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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 EDWARD C.,

12 Plaintiff,

13 v.

14 MARTIN O'MALLEY, Commissioner of
15 Social Security,

16 Defendant.

Case No.: 23-cv-1170-AJB-KSC

**REPORT AND
RECOMMENDATION FOR AN
ORDER REVIEWING FINAL
DECISION OF THE
COMMISSIONER OF SOCIAL
SECURITY**

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18 Plaintiff filed this action challenging the final decision of the Commissioner of
19 Social Security denying plaintiff's claim for benefits. Doc. No. 1. This Court directed the
20 parties to explore informal resolution of the matter through the meet-and-confer process,
21 but the parties were unable to resolve the case on their own. Doc. Nos. 9, 10. Having
22 reviewed the parties' briefing and the Administrative Record ("AR"), the Court submits
23 this Report and Recommendation to the assigned District Judge pursuant to 28 U.S.C.
24 § 636(b) and Federal Rule of Civil Procedure 72(b).

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1 **I. BACKGROUND**

2 Plaintiff applied for Disability Insurance Benefits. AR 15.¹ The Social Security
3 Administration denied the claim. *Id.* The Administration denied plaintiff’s claim upon
4 rehearing. *Id.* Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”).
5 *Id.* Plaintiff, represented by counsel, appeared before the ALJ. *Id.* Plaintiff’s attorney and
6 the ALJ both examined plaintiff at the hearing, and the ALJ received testimony from a
7 vocational expert. *Id.* After reviewing the documentary evidence in the record and hearing
8 the witnesses’ testimony, the ALJ ultimately concluded plaintiff was not disabled. *Id.* at
9 33.²

10 The ALJ’s decision followed the five steps prescribed by applicable regulations
11 under which the ALJ must sequentially determine (1) if the claimant is engaged in
12 substantial gainful employment; (2) whether the claimant suffers from a “severe”
13 impairment; (3) if any impairment meets or is medically equal to one of the impairments
14 identified in the regulatory Listing of Impairments; (4) the claimant’s residual functional
15 capacity (“RFC”) and whether the claimant could perform any past relevant work; and (5)
16 whether a claimant can make an adjustment to other work based on his or her RFC. *See* 20
17 C.F.R. § 404.1250(a)(4); AR 18-20. The ALJ’s evaluation ends if at any individual step
18 the ALJ finds the claimant is or is not disabled. *See* 20 C.F.R. § 404.1250(a)(4).

19 The ALJ first made a threshold finding plaintiff met the insured status requirements
20 through a date last insured (“DLI”) of December 31, 2021. AR 20. At step one, adopting
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24 ¹ All citations to “AR” are to the Administrative Record in this matter [Doc. No. 8],
25 and are paginated accordingly. Any other citations to the Court’s docket will reflect
26 pagination assigned by the Court’s CM/ECF case management system.

27 ² Although plaintiff had previously been denied benefits at a prior hearing, the ALJ in
28 this case found any presumption of continuing non-disability as a consequence of the prior
administrative proceedings had been rebutted by a showing of changed circumstances. AR
16-17.

1 the previous administrative findings, the ALJ found plaintiff had “not engaged in
2 substantial gainful activity since August 25, 2019,” the alleged onset date. *Id.*

3 At step two, the ALJ found plaintiff had the following severe impairments: “thoracic
4 spine scoliosis and degenerative disc disease; degenerative disc disease of the cervical
5 spine with radiculopathy; obesity; chronic obstructive pulmonary disease (COPD); asthma;
6 migraines; generalized anxiety disorder (GAD); panic disorder; major depressive disorder
7 (MDD); bipolar II disorder; and post-traumatic stress disorder (PTSD).” *Id.* The ALJ found
8 plaintiff had the following non-severe physical and mental impairments: “diverticulosis;
9 possible cirrhosis of the liver; anemia; hemochromatosis; pancreatitis; colitis;
10 hypertension; fatigue; gastroesophageal reflux disease (GERD); nicotine dependence;
11 tinnitus; vitamin D deficiency; syncope; insomnia; dyspnea; pharyngitis; peptic ulcer;
12 polyarthritis; and white coat syndrome.” AR 21 (internal citations omitted).

13 At step three, the ALJ found claimant’s symptoms did not meet or exceed the
14 regulatory listings. AR 21-24. At step four, the ALJ determined plaintiff had “the residual
15 functional capacity to perform light work,” except plaintiff can “frequently operate hand
16 controls, reach, push, pull, handle, finger, and feel with both upper extremities . . . ;
17 occasionally kneel, crouch, stoop, balance, and crawl”; and “occasionally climb stairs and
18 ramps.” AR 24. However, plaintiff can “never climb ladders, ropes, and scaffolds, and can
19 never be exposed to unprotected heights and moving mechanical parts.” *Id.* Plaintiff “can
20 have occasional concentrated exposure to atmospheric conditions” and “tolerate occasional
21 exposure to extreme cold and vibration.” *Id.* Plaintiff can “understand, carry out, and
22 remember simple instructions, and use judgment to make simple work-related decisions”
23 and “deal with occasional changes in a routine work setting.” *Id.* The ALJ also stated
24 plaintiff “cannot perform work requiring a specific production rate, such as assembly line
25 work or work that requires hourly quotas.” *Id.* Finally, the ALJ found plaintiff “will be off
26 task 10% of the workday.” *Id.* Given plaintiff’s RFC, the ALJ concluded plaintiff could
27 not perform any past relevant work as a parts manager or auto mechanic. AR 31.
28

1 At step five, the ALJ found “there are jobs that exist in significant numbers in the
2 national economy that plaintiff can perform,” including “cleaner, housekeeper, marker,”
3 and “sales attendant.” AR 31-32 (internal citations omitted). Accordingly, the ALJ found
4 that the plaintiff was not disabled. AR 33. The Commissioner’s decision to deny plaintiff’s
5 benefits claim became final on July 27, 2022. AR 1-3. This appeal followed.

6 II. STANDARD OF REVIEW

7 This Court will affirm the ALJ’s decision if (1) the ALJ applied the correct legal
8 standards; and (2) the decision is supported by substantial evidence. *See Batson v. Comm’r*
9 *of the Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). Under the substantial
10 evidence standard, the Commissioner’s findings are upheld if supported by inferences
11 reasonably drawn from the record, and if there is evidence in the record to support more
12 than one rational interpretation, the Court will defer to the Commissioner. *Id.*

13 Even if the ALJ makes an error, this Court can nonetheless affirm the denial of
14 benefits if such error was “harmless, meaning it was ‘inconsequential to the ultimate
15 nondisability determination.’” *Ford v. Saul*, 950 F.3d 1141, 1154 (9th Cir. 2020) (quoting
16 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008)). The Court’s ability to uphold
17 the ALJ’s decision is limited in that this Court may not make independent findings and
18 therefore cannot uphold the decision on a ground not asserted by the ALJ. *See Stout v.*
19 *Comm’r of the Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006).

20 III. ANALYSIS OF THE COMMISSIONER’S DECISION

21 Plaintiff claims two errors: the ALJ did not provide clear and convincing reasons for
22 discounting plaintiff’s allegations of mental dysfunction and erroneously discounted the
23 testimony of the plaintiff’s treating therapist, Cynthia Barnett, LMFT. *See generally* Doc.
24 No. 11 at 1-2. The Court will address both issues.

25 **A. Whether the ALJ failed to provide clear and convincing reasons for discounting** 26 **plaintiff’s allegations of mental dysfunction.**

27 In evaluating a claimant’s subjective symptom testimony, an ALJ must engage in a
28 two-step analysis. *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). “First, the ALJ

1 must determine whether the claimant has presented objective medical evidence of an
2 underlying impairment which could reasonably be expected to produce the pain or other
3 symptoms alleged.” *Id.* (quotation and citation omitted). Second, if the ALJ does not find
4 evidence of malingering, the ALJ can only reject the claimant’s testimony about the
5 severity of those symptoms for “specific, clear, and convincing reasons.” *Lambert v. Saul*,
6 980 F.3d 1266, 1277 (9th Cir. 2020) (citing *Brown-Hunter v. Colvin*, 806 F.3d 487, 488-
7 89 (9th Cir. 2015)). The “‘clear and convincing’ standard requires an ALJ to show his
8 work.” *Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022). “The standard isn’t whether
9 [this] court is convinced, but instead whether the ALJ’s rationale is clear enough that it has
10 the power to convince.” *Id.* At the same time, the ALJ may not merely provide a summary
11 of record evidence and a boilerplate conclusion that plaintiff’s testimony is generally
12 inconsistent with objective medical evidence. *Lambert*, 980 F.3d 1266 at 1277. Rather, the
13 ALJ must identify specific testimony he or she finds not credible and “link that testimony
14 to parts of the record supporting” the negative credibility assessment. *Brown-Hunter*, 806
15 F.3d 487.

16 Plaintiff alleged he suffers from depression, anxiety, PTSD, and panic attacks. AR
17 386. His anxiety keeps him “mostly at home” because he “can’t be around people.” AR
18 401. His anxiety limits his ability to concentrate. AR 406. He cannot handle stress. AR
19 407. He fears going out in public, and he has a generalized fear of “dying.” *Id.* Commenting
20 on his condition with greater specificity, plaintiff noted he cannot attend car shows, which
21 he formerly enjoyed, because there are “too many people,” which will “cause anxiety.” AR
22 405. Thus, the gravamen of plaintiff’s argument is that his mental impairments, in
23 particular his anxiety, prevent him from interacting with people, which prevents him from
24 working.

25 The ALJ noted plaintiff’s medically determinable impairments could reasonably be
26 expected to produce the symptoms as alleged. AR 25. However, the ALJ discounted
27 plaintiff’s claims about the severity of the symptoms caused by plaintiff’s mental
28 impairments. AR 25, 28. Although the ALJ’s decision is not a model of clarity, the Court

1 concludes the ALJ specifically cited the following evidence in support of this finding: (1)
2 plaintiff's history of mental health treatment; (2) Dr. Theodore Swigart's examination of
3 plaintiff; (3) plaintiff's use of an emotional support animal; (4) plaintiff's ability to engage
4 in certain activities of daily living ("ADLs"); and (5) evidence of "normal mood and
5 judgment and intact cognition without confusion" during "mental status exams." *See* AR
6 27-28 (citing AR 1226-27, 1275, 1284, 1300-08, 1450-52, 1459, 1531, 1569) AR 28 (citing
7 AR 404, 1031, 1034, 1037, 1096, 1451, 1491, 1569). As the Court will explain, none were
8 valid reasons to discount plaintiff's allegations.

9 **(1) Plaintiff's History of Mental Health Treatment**

10 Evidence that successful medical treatment has relieved the symptoms caused by a
11 mental impairment may, in an appropriate case, rebut a plaintiff's allegations of disabling
12 symptoms. *See Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017); *see also Morgan*
13 *v. Comm'r*, 169 F.3d 595, 599-600 (9th Cir. 1999) (noting that a plaintiff's "mental
14 symptoms improved with the use of medication" can be a clear and convincing reason to
15 reject a claim of disability). Here, the ALJ concluded plaintiff's anxiety was "stable with
16 continuous use of anxiolytic medications." AR 27 (citing AR 1459). This conclusion was
17 based on a single observational note from an annual physical exam performed on or around
18 August 4, 2021. *See* AR 1459-60. But a disability determination must be based on the
19 record "as a whole." *Smith v. Kijakazi*, 14 F.4th 1108, 1112-14 (9th Cir. 2012); *Burrell v.*
20 *Colvin*, 775 F.3d 1133, 1140 (9th Cir. 2014). The Court first notes that, during the same
21 physical examination performed by the ALJ, plaintiff reported severe anxiety symptoms
22 "nearly every day." *See* AR 1457. Thus, the record relied on by the ALJ suggests plaintiff's
23 anxiety was stable, but also severe. The two conditions are not mutually exclusive, as a
24 severe condition can nonetheless be "stable" if it is getting neither better nor worse. The
25 ALJ's analysis does not account for this, and it was therefore incomplete.

26 Moreover, the record suggests that plaintiff's use of anti-anxiety drugs may well
27 assuage the symptoms of an acute panic attack, but at the same time they leave him too
28 drowsy to function normally. *See* AR 70, 408. The ALJ may have correctly concluded that

1 plaintiff could avoid his most severe panic attacks by taking Xanax, but that was not
2 enough. Given the record as a whole, the ALJ also had to ascertain whether plaintiff could
3 still work given the side effects of his medication. Accordingly, the mere fact that plaintiff
4 could take medication is not substantial evidence tending to rebut his claims of disabling
5 mental impairments.

6 **(2) Dr. Swigart’s Examination and Report**

7 A contradictory medical opinion can be substantial evidence that rebuts subjective
8 symptom testimony. *See Carmickle v. Comm’r*, 533 F.3d 1155, 1161 (9th Cir. 2008). In
9 *Carmickle*, an ALJ rejected a plaintiff’s testimony that he could “lift only 10 pounds
10 occasionally” based on a “contradictory opinion that [plaintiff] can lift up to 10 pounds
11 frequently.” *Id.* The ALJ in this case relied on a June 2021 consultative exam performed
12 by Dr. Theodore Swigart. *See AR 27* (citing AR 1450-52). The ALJ noted Dr. Swigart’s
13 findings that plaintiff maintained “adequate eye contact” and “establish[ed] rapport with
14 the examiner.” *Id.* Dr. Swigart also noted plaintiff “was able to perform simple math, do
15 serial threes and serial sevens, spell ‘world’ forward and backward, state the similarities of
16 apples and oranges, name past Presidents, display common sense understandings, register
17 3/3 objects after five minutes, and respond appropriately to imaginary situations requiring
18 social judgment.” *Id.*

19 Unlike *Carmickle*, where the contradictory medical opinion directly addressed a
20 functional limitation claimed by the plaintiff, the medical opinion at issue here does not
21 adequately rebut the plaintiff’s claims. Plaintiff in this case claims he is so crippled by
22 anxiety that he cannot interact with the public. Whether he can count backwards by threes,
23 remember who is or was President, or spell grade-school vocabulary words is wholly
24 beside the point. While Dr. Swigart’s medical opinion might support a finding that plaintiff
25 is mentally capable of performing certain job duties as a matter of pure cognition, the
26 opinion is not substantial evidence tending to rebut plaintiff’s claims of debilitating panic
27 attacks, and it was error for the ALJ to so conclude.

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1 **(3) Plaintiff’s Use of an Emotional Support Animal**

2 Although neither party sufficiently addressed this in the briefing, and the ALJ’s
3 decision is not clear on whether the ALJ considered it favorably or unfavorably to plaintiff,
4 the ALJ appears to have considered plaintiff’s use of an emotional support animal as a
5 factor tending to rebut plaintiff’s subjective symptom testimony. *See* AR 28. A different
6 ALJ, in plaintiff’s previous hearing, questioned plaintiff about whether plaintiff’s dog
7 could accompany him to work and thereby relieve his anxiety, and a previous vocational
8 expert opined that, at least for some jobs, having on on-site emotional support animal might
9 be a valid option. *See* AR 81-83. However, plaintiff also testified his pet would not be
10 capable of performing that role because she bites strangers. *See id.* Thus, to the extent the
11 ALJ considered plaintiff’s use of an emotional support animal as tending to rebut testimony
12 that plaintiff’s anxiety prevents him from working, that conclusion would not be supported
13 by substantial evidence on this record.

14 **(4) Plaintiff’s Activities of Daily Living**

15 Evidence related to a plaintiff’s ADLs is generally of limited probative value
16 because a plaintiff need not be confined to permanent bedrest to be deemed too disabled to
17 work. *See Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014). As such, evidence of an
18 ability to engage in ADLs is only probative when it is “inconsistent” with a plaintiff’s
19 testimony or where it establishes skills that can readily be transferred to the workplace. *Id.*
20 The Ninth Circuit “has repeatedly asserted that the mere fact that a plaintiff has carried on
21 certain daily activities, such as grocery shopping, driving a car, or limited walking for
22 exercise, does not in any way detract from [his] credibility as to [his] overall disability.”
23 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001); *see also Smolen v. Chater*, 80
24 F.3d 1273, 1284 (9th Cir. 1996) (recognizing “many home activities may not be easily
25 transferrable to a work environment”).

26 The ALJ discounted plaintiff’s testimony about his mental impairments because the
27 ALJ concluded plaintiff’s allegations were inconsistent with his activities of daily living,
28 including “driv[ing], manag[ing] finances, and maintain[ing] a good relationship with most

1 of his family.” AR 28. The ALJ did not explain *how* these ADLs were inconsistent with
2 plaintiff’s testimony or *how* they demonstrated transferrable job skills. A single conclusory
3 statement declaring the existence of an inconsistency does not rise to the level of an ALJ
4 providing a clear and convincing reason to discount plaintiff’s allegations. Given the nature
5 of plaintiff’s mental impairments—that his anxiety precludes him from performing any
6 work because he cannot interact with the public—evidence that plaintiff can sometimes
7 drive or manage his finances (both of which can be done alone and can be skipped or
8 paused at will to deal with unprovoked anxiety) or interact with his family (who are not the
9 general public) is not substantial evidence supporting a conclusion that plaintiff’s ADL’s
10 rebut his allegations of mental impairment.

11 **(5) Plaintiff’s Mental Status Exams**

12 Although an ALJ may not “insist on clear medical evidence to support each part of
13 a” plaintiff’s subjective symptom testimony, “[w]hen objective medical evidence in the
14 record is inconsistent with the claimant’s subjective testimony, the ALJ may indeed weigh
15 it as undercutting such testimony.” *Smartt v. Kijakazi*, 53 F.4th 489, 498 (9th Cir. 2022).
16 The ALJ in this case discounted plaintiff’s testimony in part because he found it
17 inconsistent with plaintiff’s “mental status exams [that] show normal mood and judgment
18 and intact cognition without confusion.” AR 28 (citing AR 1031, 1034, 1037, 1096, 1491,
19 1569). Plaintiff argues the ALJ cherry-picked from the record to focus on evidence
20 favorable to a benefits denial, choosing to focus on “notations made during hematology
21 clinic visits, while ignoring probative primary care treatment notes, which showed . . .
22 moderate to severe mental health evaluations.” Doc. No. 11 at 6. Defendant’s response is
23 that the ALJ is not required to draft a “dissertation” as part of a benefits denial, and
24 resolving evidentiary conflicts is a matter for the ALJ, not this Court. Doc. No. 13 at 6-7.

25 The Ninth Circuit has repeatedly held that an ALJ cannot cherry pick from the record
26 by focusing on the evidence that hurts the plaintiff’s case while ignoring the evidence that
27 could support a finding of disability. *See Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir.
28 2014); *Garrison v. Colvin*, 759 F.3d 995, 1017 n.23 (9th Cir. 2014); *Holohan v. Massanari*,

1 246 F.3d 1195, 1207 (9th Cir. 2001). As the ALJ noted, multiple hematology and
2 pulmonology clinicians marked plaintiff down as having a normal mood and intact
3 cognition during his clinic visits. *See* AR 1031, 1034, 1037, 1096, 1491, 1569. The ALJ
4 characterized these observations as “mental status exams.” *See* AR 28. In reality, the visits
5 at issue concerned plaintiff’s blood and lungs. *See, e.g.*, AR 1031 (noting there was
6 “extensive discussion about the diagnosis of hemochromatosis” with no mention of
7 psychiatric issues); AR 1096 (noting plaintiff received advice and counseling on keeping
8 a healthy diet and/or exercising despite breathing issues). Thus, the ALJ’s conclusory
9 statement that these exams rebutted plaintiff’s testimony about his mental impairments is
10 unreasonable based on the record. Moreover, the ALJ ignored multiple medical records
11 favorable to plaintiff.

12 For example, the ALJ failed to acknowledge how plaintiff’s mood was described as
13 “depressed and tearful,” by Dr. Theodore Swigart, a clinical psychologist. AR 1451. Dr.
14 Swigart stated plaintiff’s “anxiety and depression symptoms appeared to have worsened
15 over the past two years as his medical condition has worsened.” AR 1452. Dr. Swigart also
16 noted plaintiff:

17 [P]resented with slowed thinking consistent with depression and feeling easily
18 overwhelmed. He is easily irritated. He has crying episodes. He has poor
19 sleep. He has reduced energy as well as a worrisome thinking about his health
20 and social anxiety. He also has a history of panic attacks as well as symptoms
21 similar to posttraumatic stress disorder mainly nightmares and intrusive
images of the traumatic death of his friend that he witnessed.

22 *Id.* Dr. Swigart further stated plaintiff “would have mild limitations completing a normal
23 workday or workweek due to his mental condition” and “would have moderate difficulties
24 to be able to handle the usual stresses, changes and demands of gainful employment.” AR
25 1453. Lastly, Dr. Swigart diagnosed plaintiff with recurrent major depressive disorder and
26 unspecified anxiety disorder. AR 1452. The ALJ failed to note Dr. Swigart’s overall
27 impression that plaintiff’s prognosis from a psychiatric standpoint was “poor.” AR 1453.
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1 The ALJ ignored psychiatric screenings that rated plaintiff’s ability to interact with
2 supervisors and coworkers or complete a normal workday without interruptions from
3 psychologically based symptoms as “poor.” *See* AR 1268-71. The ALJ failed to account
4 for multiple office treatment records that report a long history of severe mental health
5 symptoms, and which generally corroborate plaintiff’s testimony at the hearing about the
6 severity of his depression, anxiety, and PTSD. *See, e.g.*, AR 1239-41, 1242-45, 1274-75,
7 1276-78, 1278-82. The Court concludes the ALJ improperly cherry-picked evidence from
8 the record when the ALJ concluded plaintiff’s “mental status examinations” were
9 consistent with a finding of non-disability. Because this, and all the other reasons the ALJ
10 gave for discounting plaintiff’s subjective symptom testimony, were unsupported by
11 substantial evidence, the ALJ’s decision was erroneous on this issue.

12 **(B) Whether the ALJ Properly Rejected Ms. Barnett’s Opinion**

13 Plaintiff also assigns error to the ALJ’s evaluation of a report provided by plaintiff’s
14 treating therapist, Cynthia Barnett, LMFT. *See* Doc. No. 11 at 8. Plaintiff characterizes the
15 ALJ’s analysis of Ms. Barnett’s opinion as non-specific, particularly because the ALJ does
16 not identify which parts of her opinion he accepts and which parts he rejects. *Id.* at 10-11.
17 Defendant argues the ALJ properly discharged his duties by stating generally how
18 persuasive he found the opinion in light of the two factors of supportability and
19 consistency. Doc. No. 13 at 8-9.

20 When an ALJ evaluates competing medical opinions in the administrative record,
21 the ALJ must evaluate the persuasiveness of any medical opinions and articulate his or her
22 assessment as to each. 20 C.F.R. § 404.1520c. In evaluating persuasiveness, an ALJ
23 considers the medical opinions’ supportability and consistency; and the ALJ may also
24 consider the relationship between the source and the claimant, the source’s specialization,
25 and other factors such as the source’s knowledge of other evidence, social security
26 requirements, and whether there was subsequently submitted evidence. *See* 20 C.F.R. §
27 404.1520c(1)-(5). Although an ALJ may discuss each of the factors to be considered in his
28 or her opinion, the regulations only require the ALJ to explain how he or she considered

1 the most important factors— supportability and consistency—when determining a medical
2 opinion’s persuasiveness, unless two conflicting medical opinions are both equally well-
3 supported and consistent with the record. 20 C.F.R. § 404.1520c(b)(2)-(3). Under the
4 current regulations, the ALJ’s decision “to discredit any medical opinion” will be upheld
5 if it is “supported by substantial evidence.” *Woods v. Kijakazi*, 32 F.4th 785, 787 (9th Cir.
6 2022).

7 “Consistency” measures how consistent a medical opinion is with other evidence in
8 the record. See 20 C.F.R. §§ 404.1520c(c)(2), 416.920c(c)(2). “Supportability” is the
9 extent to which a source presents relevant objective medical evidence and explanations to
10 support its opinion or finding. 20 C.F.R. § 404.1520c(c)(1), 416.920c(c)(1). The ALJ did
11 mention “consistency” and “supportability” in his evaluation of Ms. Barnett’s opinion, the
12 entirety of which is as follows:

13 [In] May 2021, Cynthia Barnett, LMFT, opined that the claimant had fair
14 ability interact appropriately with the public and a good ability to understand,
15 remember, and carry out simple and complex instructions; maintain
16 concentration, attention, and persistence; and perform activities within a
17 schedule and maintain regular attendance. This opinion is somewhat
18 persuasive. It is supported by LMFT Barnett’s note indicating that the
claimant’s progress was maintained in treatment. However, it is not fully
consistent with the claimant’s testimony of trouble concentrating.

19 *See* AR 29. The Court concludes this assessment is ultimately inscrutable for several
20 reasons. First, the ALJ did not explain how Ms. Barnett’s “note” is a proper supportability
21 factor because it does not facially appear to describe the credible medical information Ms.
22 Barnett considered when forming her opinion, and the Court cannot review an assessment
23 by the ALJ that is so conclusory and unclear. More problematically, the ALJ appears to
24 have actually *rejected* Ms. Barnett’s opinions about plaintiff’s abilities to focus and
25 concentrate, which means the ALJ thought plaintiff was *more* disabled than Ms. Barnett’s
26 opinion suggested. The ALJ ignored the parts of Ms. Barnett’s opinion which suggest
27 plaintiff’s impairments may have been serious enough to preclude any engagement in
28 substantial gainful activity: his “poor” ability to interact with coworkers and supervisors,

1 his “poor” ability to work without interruption, and his “poor” ability to respond to changes
2 in a work setting. *See* AR 1270. The ALJ’s assessment, therefore, implausibly ignores
3 without explanation Ms. Barnett’s assessments and is not an appropriate discharge of the
4 obligation to assess the persuasiveness of competing medical opinions.

5 **(C) Whether the ALJ’s Error Was Harmless**

6 This Court’s ability to assign harmlessness to an ALJ’s error is severely constrained
7 because the decision on an applicant’s disability rests solely with the Social Security
8 Administration. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015). Harmless
9 error is therefore the exception to the rule in Social Security appeals. *See id.* The Ninth
10 Circuit finds harmless error where the ALJ commits error, but the ALJ’s decision
11 nonetheless incorporated another, independently sufficient ground for denial of benefits.
12 *See Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012), superseded on other grounds
13 20 C.F.R. § 404.1502(a). In this case, the Court has concluded the ALJ’s assessment of
14 plaintiff’s testimony was not supported by substantial evidence and the evaluation of
15 LMFT Barnett’s opinion was legally insufficient. None of the ALJ’s flawed analyses were
16 supported by independent, sufficient reasoning free from error. Accordingly, the Court
17 concludes the errors here were not harmless.

18 The question of disposition remains. Plaintiff suggested the decision here should be
19 “remanded.” *See* Doc. No. 11 at 14. Here, although the ALJ failed to properly assess
20 plaintiff’s subjective symptom testimony and inadequately considered the persuasiveness
21 of Ms. Barnett’s opinion, it is the agency’s job, not this Court’s, not make the ultimate
22 determination on disability. The Court accordingly concludes remand for further
23 proceedings is the appropriate remedy.

24 **IV. CONCLUSION AND RECOMMENDATION**

25 The Court recommends the decision of the Commissioner be vacated and the matter
26 remanded. On remand, the ALJ shall reconsider the record and issue a new decision
27 consistent with this Report and Recommendation. Any objections (or responses thereto) to
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1 this Report and Recommendation shall be filed within the time limits allowed by Federal
2 Rule of Civil Procedure 72(b).

3 Dated: July 3, 2024



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5 Hon. Karen S. Crawford
6 United States Magistrate Judge
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