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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF NEVADA

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6 MARK F. GUTIERREZ,

Case No. 2:17-cv-02365-MMD-EJY

7 Plaintiff,

ORDER

8 v.

9 ANDREW SAUL, Acting Commissioner of  
Social Security,<sup>1</sup>

10 Defendant.

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12 **I. SUMMARY**

13 This case concerns Plaintiff Mark F. Gutierrez's application for disability benefits.  
14 Chiefly before the Court is the Report and Recommendation of United States Magistrate  
15 Judge Elayna J. Youchah ("R&R" or "Recommendation") regarding Gutierrez's motion for  
16 remand/reversal ("Motion") (ECF No. 12) and Defendant Acting Commissioner's cross-  
17 motion to affirm and opposition to the Motion ("Cross-Motion") (ECF No. 15). (ECF No.  
18 26.) The Commissioner has filed an objection ("Objection") (ECF No. 29) to which  
19 Gutierrez has responded (ECF No. 31). Having reviewed the administrative record<sup>2</sup> filed  
20 by the Commissioner (ECF No. 11-1 (sealed)) and considered the parties' positions in  
21 their briefing, the Court accepts the R&R in part—as to its substantive findings—and  
22 rejects it in part—as to its recommended relief.<sup>3</sup>

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24 <sup>1</sup>Former Commissioner Nancy A. Berryhill was the original Defendant in this action.  
25 Andrew Saul has been automatically substituted pursuant to Fed. R. Civ. P. 25(d) because  
he is now the Commissioner of the Social Security Administration.

26 <sup>2</sup>For ease of reference, the Court hereinafter cites to the administrative record as  
27 AR.

28 <sup>3</sup>The Commissioner has also filed a motion to strike a notice from Gutierrez's  
treating physician, Dr. Akindele Kolade (ECF Nos. 28, 28-1), which the Court will grant

1 **II. RELEVANT BACKGROUND**

2 Gutierrez completed an application for disability insurance benefits and  
3 Supplemental Security Income under Titles II of the XVI of the Social Security Act (“Act”).  
4 (AR 13.) The application was denied. (AR 124–29.) Gutierrez requested reconsideration  
5 of the denial (AR 128–34), but the application was again denied upon reconsideration.  
6 (AR 130–36.)

7 Gutierrez sought and was afforded a hearing wherein he appeared and testified  
8 before an administrative law judge (“ALJ”). (AR 137–38, 31–59.) The ALJ issued a  
9 decision, dated June 3, 2016, finding Gutierrez is not disabled under the applicable  
10 provisions. (AR 13–24.) Gutierrez then requested review of the ALJ’s decision before the  
11 Appeals Council (“AC”). (AR 1, 180.) The AC denied the request. (AR 1–6.) With this final  
12 Commissioner decision, Gutierrez commenced the instant action for judicial review  
13 pursuant to 42 U.S.C. §§ 405(g) and 1383(c). (ECF Nos. 1, 4.)

14 **III. LEGAL STANDARD**

15 **A. Review of Magistrate Judge’s Recommendation**

16 This Court “may accept, reject, or modify, in whole or in part, the findings or  
17 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). Where a  
18 party timely objects to a magistrate judge’s report and recommendation, then the court is  
19 required to “make a de novo determination of those portions of the [report and  
20 recommendation] to which objection is made.” *Id.* Nonetheless, the court is not required  
21 to conduct “any review at all . . . of any issue that is not the subject of an objection.”  
22 *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *see also United States v. Reyna-Tapia*, 328  
23 F.3d 1114 (9th Cir. 2003) (“De novo review of the magistrate judges’ findings and  
24 recommendations is required if, but *only* if, one or both parties file objections to the  
25 findings and recommendations.”) (emphasis in original); Fed. R. Civ. P. 72, Advisory

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28 under Fed. R. Civ. P. 12(f). The Court will not consider Kolade’s note at this stage because  
it was submitted after the R&R was filed and therefore not considered by Judge Youchah  
in reaching her recommendations. The document is also irrelevant in light of the Court’s  
conclusions *infra*.

1 Committee Notes (1983) (providing that the court “need only satisfy itself that there is no  
2 clear error on the face of the record in order to accept the recommendation”).

### 3 **B. Standard for Reviewing Social Security Cases**

4 Congress has limited the scope of judicial review of the Commissioner’s decisions  
5 to deny benefits under the Social Security Act. In reviewing findings of fact, the Court must  
6 determine whether the decision of the Commissioner is supported by substantial evidence.  
7 42 U.S.C. § 405(g). “Substantial evidence is more than a mere scintilla but less than a  
8 preponderance; it is such relevant evidence as a reasonable mind might accept as  
9 adequate to support a conclusion.” *Gutierrez v. Comm’r of Soc. Sec.*, 740 F.3d 519, 522–  
10 23 (9th Cir. 2014) (internal quotation marks and citations omitted). The court must consider  
11 the entire record as a whole to determine whether substantial evidence exists, and it must  
12 consider evidence that both supports and undermines the ALJ’s decision. *Id.* at 523  
13 (citation omitted). “If the ALJ’s finding is supported by substantial evidence, the court may  
14 not engage in second-guessing.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.  
15 2008). In weighing the evidence and making findings, the Commissioner must also apply  
16 the proper legal standards. *Id.* (citations omitted). Courts “may not reverse an ALJ’s  
17 decision on account of an error that is harmless.” *Molina v. Astrue*, 674 F.3d 1104, 1111  
18 (9th Cir. 2012).

## 19 **IV. DISCUSSION**

20 In the Objection, the Commissioner specifically challenges Judge Youchah’s relief  
21 recommendation and does not especially attack Judge Youchah’s substantive findings.  
22 (ECF No. 29.) As to the latter, the Commissioner simply maintains his underlying position  
23 that the ALJ’s decision is supported by substantial evidence. (*Id.* at 2.) The Commissioner  
24 otherwise states that if the Court agrees with Judge Youchah’s finding that Gutierrez is  
25 disabled in accordance with the applicable mental impairment listing, then there is no need  
26 for remand and the Court should award benefits. (*Id.* at 2–3.) In responding to the  
27 Objection, Gutierrez agrees with the Commissioner on the remand issue. (ECF No. 31 at  
28 2–3.) Specifically, both parties agree that Judge Youchah’s recommendation that this case

1 be remanded for further consideration under the Compassionate Allowances program is  
2 inappropriate here<sup>4</sup> and unnecessary based on Judge Youchah’s finding that Gutierrez is  
3 disabled. Because the Court agrees with the parties and otherwise finds no clear error in  
4 Judge Youchah’s findings, the Court will accept the R&R in its substantive findings and  
5 reject it has to the recommended relief.

6 As indicated above, the Court need only satisfy itself that there is no clear error on  
7 the face of the record in order to accept the R&R’s substantive findings in the absence of  
8 relevant objections. The Court is so satisfied.

9 The Court agrees with Judge Youchah’s finding that the ALJ improperly failed to  
10 consider substantial evidence that supports a conclusion that Gutierrez is disabled within  
11 the meaning of the Act. First, Judge Youchah concluded that the ALJ committed reversible  
12 error in failing to consider the opinion of Gutierrez’s treating physician—Dr. Akindele  
13 Kolade—in its entirety and overall giving “light weight” to the physician’s opinion. (ECF No.  
14 26 at 29, 33.) Notably, Judge Youchah concluded that it was improper for the ALJ to reject  
15 the physician’s opinion based on internal discrepancies in the physician’s completed  
16 Medical Impairment Questionnaire where the physician’s finding of debilitating limitations  
17 was otherwise consistent with the evidence in the record as a whole. (*See generally id.*  
18 at 28–33; *see also e.g.*, AR 364–83, 387–88, 393, 412, 508–09, 515–16, 534, 536, 538,  
19 542, 544, 546, 548, 549, 551, 553, 555, 558, 560, 562, 564–65, 567–68, 572 (providing  
20 Dr. Kolade’s notes, findings, opinion and questionnaire and the notes of other  
21 attending/emergency room physicians).) Second, Judge Youchah determined that the  
22 ALJ’s assessment of Gutierrez’s credibility was not supported by clear and convincing  
23 reasons, considering each basis underlying the ALJ’s credibility determination. (ECF No.  
24 26 at 33–45; *see also e.g.*, AR 40–53, 382 (providing some of Gutierrez’s testimony).)  
25 Third, by extension of the ALJ improperly rejecting Gutierrez’s testimony, Judge Youchah  
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27 <sup>4</sup>See Compassionate Allowances, <https://www.ssa.gov/compassionateallowances/>  
28 (last visited Mar. 16, 2020) (providing that the program is reserved “for individuals with the  
most serious disabilities,” and examples include “certain cancers, adult brain disorders,  
and a number of rare disorders that affect children”).

1 found that the ALJ baselessly failed to consider Gutierrez’s lay witness testimony—that of  
2 his mother, Judy Gutierrez. (ECF No. 26 at 45–46; see AR 288–95 (Judy’s Third Party  
3 Function Report describing Gutierrez’s limitations).)

4 The caselaw Judge Youchah relied on supports her conclusions that Dr. Kolade’s  
5 opinion should not have been given “little weight” as a whole, that Gutierrez’s credibility  
6 was not properly assessed, and that the lay witness’s statements should have been  
7 considered.<sup>5</sup> To be sure, in not particularly addressing Judge Youchah’s substantive  
8 findings, the Commissioner’s Objection provides no authority or argument to support  
9 contrary conclusions. Accordingly, the Court is satisfied that there is no clear error on the  
10 face of the record before it.

11 Most importantly, considering the above substantial evidence which the ALJ failed  
12 to give proper credence, Judge Youchah concluded that Gutierrez’s mental impairments  
13 satisfy the requirements of the then applicable Listing of Impairments 12.04  
14 (20 C.F.R. Pt. 404, Subpt. P, App. 1, §§ 12.00, 12.04)<sup>6</sup> and therefore the ALJ should have  
15 found Gutierrez disabled under the Act. (ECF No. 26 at 19–27, 51.) In the Objection, the  
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17 <sup>5</sup>(See generally ECF No. 26 at 28–33 (citing cases such as: *Garrison v. Covlin*, 759  
18 F.3d 995, 1012 (9th Cir. 2014); *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007);  
19 *Orn v. Astrue*, 495 F.3d 625, 631, 633 (9th Cir. 2007); *Holohan v. Massanari*, 246 F.3d  
20 1195, 1205 (9th Cir. 2001); *Tackett v. Apfel*, 180 F.3d 1094, 1102–03 (9th Cir. 1999);  
21 *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996); *Magallanes v. Bowen*, 881 F.2d  
22 747, 751 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989) (relevant to  
23 assessing weight to a treating physician’s opinion)); *id.* at 33–45 (citing authority such as:  
24 SSR 16-3p (eff. Mar. 16, 2016), 2016 WL 1119029, at \*7; 20 C.F.R. §§ 404.1529(c),  
25 416.929 (c).2; *Garrison*, 759 F.3d at 1014–15; *Molina*, 674 F.3d at 1113; *Carmickle v.*  
*Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161–62 (9th Cir. 2008); *Lingenfelter*, 504  
26 F.3d at 1036; *Orn*, 495 F.3d at 638; *Thomas v. Barnhart*, 278 F.3d 948, 958 (9th Cir. 2002);  
27 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001), (relevant to assessing a claimant’s  
28 credibility)); *id.* at 45–46 (relying on cases such as: *Stout v. Comm’r Soc. Sec. Admin.*,  
454 F.3d 1050, 1053 (9th Cir. 2006); *Dodrill v. Shalala*, 12 F.3d 915, 918–19 (9th Cir.  
1993); *Molina*, 674 F.3d at 1114 (relevant to considering lay witness testimony)).)

<sup>6</sup>The R&R properly reflects changes to the relevant sections of the listing that went  
into effect on January 17, 2017. Here, the ALJ relied on the old version of the mental  
health listings because Gutierrez’s claim was filed in 2014 while, as Judge Youchah notes,  
the Commissioner’s Cross-Motion is based largely on the revised listings. (ECF No. 26 at  
24; see ECF No. 15 at 4–8; see also ECF No. 17 at 3 (highlighting the Commissioner’s  
improper reliance).)

1 Commissioner agrees that if a claimant meets a listing, the claimant is disabled (ECF No.  
2 29 at 3). Such is the law. See 20 C.F.R. § 404.1520(d) (“When your impairment(s) meets  
3 or equals a listed impairment in appendix 1. If you have and impairment(s) which meets  
4 the duration requirement and is listed in appendix 1 or is equal to a listed impairments(s),  
5 [the Commissioner] will find you disabled without considering your age, education, and  
6 work experience.”); see also *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013)  
7 (“Listed impairments set . . . strict standards because they automatically end the five-step  
8 [sequential evaluation process for determining whether a claimant is disabled withing the  
9 meaning of the Act], before functional capacity is even considered.”).

10 Accordingly, while Judge Youchah recommends that this case be remanded for  
11 further proceedings under the Compassionate Allowances program, the Court concludes  
12 that remand is not needed here. Judge Youchah’s remand recommendation is grounded  
13 on her conclusion that further administrative proceedings would be useful in light of the  
14 internal discrepancies in Dr. Kolade’s Medical Impairment Questionnaire, applying the  
15 three-part credit-as-true standard in *Garrison v. Covlin*, See 759 F.3d 995, 1020 (9th Cir.  
16 2014). But Judge Youchah appears to concede, and the Court finds, that the issue  
17 pertaining to the discrepancies would not alter the finding of disability. (See ECF No. 26  
18 at 50 (“Here, there is no serious doubt that Plaintiff is disabled under the [Act].”).) This is  
19 to say, the Court finds that the conclusion of disability makes further administrative  
20 proceedings materially useless. The Court otherwise agrees with Gutierrez that the other  
21 two *Garrison* prongs are met here. (See ECF No. 31 at 3–4 (Gutierrez’s response to the  
22 Commissioner’s Objection arguing the other two prongs).)

23 To be clear, the Court agrees that the evidence<sup>7</sup> supports the noted finding of  
24 disability. Therefore, there is no need to remand this case. See, e.g., *Harman v. Apfel*, 211  
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26 <sup>7</sup>(E.g., ARs 374–75, 376–77, 412, 481, 483, 509, 548, 515, 522, 536, 538, 548,  
27 551, 567-68, 572 (supporting that Gutierrez suffers from depressive syndrome and bipolar  
28 syndrome thereby satisfying Paragraph A of Listing 12.04—specifically Paragraphs A.1  
and A.3; ARs 49, 290–93, 382–83, 510, 513 (supporting a finding of two consequences of  
bipolar disorder—marked restriction of activities of daily living and marked difficulties in

1 F.3d 1172, 1176, 1178 (9th Cir. 2000) (explaining that a court may exercise discretion to  
2 direct an immediate award of benefits or remand for further administrative proceedings  
3 where enhancement of the record would be useful). The Court will therefore reject the  
4 R&R's recommendation to remand this case for further administrative proceedings. The  
5 Court will instead remand for an immediate payment of benefits. See *id.* at 1178.

## 6 **V. CONCLUSION**

7 The Court notes that the parties made several arguments and cited to several cases  
8 not discussed above. The Court has reviewed these arguments and cases and determines  
9 that they do not warrant discussion as they do not affect the outcome of the issues before  
10 the Court.

11 It is therefore ordered that the Report and Recommendation of Magistrate Judge  
12 Elayna J. Youchah (ECF No. 26) is adopted in part and rejected in part. The Court adopts  
13 the R&R's substantive findings but rejects its recommendation that this case be remanded  
14 for further proceedings under the Compassionate Allowances program and its ancillary  
15 recommendations in this regard (see ECF No. 26 at 52).

16 It is further ordered that Gutierrez's motion for remand/reversal (ECF No. 12) is  
17 granted.

18 It is further ordered that the Commissioner's cross-motion to affirm (ECF No. 15) is  
19 denied.

20 It is further ordered that the case be remanded for payment of benefits to Gutierrez  
21 because the Court adopts Judge Youchah's finding of disability.

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26 maintaining social functioning—thereby satisfying Paragraph B of Listing 12.04.) As  
27 Judge Youchah explains, "Listing 12.04 has 'three paragraphs, designated A, B, and C;  
28 [the claimant's] mental disorder must satisfy the requirements of both paragraphs A and  
B, or the requirements of both paragraphs A and C" (ECF No. 26 at 20 (quoting 20 C.F.R.  
§ Pt. 404. Subpt. P, App. 1, 12.00)). See also *Lester v. Charter*, 81 F.3d 821, 828–29 (9th  
Cir. 1995) (explaining what is needed to meet the Listings' requirement).

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It is further ordered that the Commissioner's motion to strike (ECF No. 30) is granted.

The Clerk is directed to enter judgment in accordance with this order and close this case.

DATED THIS 17<sup>th</sup> day of March 2020.

  
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MIRANDA M. DU  
CHIEF UNITED STATES DISTRICT JUDGE