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5 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 MANUEL S. ABRAHAMSON,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN,
Acting Commissioner of Social
Security,

10 Defendant.

No. 2:14-CV-00308-RHW

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

11 Before the Court are the parties' cross-motions for summary judgment, **ECF**
12 **Nos. 11, 12**. Sara Herr-Waldroup represents Manuel S. Abrahamson ("Plaintiff" or
13 "Claimant") and Special Assistant United States Attorney Benjamin Groebner
14 represents Defendant Commissioner of Social Security (the "Commissioner").
15 Plaintiff brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g),
16 of the Commissioner's final decision, which denied his application for
17 Supplemental Security Income ("SSI") under Title XVI of the Social Security Act,
18 42 U.S.C §§ 1381- 1383F. After reviewing the administrative record and briefs
19 filed by the parties, the Court is now fully informed. For the reasons set forth
20

**ORDER GRANTING DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT ~ 1**

1 below, the Court grants Defendant’s Motion for Summary Judgment and directs
2 entry of judgment in favor of Defendant.

3 **I. Jurisdiction**

4 Plaintiff filed an application for SSI benefits on February 9, 2011. Tr. 153-
5 159. Plaintiff’s application was initially denied on May 26, 2011, Tr. 74-79, and
6 on reconsideration on September 14, 2011, Tr. 80-94. Plaintiff filed a written
7 request for hearing on October 20, 2011. Tr. 117-19. On October 29, 2012,
8 Administrative Law Judge (“ALJ”) Moira Ausems held a hearing in Spokane,
9 Washington. Tr. 39-74. On February 1, 2013, the ALJ issued a decision finding
10 Plaintiff ineligible for SSI payments. Tr. 22-33. The Appeals Council denied
11 Plaintiff’s request for review on May 12, 2014, Tr. 6-8, making the ALJ’s ruling
12 the “final decision” of the Commissioner. On July 2, 2014, Plaintiff requested a 45
13 day extension to file a civil action, Tr. 1-4, which the Appeals Council granted on
14 August 8, 2014. Plaintiff timely filed the present action on September 19, 2014,
15 and accordingly, Plaintiff’s claims are properly before this Court pursuant to 42
16 U.S.C. § 405(g).

17 **II. Sequential Evaluation Process**

18 The Social Security Act defines disability as the “inability to engage in any
19 substantial gainful activity by reason of any medically determinable physical or
20 mental impairment which can be expected to result in death or which has lasted or

1 can be expected to last for a continuous period of not less than twelve months.” 42
2 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
3 under a disability only if his or her impairments are of such severity that the
4 claimant is not only unable to perform previous work, but cannot, considering
5 claimant's age, education and work experience, engage in any other substantial
6 gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A) &
7 1382c(a)(3)(B).

8 The Commissioner has established a five-step sequential evaluation process
9 for determining whether a claimant is disabled within the meaning of the Social
10 Security Act. 20 C.F.R. §§ 404.1520(a)(4) & 416.920(a)(4); *Lounsbury v.*
11 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

12 Step one inquires whether the claimant is presently engaged in “substantial
13 gainful activity.” 20 C.F.R. §§ 404.1520(b) & 416.920(b). Substantial gainful
14 activity is defined as significant physical or mental activities done or usually done
15 for profit. 20 C.F.R. §§ 404.1572 & 416.972. If the claimant is engaged in
16 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
17 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

18 Step two asks whether the claimant has a severe impairment, or combination
19 of impairments, that significantly limits the claimant’s physical or mental ability to
20 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe

1 impairment is one that lasted or is expected to last for at least twelve months, and
2 must be proven by reference to objective medical evidence. 20 C.F.R. §§
3 404.1508-09 & 416.908-09. If the claimant does not have a severe impairment, or
4 combination of impairments, the disability claim is denied, and no further
5 evaluative steps are required. Otherwise, the evaluation proceeds to the third step.

6 Step three involves a determination of whether any of the claimant’s severe
7 impairments “meets or equals” one of the listed impairments acknowledged by the
8 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
9 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
10 20 C.F.R. § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or
11 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
12 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to
13 the fourth step.

14 Step four examines whether the claimant’s residual functional capacity
15 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f)
16 & 416.920(e)-(f). If the claimant can still perform past relevant work, then the
17 claimant is not entitled to disability benefits and the inquiry ends there. *Id.* If the
18 claimant cannot perform past relevant work, the ALJ must proceed to step five.

19 Step five shifts the burden to the Commissioner to prove that the claimant is
20 able to perform other work in the national economy, taking into account the

1 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
2 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
3 burden, the Commissioner must establish that (1) the claimant is capable of
4 performing other work; and (2) such work exists in "significant numbers in the
5 national economy." 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
6 676 F.3d 1203, 1206 (9th Cir. 2012).

7 **III. Standard of Review**

8 A district court's review of a final decision of the Commissioner of Social
9 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
10 limited, and the Commissioner's decision will be disturbed "only if it is not
11 supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698
12 F.3d 1144, 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means
13 "more than a mere scintilla but less than a preponderance; it is such relevant
14 evidence as a reasonable mind might accept as adequate to support a conclusion."
15 *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v.*
16 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted).
17 In determining whether the Commissioner's findings are supported by substantial
18 evidence, "a reviewing court must consider the entire record as a whole and may
19 not affirm simply by isolating a specific quantum of supporting evidence."
20

1 *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock*
2 *v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989)).

3 In reviewing a denial of benefits, a district court may not substitute its
4 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
5 1992). If the evidence in the record “is susceptible to more than one rational
6 interpretation, [the court] must uphold the ALJ's findings if they are supported by
7 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
8 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
9 2002) (if the “evidence is susceptible to more than one rational interpretation, one
10 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
11 a district court “may not reverse an ALJ's decision on account of an error that is
12 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
13 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
14 The burden of showing that an error is harmful generally falls upon the party
15 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

16 **IV. Statement of Facts**

17 The facts of the case are set forth in detail in the transcript of proceedings,
18 and are only briefly summarized here. Plaintiff was born on November 19, 1969,
19 and was 42 years-old on the date of the hearing. Tr. 187. Plaintiff obtained a GED
20 in the “mid 1990’s,” Tr. 44, and has worked as a construction worker and general

1 laborer in various settings with a range of medium to very heavy exertional
2 demands, Tr. 59.

3 Plaintiff alleges he is disabled primarily because of injuries resulting from
4 two significant motor vehicle accidents. The first accident occurred in May of
5 2007. Tr. 526. Plaintiff sustained a left midshaft femur fracture by traumatic
6 impalement, resulting in a “massive hemorrhage” from his left thigh, Tr. 526, and a
7 right distal tibia fracture, Tr. 535. Infection in Plaintiff’s left leg required surgical
8 intervention on two occasions, once in August of 2007, Tr. 635, and again in May
9 of 2011, Tr. 256-57. In December of 2010, Plaintiff again injured his left leg when
10 he slipped on ice and sustained a proximal tibia fracture in the metaphyseal area of
11 his left leg. Tr. 638. The second motor vehicle accident occurred in January of
12 2012, and Plaintiff sustained bilateral wrist fractures, a fracture of his mandible
13 bone, and a closed head injury.

14 **V. The ALJ’s Findings**

15 The ALJ determined that Plaintiff was not disabled under the Social Security
16 Act and denied his application for SSI benefits. Tr. 22-33.

17 **At step one**, the ALJ found that the Plaintiff had not engaged in substantial
18 gainful activity since February 7, 2011. Tr. 24 (citing 20 C.F.R. § 416.971 *et seq.*).

19 **At step two**, the ALJ found Plaintiff had the following severe impairments:
20 status post-left lower extremity surgery, cognitive disorder likely substance-

1 induced, and personality disorder, not otherwise specified. Tr. 24 (citing 20 C.F.R.
2 § 416.920(c)).

3 At **step three**, the ALJ found that Plaintiff did not have an impairment or
4 combination of impairments that meets or medically equals the severity of one of
5 the listed impairments in 20 C.F.R. §§ 404, Subpt. P, App. 1. Tr. 25 (citing 20
6 C.F.R. §§ 416.920(d), 416.925, and 416.926).

7 At **step four**, the ALJ found that Plaintiff had the residual functional
8 capacity to perform light work and is able to stand or walk up to six hours in an
9 eight-hour workday and sit for up to six hours in an eight-hour work day. Tr. 27.
10 In addition, the ALJ found that Plaintiff can occasionally climb ramps and stairs,
11 and balance, stoop, kneel, and crouch, but must avoid crawling, climbing ropes,
12 ladders, or scaffolds, and concentrated exposure to extreme cold and heat,
13 humidity, vibration, and hazards. *Id.* With respect to Plaintiff's non-exertional
14 limitations, the ALJ found that Plaintiff can perform simple and routine tasks but
15 must be limited to brief superficial contact with the general public. *Id.* Vocational
16 expert Diane Kramer CDMS testified at the hearing that an individual with the
17 above-described residual functional capacity could not perform any of Plaintiff's
18 past relevant work, Tr. 59-60, and based on this testimony, the ALJ found that
19 Plaintiff is unable to perform his past relevant work, Tr. 31.

1 At **step five**, the ALJ found, after considering his age, education, work
2 experience, and residual functional capacity, that Plaintiff is capable of making a
3 successful adjustment to other work that exists in significant numbers in the
4 national economy. Tr. 32-33.

5 VI. Issues for Review

6 Plaintiff contends that the ALJ erred by (1) failing to find that Plaintiff's
7 hepatitis B, hepatitis C, status post right distal tibia fracture, and status post
8 bilateral wrist fractures were severe impairments; and (2) improperly assessing
9 Plaintiff's residual functional capacity.

10 VII. Discussion

11 As an initial matter, although Plaintiff assigns error to the ALJ's findings
12 that his hepatitis B and hepatitis C are non-severe impairments, as the government
13 points out, ECF No. 12 at 2, he does not advance any arguments on this issue in his
14 opening brief. Because Plaintiff has not argued the issue with specificity, the
15 Court need not address it. *See Carmickle v. Commissioner, Soc. Sec. Admin.*, 533
16 F.3d 1155, 1161 n. 2 (9th Cir. 2008). In any case, Plaintiff appears to have
17 conceded this point, as his reply brief contains a statement of issues that does not
18 assign error to the ALJ's severity findings with respect to Plaintiff's hepatitis B
19 and hepatitis C. ECF No. 14 at 1.

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1 **A. Step Two Severity Findings**

2 Plaintiff argues that the ALJ erred at step two of the sequential evaluation
3 process by finding that his right distal tibia fracture and bilateral wrist fractures
4 were non-severe. ECF No. 11 at 10-12. The Commissioner responds that the ALJ
5 properly found that Plaintiff’s bilateral wrist fractures were non-severe, and that
6 any error in the ALJ’s severity finding with respect to Plaintiff’s right distal tibia
7 fracture is harmless. ECF No. 12 at 2-6.

8 An impairment or combination of impairments can be found to be non-
9 severe only if the evidence establishes a slight abnormality that has no more than a
10 minimal effect on an individual’s ability to work. *Smolen v. Chater*, 80 F.3d 1273,
11 1290 (9th Cir. 1996). A finding that an impairment or combination of impairments
12 are non-severe must be “clearly established by medical evidence.” *Webb v.*
13 *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (quoting SSR 85-28 (1985)).

14 **1. The ALJ Properly Found Plaintiff’s Bilateral Wrist Fractures to be**
15 **Non-Severe**

16 The ALJ’s finding that Plaintiff’s bilateral wrist fractures are non-severe is
17 clearly established by medical evidence. Plaintiff fractured his wrists in a severe
18 motor vehicle accident in January of 2012, and both wrists required surgical repair.
19 Tr. 660. By February of 2012, Plaintiff’s wrists had healed sufficiently to have his
20 casts removed. Tr. 491. The treatment notes for that visit indicate that imaging
revealed “good alignment,” “abundant healing,” and “adequate” fracture reduction.

1 Tr. 493. A bilateral upper extremity exam performed during that same visit
2 revealed normal findings, other than some right wrist tenderness. Tr. 493.
3 Diagnostic imaging performed in May of 2012 confirmed that Plaintiff's fractures
4 had healed and were without significant radiographic complication. Tr. 675. The
5 few treatment records subsequent to Plaintiff's wrist surgery contain little, if any,
6 evidence that Plaintiff's bilateral wrist fractures impose ongoing functional
7 limitations that would affect his ability to engage in basic work activities. The
8 treatment records that are available confirm the ALJ's conclusion that Plaintiff's
9 fractures have healed without significant complication. *See* Tr. 493, 675, 679.

10 **2. The ALJ Erred by Finding Plaintiff's Right Distal Tibia Fracture to**
11 **be Non-Severe but the Error was Harmless**

12 In May of 2007, Plaintiff sustained traumatic injuries in a motor vehicle
13 accident. In addition to the lower left extremity injuries the ALJ found to be
14 severe, Plaintiff also fractured his right distal tibia. Although the ALJ does
15 consider that Plaintiff "fractured numerous bones" and has metal hardware in both
16 of his knees as a result of the 2007 accident, she did not specifically list or discuss
17 Plaintiff's right distal tibia fracture. The lack of explanation accompanying the
18 ALJ's conclusion that Plaintiff's right distal tibia fracture is non-severe fails to
19 show that this conclusion is clearly established by medical evidence, and
20 accordingly is in error.

1 Any error in ALJ Ausems's finding at step two, however, is harmless
2 provided that she considered functional limitations arising from each of Plaintiff's
3 impairments, both severe and non-severe, when assessing Plaintiff's residual
4 functional capacity. See 20 C.F.R. § 416.945(a)(2) (requiring an ALJ to consider
5 all medically determinable impairments when assessing a claimant's residual
6 functional capacity); see also *Lewis v. Astrue*, 498 F.3d 909, 910 (9th Cir. 2007)
7 (holding that failure to consider an impairment at step two is harmless error where
8 the ALJ includes limitations arising from that impairment in his or her
9 determination of the claimant's residual functional capacity). Because, as
10 discussed below, *infra* pp. 21-22, the ALJ properly assessed Plaintiff's residual
11 functional capacity based on the functional limitations supported by the record, any
12 error in failing to classify plaintiff's right distal tibia fracture as a severe
13 impairment at step two was harmless.

14 **B. Opinion Evidence**

15 Plaintiff challenges the weight accorded to every single medical opinion of
16 record. First, Plaintiff contends that the ALJ improperly discounted the opinions
17 of treating physician Carla Smith M.D., treating physicians Ted Sousa M.D. and
18 Coy Fullen D.O. at the David C. Wynecoop Memorial Clinic, examining physician
19 Dennis Pollack Ph.d., and "other source" Karen Laemmie ARNP. Second,
20 Plaintiff submits that the ALJ improperly accorded "substantial weight" to the

1 opinions of non-examining physicians Alnoor Virji M.D., and Renee Eisenhauer
2 Ph.d., who prepared the residual functional capacity assessment accompanying
3 Plaintiff's denial on reconsideration. The Commissioner responds that the ALJ
4 properly weighed the conflicting medical opinions contained in the record and
5 gave legally adequate reasons for the weight assigned to each opinion.

6 **1. Physicians' Opinions**

7 The Ninth Circuit has distinguished between three classes of physicians in
8 defining the weight to be given to their opinions: (1) treating physicians, who
9 actually treat the claimant; (2) examining physicians, who examine but do not treat
10 the claimant; and (3) non-examining physicians, who neither treat nor examine the
11 claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). A treating
12 physician's opinion is given the most weight, followed by an examining physician,
13 and then by a non-examining physician. *Id.* at 803-831. In the absence of a
14 contrary opinion, a treating or examining physician's opinion may not be rejected
15 unless "clear and convincing" reasons are provided. *Id.* at 830. If contradicted, a
16 treating or examining doctor's opinion can be discounted for "specific and
17 legitimate reasons that are supported by substantial evidence in the record." *Id.* at
18 830-31. The controverting opinion of a non-examining physician, however, does
19 not by itself constitute substantial evidence justifying the rejection of a treating or
20 examining physician's opinion. *Id.* at 831.

1 **a. The ALJ Properly Accorded Little Weight to the Opinion of**
2 **Carla Smith M.D.**

3 The ALJ accorded little weight to Dr. Smith’s opinion that Plaintiff could
4 only attend class once weekly for one and a half hours as a result of his bilateral
5 wrist fractures, Tr. 494, because the opinion was given only a month after
6 Plaintiff’s accident and thus, did not reflect the improvement in Plaintiff’s
7 condition evidenced by subsequent treatment records, Tr. 24. Plaintiff argues that
8 although the ALJ is correct that Dr. Smith opined on plaintiff’s condition “just
9 after the accident in which Plaintiff sustained his injuries,” nothing in Dr. Smith’s
10 note indicates that the assessed limitations are of limited duration. ECF No. 11 at
11 11. The difficulty with this argument, however, is that the medical evidence
12 corroborates the ALJ’s conclusion that Dr. Smith’s opinion regarding the severity
13 of Plaintiff’s limitations does not address his continued improvement post-surgery.
14 Dr. Smith’s opinion predates the removal of Plaintiff’s casts, and, as detailed
15 above, *supra* p. 10-11, post-surgery treatment records indicate that Plaintiff’s
16 condition improved dramatically. In light of the significant improvement in
17 Plaintiff’s condition subsequent to Dr. Smith’s opinion concerning the limitations
18 imposed by Plaintiff’s bilateral wrist fractures, the ALJ’s decision to accord little
19 weight to that opinion is appropriate.

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1 **b. The ALJ Properly Accorded Little Weight to the Opinions of Ted**
2 **Sousa, M.D., and Coy Fullen, D.O., at the David C. Wynecoop**
3 **Memorial Clinic**

4 In March of 2011, Dr. Sousa completed a functional assessment form for the
5 Washington State Department of Social and Health Services. Tr. 303-04. Dr.
6 Sousa indicated that Plaintiff's condition was expected to impair his ability to work
7 for three months. Tr. 303. He opined that, during that period, Plaintiff would be
8 able to stand for between one and two hours in an eight-hour work day, sit for eight
9 hours, and occasionally lift ten pounds. Tr. 303. In August of 2011, Dr. Fullen
10 completed the same form. Tr. 300-01. Dr. Fullen indicated that for 28 weeks,
11 Plaintiff could stand for less than one hour in an eight-hour workday, sit for eight
12 hours, and could not lift any weight. Tr. 300. The ALJ accorded little weight to
13 the opinions of these physicians because "the opinions are not support [sic] by the
14 medical evidence of record or the weight of the evidence."

15 Plaintiff's contention that the ALJ provided legally insufficient reasons for
16 according little weight to Dr. Sousa and Dr. Fullen is unavailing. In the paragraphs
17 immediately preceding the ALJ's analysis of Dr. Sousa's and Dr. Fullen's
18 opinions, the ALJ discusses, in depth, the evidence that supports her findings
19 concerning Plaintiff's exertional limitations. Tr. 28-29. As this discussion
20 elucidates, evidence of Plaintiff's activities during the period of disability,
 including Plaintiff's ability to ride a four-wheeler, Tr. 315, and care for his father,

1 who has severe cancer, Tr. 47-48, undermine both doctors' opinions that Plaintiff's
2 impairments impose exertional limitations that render him disabled. Moreover,
3 treatment records around the time of Dr. Sousa's and Dr. Fullen's evaluations of
4 Plaintiff reflect a significantly more positive prognosis of his condition.

5 In an examination of Plaintiff conducted on March 10, 2011, Dr. Sousa
6 indicated that despite some stiffness in the left knee, Plaintiff was doing well after
7 fracturing his left tibia in December of 2010. Tr. 211. The physical examination
8 conducted during that visit revealed no "remarkable erythema" and normal
9 strength to hip flexion and knee extension and flexion. *Id.* By April of 2011,
10 Plaintiff's treatment records indicate that he was ambulating without any problems
11 or pain. Tr. 264. Although Plaintiff required additional surgery in May of 2011
12 because of infection, Tr. 256, treatment records from June of 2011 indicate that
13 Plaintiff was walking, albeit with a bit of a limp, and that his pain was well-
14 controlled. Tr. 249. In September of 2011, the month after Dr. Fullen rendered his
15 opinion, Dr. Fullen noted that Plaintiff only suffered from occasional pain, Tr. 447,
16 and began to taper down Plaintiff's pain medication, Tr. 447, 451, & 455. In
17 November of 2011, Dr. Fullen noted that Plaintiff's left knee had good range of
18 motion despite some pain and recommended that Plaintiff's pain medication be
19 tapered again in January of 2012. Tr. 455.

1 As the foregoing discussion demonstrates, Dr. Sousa's and Dr. Fullen's
2 opinions that Plaintiff's impairments impose disabling limitations are inconsistent
3 with Plaintiff's activities during the period of disability and his contemporary
4 treatment records, which provide a significantly more positive assessment of his
5 condition. This inconsistency constitutes substantial evidence supporting the
6 ALJ's conclusion regarding Dr. Sousa's and Dr. Fullen's opinions of Plaintiff's
7 limitations: that neither is supported by the medical record or the weight of the
8 evidence.

9 **c. The ALJ Erred in According Little Weight to the Opinion of**
10 **Examining Physician Dennis Pollack, Ph.D. but such Error was**
11 **Harmless**

12 Examining physician Dennis Pollack, Ph.D. conducted a psychological exam
13 on August 23, 2011, and provided an extensive report outlining Plaintiff's mental
14 impairments. Dr. Pollack assigned Plaintiff a Global Assessment of Functioning
15 ("GAF") score of 50, Tr. 82—which indicates serious symptoms or any serious
16 impairment in social, occupational, or school functioning, AM. PSYCHIATRIC
17 ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32-34 (4th
18 ed., text revision 2000)—but did not provide a function-by-function assessment of
19 Plaintiff's abilities and limitations. The ALJ discussed Dr. Pollack's findings at
20 length, but ultimately accorded little weight to Dr. Pollack's opinion because his

1 findings “were reflective of undue reliance upon subjective allegations of an
2 individual trying to qualify for disability.” Tr. 30.

3 Plaintiff takes particular exception to the ALJ’s implication that Plaintiff
4 exaggerated his mental limitations during Dr. Pollack’s evaluation, arguing that
5 because every claimant evaluated by a consultative examiner is “trying to qualify
6 for disability” the ALJ’s explanation failed to provide a specific and legitimate
7 reason for according little weight to Dr. Pollack’s findings. This argument puts
8 undue emphasis on the portion of the ALJ’s conclusion referencing Plaintiff’s
9 desire to qualify for disability benefits. The ALJ’s determination that Dr. Pollack’s
10 opinion should be accorded little weight is clearly based on a finding that his report
11 was based upon Plaintiff’s subjective allegations, which the ALJ found to be “not
12 entirely credible.” Tr. 31.

13 The problem with the ALJ’s conclusion in this context is that Dr. Pollack’s
14 opinion is premised, not on Plaintiff’s subjective allegations, but instead on
15 clinically accepted objective diagnostic techniques: the mental status examination,
16 the Weschler Adult Intelligence Scale, the Minnesota Multiphasic Personality
17 Inventory, and the trail making test. *See, e.g., Atkins v. Virginia*, 536 U.S. 304,
18 309 n. 5 (2002) (noting that the Wechsler Adult Intelligence Scale test is the
19 standard instrument in the United States for assessing intellectual functioning);
20 *Wall v. Astrue*, No. C11-5308-JLR-JPD, 2012 WL 555250, at *6 (W.D. Wash.

1 2012) (indicating that mental status examinations and trail making tests constitute
2 “objective” medical evidence); and *Ryan v. Clarke*, 281 F. Supp. 2d 1008, 1032
3 (D. Neb. 2008) (noting that the Minnesota Multiphasic Personality Inventory is the
4 “gold standard” for objective psychological testing). Moreover, the Minnesota
5 Multiphasic Personality Inventory is specifically designed to address the ALJ’s
6 concerns about the accuracy of Dr. Pollack’s findings by measuring, not only a
7 claimant’s personality traits, but also possible malingering, *see Wedge v. Astrue*,
8 624 F. Supp. 2d 1127, 1131 (C.D. Cal. 2008). Nowhere in Dr. Pollack’s report
9 does he suggest that Plaintiff was feigning or exaggerating his symptoms.

10 A holistic review of Dr. Pollack’s report reveals that his findings were based
11 primarily, if not completely, on the results of medically accepted objective
12 psychological testing. As a result, the ALJ’s conclusion that Dr. Pollack’s findings
13 “were reflective of undue reliance upon [Plaintiff’s] subjective allegations,” is not
14 supported by substantial evidence in the record and accordingly, is in error.

15 The ALJ’s error in according little weight to Dr. Pollack’s opinion is
16 harmless, however, because the functional limitations reflected by Dr. Pollack’s
17 findings were ultimately incorporated into the ALJ’s determination of Plaintiff’s
18 residual functional capacity. The residual functional capacity determination
19 contained in the ALJ’s decision is based on an assessment prepared by non-
20 examining, state agency physicians Dr. Virji and Dr. Eisenhauer. *Compare* Tr. 27

1 (ALJ's assessment of Plaintiff's residual functional capacity), *with* Tr. 88-92 (Dr.
2 Virji's and Dr. Eisenhauer's joint assessment of Plaintiff's residual functional
3 capacity); *see also* Tr. 29 (according substantial weight to Dr. Virji's and Dr.
4 Eisenhauer's opinion). The state agency physicians' assessment of Plaintiff's
5 residual functional capacity fully incorporates the findings contained in Dr.
6 Pollack's report. Tr. 84-86. Consideration of Dr. Pollack's findings translated to
7 limitations to simple, repetitive tasks and superficial contact with others, Tr. 91,
8 both of which the ALJ included in her assessment of Plaintiff's residual functional
9 capacity. Tr. 27. Thus, despite the ALJ's erroneous rejection of Dr. Pollack's
10 findings, the residual functional capacity determination contained in her decision
11 adequately encompasses the functional limitations those findings reflect. The
12 ALJ's error in according little weight to Dr. Pollack's opinion was therefore
13 inconsequential to the ultimate nondisability determination and accordingly is
14 properly considered harmless. *See Molina*, 674 F.3d at 1115.

15 **d. The ALJ did not Err in According "Substantial Weight" to the**
16 **Opinions of State Agency Physicians Dr. Virji and Dr. Eisenhauer**

17 Plaintiff contends that the ALJ erred in according "substantial weight" to the
18 opinions of non-examining physicians Dr. Virji and Dr. Eisenhauer. Plaintiff
19 submits that the ALJ's reliance on these opinions is erroneous because both
20 doctors assessed Plaintiff's ability to work prior to his motor vehicle accident in
January of 2012 in which he suffered additional injuries. Review of the record

1 reveals, however, that these injuries did not ultimately result in lasting symptoms
2 or functional limitations that undermine Dr. Virji's and Dr. Eisenhauer's opinions.
3 Records from after the January 2012 accident focus almost entirely on the
4 treatment of Plaintiff's bilateral wrist fractures, and, as discussed above, *supra* pp.
5 10-11, there is little, if any, evidence that those fractures impose ongoing
6 functional limitations that would affect Plaintiff's ability to engage in basic work
7 activities. Without such evidence, Dr. Virji's and Dr. Eisenhauer's opinions retain
8 their efficacy, and accordingly the ALJ's reliance upon those opinions was proper.

9 **2. The ALJ Properly Accorded Little Weight to the Opinion of Karen
10 Laemmie ARNP**

11 Plaintiff contends that the ALJ improperly rejected the "other source"
12 opinion of Karen Laemmie ARNP. In disability proceedings, the opinion of an
13 acceptable medical source, such as a physician or psychologist, is given more
14 weight than that of an "other source." 20 C.F.R. §§ 404.1527 & 416.927; *Gomez*
15 *v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). "Other sources" include nurse
16 practitioners, physicians' assistants, therapists, teachers, social workers, spouses
17 and other non-medical sources. 20 C.F.R. §§ 404.1513(d) & 416.913(d). An ALJ
18 must give reasons germane to the "other source" testimony before discounting it.
19 *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 2003).

20 A few days after Plaintiff's surgery in May of 2011 to address infection in
his left leg, Ms. Laemmie recommended left lower extremity weight bearing

1 activity as tolerated. Tr. 251-52. The ALJ gave Ms. Laemmie’s opinion no weight
2 because it was given in very close proximity to Plaintiff’s surgery and thus, did not
3 reflect lasting functional limitations. Tr. 29. Despite Plaintiff’s contention that
4 “there is nothing to indicate the limitations assessed would not last,” the ALJ’s
5 conclusion is corroborated by subsequent records that demonstrate improvement.
6 By June of 2011, treatment records indicate that Plaintiff was walking with only a
7 slight limp, that his pain was well-controlled, and that he was otherwise doing
8 well. Tr. 247, 249. The explanation provided by the ALJ for rejecting Ms.
9 Laemmie’s opinion is both clearly germane to her testimony and supported by
10 substantial evidence. Accordingly, the ALJ’s rejection of Ms. Laemmie’s opinion
11 was legally adequate.

12 **C. The ALJ’s Assessment of Plaintiff’s Residual Functional Capacity**
13 **Accurately Reflects Plaintiff’s Functional Limitations**

14 Plaintiff contends that errors in the ALJ’s analysis of the opinion evidence
15 resulted in a residual functional capacity assessment that does not include all of
16 Plaintiff’s functional limitations. As the preceding discussion indicates, however,
17 *supra* pp. 13-22, the ALJ committed only a single error with respect to her
18 evaluation of the opinion evidence—the improper rejection of Dr. Pollack’s
19 report—and despite that error, her determination of Plaintiff’s residual functional
20 capacity encompassed Dr. Pollack’s findings. An ALJ commits no error by failing
to include limitations from properly discounted evidence in his or her assessment

1 of a claimant's residual functional capacity. *Batson v. Comm'r of the Soc. Sec.*
2 *Admin.*, 39 F.3d 1190, 1197 (9th Cir. 2004). Here, the ALJ's determination of
3 Plaintiff's residual functional capacity included all functional limitations supported
4 by the record and excluded only those limitations contained in opinions that were
5 properly discounted. Accordingly, the ALJ properly assessed Plaintiff's residual
6 functional capacity and his finding that Plaintiff is not disabled is supported by
7 substantial evidence.

8 **VIII. Conclusion**

9 For the foregoing reasons, the Court finds the Commissioner's decision is
10 free of legal error and supported by substantial evidence. Therefore, Defendant's
11 Motion for Summary Judgment is granted.

12 Accordingly, **IT IS HEREBY ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.

14 2. Defendant's Motion for Summary Judgment, **ECF No. 12**, is

15 **GRANTED.**

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1 3. The District Court Executive is directed to enter judgment in favor of
2 Defendant and against Plaintiff.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
4 Order, forward copies to counsel, and **CLOSE** the file.

5 **DATED** this 8th day of February, 2016.

6
7 *s/Robert H. Whaley*
8 **ROBERT H. WHALEY**
9 Senior United States District Judge