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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SEAN E. MONTGOMERY,
12 Plaintiff,
13 v.
14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,
16 Defendant.
17
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Case No.: 16cv1735 - JLS (PCL)

**REPORT AND
RECOMMENDATION OF U.S.
MAGISTRATE JUDGE RE:**

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT
[Doc. 25]; and**

**DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT
[Doc. 26]**

20
21 **I. INTRODUCTION**

22 Plaintiff Sean E. Montgomery has filed a pro se complaint seeking judicial review
23 of Defendant Social Security commissioner Nancy A. Berryhill's denial of his application
24 for Supplemental Security Income and for Disability Insurance Benefits under the Social
25 Security Act. (Doc. 1.) Plaintiff has filed a Motion for Summary Judgment (Doc. 25), and
26 Defendant filed a Cross-Motion for Summary Judgment and Opposition to Plaintiff's
27 Motion for Summary Judgment (Doc. 26-1.) For the reasons set forth below, the Court
28

1 RECOMMENDS that Plaintiff's motion be DENIED and that Defendant's motion be
2 GRANTED.

3 **II. PROCEDURAL HISTORY**

4 On June 5, 2007, Plaintiff filed an application for Disability Insurance and
5 Supplemental Security Income pursuant to Titles II and XIV of the Social Security Act,
6 alleging bipolar disorder, phobias, depression, paranoia, suicidal thoughts, insomnia, and
7 physical impairments beginning January 1, 1993. (A.R. 256, 322.) Plaintiff's disability
8 onset date was later amended to June 5, 2007. (A.R. 36.) Plaintiff's applications were
9 denied initially and upon reconsideration. (A.R. 126-29.) Thereafter, Plaintiff filed a written
10 request for a hearing. (A.R. 140-50.) An Administrative Law Judge ("ALJ") held a hearing
11 on May 26, 2011. (A.R. 49-113.) On July 6, 2011, the ALJ issued a written decision finding
12 Plaintiff not disabled because he could perform a significant number of jobs in the national
13 economy. (A.R. 32-48.) After considering all the evidence in the record as a whole, the
14 ALJ found:

- 15 1. Plaintiff's disability onset date was amended to June 5, 2007. (A.R. 36.)
- 16 2. Amendment of Plaintiff's disability onset date was appropriate in light of Title XVI
17 eligibility. (A.R. 36.)
- 18 3. Plaintiff had not engaged in substantial gainful activity since the alleged disability
19 onset date of June 5, 2007. (A.R. 36.)
- 20 4. Plaintiff had the following severe impairments: back pain; right elbow, hand, and
21 wrist impairment; nerve damage in the right elbow; gastroesophageal reflux disease
22 ("GERD"); status post right foot fracture; dysthymia or mood disorder NOS; and
23 substance abuse (drugs), by history. (A.R. 36.)
- 24 5. Plaintiff's impairments did not meet or medically equal one of the listed impairments
25 in 20 CFR Part 404, Subpart P, Appendix 1. (A.R. 37.)
- 26 6. Plaintiff retained the residual functional capacity ("RFC") to lift or carry twenty-five
27 pounds frequently and fifty pounds occasionally; stand and/or walk for a total of
28 about six hours out of an eight-hour workday; sit for a total of about six hours out of

1 an eight-hour workday; is restricted to frequent climbing, balancing, stooping,
2 kneeling, crouching, and crawling; and mentally limited to work with no public
3 contact and minimal contact with co-workers. (A.R. 38.)

4 7. Plaintiff has no past relevant work. (A.R. 39.)

5 8. Plaintiff was 41 years old when the application was filed, which is defined as a
6 younger individual age 18-49. (A.R. 39.)

7 9. Plaintiff has a high school education and is able to communicate in English. (A.R.
8 39.)

9 10. Plaintiff's education and training do not permit direct entry into skilled work. (A.R.
10 40.)

11 11. Transferability of job skills is not an issue because Plaintiff does not have past
12 relevant work. (A.R. 40.)

13 12. In light of Plaintiff's age, education, work experience, and residual functional
14 capacity, there are jobs that exist in significant numbers in the national economy that
15 Plaintiff can perform. (A.R. 40.)

16 13. Plaintiff had not been under a disability, as defined in the Social Security Act, from
17 June 5, 2007, through the date of his decision on July 6, 2011. (A.R. 41.)

18 On January 29, 2013, the Appeals Council denied Plaintiff's request to review the ALJ
19 decision, making the ALJ's decision the Commissioner's final decision. (A.R. 26-29.)

20 Plaintiff then filed a federal complaint on July 1, 2016, seeking judicial review of the
21 Commissioner's decision. (Doc. 1.)

22 **III. ADMINISTRATIVE RECORD**

23 A. Psychological Evidence

24 1. Prison and Parole Records

25 Chronological Interdisciplinary Progress Notes ("chronos") from August 9, 2008 to
26 May 8, 2007, detail Plaintiff's treatment while incarcerated before the alleged onset date
27 of Plaintiff's disability. (A.R. 437-63.) These treatment notes contain summaries of brief
28 interactions with Plaintiff on a semi-regular basis. Plaintiff had a consistently moderate

1 treatment plan throughout this time and the records show no significant increase in either
2 treatment frequency or medication. (Id.)

3 Frequently, these treatment notes tie Plaintiff's mood and affect to the prison's
4 efforts to move Plaintiff out of his secure housing unit, where he lived alone, and into
5 housing with a cellmate. (A.R. 442, 447-48, 453-55, 457-63.) Plaintiff indicated that he
6 had a previous experience with a "cellie" where the individual attacked him in his sleep
7 and he had to "beat him down badly" in an effort to defend himself. (A.R. 454.) Plaintiff
8 worried that having to live with a cellie again would create a potential conflict that Plaintiff
9 wanted to avoid given that he already had two strikes and a third would destroy his chances
10 of being released in July, 2007. (Id.) Plaintiff often engaged in hunger strikes as a way of
11 challenging his housing transfer. (A.R. 457-58, 460, 463.)

12 Plaintiff's treatment notes indicate that Plaintiff had bipolar disorder "by history,"
13 however none of the chronos provide an original diagnosis. (A.R. 437-63.) His behavior
14 was always within normal limits and Plaintiff never demonstrated either suicidal or
15 homicidal ideations, however Plaintiff did display a consistent fear of bugs. (Id.) On
16 December 5, 2006, a psych evaluation was requested after staff discovered while reviewing
17 outgoing mail that Plaintiff wrote he was going to commit suicide. (A.R. 453.) Plaintiff
18 reaffirmed the intention over the phone to his sister. (Id.) The clinical psychologist who
19 attended to Plaintiff found him calm, alert, oriented to time, place person and situation, and
20 cooperative. (Id.) Plaintiff told the psychologist that his behavior was an attention seeking
21 device in order to not be moved in with a cellmate. (Id.) During this conversation Plaintiff
22 denied any current suicidal ideation, indicated that he would likely hunger strike, and the
23 psychologist deemed Plaintiff not suicidal. (A.R. 454-55.)

24 Client Episode Profile (Parole) records for Plaintiff detail information relayed
25 following Plaintiff's release from Prison on May 10, 2007. (A.R. 476-87.) Plaintiff
26 indicated he had been incarcerated many times, frequently for burglary and that he had a
27 long history of substance abuse, going back to age fifteen, starting with PCP and later
28 preferring cocaine. (A.R. 481.) Plaintiff indicated that he last used cocaine in 2001. (Id.)

1 Plaintiff also indicated that while in prison he was diagnosed with bipolar disorder and that
2 he was taking Pisperidone, Wellbutrin, and Benadryl for his mood swings. On June 12,
3 2007, Plaintiff described himself as “moody” and reported that his elevated moods are
4 “more up than normal.” (A.R. 485.) The clinician noted that Plaintiff’s description of “up”
5 does not describe mania or hypomania, but rather “just very energetic as compared to when
6 he’s depressed.” (*Id.*) Notes also indicated that Plaintiff was enrolled at City College and
7 hoping to find part-time work. (A.R. 486.)

8 The June 18, 2007 case note indicates Plaintiff has cocaine dependence in remission
9 and the assessment and plan calls for ruling out the possibility of a substance induced mood
10 disorder and malingering of mental illness for secondary gain. (A.R. 481-82.) Plaintiff also
11 provided his class schedule, as he would be missing weekly sessions, instead attending
12 classes full time. (A.R. 481.) Additionally, the clinician noted that “[i]t has been very
13 obvious during the interview that [Plaintiff] was more focused [on] how to get SSI rather
14 than address any mental health issues.” (*Id.*)

15 Parole records from September 2010 indicate that following a twenty-six month
16 period of incarceration, Plaintiff was transient and looking for housing. (A.R. 645-47.)
17 Notes indicate that at this time Plaintiff “denied current mental health symptoms.” (A.R.
18 646.)

19 2. Evaluating and Consulting Physicians

20 Plaintiff’s mental health impairments were evaluated by Luyen T. Luu, M.D., on
21 November 2, 2007. (A.R. 491-501.) Using the SSA’s Psychiatric Review Technique form,
22 Dr. Luu was unable to make a determination of Plaintiff’s disposition because there was
23 insufficient evidence. (A.R. 491.)

24 On August 31, 2010, Dr. K. Loomis, M.D. completed another Psychiatric Review
25 Technique form and determined that Plaintiff’s impairments were not severe. (A.R. 620-
26 30.) Dr. Loomis reviewed Plaintiff’s records to evaluate whether Plaintiff’s impairments
27 met or equaled listing 12.04: Affective Disorder. (A.R. 620.) Dr. Loomis determined that
28 a medically determinable impairment was present that does not precisely satisfy the

1 diagnostic criteria for 12.04. (A.R. 623.) Dr. Loomis, in evaluating Plaintiff's functional
2 limitations, determined that Plaintiff experienced mild limitations in restriction of activities
3 of daily living, difficulties in maintaining social functioning, and difficulties in maintaining
4 concentration, persistence, or pace. (A.R. 628.) Dr. Loomis also noted that Plaintiff had no
5 repeated episodes of decompensation. (Id.)

6 B. Medical Evidence

7 1. Plaintiff's Provided Records

8 Records from a MRI on October 7, 2009, indicate that Plaintiff was diagnosed with
9 minimal multilevel spondylosis but without a focal disc herniation, spinal stenosis, or
10 foraminal narrowing, the cause of his lower back pain. (A.R. 610.) Plaintiff's pain was
11 treated with Neurontin and at an appointment on January 11, 2010, he was also instructed
12 to perform back exercises for ten minutes, twice daily. (A.R. 586.) Plaintiff's records
13 indicate that similar treatment was recommended on February 18, 2010 and March 22,
14 2010. (A.R. 580, 583.) The March 22 note also indicates that Plaintiff was unable to get
15 Tylenol #3 because a policy prohibited prescriptions in excess of ten days. (A.R. 580.) In
16 May 2010, Plaintiff reported that his back pain was well controlled with Neurontin and an
17 over the counter pain reliever (naprosen). (A.R. 575.) The clinician recommended Plaintiff
18 take naprosen thirty to sixty minutes before exercising. (Id.) Plaintiff indicated his pain was
19 a three to five (presumably out of ten) with his current regimen and that he had minimal
20 interference in his functional activities. (Id.)

21 An orthopaedic surgery record from October 9, 2009, shows that Plaintiff was
22 suffering from a ganglion cyst in his right wrist. (A.R. 612.) The record indicates that this
23 was not the first cyst Plaintiff had. (Id.) Because an aspiration would have been dangerous
24 given proximity to the radial artery, the surgeon recommended an excision. (Id.) The cyst
25 was successfully excised on November 12, 2009. (A.R. 590-91.) Plaintiff complained of
26 numbness in his fourth and fifth fingers as a result of the excision at an appointment in
27 January 2010. (A.R. 586.) Plaintiff was still experiencing numbness in February 2010 and
28

1 his doctor recommended Plaintiff wear a wrist splint, which he received in March 2010.
2 (A.R. 583, 586.)

3 The progress note from May 2010 reports that Plaintiff suffered a volar plate fracture
4 of his middle phalanx right middle finger. (A.R. 574, 611.) The note indicates that Plaintiff
5 injured his finger playing basketball two or three months before the May 20 appointment.
6 (Id.)

7 2. Evaluating and Consulting Physicians

8 On November 29, 2010, Plaintiff was examined by Dr. Thomas Sabourin, M.D.,
9 who provided a medical source statement. (A.R. 658-62.) Dr. Sabourin noted that
10 Plaintiff's social history did not include drug use, but that Plaintiff smoked upwards of half
11 a pack of cigarettes a day. (A.R. 659.) The statement indicates that Plaintiff sits and stands
12 with normal posture, without evidence of a tilt or list, and sits comfortably. (Id.) Plaintiff
13 was able to rise from a chair without difficulty and used no assistive device except for the
14 splint on his right wrist. (Id.) Dr. Sabourin noted that while Plaintiff's neck range of motion
15 is normal, he does experience pain with right lateral flexion. Plaintiff demonstrated no
16 tenderness in his neck but did have neck pain with axial loading. (Id.) Additionally,
17 Plaintiff's back range of motion was normal, but he had pain with full flexion. (A.R. 660.)

18 Dr. Sabourin indicated that Plaintiff's range of motion of the wrists was grossly
19 normal and painless. (A.R. 660.) His wrists were without tenderness, warmth, crepitus,
20 instability, or swelling. (Id.) Dr. Sabourin did note that Plaintiff had well-healed volar and
21 dorsal scars on the right wrist, though there was no instability. (Id.) Plaintiff's range of
22 motion was grossly normal and painless in his shoulders, elbows, wrists, hands and fingers,
23 hips, knees, ankles, and feet. (Id.)

24 From his examination, Dr. Sabourin produced the following diagnostic impression:
25 1) Status post excision of right wrist ganglion cyst; 2) Mild irritation of the right
26 antebrachial cutaneous nerve, right arm; 3) Lumbar strain and sprain with minimal
27 degenerative changes on MRI; 4) Status post right foot fifth metatarsal base fracture,
28 healed; and 5) Fracture of the right long finger volar plate at the middle joint, well-healed

1 with full range of motion. (A.R. 661.) Dr. Sabourin indicated that Plaintiff's severity and
2 duration of his complaints is disproportionate to Plaintiff's determinable condition. (A.R.
3 662.) There was no discernable reason why Plaintiff would need to continue using the wrist
4 splint and he displayed no weakness or neurological deficit. (Id.) With regard to Plaintiff's
5 back pain, Dr. Sabourin indicated that Plaintiff has nominal changes on MRI and a full
6 range of motion without neurological deficit or atrophy. (Id.) Dr. Sabourin concluded his
7 discussion by stating that "[i]n general, [Plaintiff] is doing quite well at this time." (Id.)

8 Dr. Sabourin indicated that Plaintiff could lift or carry fifty pounds occasionally and
9 twenty-five pounds frequently; could stand and walk for six hours in an eight-hour workday
10 and could sit for the same amount of time. (A.R. 662.) Plaintiff's push and pull limitations
11 were equal to his lift and carry limitations, and Plaintiff would be able to climb, stoop,
12 kneel, and crouch frequently. Dr. Sabourin indicated that Plaintiff had no manipulative
13 limitations and no need for assistive devices. (Id.)

14 Medical Consultant J. Ross, M.D., completed a Physical RFC Assessment on
15 December 1, 2010. (A.R. 665-70.) In terms of exertional limitations, Plaintiff was limited
16 to occasionally lifting fifty pounds and frequently lifting twenty-five pounds. (A.R. 666.)
17 Plaintiff was limited to standing or walking for six hours in an eight-hour workday and
18 sitting for the same. Like Dr. Sabourin's determination, Dr. Ross limited Plaintiff's ability
19 to push and pull in line with Plaintiff's lift and carry limitations. (Id.) Posturally, Plaintiff
20 was limited to frequently climbing, balancing, stooping, kneeling, crouching, and crawling.
21 (A.R. 667.) Plaintiff's RFC included no manipulative, visual, communicative, or
22 environmental limitations. (A.R. 667-68.)

23 C. Administrative Hearing

24 On May 26, 2011, ALJ Jerry F. Muskrat conducted a hearing to determine Plaintiff's
25 disability claims. (A.R. 49-113.) Plaintiff appeared in person, represented by his partner
26 Mary Edwards. (A.R. 49.) Medical Expert Dr. Kent Layton and Vocational Expert John
27 Koucher also testified. (Id.)

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1 1. Plaintiff's Testimony

2 Plaintiff testified that he was forty-five years old, obtained his GED, and had no
3 vocational training. (A.R. 77-78.) Plaintiff testified that he has been incarcerated “off and
4 on.” (A.R. 79.) Plaintiff supported himself through food stamps, as he has not been
5 working. (A.R. 80.) Plaintiff also testified that he had been incarcerated for a time since
6 the alleged onset date of his disability, from December 2007 to September 2010. (Id.)

7 Plaintiff testified that in terms of mental health, he suffers from bipolar disorder,
8 phobia, depression, paranoia, suicidal ideation, schizoaffective disorder, and obsessive
9 compulsive disorder. (A.R. 83.) Additionally, Plaintiff indicated he has nerve damage to
10 his right elbow and wrist, back pain, and is supposed to use a cane as a result of his once-
11 broken right foot. (Id.) Plaintiff testified that although the break was in 2005, he still
12 experienced “real bad” pain. (A.R. 83-84.) Plaintiff testified that he attempted suicide in
13 February 2010 by hanging himself with a bed sheet while in prison. (A.R. 85.) He indicated
14 that his OCD leads him to repeatedly clean something “to make sure it’s clean.” (A.R. 86-
15 87.) Plaintiff testified that he was taking Klonopin for OCD, Risperdal to treat his
16 schizophrenia and bipolar disorder, Mapap for the pain in his hand, arm, and back, and
17 Prilosec for acid reflux. (A.R. 66-67, 71-74.)

18 When given the opportunity to supplement Plaintiff’s testimony, Ms. Edwards
19 indicated that Plaintiff is “very suicidal.” (A.R. 88.) Ms. Edwards also indicated that
20 Plaintiff was unable to be around people or talk to others, and that “he’ll have outbreaks
21 where if you bother him too much, then he may try to harm you.” (Id.)

22 2. Medical Expert Testimony

23 Clinical Psychologist Dr. Kent Layton, Psy.D., testified regarding his analysis of the
24 medical and psychological evidence. (A.R. 90-103.) Dr. Layton indicated that Plaintiff
25 likely suffered from substance addiction disorder and that any hallucinations Plaintiff
26 experienced are likely “a result of the large amount of amphetamines, crystal meth, [and]
27 cocaine that [Plaintiff] used.” (A.R. 91.) With respect to Plaintiff’s claims of bipolar
28 disorder, Dr. Layton pointed out that none of the evidence establishes that Plaintiff has ever

1 suffered a manic episode and therefore indicated that Plaintiff is not bipolar. (A.R. 92.) Dr.
2 Layton testified that substance addiction disorder was likely the cause of Plaintiff's
3 depression. (Id.)

4 Dr. Layton thoroughly reviewed Plaintiff's records and highlighted that at one point
5 Plaintiff seemed more focused on how to get SSI benefits than committed to his treatment.
6 (A.R. 92.) Also highlighted was the fact that after the alleged onset date of his disability,
7 Plaintiff was being excused from mental health meetings so he could go to school. (Id.) Dr.
8 Layton indicated that when looked at as a whole, the evidence shows that Plaintiff has some
9 OCD traits, but not the disorder. (A.R. 93.)

10 Dr. Layton, with the help of the Social Security Administration's psychiatric review
11 technique form, analyzed Plaintiff's impairments under listing 12.09 (substance addiction
12 disorder) and 12.04 (affective disorder). (A.R. 94-95.) With respect to 12.04, Dr. Layton
13 testified that Plaintiff exhibited, to some extent, psychomotor agitation, problems with
14 concentrating or thinking, thoughts of suicide, delusions or paranoid thinking,
15 hyperactivity, and easy distractibility. (A.R. 96.) Dr. Layton indicated that with respect to
16 degree of limitation due to both 12.04 and 12.09, Plaintiff experienced a mild restriction of
17 activities of daily living, moderate difficulty maintaining social functioning, moderate
18 difficulty with maintaining concentration, persistence, and pace, and rare and brief
19 episodes of decompensation that are not severe enough to result in a loss of adaptive
20 functioning. (A.R. 97-98.) When asked if, in his expert opinion, Plaintiff's impairments
21 meet a listing, Dr. Layton testified that he did not. (A.R. 98.)

22 Addressing Plaintiff's capacity to perform work functions, Dr. Layton testified that
23 Plaintiff can have simple or complex tasks, minimum interaction with either the public or
24 co-workers, and should have no problem with supervisors. (A.R. 98-99.) Dr. Layton also
25 testified that should Plaintiff be found disabled, his condition would likely stabilize and
26 improve with consistent medical treatment over the following eighteen months. (A.R. 99-
27 100.)

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1 3. Vocational Expert Testimony

2 Vocational expert John Koucher determined that Plaintiff had no past relevant work.
3 (A.R. 104-106.) The ALJ proposed the following hypothetical to Mr. Koucher: a
4 hypothetical individual limited to medium range work with postural limitations limiting
5 him to frequent climbing, balancing, stooping, and crouching or crawling and mental
6 limitations requiring him to work in a non-public environment with minimal contact with
7 co-workers, has a high school education, no past relevant work, and is categorized as a
8 younger individual. Mr. Koucher indicated that based solely on the exertional limitations
9 as proposed, the hypothetical calls for a finding of not disabled. (A.R. 107.) Mr. Koucher
10 also indicated that despite the slight erosion effect of the hypothetical’s non-exertional
11 limitations, there were a significant number of jobs that the hypothetical individual could
12 perform including a hand packager, cleaner, and laundry worker. (A.R. 107-109.)

13 Ms. Edwards countered Mr. Koucher’s testimony by asserting that Plaintiff would
14 be unable to be a packager because Plaintiff’s “is like completely gone.” (A.R. 110-11.)
15 Similarly, Ms. Edwards argued that Plaintiff would be unable to work as a laundry worker
16 because he was unable to lift.” (A.R. 111.)

17 **IV. ALJ DECISION**

18 The ALJ sought to determine whether Plaintiff was disabled under sections 216(i),
19 223(d) and 1614(a)(3)(A) of the Social Security Act. (A.R. 35.) The ALJ ruled that Plaintiff
20 was not disabled as defined by the Act from June 5, 2007 through the date of his decision
21 on July 6, 2011. (A.R. 32, 41.)

22 The ALJ conducted the five-step disability analysis set forth in 20 C.F.R. §§
23 404.1520(a)(4), 416.920(a)(4). (A.R. 32-48.) At step one, the ALJ found that Plaintiff’s
24 alleged disability onset date needed to be adjusted to June 5, 2007, and that Plaintiff had
25 not engaged in substantial gainful activity since that date. (A.R. 36.) At step two, the ALJ
26 found that Plaintiff had severe impairments of back pain; right elbow, hand and wrist
27 impairment; nerve damage in the right elbow; GERD; status post right foot fracture;
28 dysthymia or mood disorder NOS; and substance abuse (drugs), by history. (Id.) At step

1 three, the ALJ determined that none of Plaintiff's impairments or combination of
2 impairments met or equaled any impairment listed in 20 CFR, Part 404, Subpt. P, App. 1
3 (the Listings). (A.R. 37.) The ALJ next determined that Plaintiff retained the RFC to lift or
4 carry twenty-five pounds frequently and fifty pounds occasionally; stand and/or walk for a
5 total of about six hours in an eight-hour workday; sit for a total of about six hours in an
6 eight-hour workday; is restricted to frequent climbing, balancing, stooping, kneeling,
7 crouching, and crawling; and mentally limited to work with no public contact and minimal
8 contact with co-workers. (A.R. 38.) The ALJ found that Plaintiff's subjective symptom
9 testimony was not fully credible. (Id.) At step four, the ALJ found that Plaintiff is unable
10 to perform any past relevant work. (Id.) Finally, at step five the ALJ found that considering
11 Plaintiff's age, education, work experience, and RFC, jobs existed in significant numbers
12 in the national economy that Plaintiff was capable of performing. (A.R. 40.) As a result of
13 the five-step analysis, the ALJ concluded that Plaintiff was not disabled as defined by the
14 Act. (A.R. 41.)

15 The ALJ weighed the evidence in Plaintiff's case as follows. The ALJ summarized
16 Plaintiff's diagnoses from the medical record including chronic back pain, GERD, a
17 ganglion cyst with decreased digit sensitivity following excision, irritation of the right
18 arm's right antebrachial cutaneous nerve, post-right foot fracture, drug abuse history, and
19 mood disorder NOS. (A.R. 36.) At the administrative hearing, Kent Layton, Psy.D. testified
20 that Plaintiff suffered from dysthymia or mood disorder NOS and a history of drug abuse.
21 Dr. Layton testified that the medical record showed evidence that Plaintiff's mood disorder
22 was manifested as a depressive syndrome characterized by "psychomotor agitation,
23 difficulty concentrating or thinking; thoughts of suicide; delusions or paranoid thinking as
24 well as manic syndrome characterized by hyperactivity and easy distractibility." (A.R. 37.)
25 The ALJ indicated that both he and the medical evidence as a whole concur with Dr.
26 Layton's mood disorder and drug abuse diagnoses and as such, the ALJ adopted Dr.
27 Layton's analysis. (Id.)
28

1 In determining that Plaintiff's medically determinable impairments do not meet or
2 medically equal a listing, the ALJ discussed and analyzed both the medical expert
3 testimony and Plaintiff's medical evidence. (A.R. 37-39.) First, the ALJ noted that while
4 Plaintiff's mental impairments resulted in mild restrictions of the activities of daily living,
5 moderate difficulties in maintaining social functioning, moderate difficulties in
6 maintaining concentration, persistence, or pace, there were no episodes of decompensation.
7 (A.R. 37.) The ALJ indicated that the medical evidence did not establish the presence of
8 any "C" criteria of the Listings. (Id.)

9 In making his RFC determination, the ALJ considered all symptoms and the extent
10 to which the symptoms were consistent with the objective medical and opinion evidence.
11 (A.R. 38.) The ALJ found that Plaintiff's medically determinable impairments could
12 reasonably be expected to cause the alleged symptoms but that Plaintiff's statements
13 concerning the intensity, persistence and limiting effects of the symptoms were not fully
14 credible. (Id.) The ALJ indicated that Plaintiff had been diagnosed with "rule out
15 malingering of mental illness for secondary gain" and that he had not been compliant with
16 his prescribed treatment protocol. (Id.) Further, the ALJ noted that Plaintiff was enrolled
17 in and attending City College courses for music production five days a week during the
18 alleged onset of his disability. (Id.) The ALJ also noted that in April 2008 Plaintiff told the
19 consulting psychologist that he did not have an alcohol or drug problem, while throughout
20 the rest of the record Plaintiff has spoken "volumes about his longstanding drug abuse since
21 age 15." (Id.)

22 The ALJ discussed the severity and intensity of Plaintiff's medical treatment and
23 indicated that the course of Plaintiff's treatment has been generally conservative despite
24 claims that Plaintiff is totally disabled. (A.R. 39.) The medical evidence, as summarized
25 by the ALJ, indicates that Plaintiff does not require any special accommodation to relieve
26 pain or other symptoms and that despite Plaintiff's claims of disabling fatigue and
27 weakness, Plaintiff does not exhibit significant atrophy, loss of strength, or difficulty
28 moving that would be demonstrative of severe and disabling pain. (Id.) Further, the ALJ

1 reported that the objective evidence establishes that the prescribed medication has been
2 effective in controlling Plaintiff's symptoms and that he has not alleged any side effects
3 from the medication. (Id.)

4 In summarizing the medical evidence, the ALJ noted that there was no evidence of
5 loss of weight or appetite due to pain or depression. (A.R. 39.) Similarly, there is no
6 evidence of sleep deprivation or cognitive deficits due to pain or depression. (Id.)
7 Ultimately, the ALJ reasoned that Plaintiff's claims of significant limitations are not
8 supported by Plaintiff's own description of his daily activities noting that Plaintiff is able
9 to cook, clean, shop, and do errands. (Id.)

10 Last, the ALJ noted that within the medical evidence, no physician has indicated that
11 Plaintiff is totally disabled and precluded from all work and that Dr. Sabourin indicated
12 Plaintiff was capable of performing medium exertional work with frequent postural
13 limitations. (A.R. 39.)

14 **V. STANDARD OF REVIEW**

15 To qualify for disability benefits under the Social Security Act, an applicant must
16 show that: (1) he suffers from a medically determinable impairment that can be expected
17 to result in death or that has lasted or can be expected to last for a continuous period of
18 twelve months or more, and (2) the impairment renders the applicant incapable of
19 performing the work that he previously performed or any other substantially gainful
20 employment that exists in the national economy. See 42 U.S.C.A. § 423 (d)(1)(A) (West
21 2004). An applicant must meet both requirements to be "disabled." Id.

22 A. Sequential Evaluation of Impairments

23 The Social Security Regulations outline a five-step process to determine whether an
24 applicant is "disabled." The five steps are as follows: (1) Whether the claimant is presently
25 working in any substantial gainful activity. If so, the claimant is not disabled. If not, the
26 evaluation proceeds to step two. (2) Whether the claimant's impairment is severe. If not,
27 the claimant is not disabled. If so, the evaluation proceeds to step three. (3) Whether the
28 impairment meets or equals a specific impairment listed in the Listing of Impairments. If

1 so, the claimant is disabled. If not, the evaluation proceeds to step four. (4) Whether the
2 claimant is able to do any work he has done in the past. If so, the claimant is not disabled.
3 If not, the evaluation proceeds to step five. (5) Whether the claimant is able to do any other
4 work. If not, the claimant is disabled. Conversely, if the Commissioner can establish there
5 are a significant number of jobs in the national economy that the claimant can do, the
6 claimant is not disabled. 20 CFR § 404.1520; see also Tackett v. Apfel, 180 F. 3d 1094,
7 1098-99 (9th Cir. 1999).

8 B. Judicial Review

9 Sections 206(g) and 1631(c)(3) of the Social Security Act allow unsuccessful
10 applicants to seek judicial review of the Commissioner’s final agency decision. 42 U.S.C.A
11 §§ 405(g), 1383(c)(3). The scope of judicial review is limited. The Commissioner’s final
12 decision should not be disturbed unless: (1) the ALJ’s findings are based on legal error or
13 (2) are not supported by substantial evidence in the record as a whole. Schneider v. Comm’r
14 of Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000). Substantial evidence means “more
15 than a mere scintilla but less than a preponderance; it is such relevant evidence as a
16 reasonable mind might accept as adequate to support a conclusion.” Andrews v. Shalala,
17 53 F.3d 1035, 1039 (9th Cir. 2001); Desroisers v. Sec’y of Health & Human Servs., 846
18 F.2d 573, 576 (9th Cir. 1988). “The ALJ is responsible for determining credibility,
19 resolving conflicts in medical testimony, and for resolving ambiguities.” Vasquez v.
20 Astrue, 547 F.3d 1101, 1104 (9th Cir. 2008) (quoting Andrews, 53 F.3d at 1039). Where
21 the evidence is susceptible to more than one rational interpretation, the ALJ’s decision must
22 be affirmed. Id. (citation and quotations omitted). “A decision of the ALJ will not be
23 reversed for errors that are harmless.” Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

24 Section 405(g) permits this Court to enter a judgment affirming, modifying, or
25 reversing the Commissioner’s decision. 42 U.S.C.A §405(g). This matter may also be
26 remanded to the Social Security Administration for further proceedings. Id.

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1 **VI. DISCUSSION**

2 Plaintiff argues that he “meets and exceeds” the requirements to be awarded SSI
3 benefits. (Doc. 25 at 2.) To support his contention, Plaintiff relies on the Americans with
4 Disabilities Act (“ADA”) and the California State Prisoner’s Handbook. (Id. at 6.) Plaintiff
5 does not contend that the ALJ made specific errors with regard to Plaintiff’s credibility,
6 evaluating the medical record, or weight given to the examining or consulting medical
7 experts. (Doc. 25.) Defendant argues that neither the ADA nor Prisoner’s Handbook are
8 applicable as the Social Security Act has its own definition of disabled which is to be used
9 to determine eligibility for benefits. (Doc. 26-1 at 4.)

10 “For purposes of the Social Security Act, a claimant is disabled if the claimant is
11 unable ‘to engage in any substantial gainful activity by reason of any medically
12 determinable physical or mental impairment which can be expected to result in death or
13 which has lasted or can be expected to last for a continuous period of not less than 12
14 months.’” Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012) citing 42 U.S.C. §
15 423(d)(1)(A). It is the providence of the ALJ to apply this standard to the medical evidence
16 and where substantial evidence supports the ALJ’s determination, there is no error.
17 Schneider, 223 F.3d at 973.

18 Here, there is substantial medical evidence in the record to support the legal
19 conclusion that Plaintiff is not disabled within the meaning of the Act. At no point in any
20 of the medical evidence did a physician or psychologist indicate that Plaintiff was disabled
21 and precluded from working. In fact, treating clinicians and doctors as well as the
22 examining and consulting physicians all indicated that Plaintiff’s impairments are mild and
23 pose the most modest of limitations on Plaintiff’s RFC. Medical experts determined that
24 Plaintiff did not suffer from bipolar disorder as he claimed and additionally found that
25 overall, Plaintiff’s subjective complaints were disproportionate to the realities of his
26 impairments.

27 To the extent that the ALJ was required to identify and weigh the evidence in the
28 record, the ALJ noted that the evidence showed a conservative course of treatment that did

1 not become more intense to meet Plaintiff's claims of increased impairment. (A.R. 38-39.)
2 Plaintiff received instructions to exercise his back to alleviate symptoms and the medical
3 expert testified that Plaintiff's impairments were expected to improve with consistent
4 treatment. Additionally, the medication recommended to Plaintiff for his impairments,
5 such as naprosen, is a low-level over the counter drug. Were Plaintiff's back and arm
6 impairments as significant as claimed, one would expect the record to reflect a more
7 advanced course of treatment. While Plaintiff did have surgery on his wrist for a cyst
8 excision, the examining physician indicated that Plaintiff was fully healed from surgery
9 and no longer needed to wear a wrist splint.

10 Additionally, after reviewing the entire medical record, there is more than substantial
11 evidence present to determine that Plaintiff is not disabled and totally precluded from all
12 work. Along with the fact that no medical staff determined that Plaintiff was disabled,
13 Plaintiff's own behavior indicates that Plaintiff has the capacity to work. First, the record
14 indicates that Plaintiff was, after the disability onset date, attending City College as a full
15 time student studying music production. Second, Plaintiff injured himself playing
16 basketball. Plaintiff claims that his physical and mental impairments prevent him from
17 working, but surely those same impairments would prevent him from full time coursework
18 and recreation. At the very least, this establishes that Plaintiff's activities of daily living
19 are not impacted by Plaintiff's impairments. This evidence also runs counter to Ms.
20 Edwards' assertions at the hearing with respect to Plaintiff's ability to work with others.
21 Coursework and basketball are both activities that generally include interactions with
22 others. It is unlikely that Plaintiff was taking his full-time coursework alone, so the
23 assumption is that Plaintiff would have to engage with others fairly regularly, and
24 successfully, if he was to continue in his studies.

25 The medical record as a whole, including the records, reports from examining and
26 consulting physicians, and expert testimony; when evaluated through the lens of the
27 standard for determining disability, reveals that Plaintiff does not meet the definition of
28 disabled as defined by the Social Security Act. This is strengthened by both the record and

1 testimony that indicates Plaintiff displayed more focus on obtaining SSI benefits than
2 improving his mental health impairments and the likelihood that he was malingering for
3 secondary gain. As such, the ALJ's determination is supported by substantial evidence and
4 there is no error.

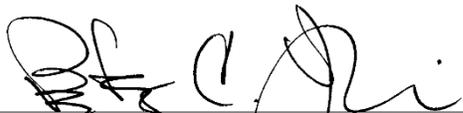
5 **VII. CONCLUSION**

6 For the reasons set forth above, the Court recommends granting Defendant's Motion
7 for Summary Judgment and denying Plaintiff's Motion for Summary Judgment.

8 This report and recommendation is submitted to the Honorable Janis L. Sammartino
9 pursuant to 28 U.S.C. § 636(b)(1). Any party may file written objections with the Court
10 and serve a copy on all parties on or before **July 12, 2017**. The document should be
11 captioned "Objections to Report and Recommendation." Any reply to the objections shall
12 be served and filed on or before **July 26, 2017**. The parties are advised that failure to file
13 objections within the specific time may waive the right to appeal the district court's order.
14 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 **IT IS SO ORDERED.**

16 Dated: June 27, 2017

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18 Hon. Peter C. Lewis
19 United States Magistrate Judge
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