to make the requisite factual findings to support his conclusion." *Pinto*, 249 F.3d at 844 (citing SSR 82-62, 1982 WL 31386, at *3-4 (1982)).

The ALJ is required to make the following specific findings of fact: (1) a finding of fact as to the individual's residual functional capacity; (2) a finding of fact as to the physical and mental demands of the past job; and (3) a finding of fact that the individual's residual functional capacity would permit a return to his or her past job. SSR 82-62, 1982 WL

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[8] The ALJ adopted the VE's opinion that plaintiff could perform the alternate occupations of host, school bus monitor, and barker.

31386, at *4. Policy statements by the Social Security Administration emphasize the importance of obtaining detailed information about the requirements of the past work from claimant, employer, or other informed sources to permit the ALJ to consider and fully explain whether the claimant retains the functional capacity to perform past work. *Id.* at *3 ("Since this is an important and, in some instances, a controlling issue, every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit.").

An ALJ may rely on information about the requirements of work in the national economy from the DOT and from vocational experts. SSR 00-4p, 2000 WL 1898704, at *2. "Occupational evidence provided by a [vocational expert] generally should be consistent with the occupational information supplied by the DOT." *Id.* If there is a conflict between the vocational expert testimony and the DOT, the ALJ may rely on expert testimony, "but only insofar as the record contains persuasive evidence to support the deviation." *See Light v. Soc. Sec. Admin.*, 119 F.3d 789, 793 (9th Cir. 1997), *as amended on reh'g* (Sept. 17, 1997) (quoting *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir.1995)); *see also* SSR 00-4p, 2000 WL 1898704, at *4.

Here, the record and the testimony provide only a limited amount of information about plaintiff's past work as a painter. The only description about plaintiff's past work in the record is the title of "painter" and the companies that employed him, plaintiff's written remarks about the difficulty of painting with one arm, and plaintiff's hearing testimony. [AR 55-57; 70-71; 251; 258.] Plaintiff testified that after the loss of his non-dominant arm, he could no longer use a roller to paint walls and instead used a brush; he painted door frames and small sections; and he used a lift. [AR 57, 70.] Although the ALJ made a finding of plaintiff's residual functional capacity – which is undisputed here – the application of residual functional capacity to past work requires more information about the past work requirements than is available in this case.

With this limited information about plaintiff's past work, the VE made two findings: (1) plaintiff's past work was that of a maintenance painter, but that plaintiff did not do it

as generally performed at the medium level; and (2) plaintiff's past work of solely using a brush to paint is equivalent to the DOT job of "touch-up painter." [AR 72.] However, the DOT description of touch-up painter has facial discrepancies when compared to the limited information about plaintiff's past work. The DOT description of a touch-up painter is as follows:

> Paints articles, such as clock or instrument hands and dials, engraved surfaces, glass tubes, and ceramics, to cover or touch up articles, using brush: Inspects workpiece for inspector's markings or defects. Wipes, scrapes, sands, or applies cleaning solution to surface to prepare for retouching. Dips brush into specified paint or protective coating solution and applies it to surface of article specified. Brushes paint over surface and wipes it from unengraved area to paint engraved etchings. May apply coating of material, such as plastic wax or removable paint, to mask surfaces for plating, painting, or metallizing. May straighten parts, such as clock dials or hands, using jig or bench press, preparatory to painting. May paint original items, such as dials for custom-built instruments, freehand or using stencil or tracing device.

DICOT 740.684-026, 1991 WL 680237 (1991).

Notwithstanding the VE's testimony that his opinion was consistent with the DOT, this does not alleviate the ALJ's burden to resolve any apparent conflicts. *See Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1003-04 (9th Cir. 2015) (ALJ must reconcile apparent conflict between DOT and vocational expert's testimony even when vocational expert makes bare assurance that there is no conflict). The SSA regulations also place a strong emphasis on the requirement for the ALJ to make specific factual findings so that the decision as to whether a claimant retains the capacity to perform past work is developed and explained fully. SSR 82-62, 1982 WL 31386, at *3. Here, there is an apparent conflict on the face of the DOT description of touch-up painter and plaintiff's limited description of his past work that was neither recognized or addressed by either the ALJ or the VE. It is indisputable that painting clocks and ceramics is different from painting walls and door

frames. The ALJ made only conclusory statements about plaintiff's past relevant work and failed to support his decision with the specific findings required. [AR 38.]

Therefore, without more, the Court is unable to determine whether substantial evidence supports the ALJ's finding that plaintiff's past work is consistent with that of a touch-up painter, nor whether plaintiff retains the functional capacity to perform the work of touch-up painter as generally or as actually performed. *See Pinto*, 249 F.3d at 847 ("When . . . the ALJ makes findings only about the claimant's limitations, and the remainder of the step four assessment takes place in the [vocational expert's] head, we are left with nothing to review." (quotation marks and citation omitted)). Accordingly, the ALJ made a legal error at step four of the sequential evaluation. This Court has determined, however, that the legal error made by the ALJ at step four is harmless because, as set forth below, the ALJ's ultimate conclusion remains supported that plaintiff can perform the position of a school bus monitor. *See Batson v. Comm'r of Soc. Sec.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (finding an error harmless where it did not negate the validity of the ALJ's ultimate conclusion).

Notwithstanding that the Court finds that the ALJ made a legal error at step four of the sequential evaluation, the Court will consider the ALJ's alternative findings made at step five.

B. Other Work in Step Five

Plaintiff argues that the ALJ's alternative finding at step five of the sequential evaluation that plaintiff can perform other work as a barker, host, or school bus monitor is not supported by substantial evidence. [Doc. No. 12- 1, at p. 10.] Specifically, plaintiff argues that the ALJ's alternative finding is based on a deviation between the DOT and plaintiff's residual functional capacity without explanation by the ALJ or the VE. [Doc. No. 12- 1, at p. 10.] Defendant argues that the ALJ appropriately relied on the vocational expert's testimony that plaintiff could perform other work as barker, host, or school bus monitor and that it is supported by substantial evidence. [Doc. No. 15-1, at pp. 12-13.]

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1. Barker and Host

Plaintiff argues that the DOT descriptions of barker and host require Level Three reasoning,[9] but plaintiff is limited to Level Two Reasoning.[10] [Doc. No. 12-1, at p. 12]; DICOT 342.657-010, 1991 WL 672843 (1991) (barker); DICOT 349.667-024, 1991 WL 672884 (1991) (host). Defendant argues that plaintiff's graduation from high school and past work as a maintenance painter, which required Level Three reasoning, provide substantial evidence that plaintiff can perform work as a barker and host at Level Three reasoning.[11] [Doc. No. 16-1, at p. 16.]

It is established in the Ninth Circuit that "[u]npublished decisions of panels of this Court and opinions from some of our sister circuits have concluded that an RFC limitation to 'simple' or 'repetitive' tasks is consistent with Level Two reasoning." *Rounds*, 807 F.3d at 1004, n.6 (9th Cir. 2015). The Ninth Circuit has also found that there is "no rigid correlation between reasoning levels and the amount of education that a claimant has completed." *Zavalin v. Colvin*, 778 F.3d 842, 847 (9th Cir. 2015).

Here, the ALJ determined that plaintiff's residual functional capacity includes the finding that "[plaintiff] can maintain attention and concentration to complete simple,

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[9] Level Three reasoning is defined as being able to "[a]pply commonsense understanding to carry out instructions furnished in written, oral, or diagrammatic form" and "deal with problems involving several concrete variables in or from standardized situations." DOT Appendix C, 1991 WL 688702 (1991).

[10] Level Two reasoning is defined as being able to "[a]pply commonsense understanding to carry out detailed but uninvolved written or oral instructions" and "deal with problems involving a few concrete variables in or from standardized situations." DOT Appendix C, 1991 WL 688702 (1991).

[11] Defendant's arguments about plaintiff's ability to perform work at Level Three reasoning are unconvincing. First, defendant's contention about plaintiff's education level contradicts Ninth Circuit precedent that education level alone is not rigidly correlated to reasoning level. *Zavalin v. Colvin*, 778 F.3d at 847. Defendant also ignores the fact that plaintiff attended special education classes in middle school. Furthermore, defendant's argument that plaintiff performed Level Three reasoning as a maintenance painter in the past ignores the fact that the ALJ has determined that plaintiff's current residual functional capacity includes a limitation of attention and concentration to "simple, routine, repetitive tasks." [AR 33.]

routine, repetitive tasks." [AR 33.] This limitation to "simple" and "repetitive" tasks is consistent with Level Two reasoning. Notably, neither the ALJ nor the VE explained the discrepancy between the Level Three reasoning required for the positions of barker and host and plaintiff's residual functional capacity which appears to be consistent with Level Two reasoning. *See Light v. Soc. Sec. Admin.*, 119 F.3d at 793 (quoting *Johnson v. Shalala*, 60 F.3d at 1435). Accordingly, the Court finds that the ALJ's determination that plaintiff can perform other work as a barker or a host is not supported by substantial evidence.[12]

2. School Bus Monitor

Plaintiff argues that the DOT description of school bus monitor requires dealing with the general public to an extent that exceeds plaintiff's residual functional capacity, and that this deviation was not supported by substantial evidence. [Doc. No. 12-1, at p. 13.] Alternatively, plaintiff argues that school bus monitor is primarily a part-time job, and therefore does not satisfy the step five determination of other gainful work that exists in the national economy. *Id.* Defendant argues that the ALJ appropriately accepted the VE's testimony about the school bus monitor position to fulfill his step five burden. [Doc. No. 15-1, at pp. 13-14.]

The DOT description of school bus monitor requires an ability to deal with people, but it is silent as to how much interaction is required. DICOT 372.667-042, 1991 WL 673102 (1991). It quantifies the requirement of "talking" as "frequently – Exists from 1/3 to 2/3 of the time." *Id.*

Here, the ALJ determined that plaintiff's residual functional capacity includes the ability to "have frequent interaction with coworkers, supervisors, and the general public." [AR 33.] In determining that plaintiff was capable of frequent interaction with the public, the ALJ cited to substantial evidence in the record. First, the ALJ considered the medical

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[12] Notwithstanding that the ALJ's determination that plaintiff can perform other work as a barker or a host is not supported by substantial evidence, as set forth below, the ALJ's ultimate conclusion remains supported that plaintiff can perform the position of a school bus monitor. *See Batson,* 359 F.3d at 1197.

treatment plaintiff received for his mental health condition. The record here indicated that plaintiff received "minimal and conservative treatment consisting of medication management." [AR 34.] The Ninth Circuit has held that evidence of "conservative treatment" is sufficient to discount a claimant's testimony regarding severity of an impairment. *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995). Accordingly, it was reasonable for the ALJ to conclude that plaintiff's allegation of impairment "was greater than expected in light of the objective evidence in the record." [AR 34.]

The medical evidence also indicated that plaintiff was showing improvement in his mental health. Plaintiff "saw a therapist for his depression and took psychotropic medications." *Id.* Furthermore, the medication, plaintiff admitted, "helped." *Id.* As a result, plaintiff showed drastic improvement in GAF score, which measures the severity of mental health disorders. [AR 37.] The ALJ noted that in January 2012, plaintiff had a GAF score of 41, indicating serious symptoms.[13] *Id.* In July 2012, plaintiff's mental health status findings were "unremarkable," and plaintiff was assessed a GAF score of 54, indicating just moderate symptoms.[14] In December 2012, plaintiff was assessed a GAF score of 55, showing improvement. *Id.*

The ALJ also considered plaintiff's testimony regarding his daily activities, which include, *inter alia*, "taking public transportation" and "doing odd jobs in exchange for food and/or money." [AR 34.] Based on plaintiff's "somewhat normal level of daily activity and interaction," the ALJ concluded that "the physical and mental capabilities requisite to performing many of the tasks described above as well as the social interactions replicate those necessary for obtaining and maintaining employment." *Id.*

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[13] The ALJ noted: "A GAF score of 41-50 indicates serious symptoms (e.g. suicidal ideation, sever obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g. no friends, unable to keep a job)." [AR 37 (internal citations omitted).]

[14] The ALJ notes: "A GAF score of 51-60 indicates moderate symptoms (e.g. flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g. new friends, conflicts with peers or co-workers)." *Id.*

During the hearing, the ALJ questioned the VE about the specific requirement of dealing with the general public in connection with the school bus monitor position. [AR 73-76.] Specifically, the VE testified that a hypothetical person with an ability limited to "occasional" dealing with the general public would not be able to perform the job of school bus monitor. *Id.* However, the VE testified that if the hypothetical person's ability was instead limited to "frequent" dealing with the general public, then that person could perform the job of school bus monitor. *Id.* at 76. The VE explicitly considered and testified about the difference between someone who is able to interact with the general public occasionally and someone who is able to interact with the general public frequently in the context of a school bus monitor position. In light of the ALJ's well-reasoned conclusion that plaintiff can have frequent interaction with the public, as set forth above, the Court finds that the ALJ's determination that plaintiff can perform other work as a school bus monitor is supported by substantial evidence.

In connection with plaintiff's second argument that a school bus monitor is primarily a part-time job, plaintiff does not cite any evidence in support of this position. Instead, plaintiff merely cites "common sense." [Doc. No. 12-1, at p. 13.] Plaintiff relies on District Court case, *De La Cruz v. Astrue*, No. 1:08cv0782 DLB, 2009 WL 1530157, at *9 (E.D. Cal. May 28, 2009), in support of the general position that a part-time job does not satisfy the step five determination of other gainful work that exists in the national economy. The court in *De La Cruz* found that although it is unclear in the Ninth Circuit whether part-time work constitutes "other work" at step five, "case law in other circuits as well as Defendant's failure to address the issue, suggest that the identification of part-time work as 'other work' at step five does not meet the Commissioner's burden." *Id.*

Notwithstanding plaintiff's argument and reliance on one unreported case, there are at least three other District Court cases that are more recent than *De La Cruz* that found the position of "school bus monitor" as "other work" in step five is appropriate. *See Sharp v. Colvin*, No. 1:13-CV-02028-BAM, 2015 WL 1274727, at *2 (E.D. Cal. Mar. 19, 2015); *Jones v. Colvin*, No. EDCV 13-01410-MAN, 2015 WL 1266789, at *6-7 (C.D. Cal. Mar.

18, 2015); *Griffin v. Astrue*, No. CV 09-1321-JEM, 2010 WL 3521783, at *7 (C.D. Cal. Sept. 7, 2010). Additionally, arguments based on "common sense" do not overcome the actual language contained in the DOT. *See, e.g., Jones v. Colvin*, No. EDCV 13-0410-MAN, 2015 WL 1266789, at *6 (C.D. Cal. Mar. 18, 2015).

At step five of the analysis, the ALJ is entitled to rely on the DOT's description of the requirements for each listed occupation and on VE testimony about the specific occupations that plaintiff can perform. *Zavalin*, F.3d, 2015 WL 728036, at *3; *see also Osenbrock v. Apfel*, 240 F.3d 1157, 1163 (9th Cir. 2001). Plaintiff cites no binding authority in support of his argument that a school bus monitor is inherently a part-time job or that part-time work is inappropriate to consider in step five. The Court is aware of aware of no legal authority that permits an ALJ to reject VE testimony and the DOT whenever he feels it conflicts with "common sense." Accordingly, the Court finds that the ALJ's determination that plaintiff could perform the occupation of school bus monitor is supported by substantial evidence.

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VI. Conclusion.

Based on the foregoing, this Court concludes that substantial evidence in the Administrative Record supports the ALJ's July 18, 2014 decision that plaintiff did not qualify for disability benefits because he retained the residual functional capacity to do other work that exists in significant numbers in the national economy.

IT IS THEREFORE RECOMMENDED THAT THE DISTRICT COURT:

1. **DENY** plaintiff's Motion for Summary Judgment [Doc. No. 12]; and

2. **GRANT** defendant's Cross-Motion for Summary Judgment [Doc. No. 15].

This Report and Recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1) and Civil Local Rule 72.1(d). Within **fourteen (14) days** after being served with a copy of this Report and Recommendation, "any party may serve and file written objections." 28 U.S.C. § 636(b)(1)(B)&(C). The document should be captioned "Objections to Report and Recommendation." The parties are advised that failure to file objections within this specific time may waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153, 1156–57 (9th Cir.1991).

IT IS SO ORDERED.

Dated: July 17, 2017

Hon. Karen S. Crawford
United States Magistrate Judge