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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 KENNETH MARTIN GARDNER,  
11 Plaintiff,  
12 v.  
13 UNITED STATES COMMISSIONER OF  
14 SOCIAL SECURITY,  
15 Defendant.

Case No.: 16cv02940 JAH-WVG

**ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT  
[Doc. Nos. 23, 24, 28, 33]**

16  
17 **INTRODUCTION**

18 Plaintiff seeks review of the Social Security Commissioner's final decision denying  
19 benefits. After a thorough review of the parties' submissions and for the reasons set forth  
20 below, the Court DENIES Plaintiff's motion for summary judgment and GRANTS  
21 Defendant's cross-motion for summary judgment.

22 **BACKGROUND**

23 Plaintiff was born on January 18, 1965 and is currently 53 years of age. AR<sup>1</sup> at 146.  
24 He alleges he has been unable to work since May 29, 2014, as a result of his disabling  
25 condition. He filed an application for disability insurance benefits on September 8, 2015.  
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28 <sup>1</sup> AR refers to the administrative record.

1 Id. The Commissioner of the Social Security Administration denied the claim on January  
2 21, 2016, and denied the claim again upon reconsideration. AR at 97, 101. Plaintiff  
3 requested a hearing, and appeared and testified at the hearing on July 5, 2016. AR at 108,  
4 26. The ALJ issued an unfavorable decision on September 1, 2016. AR at 10. Plaintiff  
5 filed a request for review of the ALJ's decision and the Appeals Council denied the request.  
6 AR at 1-9.

7 Plaintiff, appearing *pro se*, originally filed a complaint regarding the denial of social  
8 security benefits on December 2, 2016. Defendant filed a motion to dismiss the complaint  
9 for lack of subject matter jurisdiction and failure to state a claim. See Doc. No. 8. Finding  
10 a lack of jurisdiction over Plaintiff's Federal Tort Claims Act claim, the Court granted the  
11 motion to dismiss and provided Plaintiff an opportunity to amend his complaint to assert a  
12 claim for review of the Commissioner's final decision denying benefits. See Doc. No. 16.  
13 Plaintiff filed a First Amended Complaint on April 25, 2018, and Defendant filed an answer  
14 and the administrative record. See Doc. Nos. 17, 18, 19.

15 On June 13, 2018, Plaintiff filed a motion for summary judgment. See Doc. No. 23.  
16 On July 10, 2018, Defendant filed a cross-motion for summary judgment and opposition  
17 to Plaintiff's motion. Doc. Nos. 24, 25. Plaintiff filed an amended motion for summary  
18 judgment *nunc pro tunc* to July 20, 2018. See Doc. No. 28. Upon review of the amended  
19 motion, the Court issued an order providing Defendant an opportunity to respond and  
20 Plaintiff an opportunity to reply to any response filed by Defendant. Defendant filed a  
21 amended cross motion for summary judgment and response in opposition, and Plaintiff  
22 filed a reply. See Doc. Nos. 33, 34, 36.

## 23 **DISCUSSION**

### 24 **I. Legal Standards**

#### 25 **A. Qualifying for Disability Benefits**

26 To qualify for disability benefits under the Act, an applicant must show that: (1) he  
27 suffers from a medically determinable impairment that can be expected to result in death  
28 or that has lasted or can be expected to last for a continuous period of not less than twelve

1 months; and (2) the impairment renders the applicant incapable of performing the work  
2 that he previously performed or any other substantially gainful employment that exists in  
3 the national economy. See 42 U.S.C. § 423(d)(1)(A), 2(A). An applicant must meet both  
4 requirements to be “disabled.” Id.

5         The Secretary of the Social Security Administration has established a five-step  
6 sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§  
7 404.1520, 416.920. Step one determines whether the claimant is engaged in “substantial  
8 gainful activity.” If he is, disability benefits are denied. 20 C.F.R. §§ 404.1520(b),  
9 416.920(b). If he is not, the decision maker proceeds to step two, which determines  
10 whether the claimant has a medically severe impairment or combination of impairments.  
11 If the claimant does not have a severe impairment or combination of impairments, the  
12 disability claim is denied. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the impairment is  
13 severe, the evaluation proceeds to the third step, which determines whether the impairment  
14 is equivalent to one of a number of listed impairments that the Secretary acknowledges are  
15 so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d); 20 C.F.R.  
16 Part 404 Appendix 1 to Subpart P. If the impairment meets or equals one of the listed  
17 impairments, the claimant is conclusively presumed to be disabled. If a condition “falls  
18 short of the [listing] criterion” a multiple factor analysis is appropriate. Celaya v. Halter,  
19 332 F.3d 1177, 1181 (9th Cir. 2003). Of such analysis, “the Secretary shall consider the  
20 combined effect of all the individual’s impairments without regard to whether any such  
21 impairment, if considered separately, would be of such severity.” Id. at 1182 (quoting 42  
22 U.S.C. § 423(d)(2)(B)). If the impairment is not one that is conclusively presumed to be  
23 disabling, the evaluation proceeds to the fourth step, which determines whether the  
24 impairment prevents the claimant from performing work he has performed in the past. If  
25 the claimant cannot perform his previous work, the fifth and final step of the process  
26 determines whether he is able to perform other work in the national economy considering  
27 his age, education, and work experience. The claimant is entitled to disability benefits only  
28 if he is not able to perform other work. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

1 **B. Judicial Review of an ALJ’s Decision**

2 Section 405(g) of the Act allows unsuccessful applicants to seek judicial review of  
3 a final agency decision of the Commissioner. 42 U.S.C. § 405(g). The scope of judicial  
4 review is limited. The Commissioner’s denial of benefits “will be disturbed only if it is not  
5 supported by substantial evidence or is based on legal error.” Brawner v. Secretary of  
6 Health and Human Servs., 839 F.2d 432, 433 (9th Cir. 1988) (citing Green v. Heckler, 803  
7 F.2d 528, 529 (9th Cir. 1986)).

8 Substantial evidence means “more than a mere scintilla” but less than a  
9 preponderance. Sandgathe v. Charter, 108 F.3d 978, 980 (9th Cir. 1997) (citation omitted).  
10 “[I]t is such relevant evidence as a reasonable mind might accept as adequate to support a  
11 conclusion.” Id. (quoting Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995)). The  
12 Court must consider the record as a whole, weighing both the evidence that supports and  
13 detracts from the Commissioner’s conclusions. Desrosiers v. Secretary of Health &  
14 Human Servs., 846 F.2d 573, 576 (9th Cir. 1988) (citing Jones v. Heckler, 760 F.2d 993,  
15 995 (9th Cir. 1985)). If the evidence supports more than one rational interpretation, the  
16 Court must uphold the ALJ’s decision. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984)  
17 (citing Allen v. Secretary of Health and Human Servs., 726 F.2d 1470, 1473 (9th Cir.  
18 1984). When the evidence is inconclusive, “questions of credibility and resolution of  
19 conflicts in the testimony are functions solely of the Secretary.” Sample v. Schweiker, 694  
20 F.2d 639, 642 (9th Cir. 1982).

21 However, even if the reviewing court finds that substantial evidence supports the  
22 ALJ’s conclusions, the Court must set aside the decision if the ALJ failed to apply the  
23 proper legal standards in weighing the evidence and reaching a decision. See Benitez v.  
24 Califano, 573 F.2d 653, 655 (9th Cir. 1978). Section 405(g) permits a court to enter a  
25 judgment affirming, modifying, or reversing the Commissioner’s decision. 42 U.S.C. §  
26 405(g). The reviewing court may also remand the matter to the Social Security  
27 Administrator for further proceedings. Id. “If additional proceedings can remedy defects  
28 in the original administrative proceeding, a social security case should be remanded.”

1 Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990) (quoting Lewin v. Schweiker, 654  
2 F.2d 631, 635 (9th Cir. 1981)).

### 3 **II. The ALJ's Decision**

4 In the present case, the ALJ found Plaintiff had not engaged in substantial gainful  
5 activity since May 29, 2014, and has severe impairments, including post-traumatic stress  
6 disorder (“PTSD”), major depressive disorder, and anxiety disorder, that cause more than  
7 minimal limitations on Plaintiff’s ability to perform basic work activities. AR at 15. The  
8 ALJ determined Plaintiff does not have an impairment or combination of impairments that  
9 meet or are medically equal in severity to one of the listed impairments in 20 CFR Part 404  
10 Subpart P, Appendix 1. Id. at 16. In making this determination, the ALJ found Plaintiff  
11 has no more than mild restrictions in daily living, no more than moderate difficulties in  
12 social functioning and no more than moderate difficulties in concentration, persistence or  
13 pace. Id. Additionally, the ALJ found the evidence did not document any episodes of  
14 decompensation of extended duration within the period at issue, and there was no evidence  
15 to suggest a complete inability to function independently outside the area of one’s home.  
16 Id.

17 The ALJ found Plaintiff has the residual functional capacity to perform a full range  
18 of work at all exertional levels but with non-exertional limitations that include no  
19 interaction with the public; no more than occasional, work related, non-personal, non-  
20 social interaction with co-workers and supervisors involving no more than a brief exchange  
21 of information or hand-off of product; and no work as part of a team. Id. at 17. In making  
22 the finding, the ALJ considered all symptoms and the extent the symptoms can reasonably  
23 be accepted as consistent with objective medical evidence, and opinion evidence. Id. The  
24 ALJ found the evidence failed to support Plaintiff’s allegations of disabling symptoms and  
25 limitations. Id. at 18. The ALJ rejected the opinion of Dr. Greytak, a consultative  
26 psychiatrist, that Plaintiff had a Global Assessment of Function (“GAF”) score of 50 based  
27 upon a psychiatric evaluation in December 2015 as not supported by the record. Id. at 19.  
28 The ALJ noted that the GAF scale is no longer used to assess global functioning. Id. The

1 ALJ gave significant weight to psychological consultants' opinions in January 2016, and  
2 March 2016, which determined that Plaintiff was capable of simple work tasks in a more  
3 isolated work environment with brief/perfunctory interaction with others. Id. The ALJ  
4 determined Plaintiff's allegations of disabling symptoms and limitations were not  
5 consistent with the record based upon Plaintiff's lack of mental health treatment despite  
6 access to medical care including declinations for ongoing psychotherapy, and relatively  
7 benign findings from the limited mental health treatment records. Id.

8 The ALJ determined Plaintiff was unable to perform any past relevant work but he  
9 could perform jobs that exist in significant numbers in the national economy. Id. at 19-20.  
10 Ultimately, the ALJ concluded Plaintiff had not been under a disability as defined by the  
11 Act from the date of his application. Id. at 21.

### 12 **III. Analysis**

13 Plaintiff argues the ALJ demonstrated bias against him as veteran suffering from  
14 PTSD as evidenced by the ALJ's derisive and hostile statements at the hearing surrounding  
15 discussion of his PTSD. He contends the ALJ showed he did not view Plaintiff's condition  
16 as disabling despite the vocational expert's testimony and Plaintiff's testimony.

17 Defendant argues Plaintiff fails to rebut the presumption that the ALJ was unbiased.  
18 She contends Plaintiff's bias argument stems from his misconception that having a severe  
19 impairment necessarily equates to a disability. Defendant maintains PTSD is not *per se*  
20 disabling and the ALJ acknowledged Plaintiff's impairments, including PTSD, were  
21 severely limiting and carefully considered Plaintiff's PTSD and other mental health  
22 impairments in accordance with the Commissioner's regulations. Defendant further  
23 maintains the ALJ appropriately sought clarification as to why Plaintiff continued to work  
24 for 18 years given that he testified his symptoms began in 1996. She contends the ALJ's  
25 line of questioning was reasonable and there is no evidence of hostility. Further, Defendant  
26 contends Plaintiff's assertion that the ALJ had an ulterior motive in questioning whether  
27 Plaintiff's past work involved sales is confounding given that Plaintiff himself described  
28 his past jobs as sales positions, and is irrelevant because the ALJ determined Plaintiff could

1 not perform his past relevant work. Defendant argues Plaintiff's allegation of bias is  
2 nothing more than an objection to the outcome of the decision and the questions or  
3 comments Plaintiff cites as evidence of bias were either requests for clarification of  
4 information an ALJ must consider when determining disability under the Act's regulations  
5 or explanations of the agency's process for evaluating disability claims. Thus, Defendant  
6 argues, the Court should affirm the ALJ's Decision.

7 Defendant further argues the ALJ's decision was supported by substantial evidence  
8 and is free from harmful error. She maintains the ALJ considered the record as a whole  
9 and thoroughly evaluated the medical evidence, physician opinions, other agencies'  
10 findings, and Plaintiff's subjective statements. Additionally, Defendant contends Plaintiff  
11 fails to allege any error other than bias which is meritless.

12 In reply, Plaintiff argues Defendant's inadvertent error omitting the word "not" from  
13 a sentence in her original cross-motion demonstrates that key words were omitted from the  
14 ALJ hearing transcript. He further argues the ALJ's denial rate of 53% is evidence of his  
15 bias.

16 Plaintiff's sole challenge to the ALJ's denial of benefits is that the ALJ was biased  
17 against him as a sufferer of PTSD. ALJs are presumed to be unbiased. Verduzco v. Apfel,  
18 188 F.3d 1087, 1089 (9th Cir. 1999) (citing Schweiker v. McClure, 456 U.S. 188. 195  
19 (1982)). A party asserting bias has the burden of rebutting the presumption "by showing a  
20 conflict of interest or some other specific reason for disqualification." Id.

21 Plaintiff contends the ALJ's bias is demonstrated by his derisive and hostile  
22 comments made during the hearing. He points to portions of the transcript of the hearing  
23 and insists there are additional hostile comments not included in the transcript. Generally,  
24 remarks by a judicial officer during proceedings "that are critical or disapproving of, or  
25 even hostile to, counsel, the parties, or their cases" do not support a bias. Liteky v. United  
26 States, 510 U.S. 540, 555 (1994). Plaintiff must show "the ALJ's behavior, in the context  
27 of the whole case, was so extreme as to display clear inability to render fair judgment."  
28 Bayliss v. Barnhart, 427 F.3d 1211, 1214-15 (9th Cir. 2005). The ALJ's questions

1 regarding the onset of Plaintiff's PTSD and the number of years between the onset and the  
2 date of alleged disability, the character of his past relevant work, and discussion of the  
3 Veterans Administration disability rating do not demonstrate the ALJ was unable to render  
4 a fair judgment. Rather, they show the ALJ was gathering and evaluating the evidence to  
5 assist in making a determination of disability.

6 Plaintiff further asserts the ALJ's denial rates demonstrate a bias. He attaches a  
7 document he describes as a webpage showing statistics of the ALJ's approvals and denials  
8 of benefits. Defendant contends the statistics have no bearing on this case. The Court finds  
9 the statistics offered by Plaintiff fail to demonstrate bias. There is nothing showing how  
10 many of the denials were claims by PTSD sufferers or how many of the ALJ's decisions  
11 were overturned. Plaintiff's assertion that the statistics are evidence of a bias against those  
12 suffering mental health issues is no more than speculation. Plaintiff fails to overcome the  
13 presumption that the ALJ was not biased and his motion for summary judgment is denied.

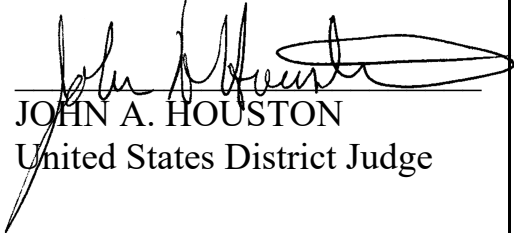
14 As discussed above, the ALJ performed the five-step sequential evaluation process  
15 and made findings regarding Plaintiff's impairments, limitations and residual functional  
16 capacity which he supports with specific evidence in the record. The Court finds the ALJ's  
17 determination that Plaintiff is not disabled is based on substantial evidence in the record  
18 and free of legal error.

### 19 CONCLUSION AND ORDER

20 Based on the foregoing, IT IS HEREBY ORDERED:

- 21 1. Plaintiff's motion for summary judgment is **DENIED**;
- 22 2. Defendant's cross-motion for summary judgment is **GRANTED**;
- 23 3. The Clerk of Court shall enter judgment accordingly.

24 Dated: December 6, 2018

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27 JOHN A. HOUSTON  
28 United States District Judge