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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES T.,

No. 3:20-cv-00985-JM-LL

Plaintiff,

**REPORT AND
RECOMMENDATION REGARDING
CROSS MOTIONS FOR SUMMARY
JUDGMENT**

v.

ANDREW SAUL,
Commissioner of Social Security,

[ECF Nos. 17, 20]

Defendant.

Plaintiff James T. brought this action for judicial review of the Social Security Commissioner’s denial of his claim for disability insurance benefits. Before this Court are Plaintiff’s Motion for Summary Judgment [ECF No. 17 (“Pl.’s Mot.”)], Defendant’s Cross-Motion for Summary Judgment and Opposition to Plaintiff’s Motion for Summary Judgment [ECF No. 20 (“Def.’s Mot.”)], and Plaintiff’s Reply in Support of Motion for Summary Judgment [ECF No. 21 (“Pl.’s Reply”)].

This Report and Recommendation is submitted to United States District Judge Jeffrey T. Miller pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(c) of the United States District Court for the Southern District of California. For the reasons set forth below, this Court **RECOMMENDS** that Plaintiff’s Motion for Summary Judgment be

1 **GRANTED**, and Defendant’s Cross-Motion for Summary Judgment be **DENIED**. This
2 Court further **RECOMMENDS** that the case be **REMANDED** for further proceedings.

3 **I. PROCEDURAL BACKGROUND**

4 On July 8, 2016, Plaintiff applied for Title II disability insurance benefits (“DIB”)
5 pursuant to Title II. See Administrative Record (“AR”) at ECF No. 15 at 222-227. On June
6 8, 2016, Plaintiff filed an application for Supplemental Security Income (“SSI”) pursuant
7 to Title XVI. Id. at 228-235. In both applications, Plaintiff alleged disability beginning on
8 October 1, 2015. Id. at 222-235. Plaintiff’s claims for both DIB and SSI were initially
9 denied on November 8, 2016. Id. at 155-160. Plaintiff requested reconsideration of the
10 initial determination on January 6, 2017, which was denied on May 25, 2017. Id. at 165-
11 171. On June 8, 2017, Plaintiff requested a hearing before an Administrative Law Judge.
12 Id. at 172-173.

13 On February 13, 2019, a hearing was held before Administrative Law Judge (“ALJ”)
14 Jay E. Levine. Id. at 47-65. On March 13, 2019, ALJ Levine denied Plaintiff’s claim. Id.
15 20-46. On March 27, 2020, the Appeals Council denied Plaintiff’s request for review. Id.
16 1-6. The ALJ’s decision became the final decision of the Commissioner on March 27, 2020,
17 when the Appeals Council denied Plaintiff’s request. Id.

18 On March 26, 2021, Plaintiff filed a Motion for Summary Judgment. ECF No. 17.
19 On April 29, 2021, Defendant filed a Cross-Motion for Summary Judgment. ECF No. 20.
20 On May 13, 2021, Plaintiff filed a Reply. ECF No. 21. Defendant did not file a Reply in
21 Support of the Motion for Summary Judgment. See Docket.

22 **II. DISABILITY HEARING**

23 On February 13, 2019, Plaintiff appeared with counsel at the hearing before the ALJ.
24 Id. at 47-52. During the hearing, Plaintiff’s counsel commented that Plaintiff forgot his
25 hearing aids and was unable to retrieve them for purposes of the hearing.¹ Id. at 49. Plaintiff
26

27 ¹ When asked if he could hear counsel speak at the hearing, Plaintiff indicated he could
28 only hear “a little bit.” AR 50. Plaintiff repositioned himself to sit in a different chair to

1 stated he was born with hearing trouble, and although one ear was initially worse, both ears
2 were now equally bad. Id. at 60.

3 The ALJ questioned Plaintiff regarding his work experience and alleged disability.
4 Id. at 49-65. Plaintiff testified that he was forty-five years old and had a high school
5 diploma. Id. at 51. Plaintiff stated that he was placed in special education while in high
6 school. Id. Plaintiff described his trouble in school included difficulty with comprehension
7 and being listed as “slow.” Id. Plaintiff stated that he did not take college classes after high
8 school. Id. Plaintiff stated he had one thirteen-year-old daughter who attends school and
9 stays in a women’s transitional home with the owner of the property. Id. at 51, 54. Plaintiff
10 stated that he had no other sources of income apart from general relief and food stamps. Id.
11 at 51.

12 Plaintiff described his work history, testifying that he worked from 2007 to 2010. Id.
13 at 52. In 2007, Plaintiff worked with an elder member of his church who “t[ook] [him]
14 under his wing” to do assembly work. Id. From 2008 to 2010, Plaintiff worked for
15 Richmond Management Corporation as a security guard. Id. In 2008, Plaintiff earned over
16 \$14,000. Id. In 2009, Plaintiff earned \$17,000, and in 2010, Plaintiff earned \$6,500. Id. His
17 job duties at the Richmond Management Corporation involved sitting down at a gate and
18 signing trucks into a cruise ship terminal. Id. When asked about his employment gap
19 between 2009 and 2014, Plaintiff responded that “[t]here was a[n] [inaudible] issue.” Id. at
20 52-53. In 2015, Plaintiff worked for South Bay Sand Blasting as a janitor. Id. at 53.
21 Plaintiff explained that the job did not require lifting of heavy equipment. Id. When
22 questioned about this job, Plaintiff responded that he “couldn’t function” and “wasn’t
23 moving fast enough” so they “let him go.” Id. Plaintiff stated he has not tried to work since
24 due to mental issues. Id.

25
26
27 hear better. Counsel asked Plaintiff again if he could hear, and stated for the record that
28 Plaintiff was trying to read his lips. Plaintiff’s counsel then used a microphone to assist
Plaintiff’s hearing. Id. at 57.

1 Plaintiff was asked if he could do similar work to his job as a security guard today.

2 Id. at 58. Plaintiff responded no:

3 I'm not good with people. I'm not. I can't. I'm not a patient person with my
4 mental and my – the things that I am going through. I don't want to wind up
going to jail with the stuff that I am going through.

5 Id. Plaintiff was asked whether “[he] can get angry pretty easily,” to which Plaintiff
6 responded “yes.” Id.

7 Plaintiff's counsel later asked him regarding his work as a janitor at the shipyard,
8 asking if Plaintiff could do that same job today. Id. at 59. Plaintiff responded he could not:

9 I'm not in the mood to do that. The way my body is I am not. My pain, going
10 up and down the stairs and trying to keep up with people, I won't be able to
function real right.

11 Id. at 59-60.

12 Plaintiff stated he has “a lot” of problems, both physical and mental. Id. at 54.
13 Physically, Plaintiff stated he cannot do “much of anything.” Id. at 54-55. Plaintiff testified
14 he had surgery on both sides of both wrists because his hands “start to lock up” painfully
15 when attempting to lift objects:

16 I can't do much of anything. Like, you know, as far as like bending over, I
17 can't even tie my own shoes. I came in, you know. I didn't do most of the
18 things like everybody else do. I could only walk a minimum, a minimum of
19 time, and then after that I have to sit down. You know. At the time, I have to
20 get my daughter to tie my shoes or put my socks on. I can't. I can't even do
much of anything right now, as far as lifting or trying to do most things I used
to do when I was young.

21 Id. at 54.

22 While residing at the transitional home, Plaintiff stated he did some housework in
23 exchange for reduced rent. Plaintiff stated he only worked a few hours a week, and “didn't
24 do much of anything . . . [I] physically can't do much.” Id. at 59. His duties included
25 cleaning the bathroom, and for a brief period, cooking meals for residents, until he was
26 replaced. Id. at 58.

27 His counsel noted Plaintiff arrived at the hearing with a cane. Id. Plaintiff stated he
28 has “real bad knee problems,” with no cartilage between his knee and bones. Id. at 59. He

1 said that his doctor provided the cane because he can “barely walk.” Id. Plaintiff then used
2 the hearing room to indicate he could walk from his chair to the waiting room door before
3 needing to take a break. Id. Plaintiff stated that the pain in his knees at the time of the
4 hearing was at a level 8. Id. Plaintiff testified that he had pain in his back, which he feels
5 all the time. Id.

6 Plaintiff noted that he spends most days doing a little bit of reading, followed by
7 taking pain medication and medication for his conditions, and then tries to sleep. Id. at 60.
8 Plaintiff stated he has trouble with his vision. Id. Plaintiff said he is blind in his right eye
9 from birth, and his vision has worsened because he squints. Id. at 60-61. He said he cannot
10 read things right in front of him and must ask others what it says or what he is looking at.
11 Id. at 60.

12 During the hearing, the ALJ also questioned the Vocational Expert (“VE”), Connie
13 Guillory, regarding Plaintiff’s employment history. Id. at 49, 56. The ALJ asked if Ms.
14 Guillory had any information from the file as to what claimant did in 2008 and 2009. Id. at
15 55. Ms. Guillory stated that she did not have information in her file about Plaintiff’s
16 cleaning job, church assembler position, or sandblaster position. Id. at 56. She categorized
17 Plaintiff’s job as a security guard as “light and semi-skilled with an SVP of 3.” Id. at 57.
18 She categorized his cleaning job as “medium and unskilled with an SVP of 2.” Id. at 57.
19 The ALJ presented Ms. Guillory with a hypothetical of:

20 [Someone with the] claimant’s age, education, prior work experience. Assume
21 this person is restricted to a light range of work, no work on unprotected
22 heights, no work on dangerous machinery, no ladders, occasional stairs and
23 ramps, occasional stooping and bending, no job that requires depth perception
24 and no excessive noisy environment like loud industrial environment. Simple
25 and repetitive tasks, no sustained interaction with coworkers or supervisors.
26 However, incidental, or brief social conversation is not precluded. No problem
27 solving with either of those group. Could such a hypothetical individual
28 perform claimant’s past work?

29 Id. at 61.

30 Ms. Guillory said “No, Your Honor. They would not be able to.” Id. When asked
31 about whether there was other work that such a hypothetical individual could perform, Ms.
32 Guillory stated that he could be an “inspector,” a “hand packer,” or a “sub assembler.” Id.

1 Next, the ALJ asked the vocational expert about another hypothetical of an individual with
2 the same restrictions as in the previous hypothetical, but someone who “would be off task
3 at least 20 percent of the work day due to pain and/or inability to maintain concentration,
4 persistence or pace.” Id. at 62. Ms. Guillory responded that the positions of inspector, hand
5 packer or sub assembler could not be performed by that hypothetical individual. Id. After
6 considering a few other positions, she said that there would be no work for that hypothetical
7 individual. Id.

8 Plaintiff’s attorney stated that the record shows Plaintiff has a case worker with the
9 regional center, who brought Plaintiff to the hearing Id. at 64. “[Plaintiff] is a person that .
10 . . . without that kind of support I don’t think he could function day to day . . . [A]nd the]
11 consultative exam (Exhibit 12-F)] done in October of 2016, has had him marked and
12 extreme with a GAF of 35.” Id. at 64-65.

13 **III. SUMMARY OF THE ALJ’S DECISION**

14 On March 13, 2019, the ALJ issued a written decision in which he determined that
15 Plaintiff had not been under a disability, as defined in the Social Security Act, from October
16 1, 2015 through the date of the ALJ’s decision. AR 20-40. The ALJ proceeded to follow
17 the Commissioner’s five-step sequential evaluation process. See 20 C.F.R. §§ 404.1520,
18 416.920.

19 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful
20 employment after the alleged onset date October 1, 2015. AR 25.

21 At step two, the ALJ found that Plaintiff had the following severe impairments:
22 “obesity, blindness in the right eye, congenital sensorineural hearing loss, cervical and
23 lumbar strain/sprain, chondromalacia bilateral knees, history of carpal tunnel syndrome,
24 status post-surgery, hypertension, headaches, depressive disorder, and borderline
25 intellectual functioning.” Id.

26 At step three, the ALJ found that Plaintiff does not have an impairment, or a
27 combination of impairments, that met or medically equaled one of the impairments as
28 defined in 20 CFR Part 404. Id. at 26. The ALJ first determined Plaintiff’s residual

1 functional capacity (20 CFR §§ 404.1520(e) and 416.920(e)). Id. at 29. The ALJ found that
2 the Plaintiff has the RFC to perform light work. Id.

3 He is able to occasionally climb ramps and stairs, stoop, and bend. He is
4 unable to perform jobs that require depth perception. He needs to avoid work
5 at unprotected heights or around dangerous moving machinery. He needs to
6 avoid excessive noisy environment. He is able to perform simple, routine tasks
7 with no sustained, intense interaction with coworkers and supervisors. He is
8 able to tolerate incidental and brief social conversation which is not precluded.

9 Id.

10 At step four, the ALJ found that Plaintiff, based on his limitation to less than the full
11 range of light work, was unable to perform his past relevant work as a security guard or
12 cleaner. Id. at 38. At step five, the ALJ adduced and accepted the VE's testimony that a
13 hypothetical person with Plaintiff's vocational profile could make a successful adjustment
14 to other work as an "inspector," a "hand packager," or a "sub-assembler." Id. at 39.
15 Accordingly, the ALJ found that Plaintiff was not disabled. Id.

16 **IV. STANDARD OF REVIEW**

17 The Social Security Act permits unsuccessful applicants to seek judicial review of
18 the Commissioner's final decision. 42 U.S.C. § 405(g). The scope of judicial review is
19 limited in that a denial of benefits will not be disturbed if it is supported by substantial
20 evidence and contains no legal error. Id.; see also Trevizo v. Berryhill, 871 F.3d 664, 674
21 (9th Cir. 2017) (citing Benton ex rel. Benton v. Barnhart, 331 F.3d 1030, 1035 (9th Cir.
22 2003)).

23 Substantial evidence is "more than a mere scintilla but may be less than a
24 preponderance." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006). It is
25 evidence that a "reasonable mind might accept as adequate to support a conclusion." Id. In
26 determining whether the ALJ's findings are supported by substantial evidence, the court
27 "must consider the entire record as a whole and may not affirm simply by isolating a
28 specific quantum of supporting evidence." Orn v. Astrue, 495 F.3d 625, 630 (9th Cir.
2007). "Where evidence is susceptible to more than one rational interpretation, the ALJ's
decision should be upheld." Trevizo, 871 F.3d at 674-75 (quoting Orn, 495 F.3d at 630).

1 Further, the court reviews “only the reasons provided by the ALJ in the disability
2 determination and may not affirm the ALJ on a ground upon which he did not rely.”
3 Garrison v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014). Additionally, the court may not
4 reverse the ALJ’s decision on account of a harmless error. Molina v. Astrue, 674 F.3d
5 1104, 1111 (9th Cir. 2012). The burden of proving harmless error falls upon the party
6 attacking the agency’s determination. Id.

7 Section 405(g) permits a court to enter judgment affirming, modifying, or reversing
8 the Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing court may also remand
9 the matter to the Social Security Administration for further proceedings. Id.

10 **V. DISCUSSION**

11 Plaintiff challenges the ALJ’s adverse decision on one ground. Plaintiff contends
12 that the ALJ improperly rejected the opinion of psychiatric consultative examiner, Dr.
13 Hailey. Pl.’s Mot. at 4-11. Plaintiff contends the ALJ erred by failing to articulate specific
14 and legitimate reasons for rejecting Dr. Hailey’s opinion. Id. at 4.

15 The Court addresses this ground below.

16 **A. Summary of Parties’ Arguments About Whether the ALJ Properly** 17 **Rejected the Opinion of Psychiatric Consultative Examiner Dr. Hailey**

18 Plaintiff claims the ALJ erred in rejecting the opinion of psychiatric consultative
19 examiner Dr. Jennifer Hailey by giving greater weight to the non-examining doctors in this
20 case. Id. at 10. Plaintiff states “the [non-examining doctors] only reviewed the evidence
21 available to them at the time of their review,” while Dr. Hailey reviewed the records and
22 had the opportunity to examine Plaintiff in person. Id. Plaintiff argues that Dr. Hailey had
23 a more comprehensive picture of Plaintiff’s condition than any other doctor who provided
24 an opinion on this record. Id. at 10. Plaintiff contends that the ALJ’s general statement that
25 the “evidence shows relatively stable objective findings” fails to adequately explain why
26 Dr. Hailey’s opinion is purportedly unsupported. Id. at 7.

27 Plaintiff further argues that the ALJ failed to “mention that Taylor’s responsibilities
28 at the Independent Living Facility (ILF) are monitored through an Individual Program Plan

1 (IPP) established by the San Diego Regional Center.” Id. at 5 (citing AR 718, 724). Plaintiff
2 states that Taylor qualified for Regional Center services due to his diagnosis of mild
3 intellectual disability. Pl.’s Mot. at 6 (citing AR 724). Plaintiff argues that the ALJ
4 seemingly “downplays the significance of the Regional Center services [Plaintiff] receives
5 . . . [Plaintiff] was working in an independent living facility through a program created to
6 help developmentally disabled individuals integrate into the workforce.” Pl.’s Mot. at 7. In
7 support thereof, Plaintiff argues:

8 [Plaintiff’s] ILF worker was assisting in reporting his income to SSI. He has
9 difficulty budgeting money and will spend too much on food without the
10 support of his ILF worker. He was going to work with his ILF worker to help
11 him find a local parenting class. An IPP from September 2015 indicated that
12 he is managing his money and paying his bills on time, but he is doing so with
13 help from Regional Center with making a list of items he needs, budgeting,
14 and connecting Taylor with resources in the community, including food banks
15 and other services to help him take care of his daughter. An IPP report from
16 November 2017 indicates that Taylor continues to utilize assistance from ILF
17 staff for scheduling and attending medical appointments. The plan at the time
18 is to continue to utilize ILF staff to assist and provide verbal prompting for
19 scheduling appointments. He continued to have difficulty budgeting and will
20 run out of money by the end of each month.

21 Id. (internal citations and quotations omitted).

22 Plaintiff argues he objectively exhibited low functioning on intellectual functioning,
23 and that “more recent records demonstrate issues with social interaction in the form of
24 interpersonal conflicts . . . he exhibited poor hygiene and demonstrated abnormal affect
25 through the more recent treatment records.” Id. at 8. Plaintiff cites to Dr. Zaven Bilezikjan’s
26 orthopedic consultative examination on December 18, 2015, in which he noted that
27 “[Plaintiff] presented with unusual facial problems, probably developmental in nature. He
28 respond[ed] to questions, but had difficulty giving full details.” AR 384. Plaintiff also cites
29 to Dr. Whitehead’s psychological consultative examination on February 10, 2016 as set
30 forth below:

31 Taylor’s ILF manager took him to the County of San Diego Mental Health
32 Services in June 2016. Taylor presented as malodorous and kept falling asleep
33 during the assessment . . . Dan Whitehead, Ph.D., conducted a consultative

1 examination. Similar to Dr. Hailey’s observation, [Plaintiff] was unable to
2 perform Serial 7’s or Serial 3’s, although he was able to count backwards from
3 20 correctly. On the Wechsler Adult Intelligence Scale-4 (WAIS-4),
4 [Plaintiff’s] composite score summary fell within the borderline range. His
5 highest scaled score was the Perceptual Reasoning Index Scale, which was in
6 the lower 6 percentile, and his lowest scaled score was his Full-Scale IQ of
7 73, falling in the bottom 3 percentile.

8 Id. (citing AR 389-94).

9 Defendant argues that the ALJ properly analyzed the evidence to afford Dr. Hailey’s
10 opinion little weight. Def.’s Mot. at 8. Defendant states that the ALJ “noted multiple
11 instances of substantially unremarkable mental status examinations showing largely full
12 orientation, normal speech, memory and thought content, appropriate affect, insight and
13 judgment, coherent thought process, and good hygiene, both before and after Dr. Hailey’s
14 opinion.” Id. (internal citations omitted). Defendant states that “the ALJ gave specific and
15 legitimate reasons for affording Dr. Hailey’s opinion little weight, namely because her
16 opined statements: (a) were inconsistent with the longitudinal record, including
17 documentation showing Plaintiff’s continued improvement in activities of daily living and
18 other doctors’ examinations; and (b) were contradicted by another consultative examiner
19 and three other doctors’ opinions, rendered after reviewing Dr. Hailey’s examination and
20 opinion.” Id. at 11 (citing AR 36-37).

21 Defendant further argues that the record shows “Plaintiff made significant progress
22 throughout the relevant period, including by managing his money, paying bills on time,
23 comparing grocery prices when shopping, and looking for employment.” Def.’s Mot. at 7.
24 Defendant states that “Plaintiff was independent in all areas of self and home care, there
25 were no concerns with his ability to get along with others, and he expressed repeated
26 interest in finding employment.” Id. Defendant states that “as the ALJ discussed, with some
27 assistance, Plaintiff was able to schedule medical and dental appointments and hold the
28 position of house manager for a group home, which entailed preparing fellow residents’
meals, ensuring they took their medication, providing security, and keeping the residence
clean.” Id. (internal citations omitted). Defendant also argues that “[i]n mid-2015, with

1 assistance, Plaintiff was noted as ‘manag[ing] his money very well’ and that ‘he continues
2 to pay all of his bills on time.’” Id. Defendant states that Plaintiff was “‘doing well in regard
3 to parenting skills’ including taking and picking up his daughter every day, helping her
4 with school assignments, cooking for her, buying what she needs, and spending time with
5 her, such as taking her to the park.” Id.

6 **B. Relevant Law Regarding Opinions of Treating and Examining** 7 **Physicians**

8 In evaluating medical opinions, the regulations distinguish among three categories
9 of physicians: (1) treating physicians; (2) examining physicians, who examine, but do not
10 treat the claimant; and (3) non-examining physicians, who neither examine nor treat the
11 claimant. 20 C.F.R. § 404.1527(c); (e)²; see also Lester v. Chater, 81 F.3d 821, 830 (9th
12 Cir. 1996). “Generally, a treating physician’s opinion carries more weight than an
13 examining physician’s, and an examining physician’s opinion carries more weight than a
14 reviewing physician’s.” Holohan v. Massanari, 246 F.3d 1195,1202 (9th Cir. 2001); see
15 also 20 C.F.R. § 404.1527(d)(2). “The opinion of an examining doctor, even if
16 contradicted by another doctor, can only be rejected for specific and legitimate reasons that
17 are supported by substantial evidence in the record.” Lester, 81 F.3d at 830-31 (citing
18 Andrews v. Shalala, 53 F.3d at 1035, 1043 (9th Cir. 1995)).

19 **C. Analysis**

20 **i. The ALJ’s Treatment of Dr. Hailey’s Opinion**

21 In his written decision, the ALJ found:

22 Psychiatric consultative examiner, Dr. Jennifer Hailey, examined
23 the claimant in October 2016 Dr. Hailey diagnosed the
24 claimant with unspecified depressive disorder and r/o BIF. Dr.
25 Hailey found that the claimant has marked limitations in his
26 ability to follow simple oral and written instructions and

27 ² The Social Security Administration issued new regulations effective March 27, 2017.
28 Unless otherwise stated, all regulations cited in this decision are effective for cases filed
prior to March 27, 2017.

1 extremely limited ability to follow detailed instructions. He has
2 markedly limited ability to interact with the public, coworkers
3 and supervisor, and markedly limited ability to comply with job
4 rules, such as safety and attendance. He has extremely limited
5 ability to respond to changes in a routine work setting and
6 respond to work pressure in a usual work setting.

7 The residual functional capacity found by Dr. Hailey is
8 inconsistent with the record The record does not support a
9 finding that the claimant's mental impairments are so severe as
10 to be disabling. Specifically, progress report from San Diego
11 New Horizons Independent Living Services reveal that the
12 claimant has been able to maintain mostly independent living,
13 aside from assistance with scheduling and managing his medical
14 appointments and budgeting. He has also been working as a
15 house manager for the ILF in exchange for reduced rent and
16 some meals, and his duties include ensuring that the residents
17 take their medication, cooking the meals, providing security, and
18 keeping the residence clean. Additionally, the claimant's mental
19 health treatment notes reveal relatively stable objective findings.
20 Accordingly, little weight is given to Dr. Hailey's opinion.

21 The undersigned notes that Dr. Hailey assessed a Global
22 Assessment of Functioning (GAF) score of 35, indicating major
23 impairment in several areas, such as work or school, family
24 relations, judgement, thinking, or mood. However, the
25 undersigned finds GAF scores in general are of limited
26 evidentiary value. These subjectively assessed scores reveal only
27 snapshots of impaired and improved behavior. The undersigned
28 gives more weight to the objective details and chronology of the
29 record, which more accurately describe the claimants'
30 impairments and limitations. For these reasons, the undersigned
31 gives little weight to the GAF score documented in the record.

32 AR at 36-37 (internal citations omitted).

33 First, the ALJ gave greater weight to the opinions of non-examining physicians
34 than to an examining physician, Dr. Hailey. The ALJ notes that he gave "great weight" to
35 the opinions of the non-examining State agency psychological consultants, Joshua D.
36 Schwartz, Ph.D., Tawnya Brode, Psy.D., and Janet Telford Tyler, Ph.D., who reviewed
37 the file and provided opinions about Taylor's condition. *Id.* at 37 (internal citations
38

1 omitted). The ALJ found generally that their opinions “are consistent with the record.” Id.
2 Thus, although Ninth Circuit law requires that Dr. Hailey’s opinion be given greater
3 weight than that of non-examining physicians, the ALJ did the opposite. See Lester, 81
4 F.3d at 830.

5 Next, if there is a conflict between medical opinions, the ALJ must give specific and
6 legitimate reasons for discounting or rejecting an examining physician’s testimony. The
7 ALJ rejected Dr. Hailey’s opinion because it was purportedly inconsistent with Plaintiff’s
8 daily activities as set forth in (1) progress reports from San Diego New Horizons
9 Independent Living Services and (2) Plaintiff’s mental health treatment notes revealing
10 relatively stable objective findings. AR 36.

11 The ALJ noted the opinions of the non-examining State agency psychological
12 consultants regarding the claimant’s abilities to do work-related activities/functional
13 limitations. The ALJ stated that Joshua D. Schwartz, Ph.D., and Tawnya Brode, Psy.D.,
14 found:

15 [Plaintiff] is able to understand and remember simple
16 instructions and carry out simple instructions. He is able to
17 maintain concentration and attention over extended periods for
18 simple tasks. He is able to maintain concentration and attention
19 over extended periods for simple tasks. He is able to sustain
20 superficial interaction with the public and maintain relationships
21 with coworkers and supervisors. He is capable of appropriately
22 responding to most changes in the work setting.

23 AR 37.

24 However, the ALJ failed to address or otherwise consider that Plaintiff’s
25 responsibilities at the Independent Living Facility are monitored through an Individual
26 Program Plan (IPP) established by the San Diego Regional Center. Under California’s
27 Lanterman Act, “developmentally disabled persons receive services through providers
28 under contract with a ‘regional center.’” Zepeda v. Colvin, 2015 WL 9239714, at *6 (9th
Cir. 2014) (internal citation and quotation omitted). A regional center is “a diagnostic,
counseling, and service coordination center for developmentally disabled persons and their
families.” 17 Cal. Code Regs. § 54302(a)(54). There is no indication that a regional center
simply offers an eligible person any service within its scope. Instead, the regional center is

1 required to prepare an individual program plan (IPP) “developed through a process of
2 individualized needs determination.” Cal. Welf & Inst. Code § 4646(b)-(c). The IPP
3 includes an assessment of the claimant’s capabilities and limitations, and a schedule of the
4 type and amount of services necessary to achieve certain objectives. See Sanchez v.
5 Johnson, 416 F.3d 1051, 1064 (9th Cir. 2005); Cal. Welf. & Inst. Code § 4646.5. When
6 developing an IPP for a working age adult, the interdisciplinary team “shall consider the
7 Employment First Policy in § 4868 et seq. Id. §§ 4646.5(a)(4), § 4868(a)(2). The purpose
8 of the Employment First Policy is to identify strategies, best practices, and incentives for
9 increasing integrated employment and gainful employment opportunities for people with
10 developmental disabilities. Id. § 4648(c)(3).

11 Here, the ALJ concluded that progress reports from the Plaintiff’s Independent
12 Living Facility “reveal that [Plaintiff] has been able to maintain mostly independent living,
13 aside from some assistance with scheduling and managing his medical appointments and
14 budgeting.” AR 36. Plaintiff works in an independent living facility through a program
15 created to help developmentally disabled individuals integrate into the workforce. Plaintiff
16 continued to need help remembering appointments and with budgeting while in a structured
17 environment set up specifically to help him succeed. It is not clear whether the ALJ
18 properly considered the transferability of Plaintiff’s daily activities to a workplace
19 environment. Thus, the Court finds that the ALJ did not provide specific and legitimate
20 reasons, based on the record, for discounting Dr. Hailey’s opinion.

21 The ALJ also focused on Plaintiff’s daily activities in support of his conclusion that
22 “the claimant has a greater sustained capacity than he alleges.” Id. at 37. The Court finds
23 that the ALJ failed to explain how any of these daily activities (personal care, grooming,
24 cooking, cleaning, playing computer games, working as a house manager, taking public
25 transportation, etc.) were inconsistent with Dr. Hailey’s opinion. While the ALJ’s opinion
26 identified a wide range of Plaintiff’s daily activities that could indicate that Plaintiff was
27 not as limited as Dr. Hailey assessed, the ALJ failed to identify which of the activities the
28 ALJ believed were inconsistent with Dr. Hailey’s opinion. Instead, the ALJ merely

1 concluded that the described daily activities are “not limited to the extent one would expect,
2 given the complaints of disabling symptoms and limitations.” Id.

3 The Ninth Circuit has repeatedly warned about the dangers of considering a
4 claimant's daily activities without the necessary context to determine if they truly rebut the
5 claimed severity of an impairment. See, e.g., Trevizo, 871 F.3d at 676, 682 (“[M]any home
6 activities are not easily transferable to what may be the more grueling environment of the
7 workplace, where it might be impossible to periodically rest or take medication.”
8 (quotation marks omitted)); see also Guzman v. Berryhill, 356 F. Supp. 3d 1025, 1039
9 (S.D. Cal. Dec. 20, 2018) (finding ALJ erred by not explaining how daily activities would
10 have no more than a minimal impact on [claimant’s] ability to work); Godow v. Comm’r
11 of SSA, No. CV 17-08160-PCT-MHB, 2018 U.S. Dist. LEXIS 171052, at *14 (D. Ariz.
12 Sep. 28, 2018) (“The ALJ must point to specific inconsistencies between Plaintiff’s daily
13 activities and [the physician’s opinions, and even if such inconsistencies exist, the ALJ
14 must show Plaintiff’s daily activities can transfer to the workplace.”). As stated previously,
15 Plaintiff is able to maintain his daily life through an assisted living facility, with
16 personalized supervision and assistance, and activities specifically modified to suit
17 Plaintiff’s needs and abilities. This kind of individualized attention and care is not typically
18 available in the workplace. Here, the ALJ failed to explain how Plaintiff’s daily activities
19 contradict his alleged limitations.

20 Similarly, the ALJ found that the Plaintiff’s mental health treatment notes reveal
21 relatively stable objective findings, without further indication of what those findings are.
22 AR at 36 (citing exhibits 5F and 33F). The ALJ referred to Exhibit 5F earlier in the opinion
23 and stated that “[t]he claimant underwent psychiatric assessment at Comprehensive Health
24 Center in June 2016.” Id. at 35. The ALJ conclusively summarized that the “assessment
25 notes reveal that he presented with poor hygiene, but was friendly and polite.” Id. The ALJ
26 further noted that “[Plaintiff] also reported multiple stressors due to irresponsible
27 roommate.” Id. (citing 5F/24-34). However, the ALJ failed to address that at Plaintiff’s
28

1 June 23, 2016 assessment at the Comprehensive Health Center, it was also noted in Exhibit
2 5F that:

3 [Plaintiff] reports feeling tired, was seen sleeping in the waiting area. CLT c/o
4 knee pain, walks slowly. CLT reports eating to relieve stress, reports ‘I feel
5 like the world is overwhelming me. I should have come here sooner. I need
help.’ He was brought in by his case worker today. He is malodorous. CLT
keeps falling asleep during the assessment.

6 AR at 418. Similarly, in Exhibit 33F in Plaintiff’s assessment completed on June 28, 2018,
7 the ALJ failed to address that it states:

8 [Plaintiff is] continuing to seek treatment for sadness, emotional reactivity,
9 lack of motivation, frustration, poor self-esteem, anger outbursts consisting of
10 shouting and breaking objects with and without triggers. . . . His fear and
11 worry sometimes trigger insomnia, dizziness and agitation. Client reports that
treatment has reduced voices he hears in his head. . . Client’s depression, anger
outbursts and anxiety impair his ability to sleep, relate to other, maintain
possessions, remain safe, work and participate in positive activities, creating
medical necessity for service.

12 AR at 839. These findings are absent from the ALJ’s discussion of Plaintiff’s medical
13 records, and contradict the ALJ’s conclusion that Plaintiff’s mental health treatment notes
14 reveal relatively stable objective findings. An ALJ may not consider evidence that supports
15 the non-disability determination, while disregarding evidence that supports the
16 contradictory opinion from a physician. See, e.g., Holohan, 246 F.3d at 1207; see also
17 Reddick, 157 F.3d at 722-23 (finding that an ALJ may not “cherry-pick” from a record to
18 support the conclusion, but rather must account for the context of the whole record). The
19 ALJ’s general conclusion that “[t]reatment notes from other care providers between
20 December 2016 and March 2018 reveal that the claimant was oriented, with normal
21 memory, mood and affect” [AR at 35] does not adequately identify what examination
22 results or reports the ALJ is relying on in support of his conclusion. The Court finds that
23 the ALJ failed to articulate specific and legitimate reasons supported by substantial
24 evidence to discount the findings of Dr. Hailey’s opinion.

25 In sum, the Court finds that the ALJ committed legal error by assigning little weight
26 to the examining physician’s opinion without appropriately considering the other relevant
27 factors. The Court is unable to deem this error harmless and finds that it constitutes grounds
28 for remand. The Court recommends that Dr. Hailey’s testimony, upon remand, be

1 reexamined consistent with this opinion and the required specific and legitimate standard.
2 Accordingly, the Court **RECOMMENDS GRANTING** Plaintiff's Motion for Summary
3 Judgment and **DENYING** Defendant's Cross-Motion for Summary Judgment.

4 **VI. Remand Versus Award for Benefits**

5 The law is well established that the decision whether to remand for further
6 proceedings or simply award benefits is within the discretion of the Court. McAllister v.
7 Sullivan, 888 F.2d 599, 603 (9th Cir. 1989); see also Lewin v. Schweiker, 654 F.2d 631,
8 635 (9th Cir. 1981). Remand is warranted where additional proceedings could remedy
9 defects in the decision. See, e.g., Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984;
10 Lewin, 654 F.2d at 635. Remand for the payment of benefits is appropriate where no useful
11 purpose would be served by further administrative proceedings, Kornock v. Harris, 648
12 F.2d 525, 527 (9th Cir. 1980); where the record has been fully developed, Hoffman v.
13 Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would unnecessarily delay
14 the receipt of benefits for which the disabled plaintiff is entitled, Bilby v. Schweiker, 762
15 F.2d 716, 710 (9th Cir. 1985).

16 Here, the Court has concluded that further administrative proceedings would serve
17 a meaningful purpose to address the errors identified herein. Therefore, this Court
18 **RECOMMENDS REVERSING** the ALJ's decision and **REMANDING** for further
19 proceedings to address the errors noted in this Order.

20 **VII. CONCLUSION**

21 For the reasons set forth above, this Court **RECOMMENDS** that Plaintiff's Motion
22 for Summary Judgment be **GRANTED**, that Defendant's Cross-Motion for Summary
23 Judgment be **DENIED**, and that judgment be entered **REVERSING** the decision of the
24 Commissioner and **REMANDING** this matter for further administrative proceedings.

25 **IT IS HEREBY ORDERED** that any written objections to this Report and
26 Recommendation must be filed with the Court and served on all parties on or before
27 **September 28, 2021**. The document should be captioned "Objections to Report and
28 Recommendation."

1 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with
2 the Court and served on all parties on or before **October 19, 2021**. The parties are advised
3 that failure to file objections within the specified time may waive the right to raise those
4 objections on appeal of the Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir.
5 1998); Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).

6 Dated: September 7, 2021



Honorable Linda Lopez
United States Magistrate Judge

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