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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RAY P. SIMS,

Plaintiff,

vs.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.¹

Case No.: 16-cv-02237-WQH-JMA

**REPORT & RECOMMENDATION
OF UNITED STATES
MAGISTRATE JUDGE RE
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
DEFENDANT’S CROSS-MOTION
FOR SUMMARY JUDGMENT
[ECF Nos. 15, 16]**

Plaintiff Ray P. Sims (“Plaintiff”) seeks judicial review of Defendant Social Security Commissioner Nancy A. Berryhill’s (“Defendant”) determination that he is not entitled to disability insurance benefits (“DIB”) and supplemental security income (“SSI”). The parties have filed cross-motions for summary judgment. [ECF Nos. 15, 16.] For the reasons set forth below, the Court recommends Plaintiff’s motion for summary judgment be **DENIED** and Defendant’s cross-

¹ Nancy A. Berryhill, the new Acting Commissioner of Social Security, is substituted as the Defendant in this suit pursuant to Federal Rule of Civil Procedure 25(d).

1 motion for summary judgment be **GRANTED**.

2 **I. BACKGROUND**

3 Plaintiff Ray P. Sims was born on June 16, 1969 and is a high school
4 graduate. (Admin. R. at 198, 220.) Until January 10, 2012, the alleged onset
5 date, Plaintiff worked as a home inspector. (Id. at 53, 221.) Plaintiff stopped
6 working in January 2012 due to an aortic dissection that was caused by blunt
7 force trauma from a physical altercation. (Id. at 54.)

8 On March 5, 2012, Plaintiff filed an application for a period of disability and
9 disability insurance benefits. (Id. at 71.) On March 6, 2012, Plaintiff protectively
10 filed an application for supplemental security income. (Id. at 28, 78.) In both
11 applications, Plaintiff alleged a disability onset date of January 10, 2012. (Id. at
12 71, 78, 196-201.) The Social Security Administration (“SSA”) denied the claim
13 initially on June 20, 2012 and again upon reconsideration on July 10, 2013. (Id.
14 at 114-17, 122-27.) On July 31, 2013, Plaintiff filed a written request for an
15 administrative hearing. (Id. at 128-29.) On November 14, 2014, a hearing was
16 conducted by Administrative Law Judge (“ALJ”) Keith Dietterle, who determined
17 on January 5, 2015 that Plaintiff was not disabled within the meaning of the
18 Social Security Act. (Id. at 28-42.) On February 8, 2015, Plaintiff requested a
19 review of the ALJ’s decision. (Id. at 23.) The Appeals Council for the SSA
20 denied Plaintiff’s request for review on July 5, 2016. (Id. at 1-7.) Plaintiff then
21 commenced this action pursuant to 42 U.S.C. § 405(g). Plaintiff raises only one
22 issue: that the ALJ failed to properly consider Plaintiff’s memory loss in
23 assessing Plaintiff’s ability to work.

24 **II. MEDICAL EVIDENCE**

25 **A. Sharp Grossmont Hospital (January 2012)**

26 On January 9, 2012, Plaintiff presented to Sharp Grossmont Hospital
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1 with unprovoked chest pain. (Id.) He was found to have a type A dissecting
2 aortic aneurysm. (Id.) He was then admitted to the Intensive Care Unit
3 (“ICU”) and underwent surgical intervention by Dr. Yuan Lin the same day.
4 (Id. at 291.) After surgery, Plaintiff had a prolonged postoperative ICU
5 course due to hypoxemia, which was the apparent result of chronic
6 marijuana use. (Id.) Once this was resolved, Plaintiff underwent physical
7 therapy and rehabilitation. (Id.) Plaintiff was discharged on January 19,
8 2012 with a number of medications: Coreg 25mg, Lisinopril 20mg, Lipitor
9 40mg, Enteric-coated aspirin 81mg, and Norvasc 10 mg. (Id.) After being
10 discharged from the ICU, and undergoing further physical therapy, Plaintiff
11 consequently regained his function and was again able to ambulate
12 normally. (Id.)

13 **B. Indian Health Council (February 2012 – August 2012)**

14 On February 3, 2012, Plaintiff presented to Dr. Charlene Tobin at
15 Southern Indian Health Council. (Id. at 524.) Plaintiff complained of
16 weakness, dizziness, sleeplessness due to medication, and discomfort
17 from the aortic dissection surgery, and that his C Pap machine for sleep
18 apnea had been stolen. (See Id. at 524-25.) Dr. Tobin noted that Plaintiff
19 was a pleasant man with a slight slur to his speech. (Id. at 525.) She
20 found Plaintiff to have the following ailments: 1) aortic dissection with
21 clinical death for 20 minutes and surgery; in a coma for 7 days, 2) brain
22 injury from the coma resulting in some slurred speech, 3) anemia from
23 blood loss in surgery, 4) fatigue, 5) sleep apnea with need for C Pap
24 machine, and 6) elevated blood sugar. (Id. at 525-26.) Over the following
25 months, he was treated for these ailments at this facility. (See Id. at 521-
26 541.)

1 **C. Albert Sharf, M.D. (May 2012 – July 2014)**

2 On October 16, 2012, Plaintiff presented to Dr. Albert Sharf
3 complaining of chest pain lasting 15-20 minutes and palpitations lasting five
4 minutes. (Id. at 554.) Plaintiff also complained of dizziness, occasional
5 claudication, and trouble remembering things. (Id.) Dr. Sharf diagnosed
6 Plaintiff with “unspecified hypertensive heart disease without heart failure.”
7 (Id. at 555.) On March 12, 2013, Plaintiff presented to Dr. Sharf
8 complaining of tunnel vision with lighting flashes and dizziness for the last
9 month. (Id. at 556.) He denied any chest pain, though he did complain of
10 “chest pressure” similar to cramping. (Id. at 556, 591.) Dr. Sharf’s
11 diagnosis remained the same and he put in an urgent referral to
12 ophthalmology (Id.) On June 18, 2013, Plaintiff presented to Dr. Sharf
13 complaining of mild palpitations about once per day. (Id. at 589.) Plaintiff
14 denied any chest pain, but said he suffered from dizziness with sudden
15 movements. (Id.) Dr. Sharf added “other acute and subacute forms of
16 ischemic heart disease” to Plaintiff’s diagnosis. (Id. at 589.) On July 8,
17 2013, Plaintiff again presented to Dr. Sharf, stating that his palpitations had
18 improved. (Id. at 587.) He denied any chest pain, dizziness or
19 claudication. (Id.) Dr. Sharf’s diagnosis remained the same through
20 November 2013. (Id.)

21 On February 24, 2014, Plaintiff underwent the following procedures at
22 Alvarado Hospital: (1) selective coronary arteriography, (2) left
23 ventriculography, and (3) thoracic and abdominal aortography. (Id. at 640.)
24 The procedures were successful. (See id. at 640-41.) The post-operative
25 plan consisted of long acting nitrates to be added to his medical regimen.
26 (Id. at 641.) Contrary to many of Plaintiff’s other medical histories, during
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1 pre-op, Plaintiff stated that he was a regular marijuana user. (Id. at 642.)

2 On May 20, 2014, Plaintiff presented to Dr. Sharf for a cardiovascular
3 exam, complaining of chest pressure, numbness of both legs at night,
4 claudication, a hernia that he recently noticed, dyspnea on exertion,
5 palpitations in the morning, and edema. (Id. at 638.) Dr. Sharf's diagnosis
6 again was unspecified hypertensive heart disease without heart failure, and
7 other acute and subacute forms of ischemic heart disease. (Id. at 639.)
8 Plaintiff's medications as of this visit included: Lisinopril, aspirin, nitrostat,
9 and carvedilol. (Id.)

10 On July 29, 2014, Dr. Sharf completed a Residual Functional
11 Capacity ("RFC") Questionnaire for Plaintiff, in which he described
12 Plaintiff's diagnoses as: aortic dissection, hypertension, and chest pain.
13 (Id. at 650.) There was no diagnosis of any mental impairments. (Id.) Dr.
14 Sharf identified Plaintiff's symptoms as: chest pain, angina, shortness of
15 breath, fatigue, weakness, edema, nausea, palpitations, dizziness, and
16 sweatiness, and indicated these symptoms were brought on by stress. (Id.
17 at 650-51.) Dr. Sharf indicated that Plaintiff had marked limitations of
18 physical activity and was incapable of even "low stress" jobs due to his
19 aortic dissection. (Id. at 651.) Dr. Sharf also found that Plaintiff's physical
20 symptoms led to emotional difficulties including depression, which in turn
21 contributed to the severity to Plaintiff's subjective symptoms and functional
22 limitations. (Id.)

23 Dr. Sharf opined that during a typical work day, Plaintiff's cardiac
24 symptoms were constantly (meaning more than 66% of an 8-hour workday)
25 severe enough to interfere with attention and concentration needed to
26 perform even simple work tasks. (Id.) Dr. Sharf indicated the following with
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1 respect to Plaintiff's functional limitations in a competitive work situation:
2 (a) He was unable to walk even one city block without rest or severe pain,
3 (b) he could not sit even two hours in an 8-hour workday and could not
4 stand/walk for two hours in an 8-hour workday, (c) he needed a job that
5 permitted shifting positions from sitting to standing at will, (d) he would
6 need to take unscheduled breaks during an 8-hour workday, (e) he could
7 never lift even weights less than 10 lbs, (f) he could never twist, stoop,
8 crouch, climb ladders, or climb stairs, and (g) he needed to avoid all
9 exposure to extreme cold, extreme heat, high humidity, wetness, cigarette
10 smoke, perfumes, soldering fluxes, solvents/cleaners, fumes/odors, dust,
11 and chemicals. (Id. at 652-53.) Dr. Sharf estimated that Plaintiff would
12 likely be absent for more than four days per month due to his impairments
13 and noted he was "unable to work." (Id.)

14 **D. Amy L. Kanner, M.D., Examining Physician (May 2013)**

15 Plaintiff presented to Dr. Amy Kanner for an internal medicine
16 examination on May 13, 2013. (Id. at 558.) He complained of chest pain,
17 shortness of breath, hypertension, eye problems, and abdominal aortic
18 dissection. (Id.) Dr. Kanner observed Plaintiff to be a well-developed, well-
19 nourished, obese male in no acute distress. (Id. at 560.) She observed
20 Plaintiff to have no problem getting in and out of a chair and noted no
21 apparent ataxia or dyspnea. (Id.) Dr. Kanner conducted a full physical
22 examination, which resulted in mostly normal findings. (See id. at 560-64.)
23 Her functional assessment was that Plaintiff could lift and carry 20 pounds
24 occasionally and 10 pounds frequently, could stand or walk for 6 hours of
25 an 8 hour work day, and could sit for 6 hours of an 8 hour work day. (Id. at
26 564.) Dr. Kanner believed Plaintiff's limitations were due to his history of
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1 abdominal aortic dissection. (Id.)

2 **E. Gitane Patel, M.D., Ophthalmologist (May 2013)**

3 Plaintiff presented to ophthalmologist Dr. Gitane Patel for an eye
4 examination on May 20, 2013. (Id. at 571.) Dr. Patel found that Plaintiff
5 had 20/20 visual acuity in both eyes. (Id.) Dr. Patel suggested that his
6 visual disturbances were likely the result of migraine headaches and
7 recommended evaluation by a neurologist. (Id. at 572.)

8 **F. Dan Whitehead, Ph.D. (April 2013 – June 2013)**

9 Plaintiff presented to Dr. Dan Whitehead for a mental status
10 evaluation on June 17, 2013. (Id. at 578.) Plaintiff told Dr. Whitehead that
11 the reason for his social security claim was because he had an aortic
12 dissection and because his “memory is shot.” (Id.) Dr. Whitehead
13 extracted a brief history from Plaintiff, and then conducted a mental status
14 evaluation and various psychological and neuropsychological tests. (See
15 id. at 578-83.)

16 Plaintiff was fully alert and coherent during the evaluation and was
17 oriented to time, space, place, person, and situation. (Id. at 580.) Plaintiff
18 demonstrated a good ability to remember recent events and circumstances
19 in his life. (Id.) Plaintiff appeared neat and clean, well groomed and
20 presentable. (Id.) He was able to perform “Serial 7’s” (a concentration
21 test) at a good ability level. (Id.) Motor activity, speech, mood, and affect
22 were all within normal levels. (Id.) Plaintiff was able to spell WORLD
23 correctly backwards and forwards, was able to perform basic
24 addition/subtraction and multiplication/division in his head, and was able to
25 identify similarities between items. (Id.) Plaintiff did not have any issues
26 with comprehension of test instructions. (Id. at 581.) He did not show any
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1 signs of problems with his thought processes. (Id.)

2 The Trails A&B test conducted by Dr. Whitehead indicated no
3 impairment. (Id.) On the Wechsler Memory Scales-4 test, Plaintiff had an
4 immediate memory index score of 75 (5th percentile, borderline), a delayed
5 memory score of 80 (9th percentile, low average), an auditory memory
6 score of 81 (10th percentile, low average), and a visual memory score of 79
7 (8th percentile, borderline). (Id.)

8 Dr. Whitehead made the following assessment of Plaintiff based on
9 his psychological testing and mental evaluation:

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11 Based on the memory and cognitive abilities
12 demonstrated by the claimant during this evaluation, he
13 seems capable of performing a variety of work activities
14 that require simple tasks at a constant level of
15 performance. Persons with intelligence and memory
16 functions in the borderline range and above are typically
17 able to perform a wide variety of simple work functions of
a constant nature, as long as there are no other major
problems or concerns.

18 (Id. at 582.)

19 **G. Centro Medico (March 2012 – August 2013)**

20 Between March 2012 and August 2013, Plaintiff presented to Centro
21 Medico a number of times. (See id. at 622-35.) These visits were made in
22 order to obtain ophthalmologist, cardiologist, and dental referrals, as well
23 as x-rays. (See id.)

24 **H. Neighborhood Healthcare (July 2014 – September 2014)**

25 On July 16, 2014, Plaintiff presented to Dr. Nathan McFarland at
26 Neighborhood Healthcare regarding his hernia. (Id. at 664.) Plaintiff reported
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1 no feelings of depression. (Id.) He did, however, report daily knee pain and
2 occasional swelling in his right knee, along with migraines, heartburn, and
3 hypertension. (Id.) After examining Plaintiff, Dr. McFarland made the following
4 assessments: (1) hypertension, (2) aortic dissection, (3) right knee meniscal
5 tear, (4) epigastric hernia, and (5) atypical mole. (Id. at 665-66.) On August 21,
6 2014, Plaintiff again presented to Dr. McFarland for a follow-up on labs. (Id. at
7 658.) Plaintiff complained of anxiety since his surgery and consequently, Dr.
8 McFarland added anxiety to his assessment of Plaintiff. (Id. at 658, 661.)

9 On September 19, 2014, Plaintiff presented to social worker Enzo Arya for
10 a behavioral follow-up for depression and anxiety. (Id. at 671.) Plaintiff
11 reported depressed mood more days than not, constant fatigue, difficulty
12 concentrating, irritability and anger, excessive worrying, anxiety, and inability to
13 feel pleasure. (Id. at 671.) Arya performed a mental examination of Plaintiff
14 and made the following assessments: (1) major depressive disorder, recurrent
15 episode, moderate and (2) anxiety disorder due to medical condition. (Id. at
16 671-72.)

17 **III. THE ADMINISTRATIVE HEARING**

18 The ALJ conducted an administrative hearing on November 14, 2014.
19 (Id. at 48-70.)

20 **A. Plaintiff's Testimony**

21 Plaintiff testified that until January 2012, he had worked as a home
22 inspector. (Id. at 53.) He stopped working in January 2012 due to
23 problems arising from an aortic dissection and the subsequent surgery. (Id.
24 at 53-54.) Plaintiff testified he experiences shortness of breath and has
25 trouble walking and sitting for long periods of time. (Id. at 55.) He
26 attributed the walking trouble to his shortness of breath, though he had not
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1 taken any medication for this. (Id. at 55-56.) He testified that he could not
2 lift at all due to a hernia in his chest area, for which he was scheduled to
3 have surgery in 2015. (Id. at 57.)

4 Plaintiff testified to having sleep issues, specifically sleep apnea,
5 though he did not have or use a CPAP machine for this. (Id.) Plaintiff also
6 suffered from an inability to sleep through the night, because he was
7 awakened by pain in his sternum and hips, and because he had a fear of
8 not waking up. (Id. at 60.) He did not feel rested when he woke in the
9 morning and testified he must lie down during the day for up to three to four
10 hours. (Id. at 60-61.)

11 Plaintiff then testified about his daily activities. He lives with his
12 sister, who treats him like a heart patient because their mother died from a
13 heart attack. (Id. at 58.) Plaintiff testified he does not have trouble
14 dressing himself, except when it comes to putting on shoes and socks,
15 because bending over is difficult. (Id. at 58-59.) He does not socialize with
16 friends and does not go out to eat or for entertainment. (Id. at 61.) He
17 testified he enjoyed fishing, though he had not gone for three or four years.
18 (Id.) Plaintiff rarely left the house alone. (Id. at 63.)

19 Plaintiff testified he was seeing a psychologist for depression and
20 anxiety. (Id. at 61-62.) This treatment involved mostly just talking, though
21 Plaintiff had also been taking a low dose of Zoloft. (Id.) Plaintiff
22 complained of bowel problems, which he thought may be either a side
23 effect of the Zoloft or possibly Crohn's disease, though he had not been
24 evaluated for Crohn's. (Id. at 62-63.) Plaintiff also testified to having had
25 knee problems for a couple of years, for which he believed he would soon
26 need to have surgery. (See id. at 63-64.) However, he indicated he was
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1 going to try and alleviate those problems through physical therapy to avoid
2 the surgery. (Id. at 65.) Plaintiff stated he had problems with his left
3 shoulder, and could not reach for or lift things without pain. (Id.) He could
4 not even reach for a cereal box with his left arm. (Id.) Furthermore,
5 Plaintiff testified he had numbness and tingling in his legs, though he was
6 uncertain as to the cause. (Id.)

7 Finally, Plaintiff testified regarding his memory and concentration
8 issues. (See id. at 64.) He testified that since his aortic dissection surgery,
9 he has had an inability to remember certain things, such as things he
10 learned in school, including measurements and the like. (Id.) Plaintiff
11 stated his concentration was lowered, such that he could not watch TV for
12 too long without changing the channel. (Id.) He also testified that he felt he
13 could work, but no more than two hours at a time, because he felt that
14 beyond two hours, he would not be able to breathe, because of “too many
15 people.” (Id.)

16 **B. Vocational Expert Testimony**

17 Vocational Expert (“VE”) Gloria Lasoff testified at the administrative
18 hearing. Ms. Lasoff identified Plaintiff’s past work as inspector as light
19 work. (Id. at 67.) The ALJ then presented the following hypothetical:

20

21 Assume in hypothetical number 1 we have a
22 younger individual. This individual has a 12th grade
23 education, is literate, speaks English and the work
24 experience as outlined by yourself. Hypothetical number
25 1, this person can sit six hours in an eight-hour day, stand
26 and walk six hours in an eight-hour day; can occasionally
27 lift 20 pounds, frequently lift ten pounds; can occasionally
climb stairs; should never climb ladders, scaffolds, ropes;
can occasionally balance, stoop, kneel, crouch and crawl.

1 This person can occasionally reach overhead with
2 the left upper extremity; should have no concentrated
3 exposure to unprotected heights, dangerous or fast-
4 moving machinery; should have no concentrated
5 exposure to vibrations. Based on that hypothetical would
6 he be able to return to past work?

7 (Id. at 67-68.) Ms. Lasoff replied that such a hypothetical individual would
8 not be able to return to Plaintiff's past work. (Id. at 68.) The ALJ then
9 inquired whether there were other jobs in the labor market this person
10 could perform. (Id.) Ms. Lasoff replied that there were: assembler, hand
11 packager, and cashier, all of which consisted of light work. (Id.)

12 The ALJ then posed a second hypothetical: someone who because of
13 difficulty with concentration would be off task 20 percent of the day. (Id.)
14 Ms. Lasoff stated that such a person would be incapable of performing any
15 work, including the above mentioned jobs. (Id.) In response to the ALJ's
16 third hypothetical, someone who, because of pain or concentration
17 problems, would miss three or more days per month from work, Ms. Lasoff
18 stated that such a person would be unemployable. (Id. at 68-69.)

19 Plaintiff's attorney then posed a fourth hypothetical: a person who could
20 only sit for a total of two hours out of eight and could only stand and walk
21 for a total of two hours out of eight. (Id.) Ms. Lasoff replied that such a
22 person would be unemployable. (Id.)

23 **IV. THE ALJ DECISION**

24 After reviewing the record, ALJ Dietterle made the following findings:

25

- 26 1. The claimant meets the insured status requirements of
27 the Social Security Act through June 30, 2013.

1 2. The claimant has not engaged in substantial gainful
2 activity since January 10, 2012, the alleged onset date
3 [citation omitted].

4 3. The claimant has the following severe impairments:
5 aortic aneurysm, right knee medial meniscus tear, and left
6 shoulder derangement [citation omitted].

7 4. The claimant does not have an impairment or
8 combination of impairments that meets or medically
9 equals the severity of one of the listed impairments in 20
10 CFR Part 404, Subpart P, Appendix 1 [citation omitted].

11 5. After careful consideration of the entire record, the
12 undersigned finds that the claimant has the residual
13 functional capacity to perform light work as defined in 20
14 CFR 404.1567(b) and 416.967(b) with the following
15 limitations: the claimant can sit 6 hours in an 8 hour work
16 day; stand and walk 6 hours in an 8 hour work day;
17 occasionally lift 20 pounds; frequently lift 10 pounds;
18 occasionally climb stairs; never climb ladders, scaffolds,
19 or ropes; occasionally balance, stoop, kneel, crouch,
20 crawl, occasionally reach over head with the left upper
21 extremity; no concentrated exposure to unprotected
22 heights, dangerous or fast moving machinery; and no
23 concentrated exposure to vibrations.

24 6. The claimant is unable to perform any past relevant
25 work [citation omitted].

26 7. The claimant was born on June 16, 1969 and was 42
27 years old, which is defined as a younger individual age
18-49, on the alleged disability onset date [citation
omitted].

8. The claimant has at least a high school education and
is able to communicate in English [citation omitted].

9. The claimant has acquired work skills from past

1 relevant work [citation omitted].

2 10. Considering the claimant's age, education, work
3 experience, and residual functional capacity, the claimant
4 has acquired work skills from past relevant work that are
5 transferable to other occupations with jobs existing in
6 significant numbers in the national economy [citation
7 omitted] . . . Accordingly, although the claimant's
8 additional limitations do not allow the claimant to perform
9 the full range of light work, considering the claimant's age,
10 education and transferable work skills, a finding of "not
11 disabled" is appropriate under the framework of Medical-
12 Vocational Rule 202.22.

13 11. The claimant has not been under a disability, as
14 defined in the Social Security Act, from January 10, 2012,
15 through the date of this decision [citation omitted].

16 (Id. at 28-42.)

17 **V. STANDARD OF REVIEW**

18 To qualify for disability benefits under the Social Security Act, an
19 applicant must show: (1) He or she suffers from a medically determinable
20 impairment that can be expected to result in death or that has lasted or can
21 be expected to last for a continuous period of twelve months or more, and
22 (2) the impairment renders the applicant incapable of performing the work
23 that he or she previously performed or any other substantially gainful
24 employment that exists in the national economy. See 42 U.S.C. §
25 423(d)(1)(A), (2)(A). An applicant must meet both requirements to be
26 "disabled." Id. Further, the applicant bears the burden of proving that he or
27 she was either permanently disabled or subject to a condition which
became so severe as to disable the applicant prior to the date upon which
his or her disability insured status expired. Johnson v. Shalala, 60 F.3d

1 1428, 1432 (9th Cir. 1995).

2 **A. Sequential Evaluation of Impairments**

3 The Social Security Regulations outline a five-step process to
4 determine whether an applicant is "disabled." The five steps are as follows:
5 (1) Whether the claimant is presently working in any substantial gainful
6 activity. If so, the claimant is not disabled. If not, the evaluation proceeds
7 to step two. (2) Whether the claimant's impairment is severe. If not, the
8 claimant is not disabled. If so, the evaluation proceeds to step three. (3)
9 Whether the impairment meets or equals a specific impairment listed in the
10 Listing of Impairments. If so, the claimant is disabled. If not, the evaluation
11 proceeds to step four. (4) Whether the claimant is able to do any work he
12 has done in the past. If so, the claimant is not disabled. If not, the
13 evaluation continues to step five. (5) Whether the claimant is able to do
14 any other work. If not, the claimant is disabled. Conversely, if the
15 Commissioner can establish there are a significant number of jobs in the
16 national economy that the claimant can do, the claimant is not disabled. 20
17 C.F.R. § 404.1520; see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th
18 Cir. 1999).

19 **B. Judicial Review**

20 Sections 205(g) and 1631(c)(3) of the Social Security Act allow
21 unsuccessful applicants to seek judicial review of the Commissioner's final
22 agency decision. 42 U.S.C.A. §§ 405(g), 1383(c)(3). The scope of judicial
23 review is limited. The Commissioner's final decision should not be
24 disturbed unless: (1) The ALJ's findings are based on legal error or (2) are
25 not supported by substantial evidence in the record as a whole. Schneider
26 v. Comm'r of Soc. Sec. Admin., 223 F.3d 968, 973 (9th Cir. 2000).

1 Substantial evidence means “more than a mere scintilla but less than a
2 preponderance; it is such relevant evidence as a reasonable mind might
3 accept as adequate to support a conclusion.” Andrews v. Shalala, 53 F.3d
4 1035, 1039 (9th Cir. 1995). The Court must consider the record as a
5 whole, weighing both the evidence that supports and detracts from the
6 ALJ’s conclusion. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir.
7 2001); Desrosiers v. Sec’y of Health & Human Servs., 846 F.2d 573, 576
8 (9th Cir. 1988). “The ALJ is responsible for determining credibility,
9 resolving conflicts in medical testimony, and for resolving ambiguities.”
10 Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009) (citing Andrews, 53
11 F.3d at 1039). Where the evidence is susceptible to more than one rational
12 interpretation, the ALJ’s decision must be affirmed. Vasquez, 572 F.3d at
13 591 (citation and quotations omitted).

14 Section 405(g) permits this Court to enter a judgment affirming,
15 modifying, or reversing the Commissioner’s decision. 42 U.S.C.A. §
16 405(g). The matter may also be remanded to the SSA for further
17 proceedings. Id.

18 **VI. DISCUSSION**

19 Plaintiff contends the ALJ’s RFC assessment is improper because
20 the ALJ failed to incorporate Plaintiff’s memory impairments. (Pl.’s Reply at
21 2.) Plaintiff does not contend there was any error with respect to
22 consideration of his physical impairments. (See Pl.’s Mem. at 5.)

23 **A. Plaintiff’s Memory Impairments**

24 Although Plaintiff had subjective complaints of memory loss, there is
25 little in the record to indicate that these issues were disabling. In fact,
26 these subjective complaints arose only on three occasions. First, on one of
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1 several visits to Dr. Sharf, Plaintiff mentioned having trouble remembering
2 things. (Admin. R. at 554.) However, Dr. Sharf's assessment of Plaintiff
3 did not include anything about Plaintiff's memory. (Id. at 556.) Second,
4 during a psychological examination by Dr. Dan Whitehead, Plaintiff stated
5 his memory was "shot." (Id. at 578.) Third, during the administrative
6 hearing, when Plaintiff was asked about any memory problems, he stated
7 this: ". . . [S]ince the surgery, I lack in some of the things that I learned from
8 my actual schooling. . . . I just don't remember measurements and stuff like
9 that." (Id. at 64.)

10 In evaluating Plaintiff's alleged memory impairment, the ALJ relied
11 upon the findings of Dr. Whitehead, an examining physician, who
12 conducted a psychological examination of Plaintiff on June 17, 2013.
13 (Admin. R. at 31-32.) During this examination, Plaintiff was fully alert and
14 oriented, coherent, and well groomed. (Id. at 580.) Plaintiff was able to
15 perform serial sevens and simple math calculations. (Id.) Plaintiff's
16 immediate memory was assessed to be in the borderline range, and his
17 delayed memory and memory process in the low average range. (Id. at
18 581.) Dr. Whitehead assessed Plaintiff's GAF score at 65-75, indicating
19 some mild symptoms. (Id.) Dr. Whitehead found Plaintiff would have very
20 mild restrictions relating to concentration, persistence, and pace, but no
21 significant limitations in his abilities to understand, carry out, and remember
22 simple instructions and detailed tasks, or in responding appropriately to
23 usual work conditions, changes in routine work setting, co-workers,
24 supervisors, and the public. (Id. at 582.) Additionally, notwithstanding
25 Plaintiff's memory test results, which were in the borderline to low average
26 range, and in which Plaintiff scored in the 10th percentile and below, Dr.

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1 Whitehead stated, “Persons with intelligence and memory functions in the
2 borderline range and above are typically able to perform a wide variety of
3 simple work functions of a constant nature, as long as there are no other
4 major problems or concerns.” (Id.) Based upon these findings by Dr.
5 Whitehead, the ALJ assessed Plaintiff’s mental impairments, including his
6 memory loss, to cause no more than minimal limitation. (Id. at 31.) The
7 Court finds the ALJ did not err in his evaluation of the evidence of Plaintiff’s
8 memory impairment and that substantial evidence – specifically Dr.
9 Whitehead’s findings – supports the ALJ’s conclusion that Plaintiff’s
10 memory impairment (in combination with his other mental impairments)
11 caused no more than minimal limitation. See Andrews v. Shalala, 53 F.3d
12 1035, 1041 (9th Cir. 1995) (stating that the opinion of an examining
13 physician, if based on independent clinical findings, qualifies as substantial
14 evidence upon which the ALJ can rely).

15 Plaintiff argues the ALJ erred by not including Plaintiff’s memory
16 function findings in his RFC assessment, and more specifically, that his
17 borderline and low average memory function scores should have been
18 included in the hypotheticals to the VE. (Pl.’s Reply at 2, 4.) The record
19 establishes the ALJ did not include Plaintiff’s mild impairments of memory
20 function in his RFC assessment and hypotheticals to the VE because he
21 found these scores to indicate only minimal limitation. (See Admin. R. at
22 31-33.) In so finding, he was not required to include these limitations in his
23 hypotheticals to the VE. See, e.g., Martinez v. Heckler, 807 F.2d 771, 774
24 (9th Cir. 1986) (stating that an ALJ has discretion, based on his review of
25 the evidence, to determine the limitations set forth in a hypothetical).
26 Furthermore, Plaintiff cites no authority to support his contention that
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1 memory scores in the low average and borderline range limit a person's
2 ability to work more than minimally, and the evidence in the record reflects
3 that a person with memory function scores in Plaintiff's range is capable of
4 "simple work functions of a constant nature." (See Pl.'s Mem. at 6-10; Pl.'s
5 Reply at 2-5; Admin. R. at 582.) The Court therefore finds the ALJ did not
6 err by not including Plaintiff's minimal limitations relating to memory
7 function in his determination of Plaintiff's RFC and in the hypotheticals
8 posed to the VE.

9 **B. Harmless Error**

10 Harmless error principles have long been recognized to apply in
11 Social Security cases. Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir.
12 2012). The general principle for these cases is that an ALJ's error is
13 harmless where, looking at the record as a whole, the error does not alter
14 the outcome of the case or the ultimate nondisability determination. (Id.;
15 see also Mangan v. Colvin, 2014 WL 4267496, at *1 (N.D. Ill., Aug. 28,
16 2014) (recognizing that courts may address issues sua sponte in Social
17 Security cases). Here, assuming *arguendo* the ALJ did commit error by
18 failing to properly consider Plaintiff's memory loss, it is harmless error. The
19 ALJ determined that Plaintiff was capable of performing light, unskilled
20 work. (Admin. R. at 42; see also 20 C.F.R. pt. 404, subpt. P, app. 2,
21 § 202.22 (Medical-Vocational Guideline referring to unskilled light work).)
22 Unskilled work is defined as: "[W]ork which needs little or no judgment to
23 do simple duties that can be learned on the job in a short period of time . . .
24 a person can usually learn to do the job in 30 days, and little specific
25 vocational preparation and judgment are needed." 20 C.F.R.
26 § 404.1568(a). Here, the ALJ found Plaintiff's mental impairments do not
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1 cause more than minimal limitation in his ability to perform basic mental
2 work activities. (Admin. R. at 31.) In his assessment of Plaintiff's mental
3 impairments, the ALJ noted that Dr. Whitehead, the examining physician
4 who evaluated Plaintiff's mental impairments, stated Plaintiff would be able
5 to understand, carry out, and remember simple instructions and detailed
6 tasks and would have no limitations in responding appropriately to co-
7 workers, supervisors, or the public. (Id. at 32.) Dr. Whitehead also stated
8 more generally, "Persons with intelligence and memory functions in the
9 borderline range . . . are typically able to perform a wide variety of simple
10 work functions of a constant nature . . ." (Id. at 582.) This appears to be
11 consistent with work that is "unskilled." Even if the ALJ's assessment of
12 Plaintiff's RFC had included Plaintiff's borderline to low average memory
13 function, Plaintiff has provided no authority to support the contention that
14 this would preclude him from performing unskilled work. (See Pl.'s Mem. at
15 6-10; Pl.'s Reply at 2-5; see also Bustamante v. Astrue, 2009 WL 112947,
16 at *6 (W.D. Wash. Jan. 13, 2009) (upholding ALJ's determination that a
17 plaintiff with memory problems was able to perform unskilled work).)
18 Therefore, the Court finds that any error in the omission of Plaintiff's
19 memory impairment in the ALJ's RFC assessment is harmless error,
20 because its inclusion would not alter the outcome of the ultimate
21 determination that Plaintiff is not disabled.


22 **VII. CONCLUSION**

23 For the reasons set forth above, Plaintiff's motion for summary
24 judgment should be **DENIED** and Defendant's cross-motion for summary
25 judgment should be **GRANTED**.

26 This report and recommendation will be submitted to the Honorable
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1 William Q. Hayes, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any
2 party may file written objections with the Court and serve a copy on all
3 parties on or before August 18, 2017. The document should be captioned
4 “Objections to Report and Recommendation.” Any reply to the Objections
5 shall be served and filed on or before September 1, 2017. The parties are
6 advised that failure to file objections within the specified time may waive the
7 right to appeal the district court’s order. Martinez v. Ylst, 951 F.2d 1153
8 (9th Cir. 1991).

9 Dated: July 27, 2017


Honorable Jan M. Adler
United States Magistrate Judge

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