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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER J.,<sup>1</sup>  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN, *Acting  
Commissioner of Social Security*<sup>2</sup>  
  
Defendant.

Case No.: 24cv349-GPC (MSB)

**REPORT AND RECOMMENDATION FOR  
ORDER REVERSING COMMISSIONER’S  
DECISION AND REMANDING FOR  
FURTHER ADMINISTRATIVE  
PROCEEDINGS**

**[ECF Nos. 11, 13, 14]**

This Report and Recommendation is submitted to the Honorable Gonzalo P. Curiel, United States District Judge, pursuant to 28 U.S.C. § 636(b)(1) and Civil Local Rule 72.1(c) of the United States District Court for the Southern District of California. On February 22, 2024, Plaintiff Christopher J. (“Plaintiff”) filed a Complaint pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) seeking judicial review of a final adverse decision by

<sup>1</sup> Under Civil Local Rule 7.1(e)(6)(b), “[o]pinions by the Court in [Social Security cases under 42 U.S.C. § 405(g)] will refer to any non-government parties by using only their first name and last initial.”

<sup>2</sup> Carolyn W. Colvin is the Acting Commissioner of Social Security. See Social Security Commissioners, <https://www.ssa.gov/history/commissioners.html>. Accordingly, Colvin is substituted as the Defendant in this lawsuit. See Fed. R. Civ. P. 25(d) (“An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer’s successor is automatically substituted as a party”).

1 Defendant Carolyn W. Colvin, Acting Commissioner of Social Security (“Commissioner”).  
2 (ECF No. 1.)

3 Now pending before the Court is Plaintiff’s Opening Brief, claiming error by the  
4 Administrative Law Judge (“ALJ”) who conducted the administrative hearing and issued  
5 the decision denying Plaintiff’s application for disability insurance benefits. (ECF No.  
6 11.) The Court has carefully reviewed the Complaint [ECF No. 1], the Administrative  
7 Record (“AR”) [ECF No. 8], Plaintiff’s Opening Brief [ECF No. 11], the Commissioner’s  
8 Responsive Brief [ECF No. 13], and Plaintiff’s Reply [ECF No. 14]. For the reasons set  
9 forth below, the Court **RECOMMENDS** judgment be entered **REVERSING** the  
10 Commissioner’s decision and **REMANDING** this matter for further administrative  
11 proceedings consistent with this Report and Recommendation.

#### 12 I. PROCEDURAL BACKGROUND

13 On May 24, 2021, Plaintiff applied for Social Security benefits under Titles II and  
14 XVIII of the Social Security Act, alleging disability beginning on November 1, 2018. (AR  
15 206–07.) The Commissioner denied his application initially on September 24, 2021, and  
16 again upon reconsideration on January 18, 2022. (AR 98–103; AR 105–110.) On January  
17 24, 2022, Plaintiff requested an administrative hearing. (AR 111–12.) ALJ Howard  
18 Treblin held a telephonic hearing on February 13, 2023, during which Plaintiff appeared  
19 with counsel; Plaintiff and vocational expert, Jeff Komar, testified.<sup>3</sup> (AR 32–50.)

20 In a written decision dated March 10, 2023, the ALJ found Plaintiff had not been  
21 under a disability from November 1, 2018, through the date of the ALJ’s decision. (AR  
22 14–31.) On May 14, 2023, Plaintiff requested review of the ALJ’s decision. (AR 203–05.)  
23 The Appeals Council denied Plaintiff’s request for review on January 4, 2024, making the  
24 ALJ’s decision final. (AR 1–6.) See also 42 U.S.C. § 405(g). This timely civil action  
25 followed.

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27 <sup>3</sup> The administrative hearing was initially set for September 27, 2022 [AR 165], but was continued to  
28 February 13, 2023, to allow for a psychological consultative examination, which took place on January  
4, 2023 [AR 558–67]. (AR 17.)



1 (“RFC”) to do the following:

2 [P]erform a full range of work at all exertional levels but with the following  
3 nonexertional limitations: understand, remember, carryout unskilled type  
4 work, with short and simple job instructions and tasks, consistent with  
5 simple and repetitive type work. [Plaintiff] can interact with coworkers and  
6 supervisors appropriately, however the work should be non-collaborative  
7 work and no teamwork. [Plaintiff] can make appropriate and intact handoff  
8 of work materials and products to coworkers and supervisors. [Plaintiff]  
9 can respond appropriately to: supervision; routine work situations; settings;  
changes and would need a non-public work setting. He can make  
appropriate decisions, ask questions, and use judgment. [Plaintiff] should  
have non-public work, but he can have incidental contact, including brief or  
occasional contact with the public, so long as it is not job-related contact.

10 (AR 21–22.) Further, the ALJ found that while Plaintiff’s “medically determinable  
11 impairments could reasonably be expected to cause the alleged symptoms . . .

12 [Plaintiff’s] statements concerning the intensity, persistence and limiting effects of these  
13 symptoms are not entirely consistent with the medical evidence and other evidence in  
14 the record.” (AR 24.)

15 At step four, the ALJ determined Plaintiff could not perform his past relevant work  
16 as the following: Light Truck Driver (Dictionary of Occupational Titles (“DOT”) 906.683-  
17 022, medium exertion); Administrative Clerk (DOT 216.362-010, light exertion); and  
18 Survey Work (DOT 205.367-054, light exertion). (AR 25.) In making this determination,  
19 the ALJ noted the vocational expert (“VE”) testified an individual with Plaintiff’s RFC  
20 would be unable to perform the past relevant work as actually or generally performed.

21 (Id.) Finally, at step five, the ALJ found that given Plaintiff’s age, education, work  
22 experience, and RFC, he could perform other jobs existing in significant numbers in the  
23 national economy. (AR 26.) Considering the VE’s testimony, the ALJ determined  
24 Plaintiff could perform jobs such as Cleaner II (DOT 919.687-014, medium exertion);  
25 Hand Packager (DOT 920.587-018, medium exertion); and Meat Clerk (DOT 222.684-  
26 010, medium exertion.) (Id.) Thus, the ALJ concluded Plaintiff has not been under a  
27 disability from November 1, 2018, through March 10, 2023. (AR 26–27.)

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1 **III. DISPUTED ISSUES**

2 In his Opening Brief, Plaintiff raises four issues as grounds for reversal:

- 3 1. Whether the ALJ’s RFC finding properly addressed Plaintiff’s limitations;  
4 2. Whether the ALJ properly addressed listing 12.04;  
5 3. Whether the ALJ provided clear and convincing reasons to discredit  
6 Plaintiff’s testimony; and  
7 4. Whether the ALJ met his burden of proof at step five.

8 (ECF No. 11 at 8.)

9 **IV. STANDARD OF REVIEW**

10 Section 405(g) of the Social Security Act allows unsuccessful applicants to seek  
11 judicial review of the Commissioner’s final decision. See 42 U.S.C. § 405(g). The scope  
12 of judicial review is limited, and the denial of benefits will only be disturbed if the final  
13 decision is not supported by substantial evidence or contains a legal error. Luther v.  
14 Berryhill, 891 F.3d 872, 875 (9th Cir. 2018) (internal citations omitted). “Substantial  
15 evidence” is a “‘term of art’ used throughout administrative law to describe how courts  
16 are to review agency factfinding.” Biestek v. Berryhill, 587 U.S. 97, 102 (2019) (quoting  
17 T-Mobile S., LLC v. City of Roswell, 574 U.S. 293, 301 (2015)). The Supreme Court has  
18 said substantial evidence means “more than a mere scintilla,” but only “such relevant  
19 evidence as a reasonable mind might accept as adequate to support a conclusion.” Id.  
20 (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The Ninth Circuit  
21 explained that substantial evidence is “more than a mere scintilla, but less than a  
22 preponderance.” Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017) (quoting  
23 Desrosiers v. Sec’y of Health & Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988).

24 Where the evidence is susceptible to more than one rational interpretation, the  
25 ALJ’s decision must be upheld. See Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir.  
26 2008) (internal citations omitted). This includes deferring to the ALJ’s credibility  
27 determinations and resolutions of evidentiary conflicts. See Lewis v. Apfel, 236 F.3d  
28 503, 509 (9th Cir. 2001) (citing Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).  
Even if the reviewing court finds substantial evidence supports the ALJ’s conclusions, the

1 court must set aside the decision if the ALJ failed to apply the proper legal standards in  
2 weighing the evidence and reaching their decision. See Batson v. Comm’r of Soc. Sec.  
3 Admin., 359 F.3d 1190, 1193 (9th Cir. 2004). The reviewing court may enter a  
4 “judgment affirming, modifying, or reversing” the Commissioner’s decision. 42 U.S.C. §  
5 405(g). The reviewing court may also remand the case to the Social Security  
6 Administration for further proceedings. Id. However, the reviewing court “may not  
7 reverse an ALJ’s decision on account of an error that is harmless.” Molina v. Astrue, 674  
8 F.3d 1104, 1111 (9th Cir. 2012) (citing Stout v. Comm’r Soc. Sec. Admin., 454 F.3d 1050,  
9 1055–56 (9th Cir. 2006)).

## 10 V. DISCUSSION

### 11 A. Whether the ALJ’s RFC Finding Properly Addressed Plaintiff’s Limitations

#### 12 1. Parties’ arguments

13 Plaintiff argues the ALJ’s RFC determination did not address Plaintiff’s moderate  
14 mental limitations; therefore, the RFC is not supported by substantial evidence. (ECF  
15 No. 11 at 10–11.) Plaintiff contends Plaintiff’s “[m]oderate limitations cannot be  
16 addressed by limiting work to simple routine work with limited contact,” and thus “the  
17 ALJ has not properly addressed [his] moderate mental limitations” in the functional  
18 areas of interacting with others and adapting or managing oneself.<sup>5</sup> (Id. at 11.)

19 In response, the Commissioner contends the ALJ’s RFC determination “reasonably  
20 captured [Plaintiff’s] alleged limitations with respect to memory, being around  
21 strangers, and concentrating.” (ECF No. 13 at 13 (citing AR 35–37).) Specifically, the  
22 Commissioner argues the ALJ reasonably accounted for Plaintiff’s limitations by  
23 “restricting Plaintiff to short and simple job instructions and tasks consistent with simple  
24 and repetitive work, no teamwork, and non-collaborative work in a non-public setting.”

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27 <sup>5</sup> Plaintiff also asserts the ALJ’s RFC determination did not address Plaintiff’s moderate limitations in  
28 the areas of “following normal rules” and exhibiting “violent behavior while working when confronted  
with stressors.” (ECF No. 11 at 10 (citing AR 21).) The Court focuses on the four broad functional areas  
set forth in the regulations. See 20 C.F.R. § 404.1520a(c)(3).

1 (Id. at 14.) The Commissioner further argues Plaintiff’s contention that his mild and  
2 moderate symptoms necessitate further limitations is without merit and at odds with  
3 binding Ninth Circuit authority. (Id. at 13.) First, the Commissioner claims Plaintiff  
4 improperly relies on nonbinding district court decisions holding that “mild or moderate  
5 mental health symptoms are not necessarily ‘sufficiently severe’ enough to ‘significantly  
6 limit[] a claimant’s ability to do work beyond the exertional limitation.’” (Id. (citing  
7 Hoopai v. Astrue, 499 F.3d 1071, 1077 (9th Cir. 2007)).) Second, the Commissioner  
8 contends the Ninth Circuit recently upheld an ALJ’s finding of “no mental limitations” in  
9 the RFC where the ALJ separately found mild limitations with respect to paragraph B.  
10 (Id. (citing Woods v. Kijakazi, 32 F.4th 785, 794 (9th Cir. 2022)).) Finally, the  
11 Commissioner maintains the ALJ’s findings regarding Plaintiff’s mental limitations are  
12 “fully consistent with the prior administrative findings of record.” (Id. at 14 (citing AR  
13 24, 68–69, 71–73, 86).) Thus, the Commissioner argues the ALJ’s RFC finding is  
14 supported by substantial evidence and should be upheld. (Id.)

15 In his Reply, Plaintiff reiterates his contention that the ALJ must address moderate  
16 limitations in the RFC; because the ALJ’s RFC finding did not include moderate  
17 limitations in two functional areas, Plaintiff alleges error. (ECF No. 14 at 5–6.) Plaintiff  
18 additionally argues Hoopai and Woods are misplaced because neither case involved a  
19 claimant assessed with moderate mental limitations. (Id. at 6.) Therefore, Plaintiff  
20 asserts the ALJ’s findings are not supported by substantial evidence. (Id.)

## 21 **2. Applicable law**

22 RFC, or residual functional capacity, is a claimant’s ability to do work-related  
23 activities on a sustained basis (i.e., eight hours a day, five days per week). Titles II & XVI:  
24 Assessing Residual Functional Capacity in Initial Claims, Social Security Ruling (“SSR”) 96-  
25 8P, 1996 WL 374184, at \*1 (S.S.A. July 2, 1996). Thus, it represents the maximum  
26 amount of work a claimant can perform despite their limitations, based on all relevant  
27 evidence in the record. See 20 C.F.R. § 416.945(a)(1); 20 C.F.R. § 404.1545(a)(1). In  
28 making this finding, the ALJ must consider all the claimant’s medically determinable

1 impairments, including those that are non-severe. See 20 C.F.R. § 404.1545(a)(2); see  
2 also Buck v. Berryhill, 869 F.3d 1040, 1049 (9th Cir. 2017) (quoting SSR 96-8P, 1996 WL  
3 374184, at \*5). “The RFC therefore should be exactly the same regardless of whether  
4 certain impairments are considered ‘severe’ or not.” Buck, 869 F.3d at 1049.

5         Additionally, the Ninth Circuit has held the agency must consider the claimant’s  
6 testimony regarding their capabilities, as well as all relevant evidence, including medical  
7 records, lay evidence, and pain. Chaudhry v. Astrue, 688 F.3d 661, 670 (9th Cir. 2012);  
8 Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006); SSR 96-8P, 1996 WL  
9 374184, at \*5. The Ninth Circuit has generally held “an RFC that fails to take into  
10 account a claimant’s limitations is defective.” Valentine v. Comm’r Soc. Sec. Admin., 574  
11 F.3d 685, 690 (9th Cir. 2009); see also Samples v. Comm’r Soc. Sec. Admin., 466 Fed.  
12 App’x 584, 586 (9th Cir. 2012). “[T]he limitations identified in the paragraph B and  
13 paragraph C criteria are not an RFC assessment.” SSR 96-8p, 1996 WL 374184, at \*4  
14 (internal quotation marks omitted). Rather, these limitations are used to rate the  
15 severity of a claimant’s mental impairments at steps two and three. Id. The RFC  
16 assessment thus requires “a more detailed assessment” than what is required at steps  
17 two and three. Id. See also Buck, 869 F.3d at 1048–49 (noting step two is “merely a  
18 threshold determination” and “is not meant to identify the impairments that should be  
19 taken into account when determining the RFC”); Darren Jeffrey C. v. Kijakazi, 3:21-CV-  
20 01012-AHG, 2022 WL 4474261, at \*10 (S.D. Cal. Sept. 26, 2022) (“[A] boilerplate  
21 statement that the RFC ‘reflects the degree of limitation’ the ALJ found at steps two and  
22 three is not sufficient to show that the requisite ‘more detailed assessment’ required by  
23 the RFC determination was actually conducted.”)

### 24                   **3. The ALJ’s findings**

25         At step three of the five-step sequential evaluation process, the ALJ addressed the  
26 four broad areas of mental functioning for evaluating mental disorders. See 20 C.F.R. §  
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1 404.1520a(c)(3). The ALJ found Plaintiff has mild<sup>6</sup> limitations in the areas of  
2 understanding, remembering, or applying information and concentrating, persisting, or  
3 maintaining pace. (AR 20–21.) Additionally, the ALJ found Plaintiff has moderate<sup>7</sup>  
4 limitations in the areas of interacting with others and adapting or managing oneself.  
5 (Id.) The ALJ determined Plaintiff does not have any marked<sup>8</sup> or extreme<sup>9</sup> mental  
6 limitations. (Id.)

7 Ultimately, the ALJ found Plaintiff has the RFC to perform a full range of work with  
8 the following non-exertional limitations:

- 9
- 10 • Understand, remember, carry out unskilled type work, with short and  
simple job instructions and tasks, consistent with simple and repetitive  
type work.
  - 11 • Interact with coworkers and supervisors appropriately, however the  
work should be non-collaborative work and no teamwork.
  - 12 • Respond appropriately to: supervision, routine work situations, settings,  
13 and changes; however, the work setting should be non-public.
  - 14 • Should have non-public work, but can have incidental contact, including  
15 brief or occasional contact with the public, so long as it is not job-related  
contact.

16 (AR 20–21.) In making this RFC determination, the ALJ said he considered “all  
17 symptoms and the extent to which these symptoms can reasonably be accepted  
18 as consistent with the objective medical evidence and other evidence.” (Id.)

#### 19 **4. Analysis**

20 The ALJ’s RFC determination is not supported by substantial evidence because the  
21 ALJ erroneously substituted his paragraph B mental functioning analysis when  
22 formulating the RFC, rather than providing the requisite “more detailed assessment” of  
23 Plaintiff’s mental impairments. (See AR 20–25.) Although the ALJ acknowledged  
24 Plaintiff has certain mild and moderate mental limitations, in assessing Plaintiff’s RFC  
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26 <sup>6</sup> “Mild” means functioning independently, appropriately, effectively, and on a sustained basis is  
slightly limited. 20 C.F.R. § Pt. 404, Subpt. P, App. 1 § 12.00(F)(2)(b).

27 <sup>7</sup> “Moderate” means functioning is fair. Id. § 12.00(F)(2)(c).

28 <sup>8</sup> “Marked” means functioning is seriously limited. Id. § 12.00(F)(2)(d).

<sup>9</sup> “Extreme” means the individual is unable to function. Id. § 12.00(F)(2)(e).

1 the ALJ considered only the classification of such limitations with respect to whether  
2 they satisfied the paragraph B criteria. (AR 20–21.) Ultimately, the ALJ concluded the  
3 paragraph B criteria were not satisfied because Plaintiff’s mental impairments do not  
4 cause at least two marked limitations or one extreme limitation. (Id.) This finding, while  
5 relevant to the ALJ’s analysis at step three, is not equivalent to the level of detailed  
6 consideration required to assess Plaintiff’s RFC. See 20 C.F.R. 404.1520(a); 20 C.F.R. §  
7 404.1545; SSR 96–8p, 1996 WL 374184, at \*4 (outlining the requirements for the five-  
8 step sequential evaluation process and RFC assessment). Indeed, immediately prior to  
9 stating his assessment of Plaintiff’s RFC, the ALJ noted:

10 The limitations identified in the “paragraph B” criteria are not a residual  
11 functional capacity assessment but are used to rate the severity of mental  
12 impairments at steps 2 and 3 of the sequential evaluation process. The  
13 mental residual functional capacity assessment used at steps 4 and 5 of the  
14 sequential evaluation process requires a **more detailed assessment** of the  
15 areas of mental functioning. **The following residual functional capacity  
assessment reflects the degree of limitation the undersigned has found in  
the “paragraph B” mental function analysis.**

16 (AR 21 (emphasis added).)

17 The ALJ did not provide a “more detailed assessment” of Plaintiff’s mild and  
18 moderate mental limitations following his paragraph B mental functioning analysis. (See  
19 generally AR 20–25.) Instead, after concluding Plaintiff had the RFC to perform a full  
20 range of work with certain non-exertional limitations, the ALJ provided a selective  
21 summary of the medical evidence and stated his RFC assessment was “supported by the  
22 objective evidence of record.” (AR 25.) Merely repeating his findings with respect to  
23 whether Plaintiff’s limitations met the paragraph B criteria—without providing  
24 additional explanation—does not rise to the level of “more detailed assessment”  
25 required for the RFC determination. See Victor R. v. O’Malley, No. 3:23-CV-00501-GPC-  
26 BGS, 2024 WL 392616, at \*4–5 (S.D. Cal. Feb. 1, 2024), report and recommendation  
27 adopted, 2024 WL 1257277 (S.D. Cal. Mar. 25, 2024); Craig H. v. Kijakazi, No. 22CV800-  
28 AJB (LR), 2023 WL 4679342, at \*12–13 (S.D. Cal. July 21, 2023), report and

1 recommendation adopted, 2023 WL 5340794 (S.D. Cal. Aug. 18, 2023); Kitty S. v.  
2 Kijakazi, No. EDCV 21-00390-JEM, 2022 WL 2117160, at \*4–6 (C.D. Cal. June 13, 2022)  
3 (all holding the ALJ erred when finding mental limitations at step two, but failing to  
4 discuss those limitations when formulating the plaintiff’s RFC).

5         Additionally, the ALJ’s boilerplate assertion that the RFC assessment “reflects the  
6 degree of limitation” he found in the paragraph B mental functioning analysis fails to  
7 conclusively indicate he considered Plaintiff’s mild and moderate mental limitations  
8 when determining the RFC. See Michele M. v. Saul, No. 19-CV-00272-JLB, 2020 WL  
9 1450442, at \*8 (S.D. Cal. Mar. 25, 2020) (finding error where “the ALJ did not explain  
10 how, if at all, her assessment of Plaintiff’s non-severe mental impairments factored into  
11 her RFC determination.”). Regardless of severity, the ALJ was required to consider all of  
12 Plaintiff’s impairments when assessing his RFC. See Hutton v. Astrue, 491 F. App’x 850,  
13 850 (9th Cir. 2012) (citing 20 C.F.R. § 40.1545(a)(2)). Here, the ALJ discussed Plaintiff’s  
14 mental limitations only within the context of paragraph B. (AR 20–25.) The ALJ did not  
15 explain whether or not he considered Plaintiff’s mild and moderate mental limitations  
16 when determining Plaintiff’s RFC, and the court “cannot substitute [its] conclusions for  
17 the ALJ’s, or speculate as to the grounds for the ALJ’s conclusions.” Treichler v. Comm’r  
18 of Soc. Sec. Admin., 775 F.3d 1090, 1103 (9th Cir. 2014) (citing Bunnell v. Sullivan, 947  
19 F.2d 341, 346 (9th Cir. 1991)). Because the ALJ did not discuss how Plaintiff’s mental  
20 limitations were factored into the RFC determination, if at all, the Court finds error.

21         Finally, the Commissioner’s reliance on Hoopai and Woods is misplaced. The  
22 Commissioner cited Hoopai in support of the proposition that “mild or moderate mental  
23 health symptoms are not necessarily ‘sufficiently severe’ enough to ‘significantly limit[]  
24 a claimant’s ability to do work beyond the exertional limitation.’” (ECF No. 13 at 13  
25 (citing Hoopai, 499 F.3d at 1077).) However, Hoopai did not actually address whether  
26 an ALJ must consider mild or moderate mental limitations when formulating the RFC;  
27 instead, it addressed whether a severity determination at step two is dispositive of the  
28 step five question regarding the claimant’s ability to perform work existing in the

1 national economy. See Kitty S., 2022 WL 2117160, at \*6; Gates v. Berryhill, No. ED CV  
2 16-00049 AFM, 2017 WL 2174401, at \*3 (C.D. Cal. May 16, 2017). The Commissioner  
3 also cited Woods to support the proposition that an ALJ’s finding of “no mental  
4 limitations” in the RFC is supported when the ALJ separately finds mild limitations with  
5 respect to the paragraph B criteria. (ECF No. 13 at 13 (citing Woods, 32 F.4th at 794).)  
6 However, an ALJ is not permitted to rely on a finding of non-severity as a substitute for a  
7 proper RFC analysis. SSR 96-8P, 1996 WL 374184, at \*4; see also Buck, 869 F.3d at  
8 1048–49 (“Step two is merely a threshold determination meant to screen out weak  
9 claims . . . It is not meant to identify the impairments that should be taken into account  
10 when determining the RFC.”) (internal citation omitted); Darren Jeffrey C., 2022 WL  
11 4474261, at \*10 (holding a boilerplate statement that the RFC “reflect[ed] the degree of  
12 limitation” found in earlier steps did not satisfy the more detailed analysis required by  
13 the regulations).

14 In sum, after finding Plaintiff had mild and moderate limitations in the four areas  
15 of mental functioning, the ALJ merely offered boilerplate language that the RFC reflects  
16 the degree of limitation found in the paragraph B analysis. (AR 20–21.) The ALJ did not  
17 provide any further discussion of Plaintiff’s mental limitations when formulating the  
18 RFC. (AR 20–25.) An “RFC that fails to take into account a claimant’s limitations is  
19 defective.” Valentine, 574 F.3d at 690. Thus, the ALJ erred by failing to perform a more  
20 detailed assessment of Plaintiff’s mental limitations when determining Plaintiff’s RFC.  
21 McCawley v. Astrue, 423 Fed. App’x. 687, 689 (9th Cir. 2011) (holding that RFC “may be  
22 the most critical finding contributing to the final . . . decision about disability”) (internal  
23 citation omitted). Because the RFC assessment could necessarily result in a different  
24 disability determination, the Court **RECOMMENDS** remand for the ALJ to adequately  
25 consider Plaintiff’s mental limitations as they relate to Plaintiff’s RFC.

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1 **B. Whether the ALJ Properly Addressed Listing 12.04**

2 **1. Parties' arguments**

3 Plaintiff argues the ALJ did not properly address the paragraph C criteria under  
4 listing 12.04 at step three of the sequential evaluation process. (ECF No. 11 at 9–10.)  
5 Specifically, Plaintiff contends the ALJ omitted information that supports a paragraph C  
6 finding, including discussion of Plaintiff's "psychiatric hospitalizations and records  
7 showing persistent inability to function due to depression and mania." (Id. at 9.)  
8 Plaintiff asserts "the evidence supports meeting Mental Listing 12.04 paragraph A and  
9 C." (Id. at 10.)

10 In response, the Commissioner argues the ALJ reasonably found Plaintiff did not  
11 meet or equal the criteria of any listing, including listing 12.04. (ECF No. 13 at 14–17.)  
12 The Commissioner explains that to satisfy paragraph C of listing 12.04, the claimant  
13 must show his mental disorder is serious and persistent, with evidence of both: (1) a  
14 highly structured setting for ongoing care; and (2) minimal capacity to adapt to changes.  
15 (Id. at 15.) Here, the Commissioner contends Plaintiff has not met his burden as to  
16 either element. (Id. at 15–17.) Because substantial evidence supports the ALJ's step  
17 three findings, the Commissioner argues they should be upheld. (Id. at 17.)

18 In his Reply, Plaintiff argues the ALJ summarily and erroneously dismissed listing  
19 12.04<sup>10</sup> by failing to address Plaintiff's long history of psychiatric treatment and  
20 hospitalization when evaluating whether he met the paragraph C criteria. (ECF No. 14 at  
21 7–8.) Plaintiff contends paragraph C does not require a showing of "permanent highly  
22 structured settings." (Id. at 8.) Plaintiff also argues the Commissioner failed to address  
23 the evidence supporting long term persistent mental limitations such that Plaintiff can  
24 understand why he is being denied disability status. (Id.)

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27 <sup>10</sup> In Plaintiff's Reply, Plaintiff references listing 12.00. (ECF No. 14 at 8.) This is likely in error,  
28 considering Plaintiff references listing 12.04 in the table of contents and in the heading of the same  
section. (Id. at 2, 8.)

## 2. Applicable law

To satisfy listing 12.04 (depressive, bipolar and related disorders), the claimant must satisfy the criteria of either paragraphs A and B or paragraphs A and C. See 20 C.F.R. § Pt. 404, Subpt. P, App'x 1 § 12.04; see also Cardona v. Kijakazi, No. 20CV226-BLM, 2022 WL 1214707, at \*9 (S.D. Cal. Apr. 25, 2022) (defining the legal standard for listing 12.04). To meet the paragraph A criteria, the claimant must show medical documentation of a mental disorder characterized by at least five of the following symptoms: depressed mood; diminished interest in almost all activities; appetite disturbance with change in weight; sleep disturbance; observable psychomotor agitation or retardation; decreased energy; feelings of guilt or worthlessness; difficulty concentrating or thinking; or thoughts of death or suicide. 20 C.F.R. Pt. 404, Subpt. P, App'x § 12.04(A). To satisfy the paragraph B criteria, the claimant's mental disorder must result in one extreme limitation or two marked limitations in the following areas of mental functioning:

1. understand, remember, or apply information;
2. interact with others;
3. concentrate, persist, or maintain pace; or
4. adapt or manage oneself.

Id. § 12.04(B). Finally, to meet the paragraph C criteria, the claimant must demonstrate their mental disorder is "serious and persistent."<sup>11</sup> Id. § 12.04(C). The claimant must also show evidence of medical treatment, mental health therapy, psychosocial support, or a highly structured setting that is ongoing and diminishes the symptoms and signs of their mental disorder, as well as "marginal adjustment."<sup>12</sup> Id. § 12.04(C).

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<sup>11</sup> A claimant's mental disorder is "serious and persistent" when they have "a medically documented history of existence of the disorder" over at least a two-year period. 20 C.F.R. § Pt. 404, Subpt. P, App'x 1 § 12.04(C).

<sup>12</sup> "Marginal adjustment" means "hav[ing] minimal capacity to adapt to changes in [the claimant's] environment or to demands that are not already part of [the claimant's] daily life." Id.

1                   **3. The ALJ’s findings**

2                   At step three of the five-step sequential evaluation process, the ALJ concluded the  
3 severity of Plaintiff’s mental impairments, considered singly and in combination, do not  
4 meet or medically equal the criteria of listing 12.04. (AR 20.) Specifically, the ALJ found  
5 Plaintiff’s mental impairments do not satisfy the paragraph B or paragraph C criteria.  
6 (AR 20–21.) First, the ALJ found Plaintiff did not satisfy the paragraph B requirements  
7 because he does not have at least one extreme or two marked limitations in the four  
8 areas of mental functioning. (Id.) Second, the ALJ found “the record fails to document  
9 the existence of any of [the paragraph C] criteria.” (AR 21.)

10                   **4. Analysis**

11                   A claimant can meet listing 12.04 by satisfying the requirements of either  
12 paragraphs A and B *or* paragraphs A and C. See 20 C.F.R. § Pt. 404, Subpt. P, App’x 1 §  
13 12.04 (emphasis added). The Court addresses each paragraph in turn.

14                   **a. Paragraph A**

15                   While Plaintiff mentions in passing that “the evidence supports meeting Mental  
16 Listing 12.04 paragraph A and C,” his Opening Brief focuses solely on whether Plaintiff’s  
17 mental impairments meet the paragraph C criteria.<sup>13</sup> (ECF No. 11 at 9–10.) Courts will  
18 not consider claims not actually argued in a plaintiff’s opening brief. See *Indep. Towers*  
19 *v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (citing *Greenwood v. FAA*, 28 F.3d 971,  
20 977 (9th Cir. 1994) (“[W]e cannot ‘manufacture arguments for an appellant’ and  
21 therefore we will not consider any claims that were not actually argued in appellant’s  
22 opening brief.”); see also *D.A.R.E. Am. v. Rolling Stone Mag.*, 270 F.3d 793, 793 (9th Cir.  
23 2001) (“A ‘bare assertion’ of an issue ‘does not preserve a claim.’”). The ALJ’s written  
24 decision is also silent as to whether Plaintiff meets the paragraph A criteria. (See AR 17–  
25 26.) The Court therefore cannot determine whether the ALJ found Plaintiff satisfied  
26 paragraph A or even considered this issue. See, e.g., *Gwen M. v. O’Malley*, No. 23-CV-

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27  
28 <sup>13</sup> Similarly, Plaintiff’s Reply does not address the paragraph A criteria. (See generally ECF No. 14.)

1 1562-KSC, 2024 WL 3888906, at \*3 (S.D. Cal. Aug. 21, 2024) (declining to assess  
2 paragraph A where the ALJ was silent on the issue of paragraph A criteria and neither  
3 party addressed it in their briefing). For these reasons, the Court deems this issue  
4 waived.

5 **b. Paragraph B**

6 There is substantial evidence in both the medical record and Plaintiff's testimony  
7 supporting the ALJ's conclusion that Plaintiff does not satisfy the paragraph B criteria.  
8 (See generally AR 20–25.) To meet the paragraph B criteria, the claimant's mental  
9 impairments must result in one extreme limitation or two marked limitations in the four  
10 areas of mental functioning. 20 C.F.R. Pt. 404, Subpt. P, App'x § 12.04(B). With respect  
11 to understanding, remembering, or applying information, the ALJ considered Plaintiff's  
12 2021 Adult Disability Report ("2021 ADR"), where Plaintiff reported "he can follow  
13 written instructions, albeit with some difficulty, and can follow spoken instructions if  
14 they are limited to two-to-three steps." (AR 20 (citing AR 274).) The ALJ also considered  
15 Plaintiff's 2023 Psychological Evaluation ("2023 PE"), in which Dr. Burr determined  
16 Plaintiff has "the ability to understand, remember, and carry out short, simplistic, and  
17 detailed instructions." (Id. (citing AR 564).) The ALJ concluded this evidence supports a  
18 finding that Plaintiff has mild limitations in understanding, remembering, or applying  
19 information, meaning his ability to function independently, appropriately, effectively,  
20 and on a sustained basis in this functional area is slightly limited. 20 C.F.R. § Pt. 404,  
21 Subpt. P, App. 1 § 12.00(F)(2)(b).

22 With respect to interacting with others, the ALJ considered Plaintiff's testimony  
23 that "he has trouble socializing, getting along with people, and will isolate himself to  
24 ensure that he can cope and keep himself out of trouble." (AR 20.) The ALJ also  
25 considered Plaintiff's 2021 ADR, where Plaintiff reported he "sometimes has issues  
26 getting along with authority figures and was fired from a job at FedEx due to a physical  
27 altercation with a co-worker." (Id. (citing AR 273).) Additionally, the ALJ noted  
28 Plaintiff's report that "during a bipolar episode he will argue with his parents, and his



1 social activities with friends [have] been significantly reduced.” (AR 20–21 (citing AR  
2 274).) Finally, the ALJ considered Plaintiff’s 2023 PE, in which Dr. Burr determined  
3 Plaintiff has “a moderate inability to interact with supervisors, coworkers, and peers.”  
4 (AR 21 (citing AR 564).) The ALJ determined this evidence supports a finding that  
5 Plaintiff experiences moderate limitations in interacting with others, meaning his ability  
6 to function independently, appropriately, effectively, and on a sustained basis in this  
7 functional area is fair. 20 C.F.R. § Pt. 404, Subpt. P, App. 1 § 12.00(F)(2)(c).

8 With respect to concentrating, persisting, or maintaining pace, the ALJ considered  
9 Plaintiff’s testimony that “he has difficulty paying attention, concentrating, and staying  
10 focused,” but that “he is trying to learn computer programs, like Excel, although he does  
11 have some difficulty stating [sic] focused.” (AR 21.) The ALJ also considered Plaintiff’s  
12 2023 PE, in which Dr. Burr determined Plaintiff could perform serial sevens and spell the  
13 word “music” forward and backward. (Id. (citing AR 562).) Further, the ALJ  
14 contemplated Plaintiff’s 2021 ADR, where Plaintiff reported he can play video games  
15 and watch television. (Id. (citing AR 273).) The ALJ concluded this evidence supports a  
16 finding that Plaintiff has mild limitations in concentrating, persisting, or maintaining  
17 pace, meaning his ability to function independently, appropriately, effectively, and on a  
18 sustained basis in this functional area is slightly limited. 20 C.F.R. § Pt. 404, Subpt. P,  
19 App. 1 § 12.00(F)(2)(b).

20 Lastly, with respect to adapting or managing oneself, the ALJ acknowledged  
21 Plaintiff’s 2021 ADR reporting he has “no problems with maintaining his personal care,”  
22 “can shop in stores independently,” and can “drive himself when going out.” (AR 21  
23 (citing AR 270, 272).) The ALJ also considered Plaintiff’s 2023 PE, in which Dr. Burr noted  
24 Plaintiff drove himself to the appointment and was “appropriately dressed and  
25 groomed.” (Id. (citing AR 559–60).) Further, the ALJ stated the record shows Plaintiff  
26 “has a moderate limitation in following normal rules[] and has exhibited some violent  
27 behavior while working when confronted with stressors.” (Id. (citing AR 521, 564).) The  
28 ALJ determined this evidence supports a finding that Plaintiff has moderate limitations

1 in managing oneself, meaning his ability to function independently, appropriately,  
2 effectively, and on a sustained basis in this functional area is fair. 20 C.F.R. § Pt. 404,  
3 Subpt. P, App. 1 § 12.00(F)(2)(c).

4 Later in his written decision, the ALJ evaluated the prior administrative medical  
5 findings (“PAMFs”) of Drs. Barbara Moura and Megan Nicoloff. (AR 24–25.) In  
6 September 2021, Dr. Barbara Moura, PsyD opined Plaintiff had no limitations in  
7 understanding, remembering, or applying information; moderate limitations in  
8 interacting with others; mild limitations in concentrating, persisting, or maintaining  
9 pace; and moderate limitations in adapting or managing oneself. (AR 24 (citing AR 68–  
10 69).) The ALJ found Dr. Moura’s opinion to be partially persuasive because the ALJ  
11 would have found a mild limitation in the functional area of understanding,  
12 remembering, or applying information, rather than no limitation. (AR 24.) In January  
13 2022, Dr. Megan Nicoloff, PsyD opined Plaintiff had no limitations in understanding,  
14 remembering, or applying information; mild limitations in interacting with others; mild  
15 limitations in concentrating, persisting, or maintaining pace; and no limitations in  
16 adapting or managing oneself. (Id. (citing AR 86).) The ALJ found Dr. Nicoloff’s opinion  
17 to be non-persuasive because he felt the record—including evidence received after Dr.  
18 Nicoloff provided her opinion—supported a finding that Plaintiff has more severe  
19 mental impairments. (AR 24.)

20 Based on the foregoing, the Court finds there is substantial evidence in the record  
21 supporting the ALJ’s determination that Plaintiff does not satisfy the paragraph B  
22 criteria. In finding Plaintiff has no extreme or marked limitations in the four areas of  
23 mental functioning, the ALJ considered Plaintiff’s testimony, Plaintiff’s 2021 ADR,  
24 Plaintiff’s 2023 PE, and PAMFs. (AR 20–25.) While Plaintiff presents a different  
25 interpretation of the record, the Court is limited to reviewing the Commissioner’s  
26 decision for legal error or lack of supporting substantial evidence. See 42 U.S.C. §  
27 405(g). Because the ALJ’s interpretation of the evidence is rational and supported by  
28 substantial evidence, the Court must uphold the ALJ’s decision. Ahearn v. Saul, 988 F.3d

1 1111, 1115–16 (9th Cir. 2021) (citing Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir.  
2 2001) (explaining the court must uphold the ALJ’s decision where the evidence can be  
3 rationally interpreted); Giulio C. v. O’Malley, No. 23-CV-02768-EJD, 2024 WL 3873980, at  
4 \*6 (N.D. Cal. Aug. 16, 2024) (internal citations omitted) (“So long as the ALJ’s  
5 interpretation of the evidence is rational, a court must uphold the ALJ’s decision even if  
6 there are alternative rational interpretations inconsistent with the ALJ’s final decision.”).

### 7 **c. Paragraph C**

8 The ALJ’s determination regarding the paragraph C criteria is not supported by  
9 substantial evidence because he provided a single, conclusory statement without citing  
10 any evidence. To satisfy the paragraph C criteria, the claimant must demonstrate their  
11 mental disorder is “serious and persistent.” 20 C.F.R. Pt. 404, Subpt. P, App'x § 12.04(C).  
12 Additionally, the claimant must show evidence of both (1) ongoing medical treatment,  
13 mental health therapy, psychosocial support, or a highly structured setting; and (2)  
14 marginal adjustment. Id. After listing these requirements, the ALJ concluded Plaintiff  
15 fails to meet the paragraph C criteria because “the record fails to document the  
16 existence of any of these criteria.” (AR 21.) The ALJ did not provide any further  
17 explanation. (Id.)

18 While ALJs are not required to “draft dissertations” or “perform a line-by-line  
19 exegesis” of the claimant’s testimony, they must do more than merely state non-specific  
20 conclusions when denying disability benefits. Lambert v. Saul, 980 F.3d 1266, 1277 (9th  
21 Cir. 2020) (citing Treichler, 775 F.3d at 1103). This Court is tasked with reviewing the  
22 ALJ’s determinations at step three for substantial evidence; the Court cannot perform  
23 any review, however, where the ALJ fails to cite any evidence. See Gwen M., 2024 WL  
24 3888906, at \*3. See also Jennifer A. v. O’Malley, No. 23CV326-GPC (LR), 2024 WL  
25 400183, at \*9 (S.D. Cal. Feb. 2, 2024), report and recommendation adopted sub nom.  
26 Jennifer A. v. O’Malley, 2024 WL 1177761 (S.D. Cal. Mar. 19, 2024) (finding error where  
27 the ALJ provided a conclusory and boilerplate statement finding that plaintiff failed to  
28 meet paragraph C without referencing any medical evidence). Although Plaintiff and

1 the Commissioner both argue their positions based on the evidence in the record [see  
2 generally ECF Nos. 11, 13, 14], the Court can only review the grounds asserted by the  
3 ALJ. Stout, 454 F.3d at 1054 (citing Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.  
4 2003)). Thus, because the ALJ did not cite *any* evidence, this renders the ALJ’s paragraph  
5 C determination unsupported by substantial evidence. See Jennifer A., 2024 WL  
6 400183, at \*9 (“[D]istrict courts within the Ninth Circuit have routinely concluded that  
7 the [ALJ’s] failure to meaningfully engage with the medical evidence at step three, in  
8 combination with [] boilerplate language is an independent basis for remand.”)  
9 (collecting cases).

#### 10 **d. Harmless error analysis**

11 Having found error in the ALJ’s step three, paragraph C determination, the Court  
12 must evaluate whether the error was harmful or harmless. Ford v. Saul, 950 F.3d 1141,  
13 1154 (9th Cir. 2020) (citing Tommasetti, 533 F.3d at 1038) (The court “may affirm the  
14 ALJ’s decision even if the ALJ made an error, so long as the error was harmless.”). An  
15 error is harmless if it is “inconsequential to the ultimate nondisability determination.”  
16 Brown-Hunter v. Colvin, 806 F.3d 487, 494 (9th Cir. 2015). Plaintiff bears the burden of  
17 showing harmful error. Shinseki v. Sanders, 556 U.S. 396, 409–10 (2009). Additionally,  
18 Plaintiff is responsible for making an initial showing that he meets all the requirements  
19 of a listed impairment. Burch v. Barnhart, 400 F.3d 676, 683 (9th Cir. 2005).

20 Here, the Court finds Plaintiff fails to demonstrate that he meets all the paragraph  
21 C criteria for listing 12.04; thus, the ALJ’s error was harmless. Plaintiff must  
22 demonstrate three elements to satisfy paragraph C: (1) a “serious and persistent”  
23 mental disorder; (2) ongoing medical treatment, mental health therapy, psychosocial  
24 support, or a highly structured setting; and (3) marginal adjustment. 20 C.F.R. § Pt. 404,  
25 Subpt. P, App’x 1 § 12.04(C). First, neither party disputes that Plaintiff’s mental disorder  
26 is “serious and persistent.” (See generally ECF Nos. 11, 13, 14.) Additionally, the record  
27 reflects that Plaintiff’s mental disorder is “serious and persistent” because Plaintiff has a  
28 medically documented history of bipolar II disorder over at least a two-year period. (See

1 AR 22 (“[C]laimant has a history of recurrent and severe bipolar disorder . . . [and]  
2 objective medical evidence indicates a diagnosis of bipolar disorder in March of 2017.”);  
3 see also AR 323–93, 444–543, 546–57.)

4 Next, Plaintiff argues the record establishes “a long history of psychiatric  
5 treatment and hospitalization,” sufficient to satisfy the second element of paragraph C.  
6 (ECF No. 14 at 7.) In response, the Commissioner contends that because Plaintiff was  
7 not in a highly structured setting for ongoing care, he fails to meet the second element.  
8 (ECF No. 13 at 16.) However, listing 12.04 does not explicitly require a showing of a  
9 highly structured setting; Plaintiff can instead satisfy this element by showing evidence  
10 of medical treatment, mental health therapy, or psychosocial support that is ongoing  
11 and diminishes the signs and symptoms of his mental disorder. See 20 C.F.R. § Pt. 404,  
12 Subpt. P, App’x 1 § 12.04(C). In his written decision, the ALJ noted the record “indicates  
13 intermittent medication and psychotherapy progress notes from Psychiatric Centers of  
14 San Diego for a period from January 3, 2019, to August 10, 2022.” (AR 23 (citing AR  
15 339–93, 443–50, 451–520, 521–43).) Further, the ALJ acknowledged Plaintiff was taking  
16 prescribed Lithium, Valproic Acid, and Buspar, and seemed to be tolerating them well.  
17 (Id. (citing AR 444).) The ALJ also stated that in September 2021, Plaintiff exhibited a  
18 stable mood, indicating the medication was helping. (Id. (citing AR 444).) Thus, the  
19 record reflects that Plaintiff received ongoing medical care that reduced the severity of  
20 his bipolar II symptoms, thereby satisfying the second element of paragraph C.

21 With respect to the third element, Plaintiff does not specifically argue he has  
22 achieved “marginal adjustment.” (See generally ECF Nos. 11, 14.) Instead, Plaintiff  
23 asserts he “has not been able to sustain work” and “[h]is medications have increased his  
24 manic episodes [] rather than decreased.” (ECF No 11 at 10.) Conversely, the  
25 Commissioner argues Plaintiff has not shown a minimal capacity to adapt to changes.  
26 (See ECF No. 13 and 16–17.) The Commissioner further contends the ALJ’s finding that  
27 Plaintiff has only a moderate limitation in adapting or managing oneself is inconsistent  
28 with a minimal capacity to adapt to changes. (Id. at 17 (citing AR 21).)

1 The regulations define “marginal adjustment” as:

2 [Y]our adaptation to the requirements of daily life is fragile; that is, you  
3 have minimal capacity to adapt to changes in your environment or to  
4 demands that are not already part of your daily life. We will consider that  
5 you have achieved only marginal adjustment when the evidence shows that  
6 changes or increased demands have led to exacerbation of your symptoms  
7 and signs and to deterioration in your functioning; for example, you have  
8 become unable to function outside of your home or a more restrictive  
9 setting, without substantial psychosocial supports.

10 20 C.F.R. Pt. 404, Subpt. P, App’x 1, § 12.00G(2)(c). In his decision, the ALJ noted  
11 Plaintiff has no problems maintaining his personal care, shopping in stores  
12 independently, driving himself, traveling, and managing his own finances. (AR 21, 23.)  
13 Moreover, the ALJ found Plaintiff’s bipolar disorder and associated symptoms “were  
14 much better after stopping his petition canvasser job.” (AR 23 (citing AR 546).) Plaintiff  
15 acknowledged the degree of interaction and stress related to his canvasser job were too  
16 much for him and said he was considering taking courses to become a licensed tax  
17 preparer. (Id. (citing AR 546).) Based on the foregoing, the Court finds Plaintiff does not  
18 meet the third element of paragraph C because he has not achieved “marginal  
19 adjustment” as defined by the regulations.

20 In sum, although the ALJ’s paragraph C determination is unsupported by  
21 substantial evidence because he provided only a single, conclusory statement that the  
22 record “fails to document the existence of any of these criteria” [AR 21], this finding is  
23 nevertheless harmless for two reasons. First, Plaintiff has not met his burden of  
24 affirmatively showing he meets all paragraph C criteria. Burch, 400 F.3d at 683. Second,  
25 the record shows that Plaintiff has more than a minimal capacity to adapt to changes  
26 and thus cannot satisfy the “marginal adjustment” requirement. 20 C.F.R. Pt. 404,  
27 Subpt. P, App’x 1, § 12.00G(2)(c). Accordingly, the Court concludes the ALJ did not err in  
28 determining Plaintiff does not meet or equal the criteria of listing 12.04.

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1                   **C. Whether the ALJ Provided Clear and Convincing Reasons to Discredit**  
2                   **Plaintiff's Testimony**

3                   **1. Parties' arguments**

4                   Plaintiff next argues the ALJ failed to specifically identify what parts of Plaintiff's  
5 testimony were not credible and why, and thus his findings are not supported by  
6 substantial evidence. (ECF No. 11 at 12–13.) Plaintiff contends the ALJ “did not provide  
7 more than a general statement without specific cites”; therefore, he did not provide  
8 clear and convincing evidence to support discounting Plaintiff's statements. (Id. at 13.)

9                   In response, the Commissioner argues “[s]ubstantial evidence supports the ALJ's  
10 evaluation of Plaintiff's subjective complaints.” (ECF No. 13 at 7 (citing AR 22–27).)  
11 Specifically, the Commissioner contends the “alleged severity of Plaintiff's subjective  
12 symptom statements was inconsistent with the objective medical evidence.” (Id. (citing  
13 AR 22–25).) For example, the Commissioner argues Plaintiff's long stretch of  
14 employment as a canvasser is at odds with his alleged need to sequester himself  
15 quarterly. (Id. at 10 (citing AR 22–23).) The Commissioner further explains the record  
16 showed “Plaintiff's symptoms were improved and stable on medication,” which the ALJ  
17 considered when evaluating Plaintiff's testimony. (Id. at 11 (citing AR 22–23).) Lastly,  
18 the Commissioner argues the ALJ identified Plaintiff's testimony with sufficient  
19 specificity and identified record evidence inconsistent with it. (Id. (citing AR 22–23).)

20                   In his Reply, Plaintiff contends the Commissioner's emphasis on Plaintiff's stable  
21 behavior is “post hoc,” as the Commissioner references evidence of Plaintiff's high and  
22 low functioning throughout the record. (ECF No. 14 at 7.) Regardless, Plaintiff argues  
23 this evidence does not contradict Plaintiff's testimony and the ALJ has failed to provide  
24 clear and convincing reasons to disregard it. (Id.)

25                   **2. Applicable law**

26                   When evaluating a claimant's allegations regarding subjective symptoms, the ALJ  
27 must engage in a two-step analysis. Johnson v. Kijakazi, No. 19-17359, 2022 WL  
28 1553259, at \*1 (9th Cir. May 17, 2022); Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir.

1 2009); see also Titles II & XVI: Evaluation of Symptoms in Disability Claims, SSR 16-3P,  
2 2017 WL 5180304, at \*2–3 (S.S.A. Oct. 25, 2017). First, the ALJ must determine whether  
3 there is objective medical evidence of an underlying impairment that “could reasonably  
4 be expected to produce the pain or other symptoms alleged.” Trevizo v. Berryhill, 871  
5 F.3d 664, 678 (9th Cir. 2017) (quoting Garrison v. Colvin, 759 F.3d 995, 1014–15 (9th Cir.  
6 2014)). The claimant is not required to show that an underlying impairment could  
7 reasonably be expected to cause the severity of the pain alleged, but only that it could  
8 have reasonably caused some degree of pain. Vasquez, 572 F.3d at 591 (citing  
9 Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)).

10 Second, if the claimant satisfies the first step and there is no evidence of  
11 malingering, then the ALJ may reject the claimant’s statements about the severity of  
12 their symptoms “only by offering specific, clear and convincing reasons for doing so.”  
13 Trevizo, 871 F.3d at 678 (quoting Garrison, 759 F.3d at 1014–15). “The clear and  
14 convincing standard is the most demanding required in Social Security cases.” Revels,  
15 874 F.3d at 655 (quoting Garrison, 759 F.3d at 1014–15). General findings are  
16 insufficient, and the ALJ must identify which specific symptom statements are being  
17 discounted and what evidence undermines those claims. See Lambert, 980 F.3d at 1277  
18 (citing Treichler, 775 F.3d at 1102); Burch, 400 F.3d at 680. An ALJ’s failure to identify  
19 specific statements and explain why they are not credible constitutes harmful error  
20 because it precludes meaningful review. Brown-Hunter, 806 F.3d at 489; SSR 16-3P,  
21 2017 WL 5180304, at \*10 (“The determination or decision must contain specific reasons  
22 for the weight given to the individual’s symptoms, be consistent with and supported by  
23 the evidence, and be clearly articulated so the individual and any subsequent reviewer  
24 can assess how the adjudicator evaluated the individual’s symptoms.”).

25 “[B]ecause symptoms, such as pain, are subjective and difficult to quantify,” the  
26 ALJ considers “all of the evidence presented,” including information about the  
27 claimant’s prior work record, statements about their symptoms, evidence submitted by  
28 their medical sources, and observations by the Agency’s employees and other persons.



1 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3). Factors the ALJ may consider, in addition to  
2 objective medical evidence, include Plaintiff's daily activities; the location, duration,  
3 frequency, and intensity of their pain or other symptoms; precipitating and aggravating  
4 factors; the type, dosage, effectiveness, and side effects of any medication taken to  
5 alleviate pain; treatment; and any other measures used to relieve pain. See 20 C.F.R. §§  
6 404.1529(c)(3), 416.929(c)(3); SSR 16-3P, 2017 WL 5180304, at \*7–8. The ALJ may also  
7 consider inconsistencies between Plaintiff's statements and the medical evidence. See  
8 20 C.F.R. §§ 404.1529(c)(4), 416.929(c)(4).

### 9 **3. Relevant factual background**

#### 10 **a. Plaintiff's testimony**

11 In his 2021 Adult Disability Report (“2021 ADR”), Plaintiff reported having “bipolar  
12 condition combined with attention deficit disorder.” (AR 269.) Plaintiff said he has no  
13 problem with personal care but uses his “cell phone alarm” for reminders related to  
14 personal needs and taking medicine. (AR 270–71.) Plaintiff stated he prepares his own  
15 meals, including sandwiches, pasta, and frozen dinners. (AR 271.) With respect to  
16 chores, Plaintiff said he performs light cleaning, laundry, and ironing two to three times  
17 per month. (Id.) Plaintiff goes outside daily and drives a car; he shops for food and  
18 clothes weekly. (AR 272.) In terms of social activities, Plaintiff testified he interacts with  
19 others in person, on the phone, and through texting one-to-two times per week. (AR  
20 273.) Plaintiff's conditions have “significantly reduced” his social activities and  
21 increased his hobbies of watching TV and playing video games. (AR 273.)

22 Plaintiff said his conditions affect the following areas: memory, following  
23 instructions, completing tasks, getting along with others, and concentration. (AR 274.)  
24 Moreover, Plaintiff experiences frequent bipolar episodes that “affect [his] ability to  
25 work and socialize” and “cause high anxiety, depression, [and] mania.” (Id.) Plaintiff  
26 stated he can pay attention for five minutes, has difficulty following written instructions,  
27 and can follow spoken instructions if limited to two-to-three steps. (Id.) Plaintiff  
28 reported he “sometimes” gets along with authority figures and was fired from his job at

1 FedEx “due to [a] physical altercation with [a] co-worker.” (Id.) Plaintiff further noted  
2 he has difficulty handling stress and struggles with changes in routine. (AR 275.) Lastly,  
3 Plaintiff indicated he takes Lithium, Carbamazepine, Buspirone, and Divalproex, and  
4 experiences the following side effects: hand shaking, fatigue, and impotence. (AR 276.)

5 At the administrative hearing on February 13, 2023, Plaintiff testified he has  
6 difficulty concentrating, paying attention, and staying focused. (AR 36.) Plaintiff stated  
7 he has issues socializing and getting along with others and self-isolates to keep himself  
8 out of trouble. (Id.) Plaintiff further testified he has problems with short-term memory  
9 and takes medication for his psychiatric impairments. (Id.) Plaintiff’s medications  
10 mitigate his symptoms, but he still experiences episodes. (AR 36–37.) Plaintiff  
11 explained his episodes, which occur quarterly during periods of intense stress, usually  
12 last one day. (AR 37.) During his episodes, Plaintiff said he tries to “minimize the  
13 amount of interaction” he has with people and self-medicates with marijuana. (Id.)  
14 Additionally, Plaintiff testified he has problems with tremors in his hands. (AR 38.)  
15 When asked what he does throughout the day, Plaintiff replied he “watch[es] a lot of  
16 TV” but has been trying to learn Microsoft Excel and other computer programs. (AR 38–  
17 39.) Plaintiff said he lives with his parents and completes some chores, including  
18 grocery shopping in town. (Id.)

19 Plaintiff also testified about specific episodes he experienced in the workplace.  
20 (AR 40–42.) First, Plaintiff said while working as a canvasser collecting signatures, he  
21 was arrested after an altercation with a woman and ultimately pled guilty to  
22 misdemeanor assault. (AR 40–41.) Second, Plaintiff testified he was fired from his job  
23 at Amazon after parking a delivery truck on a hill and failing to engage the parking  
24 brake, resulting in the truck rolling down the hill and destroying itself and another  
25 vehicle. (AR 41–42.) In the last five years, Plaintiff reported having three 5150 or  
26 involuntary holds because of a mental health crisis. (AR 42.) Plaintiff testified, “I lack  
27 the ability to stay cool under pressure” and said working in the delivery business is “too  
28 much.” (AR 43–44.)

1                                   **b. Plaintiff’s mental health records**<sup>14</sup>

2                   In an emergency department record dated December 12–13, 2019 [AR 323–38],<sup>15</sup>  
3 Plaintiff’s admission diagnosis says: “bipolar disorder, current episode depressed,  
4 recurrent severe, without psychotic features.” (AR 323.) Plaintiff’s history of present  
5 illness states:

6                   The patient is a 41 years old Male who presents with suicidal ideations. Of  
7 note, the patient has a history that includes ADHD, bipolar disorder, and  
8 marijuana use. He was brought in by law enforcement today after he  
9 endorsed suicidal ideations to his mother. Patient reports that last night his  
10 ex-girlfriend of over 1 year left him for a woman. He states that he has  
11 “intrusive thoughts due to [his] bipolar disorder” and told his mother he  
12 wanted to kill himself by putting his head on some train tracks in Encinitas.  
13 Mother became concerned, so patient was brought to the Emergency  
14 Department by police. The patient denies any “intrusive thoughts” or  
15 suicidal ideations currently, and states he had no intention of killing  
16 himself. He notes he recently told a friend he plans to apply for a job.  
17 Patient states he did not take all of his usual medications last night. He  
18 denies any attempts to overdose.

19 (AR 323–24.) The examining physician noted, “[Plaintiff] appears to be talkative,  
20 hypervocal, pressured speech, anxious with poor concentration during interview  
21 . . . [Plaintiff] report[s] lack of sleep and loss of appetite . . . [Plaintiff] [r]eports  
22 history of anxiety and denies other anxiety symptoms suggestive of agoraphobia,  
23 panic disorder, specific phobia or social phobia.” (AR 324.) The physician  
24 observed no evidence of a movement disorder, psychotic thought process  
25 disorder, loosened associations, flight of ideas, tangential thinking, or rambling of  
26 speech. (Id.) Lastly, the physician reported Plaintiff’s “insight and judgment for  
27 routine life events is poor.” (Id.)  
28

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25 <sup>14</sup> The Court focuses its attention on the records cited in Plaintiff’s Opening Brief. (See ECF No. 11 at 6.)

26 <sup>15</sup> Law enforcement brought Plaintiff to the Palomar Health Emergency Department on December 12,  
27 2019, after he reported suicidal ideations to his mother. (AR 330.) Plaintiff was subsequently admitted  
28 to the Crisis Stabilization Unit on December 13, 2019, for further evaluation. (AR 323–26.) Plaintiff  
was discharged that same day, following a finding of improvement and stability, as well as no clinical  
justification for involuntary hospitalization. (AR 326.)

1 On January 4, 2023, consultative examiner Dr. J.J. Burr provided a summary  
2 report of Plaintiff's Psychological Evaluation ("2023 PE"). (AR 559–64.) Dr. Burr noted  
3 Plaintiff was appropriately dressed and groomed. (AR 559–60.) Plaintiff drove himself  
4 to the appointment, arrived on time, and was unaccompanied. (AR 559.) Dr. Burr  
5 further noted Plaintiff's main complaint was bipolar disorder, and Plaintiff reported  
6 having bipolar episodes beginning about eight years ago. (AR 560.) Plaintiff complained  
7 these episodes make it difficult for him to function, as he is "sidetracked easily and has  
8 trouble getting along with others." (Id.) Dr. Burr also noted Plaintiff reported seeing a  
9 psychiatrist approximately every three months since he was five years old, and that he  
10 has been psychiatrically hospitalized on three occasions.<sup>16</sup> (Id.) Dr. Burr described  
11 Plaintiff's current level of functioning as follows:

12 [Plaintiff] is independent in activities of daily living, including dressing,  
13 bathing, making meals, doing household chores, and shopping. He is  
14 physically able to walk on his own. He has a driver's license, is able to drive,  
15 and has a vehicle to drive. He manages his own money with some  
16 assistance from his father. He is able to handle daily spending money. His  
17 typical day consists of watching television, washing dishes, cleaning [the]  
18 house, using the computer, playing video games, and looking for petition  
19 jobs. He reported that he is currently working on one in Florida.

18 (AR 561–62.) Dr. Burr indicated Plaintiff's intellectual functioning on testing was in the  
19 low average range and his mood was anxious. (AR 562.) Regarding Plaintiff's memory,  
20 Dr. Burr noted Plaintiff was able to recall three out of three objects immediately and  
21 one out of three objects after five minutes. (Id.) Dr. Burr found Plaintiff's auditory  
22 memory, visual memory, and visual working memory were in the low average range.  
23 (Id.) As to Plaintiff's concentration and attention span, Dr. Burr noted Plaintiff could  
24 perform serial sevens and spell the word "music" forwards and backwards. (Id.)

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26  
27 <sup>16</sup> Dr. Burr noted Plaintiff was first hospitalized in 2008 for two weeks for heavy use of marijuana, and  
28 most recently "about 2 years ago, secondary to suicidal ideation after his girlfriend broke up with him."  
(AR 560.) Dr. Burr did not record details regarding Plaintiff's third hospitalization. (See generally AR  
559–64.)

1 Dr. Burr noted the following probable diagnoses: bipolar II disorder and cannabis  
2 use disorder. (AR 563.) Dr. Burr determined Plaintiff can understand, remember, and  
3 carry out short, simplistic, and detailed instructions. (AR 564.) Dr. Burr also opined  
4 Plaintiff has a mild inability to maintain consistency and pace throughout the day and a  
5 moderate inability to follow normal workplace rules. (Id.) Dr. Burr stated Plaintiff is at  
6 risk for calling in sick, not showing up, or needing to leave early. (Id.) Finally, Dr. Burr  
7 said Plaintiff has a moderate inability to interact appropriately with supervisors,  
8 coworkers, and peers, resulting in some episodes while working. (Id.)

### 9 c. The ALJ's findings

10 The ALJ began his credibility analysis by summarizing various records, including  
11 Plaintiff's 2021 ADR, progress notes from 2019 to 2022, and Plaintiff's 2023 PE. (AR 22–  
12 23.) Consistent with Plaintiff's testimony, the ALJ found “the record does indicate that  
13 the claimant has a history of a recurrent and severe bipolar disorder without psychotic  
14 features.” (AR 22 (citing AR 323–38).) He also found “the objective medical evidence,  
15 consistent with the claimant's testimony, shows that the claimant has used marijuana  
16 habitually since at least 2017, with a self-reported history dating back to 2008.” (AR 23  
17 (citing AR 330, 562).) Although Plaintiff reported to Dr. Burr he had stopped smoking  
18 marijuana, the ALJ noted Plaintiff's testimony that he uses marijuana when his bipolar  
19 symptoms get intense. (Id. (citing AR 564).) The ALJ also noted Plaintiff was  
20 hospitalized in December 2019 after reporting suicidal ideations, but later said he was  
21 “just ‘venting’ to his mother” and did not have any intention of killing himself. (AR 23  
22 (citing AR 323–26).) At the time, Plaintiff confirmed he had a suitable supply of  
23 prescription medication, which he was taking regularly to effectively treat his condition.  
24 (Id. (citing AR 326).)

25 Additionally, the ALJ found that progress notes from Psychiatric Centers of San  
26 Diego dated January 3, 2019, to August 10, 2022, indicated Plaintiff felt in control of his  
27 anger and was working as a canvasser in various states from May 2021 to August 2022.  
28 (Id. (citing AR 339, 459, 521).) In September 2021, Plaintiff was noted to have a stable

1 mood, indicating his medication was helping. (Id. (citing AR 444).) On August 10, 2022,  
2 Plaintiff had an altercation while canvassing for signatures and was arrested with a  
3 misdemeanor assault charge. (Id. (citing AR 521).) The ALJ observed that progress  
4 notes and Plaintiff’s testimony indicated he was remorseful for his behavior and  
5 acknowledged the degree of interaction and stress related to his work was “too much  
6 for him.” (Id. (citing AR 522, 546).) The ALJ found progress notes dated December 15,  
7 2022, reflected Plaintiff’s symptoms were “much better” after discontinuing his  
8 canvasser job. (Id. (citing AR 546).) Further, the ALJ stated progress notes “indicate  
9 anxiety attributable to his bipolar disorder,” but “there was no indication of depression,  
10 insomnia, or delusional thought” and Plaintiff had “normal insight and judgment” and  
11 no suicidal ideation. (Id. (AR 549–51, 556).)

12 Ultimately, the ALJ concluded Plaintiff’s “medically determinable impairments  
13 could reasonably be expected to cause the alleged symptoms; however, the claimant’s  
14 statements concerning the intensity, persistence and limiting effects of these symptoms  
15 are not entirely consistent with the medical evidence and other evidence in the record  
16 for the reasons explained in this decision.” (AR 24.)

#### 17 **4. Analysis**

18 The Court must engage in the two-step analysis to determine whether the ALJ  
19 properly discounted Plaintiff’s subjective symptom testimony. See Johnson, 2022 WL  
20 1553259, at \*1. To begin, neither party contests the ALJ’s finding that Plaintiff has the  
21 following severe impairments: bipolar II disorder and cannabis use disorder. (See AR 20;  
22 see generally ECF Nos. 11, 13, 14.) The ALJ also found that Plaintiff’s “medically  
23 determinable impairments could reasonably be expected to cause the alleged  
24 symptoms.” (AR 24.) This satisfies the first step of the analysis. See, e.g., Vasquez, 572  
25 F.3d at 591 (finding the ALJ satisfied step one where the “ALJ acknowledged that  
26 [plaintiff’s] injuries ‘could reasonably be expected to produce some of the pain and  
27 other symptoms alleged’”). Moreover, neither party alleges evidence of malingering.  
28 (See generally ECF Nos. 11, 13, 14.) Thus, the ALJ may only reject Plaintiff’s testimony

1 by providing “specific, clear, and convincing” reasons. Brown-Hunter, 806 F.3d at 489;  
2 see Leza v. Kijakazi, No. 21-16079, 2022 WL 819782, at \*2 (9th Cir. Mar. 17, 2022) (citing  
3 Garrison, 759 F.3d at 1015). Additionally, the ALJ “must specifically identify the  
4 testimony she or he finds not to be credible and must explain what evidence  
5 undermines the testimony.” Holohan v. Massanari, 246 F.3d at 1208. Failure to do so is  
6 harmful legal error. See Brown-Hunter, 806 F.3d at 492 (“If the ALJ fails to specify his or  
7 her reasons for finding claimant testimony not credible, a reviewing court will be unable  
8 to review those reasons meaningfully without improperly ‘substitut[ing] our conclusions  
9 for the ALJ’s, or speculat[ing] as to the grounds for the ALJ’s conclusions.’”) (quoting  
10 Treichler, 775 F.3d at 1103).

11 Plaintiff contends the ALJ “did not provide more than a general statement  
12 without specific cites” and “did not provide clear and convincing evidence to support  
13 disregarding [Plaintiff’s] statements.” (ECF No. 11 at 13.) Aside from this general  
14 assertion, Plaintiff does not raise any specific arguments about why the ALJ’s  
15 assessment of Plaintiff’s subjective symptom testimony was erroneous. (See generally  
16 ECF No. 11 at 12–13, ECF No. 14 at 7.) Plaintiff’s failure to meaningfully develop  
17 arguments is problematic because the Court can only review “issues which are argued  
18 specifically and distinctly in a party’s opening brief” and “will not manufacture  
19 arguments for an appellant.” Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994)  
20 (internal citations omitted). Thus, it is difficult for the Court to perform a meaningful  
21 review where, as here, Plaintiff merely “assert[ed] in declaratory language that the ALJ  
22 failed to properly evaluate or improperly discredited evidence.”<sup>17</sup> Meyers v. Berryhill,  
23 733 F. App’x 914, 916 (9th Cir. 2018); see also, Janice H. v. O’Malley, No. 22CV1833-W  
24 (MSB), 2024 WL 709395, at \*8 (S.D. Cal. Feb. 21, 2024), report and recommendation

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26  
27 <sup>17</sup> Plaintiff’s Reply also fails to “specifically and distinctly” explain why the ALJ failed to provide clear  
28 and convincing reasons for discrediting his testimony. Greenwood, 28 F.3d at 977. Plaintiff contends  
the Commissioner’s arguments about Plaintiff’s stable condition are “post hoc,” without offering any  
further details. (See ECF No. 14 at 3.)

1 adopted, 2024 WL 1161707 (S.D. Cal. Mar. 18, 2024) (holding plaintiff failed to  
2 demonstrate harmful error where she failed to adequately develop arguments related  
3 to her symptom testimony); Valerie P. v. Kijakazi, No. 3:21-CV-01160-SB, 2022 WL  
4 2712956, at \*7 (D. Or. July 13, 2022) (same).

5 Notwithstanding Plaintiff’s underdeveloped arguments, the Court finds the ALJ  
6 has not met the demanding “clear and convincing” standard for several reasons. See  
7 Brown-Hunter, 806 F.3d at 489. First, the ALJ generally explained that Plaintiff’s  
8 “statements concerning the intensity, persistence and limiting effects of [Plaintiff’s]  
9 symptoms are not entirely consistent with the medical evidence and other evidence of  
10 record.” (AR 24.) This boilerplate introductory language does not comport with the  
11 requirement to specifically identify the testimony being discredited. Morgan v. Comm’r  
12 of Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999) (explaining the ALJ “must  
13 specifically identify what testimony is credible and what evidence undermines the  
14 claimant’s complaints”) (internal citations omitted). As the Ninth Circuit held in  
15 Treichler, an ALJ’s “ ‘vague allegation’ that a claimant’s testimony is ‘not consistent with  
16 the objective medical evidence,’ without any ‘specific findings in support’ of that  
17 conclusion is insufficient for [the court’s] review.” Treichler, 775 F.3d at 1103  
18 (quoting Vasquez, 572 F.3d at 592).

19 Second, the ALJ failed to identify specific evidence that contradicted Plaintiff’s  
20 testimony; instead, he merely stated his conclusion and provided a general summary of  
21 the medical and other evidence, without making connections to specific portions of  
22 Plaintiff’s testimony. (See AR 21–25.) “[S]imply reciting the medical evidence in support  
23 of [a RFC] determination” does not meet the “clear and convincing” standard for  
24 rejecting a plaintiff’s testimony. Brown-Hunter, 806 F.3d at 489; see also Lambert, 980  
25 F.3d at 1278 (holding that a “relatively detailed overview of [plaintiff’s] medical history”  
26 was not the same as providing clear and convincing reasons for discounting plaintiff’s  
27 testimony); Silvia S. v. Kijakazi, No. 22CV1880-MSB, 2023 WL 8167205, at \*5 (S.D. Cal.  
28 Nov. 24, 2023) (“[M]erely reciting the medical record without affirmatively contrasting it



1 to a plaintiff's testimony does not constitute clear and convincing reason."). While it  
2 may be possible to draw inferences from the ALJ's summary of the medical evidence, it  
3 is not the Court's job to do so. Accordingly, because the ALJ failed to draw connections  
4 between the statements he found not credible and evidence undermining these  
5 statements, the Court is unable to accurately assess the adequacy of the ALJ's findings.

6 Third, the ALJ's only discernible reason for discrediting Plaintiff's testimony—that  
7 the testimony is "not entirely consistent" with the medical and other evidence—does  
8 not constitute a clear and convincing reason. (AR 24.) While identification of  
9 inconsistencies between a plaintiff's testimony and the medical record may qualify as a  
10 clear and convincing reason, see Koch v. Berryhill, 720 F. App'x 361, 364 (9th Cir. 2017),  
11 an ALJ is not permitted to rely *solely* on objective medical evidence to discredit a  
12 plaintiff's testimony. See 20 C.F.R. § 404.1529(c)(2) ("[W]e will not reject your  
13 statements about the intensity and persistence of your pain or other symptoms or  
14 about the effect your symptoms have on your ability to work solely because the  
15 available objective medical evidence does not substantiate your statements."); see also  
16 Trevizo, 871 F.3d at 679. Here, the ALJ failed to meaningfully identify inconsistencies  
17 between Plaintiff's testimony and the record. See Holohan, 246 F.3d at 1208; see Silvia  
18 S. v. Kijakazi, No. 22CV1880-MSB, 2023 WL 8167205, at \*5 (S.D. Cal. Nov. 24, 2023)  
19 ("[M]erely reciting the medical record without affirmatively contrasting it to a plaintiff's  
20 testimony does not constitute clear and convincing reason."). Moreover, the ALJ did not  
21 identify any other reasons for discounting Plaintiff's subjective symptom testimony.  
22 (See AR 21–25.)

23 In conclusion, the Court finds the ALJ erred by failing to identify which of  
24 Plaintiff's statements he discredited or providing clear and convincing reasons for doing  
25 so. See Brown-Hunter, 806 F.3d at 494 (citation omitted) ("We cannot review whether  
26 the ALJ provided specific, clear, and convincing reasons for rejecting [plaintiff's] pain  
27 testimony," where, inter alia, "the ALJ never identified which testimony she found not  
28 credible.") The ALJ's only discernible reason for discounting Plaintiff's testimony—that

1 his testimony is “not entirely consistent” with the evidence—is not a clear and  
2 convincing reason because the ALJ did not identify inconsistencies between Plaintiff’s  
3 testimony and the record. Moreover, the ALJ cannot rely solely on medical evidence to  
4 discredit subjective testimony. See 20 C.F.R. § 404.1529(c)(2). The ALJ’s failure to  
5 provide clear and convincing reasons for discounting Plaintiff’s testimony is not  
6 harmless “because it precludes [the Court] from conducting a meaningful review of the  
7 ALJ’s reasoning.” Brown-Hunter, 806 F.3d at 489. Therefore, the Court **RECOMMENDS**  
8 remand for the ALJ to reevaluate Plaintiff’s subjective symptom testimony and  
9 specifically identify which portions of it the ALJ finds not credible and why.

#### 10 **D. Whether the ALJ Met his Burden of Proof at Step Five**

##### 11 **1. Parties’ arguments**

12 Lastly, Plaintiff argues the ALJ erred at step five by not meeting his burden of  
13 proof to identify jobs Plaintiff could perform existing in the national economy. (ECF No.  
14 11 at 13–14.) Plaintiff generally asserts, “[w]here the RFC is inadequate, [the ALJ]  
15 cannot meet his burden of proof.” (Id. at 13.) Plaintiff also argues the vocational expert  
16 (“VE”) provided an inadequate hypothetical regarding absenteeism. (Id. at 13–14.)  
17 Because two doctors found Plaintiff “would have limitations sustaining work and would  
18 have trouble with attendance,” Plaintiff contends the ALJ was required to address this  
19 issue. (Id. at 14.) Furthermore, Plaintiff says the three jobs the ALJ identified require  
20 working in a team and taking instructions—tasks that Plaintiff cannot perform because  
21 they cannot be done in isolation. (Id.)

22 In response, the Commissioner argues that consistent with Plaintiff’s RFC and the  
23 VE’s testimony, the ALJ reasonably found Plaintiff could perform a significant number of  
24 jobs in the national economy. (ECF No. 13 at 17–19.) The Commissioner disputes  
25 Plaintiff’s contention that Dr. Frost and Dr. Burr found Plaintiff’s limitations would  
26 prevent him from working due to absenteeism and distraction. (Id. at 17.) Specifically,  
27 the Commissioner takes issue with Plaintiff’s mention of Dr. Frost without citing any  
28 support. (Id. at 17–18.) Additionally, the Commissioner says Dr. Burr found Plaintiff

1 would be off task less than ten percent of the time or unexpectedly absent two or more  
2 times a month, which the ALJ reasonably distilled into his RFC finding. (Id. at 18 (citing  
3 AR 564).) Moreover, the Commissioner argues Plaintiff speculates, without providing  
4 any support, that the three jobs identified by the VE require supervision and working in  
5 a team. (Id.) The Commissioner says Plaintiff waived this argument because he failed to  
6 raise it at the administrative hearing. (Id. at 18–19 (citing Meanel v. Apfel, 172 F.3d  
7 1111, 1115 (9th Cir. 1999), as amended (June 22, 1999).) Regardless, the Commissioner  
8 argues the ALJ’s step five finding is supported by substantial evidence and should be  
9 upheld. (Id. at 19.)

10 In his Reply, Plaintiff reiterates that the jobs identified by the ALJ require working  
11 in a team and taking instructions based on their definitions in the Dictionary of  
12 Occupational Titles (“DOT”). (ECF No. 14 at 8.) Plaintiff contends all DOT job numbers  
13 with “8” as the fifth digit require taking instructions or orders from supervisors and  
14 cannot be performed in isolation. (Id. at 8–9.) Plaintiff also contends he has not waived  
15 this issue because “a step five error . . . only becomes apparent when the ALJ issues a  
16 decision.” (Id. at 9 (citing Samuels v. Comm’r of Soc. Sec., No. 18cv1872-VKD, at \*25  
17 (N.D. Cal. Sep. 18, 2019)).)

## 18 **2. Applicable law**

19 At step five of the sequential evaluation process, “the burden shifts to the  
20 Commissioner to prove that the claimant can perform a significant number of jobs that  
21 exist in the national economy given the claimant’s [RFC], age, education, and work  
22 experience.” Kilpatrick v. Kijakazi, 35 F.4th 1187, 1191 (9th Cir. 2022) (internal citations  
23 omitted); see also 20 C.F.R. § 416.966(a). In making this determination, the ALJ relies on  
24 the DOT and the testimony of VEs who testify about specific occupations that a claimant  
25 can perform considering their RFC. See 20 C.F.R. § 416.966(d), (e); Zavalin v. Colvin, 778  
26 F.3d 842, 846 (9th Cir. 2015); Valentine, 574 F.3d at 689. “Given its inherent reliability, a  
27 qualified vocational expert’s testimony as to the number of jobs existing in the national  
28 economy that a claimant can perform is ordinarily sufficient by itself to support an ALJ’s

1 step-five finding.” Ford, 950 F.3d at 1160 (citing Tackett v. Apfel, 180 F.3d 1094, 1100  
2 (9th Cir. 1999)); see also Kilpatrick, 35 F.4th at 1192–93.

3 An ALJ may not “rely on a vocational expert’s testimony regarding the  
4 requirements of a particular job without first inquiring whether the testimony conflicts  
5 with the [DOT].” Massachi v. Astrue, 486 F.3d 1149, 1152 (9th Cir. 2007); see also Policy  
6 Interpretation Ruling: Titles II & XVI: Use of Vocational Expert & Vocational Specialist  
7 Evidence, & Other Reliable Occupational Information in Disability Decisions, SSR 00-4P,  
8 2000 WL 1898704 (S.S.A. Dec. 4, 2000). Pursuant to SSR 00-4p, the ALJ has an  
9 affirmative duty to ask about conflicts between the VE’s testimony and the DOT. See  
10 SSR 00-4p, 2000 WL 1898704, at \*2, \*4; Rounds v. Comm’r Soc. Sec. Admin., 807 F.3d  
11 996, 1003 (9th Cir. 2015); Massachi, 486 F.3d at 1152–53. If there is a conflict between  
12 the VE’s testimony and the DOT, “the ALJ must then determine whether the vocational  
13 expert’s explanation for the conflict is reasonable and whether a basis exists for relying  
14 on the expert rather than the DOT.” Massachi, 486 F.3d at 1153. Failure to conduct  
15 such inquiry is analyzed under the harmless error standard. See Zavalin, 778 F.3d at  
16 848; Massachi, 486 F.3d at 1154 n.19 (stating that the error is harmless where “there [is]  
17 no conflict, or if the vocational expert ha[s] provided sufficient support for her  
18 conclusion so as to justify any potential conflicts.”).

19 A conflict between a VE’s testimony and the DOT exists when the VE’s testimony  
20 is obviously or apparently at odds with the DOT’s listing of “essential, integral, or  
21 expected” job requirements. Gutierrez v. Colvin, 844 F.3d 804, 808 (9th Cir. 2016). The  
22 VE’s testimony does not conflict with the DOT’s listing if the “frequency or necessity of a  
23 task is unlikely and unforeseeable.” Id. Lastly, an ALJ may rely on VE testimony elicited  
24 with a hypothetical question if the hypothetical accurately sets forth all the claimant’s  
25 limitations. Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995).

### 26 **3. The VE’s testimony and ALJ’s treatment thereof**

27 At the administrative hearing on February 13, 2023, the ALJ asked the VE to  
28 consider the following hypothetical:

1 [A]ssume we have somebody with [Plaintiff's] age, education, past work.  
2 The only limitations are going to be non-exertional, so we have somebody  
3 who can understand, remember, carry out unskilled type work. Short,  
4 simple job instructions and tasks, simple work, repetitive type work. In  
5 addition to that, we can interact appropriately with coworkers, supervisors,  
6 however the work should be non-collaborative work, no team work, but  
7 handoffs of work materials and products to coworkers and supervisors,  
8 that's appropriate and intact. Additionally, we can respond appropriately  
9 to supervision, routine work situations and settings and changes. We  
10 should have a non-public work setting. We can appropriately ask  
11 questions, make decisions, use judgement at the workplace. And  
12 concerning the public, it should be non-public type work, however if there  
13 is incidental contact, brief occasional contact with the public but not job  
14 related or work-task related contact, that's okay.

11 (AR 46–47.) The VE testified that an individual with this profile could not perform  
12 Plaintiff's past work but could perform alternative work. (AR 47.) Specifically, the VE  
13 identified three jobs Plaintiff could perform existing in the national economy: (1)  
14 Cleaner II (DOT 919.687-014, medium exertion, 51,546 jobs in the national economy);  
15 (2) Hand Packager (DOT 920.587-018, medium exertion, 78,465 jobs in the national  
16 economy); and (3) Meat Clerk (DOT 222.684-010, medium exertion, 65,572 jobs in the  
17 national economy). (Id.) The ALJ then asked the VE to consider a second hypothetical:

18 [W]e now have somebody with [Plaintiff's] age, education, past work, but  
19 for all those capabilities that I just indicated in the first hypothetical, I'm  
20 going to change those to not able, so I'm going to change it to negative. So  
21 . . . everything that I've asked, now it's unable to do all of those elements . .  
22 . Can any work be performed?

22 (AR 47–48.) The VE testified that an individual with this profile could not perform any  
23 work. (AR 48.) The VE explained his testimony is consistent with the DOT, but that  
24 “wherein the DOT is silent, in this case with respect to issues of interacting with the  
25 public, coworkers, and supervisors,” his testimony is based on his own training,  
26 experience, and expertise. (AR 48.) Plaintiff's counsel then asked the VE, considering  
27 the identified jobs, “what is the allowable absenteeism and if a person was off task in a  
28 work place, what would be allowed?” (Id.) The VE answered:

1 Typical employer tolerance in jobs like these for absenteeism is anything  
2 less than two days per month. If one was absent two days a month or  
3 more on a consistent basis, that would be work preclusive. Regarding off-  
4 task behavior, typical employer tolerance is anything less than 10%. If one  
was off task consistently 10% or more, that would also be work preclusive.

5 (Id.) In his written decision, the ALJ determined the VE's testimony was consistent with  
6 the information contained in the DOT and a finding of "not disabled" was appropriate.

7 (AR 26.)

#### 8 **4. Analysis**

9 As an initial matter, the Court does not find the Commissioner's assertion that  
10 Plaintiff waived his step five argument to be persuasive. To begin, the Commissioner's  
11 reliance on Meanel is misplaced. In Meanel, the claimant attempted to introduce *new*  
12 *evidence* not previously presented at the administrative hearing. See Meanel, 172 F.3d  
13 at 1115. By contrast, here, Plaintiff does not attempt to introduce new evidence but  
14 rather seeks to address a *legal error* in the ALJ's step five finding. (See ECF No. 11 at 14  
15 (arguing "the ALJ did not meet his burden of proof at Step Five" and "[t]herefore, the  
16 ALJ's findings are not supported by substantial evidence".)) The Ninth Circuit has held  
17 that courts may consider arguments raised for the first time on appeal if they are purely  
18 questions of law and the Commissioner would not be unfairly prejudiced. See Silveira v.  
19 Apfel, 204 F.3d 1257, 1262 n.8 (9th Cir. 2000). Moreover, district courts in the Ninth  
20 Circuit have regularly applied Silveira's reasoning in holding plaintiffs do not waive their  
21 right to appeal an ALJ's step five findings by not initially raising that argument during  
22 administrative proceedings. See e.g., Yvonne W. v. Kijakazi, No. 22CV390-BEN (LR), 2023  
23 WL 4745108, at \*17 (S.D. Cal. July 25, 2023), report and recommendation adopted, 2023  
24 WL 11884643 (S.D. Cal. Sept. 18, 2023) (declining waiver of step five argument);  
25 Kawther Y. v. Kijakazi, No. 21-CV-01191-BGS, 2023 WL 2766666, at \*3 (S.D. Cal. Mar. 30,  
26 2023) (same); Barbee v. Berryhill, No. 16cv1779-BEN (DHB), 2017 WL 3034531, at \*12  
27 (S.D. Cal. July 18, 2017), report and recommendation adopted, 2017 WL 3772975 (S.D.  
28 Cal. Aug. 31, 2017) (same). Here, Plaintiff does not seek to introduce new evidence, the

1 alleged error is purely a question of law, and the Commissioner is not unfairly  
2 prejudiced because she had an opportunity to respond during this appeal. Compare  
3 Meanel, 172 F.3d at 1115, with Silveira, 204 F.3d at 1262 n.8. Thus, the Court finds  
4 Plaintiff did not waive the issue of whether the ALJ met his burden at step five.

5 Finding no waiver, the Court must determine whether the ALJ’s findings at step  
6 five are supported by substantial evidence. Plaintiff primarily argues the ALJ’s findings  
7 are not supported by substantial evidence because the jobs the VE identified would  
8 require Plaintiff to work “with supervision and in a team,” which cannot reasonably be  
9 done in isolation. (ECF No. 11 at 13–14.) Plaintiff also maintains the VE’s hypothetical  
10 did not adequately capture Plaintiff’s absenteeism and distraction concerns, which were  
11 noted by two doctors. (Id.) These arguments are unavailing.

12 First, Plaintiff does not cite, nor does the Court discern, any authority suggesting  
13 the VE’s testimony obviously or apparently conflicts with the DOT’s descriptions of the  
14 three identified jobs. Gutierrez, 844 F.3d at 808. The three jobs—Cleaner II, Hand  
15 Packager, and Meat Clerk—contain “8” as the fifth digit of their respective DOT  
16 occupational codes, which indicates these jobs involve the lowest level of complexity in  
17 relating to people. See DICOT 919.687-014, 1991 WL 687897; DICOT 920.587-018, 1991  
18 WL 687916; DICOT 222.684-010, 1991 WL 672129; see also Seth D. v. Kijakazi, No. 22-  
19 CV-02051-LL (JLB), 2023 WL 8676095, at \*17 (S.D. Cal. Dec. 15, 2023), report and  
20 recommendation adopted sub nom. Seth D. v. O’Malley, 2024 WL 130762 (S.D. Cal. Jan.  
21 11, 2024). Level 8 occupations involve “[a]ttending to the work assignment instructions  
22 or orders of supervisor” and require “[n]o immediate response . . . unless clarification of  
23 instructions or orders is needed.” Appendix B, Explanation of Data, People, Things, 1991  
24 WL 688701. Additionally, each of these jobs are “unskilled,” meaning they require only  
25 a limited interaction with people. See DICOT 919.687-014, 1991 WL 687897 (indicating  
26 “taking instructions- helping” is “not significant”); DICOT 920.587-018, 1991 WL 687916  
27 (same); DICOT 222.684-010, 1991 WL 672129 (same); see also SSR 85-15, 1985 WL  
28 56857, at \*4 (explaining unskilled jobs “ordinarily involve dealing primarily with objects,

1 rather than with data or people”). This is consistent with the level of social interaction  
2 captured by the ALJ in his hypothetical question to the VE. (See AR 46–47 (“[Plaintiff]  
3 can interact appropriately with coworkers, supervisors, however the work should be  
4 non-collaborative work, no team work, but handoffs of work materials and products . . .  
5 [Plaintiff] should have a non-public work setting . . . however, if there is incidental  
6 contact, brief occasional contact with the public but not job related or work-task related  
7 contact, that’s okay”).) Similarly, this is consistent with the level of social interaction  
8 assessed in the ALJ’s RFC determination. (AR 22 (Plaintiff “can interact with coworkers  
9 and supervisors appropriately, however the work should be non-collaborative work and  
10 no teamwork. The claimant can make appropriate and intact handoff of work materials  
11 and products to coworkers and supervisors . . . [Plaintiff] should have non-public work,  
12 but he can have incidental contact, including brief or occasional contact with the public,  
13 so long as it is not job-related contact”).)

14 Moreover, the three identified jobs do not include activities an individual with  
15 Plaintiff’s RFC would be precluded from doing, and Plaintiff does not identify any such  
16 activities in support of his arguments. Pineda v. Comm’r of Soc. Sec., No. 1:22-CV-  
17 01287-SAB, 2023 WL 5334984, at \*14 (E.D. Cal. Aug. 18, 2023) (finding no conflict  
18 between the DOT and VE’s testimony where the plaintiff failed to identify activities she  
19 could not perform). Plaintiff also points to no evidence to support his contention that  
20 the work must be performed “in isolation.” (See generally ECF Nos. 11 & 14.) As to  
21 Plaintiff’s concerns regarding absenteeism and distraction, the Commissioner correctly  
22 points out that Dr. Burr “made no indication that Plaintiff would be off-task more than  
23 10% of the time or unexpectedly absent two or more times a month,” which was the  
24 level of employer tolerance the VE noted at the administrative hearing. (ECF No. 13 at  
25 18; AR 48, 564.) Instead, Dr. Burr opined Plaintiff has a mild inability to maintain  
26 consistency and pace; a moderate inability to follow normal workplace rules; and is at  
27 risk for calling in sick, not showing up, or needing to leave early. (AR 564.) None of  
28 these findings suggest Plaintiff would be unable to perform unskilled work involving the



1 lowest level of complexity in relating to people. The VE accurately set forth Plaintiff's  
2 limitations in his testimony; therefore, the ALJ reasonably relied upon the VE's answers.  
3 Andrews, 53 F.3d at 1043.

4 In sum, Plaintiff's arguments fall short of identifying an obvious or apparent  
5 conflict between the VE's testimony and the DOT descriptions of the three identified  
6 positions. Where there is no obvious conflict, the ALJ has no further duty to reconcile.  
7 Gutierrez, 844 F.3d at 807–08; see, e.g., Michael v. Comm'r of Soc. Sec., No. 1:21-CV-  
8 00395-SAB, 2022 WL 3999819, at \*21 (E.D. Cal. Sept. 1, 2022) (finding no conflict  
9 between DOT's description of occasional/frequent reaching and RFC limitation for no  
10 overhead reaching, where jobs did not appear to require overhead reaching). Thus, the  
11 Court finds the ALJ satisfied his burden at step five and reasonably relied on the VE's  
12 testimony that Plaintiff could perform at least one job existing in significant numbers in  
13 the national economy. Kilpatrick, 35 F.4th at 1191.

## 14 VI. CONCLUSION

15 For the foregoing reasons, the Court concludes the ALJ's decision was not free of  
16 harmful legal error. The reviewing court may enter a judgment affirming, modifying, or  
17 reversing the Commissioner's decision, or remanding the case to the Social Security  
18 Administration for further proceedings. See 42 U.S.C. § 405(g). Remand is warranted  
19 where additional administrative proceedings could remedy defects in the decision. Kail  
20 v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984)).) "An automatic award of benefits is a  
21 rare and prophylactic exception to the well-established ordinary remand rule." Leon v.  
22 Berryhill, 880 F.3d 1041, 1044 (9th Cir. 2017).

23 The Court finds remand is warranted because additional administrative  
24 proceedings could remedy the defects in the ALJ's decision. Specifically, the Court  
25 **RECOMMENDS** that, upon remand, the ALJ: (1) provide a more detailed assessment of  
26 Plaintiff's mental limitations when making the RFC determination; (2) re-evaluate  
27 Plaintiff's subjective symptom testimony and specifically identify which portions of it, if  
28

1 any, the ALJ finds not credible and why; and (3) conduct a new sequential five-step  
2 evaluation considering the above and all the evidence in the record.


3 For the foregoing reasons, the Court **RECOMMENDS** that Judgment be entered  
4 **REVERSING** the decision of the Commissioner and **REMANDING** this matter for further  
5 administrative proceedings consist with this Report and Recommendation.

6 **IT IS ORDERED** that no later than January 16, 2025, any party to this action may  
7 file written objections with the Court and serve a copy on all parties. The document  
8 should be captioned "Objections to Report and Recommendation."

9 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the  
10 Court and served on all parties no later than January 23, 2025. The parties are advised  
11 that failure to file objections within the specified time may waive the right to raise those  
12 objections on appeal of the Court's order. See Robbins v. Carey, 481 F.3d 1143, 1146–  
13 47 (9th Cir. 2007); Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

14 **IT IS SO ORDERED.**

15 Dated: January 2, 2025

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18 Honorable Michael S. Berg  
19 United States Magistrate Judge  
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