

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 04, 2019

SEAN F. MCAVOY, CLERK

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2  
3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON  
5

6 JOHN M.,

7 Plaintiff,

8 v.  
9

10 COMMISSIONER OF SOCIAL  
11 SECURITY,

12 Defendant.  
13

No. 2:18-CV-0029-JTR

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

14 **BEFORE THE COURT** are cross-motions for summary judgment. ECF  
15 No. 15, 16. Attorney Christopher H. Dellert represents John M. (Plaintiff); Special  
16 Assistant United States Attorney Sarah Moum represents the Commissioner of  
17 Social Security (Defendant). The parties have consented to proceed before a  
18 magistrate judge. ECF No. 6. After reviewing the administrative record and briefs  
19 filed by the parties, the Court **GRANTS** Defendant's Motion for Summary  
20 Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

21 **JURISDICTION**

22 In July 2015, Plaintiff filed an application for a period of disability and  
23 Disability Insurance Benefits, Tr. 218-224, and an application for Supplemental  
24 Security Income benefits, Tr. 225-229. Plaintiff alleged a disability onset date of  
25 December 16, 2014, Tr. 246, due to Anxiety Disorder, Diabetes, Thyroid Disorder,  
26 High Blood Pressure, High Cholesterol, Back Problem, Knee Problem, Learning  
27 Disability, and Stomach Problems, Tr. 250. Plaintiff's applications were denied  
28 initially and upon reconsideration.

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 Administrative Law Judge (ALJ) Jesse K. Shumway held a hearing on  
2 October 25, 2016, Tr. 37-73, and issued an unfavorable decision on December 20,  
3 2016, Tr. 18-31. The Appeals Council denied review on December 27, 2017. Tr.  
4 1-6. The ALJ's December 2016 decision thus became the final decision of the  
5 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
6 405(g). Plaintiff filed this action for judicial review on January 24, 2018. ECF  
7 No. 1, 4.

### 8 STATEMENT OF FACTS

9 The facts of the case are set forth in the administrative hearing transcript, the  
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
11 here.

12 Plaintiff was born on July 8, 1973, and was 41 years old on the alleged  
13 disability onset date, December 16, 2014. Tr. 218. He completed high school in  
14 1992. Tr. 251.

15 Plaintiff's disability report indicates he stopped working because of his  
16 conditions on December 15, 2014. Tr. 250-251. At the administrative hearing,  
17 Plaintiff testified the main issues keeping him from being able to work are  
18 back/side pain, mental anguish, and an inability to be around people. Tr. 58.  
19 However, Plaintiff testified he worked full-time for four and a half weeks in  
20 September 2015 and additionally applied for and received unemployment benefits  
21 for three months during the relevant time period. Tr. 55-57.

22 Plaintiff stated he is not able to sit or stand for long periods of time and  
23 could walk less than a block before needing to stop and rest. Tr. 59. He indicated  
24 he has numbness and a feeling of "pins and needles" in his feet and stated it feels  
25 like his feet are going to break every time he takes a step. Tr. 59. Plaintiff testified  
26 he also has problems grasping and holding with his hands. Tr. 59. He indicated he  
27 has constant numbness in his hands and shooting pain from the tips of his fingers  
28 to his shoulders. Tr. 60. He further stated he avoided going out in public, had

1 difficulty with concentration, and had digestive issues which caused him to  
2 frequently use the bathroom. Tr. 61-62. Plaintiff testified his wife helped him  
3 dress nearly every day and helped him bathe. Tr. 61.

4 With respect to Plaintiff's mental health, Marian F. Martin, Ph.D., testified  
5 as a medical expert at the administrative hearing. Tr. 44-55. Dr. Martin noted  
6 there were various diagnoses of depression throughout the record and Plaintiff had  
7 been prescribed antidepressant medications. Tr. 44-45. Dr. Martin indicated there  
8 were also reports diagnosing a generalized anxiety disorder and PTSD by history  
9 and evidencing symptoms consistent with PTSD. Tr. 46. However, Dr. Martin  
10 stated that because several of the records (at least three evaluators) suggested  
11 Plaintiff was either overreporting or exaggerating symptoms and/or not putting  
12 forth a reasonable effort on the exams, it was not possible to establish any  
13 psychological diagnosis as a medically determinable impairment. Tr. 49. Dr.  
14 Martin indicated that while there were mental health diagnoses in the record, the  
15 providers were relying on Plaintiff's self-reported symptoms, and Plaintiff's self-  
16 report was not credible. Tr. 49-50, 53-54. Nevertheless, assuming for the sake of  
17 argument that there was a valid underlying medically determinable mental  
18 impairment, Dr. Martin would limit Plaintiff to simple, routine, repetitive tasks (no  
19 detailed or complex instructions); no high-pressure or fast paced (i.e. production  
20 line) work; and minimal contact with the public. Tr. 54-55.

### 21 **STANDARD OF REVIEW**

22 The ALJ is responsible for determining credibility, resolving conflicts in  
23 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
24 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with  
25 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
26 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
27 only if it is not supported by substantial evidence or if it is based on legal error.  
28 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is

1 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
2 1098. Put another way, substantial evidence is such relevant evidence as a  
3 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
4 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
5 rational interpretation, the Court may not substitute its judgment for that of the  
6 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
7 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
8 administrative findings, or if conflicting evidence supports a finding of either  
9 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
10 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
11 supported by substantial evidence will be set aside if the proper legal standards  
12 were not applied in weighing the evidence and making the decision. *Browner v.*  
13 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

#### 14 **SEQUENTIAL EVALUATION PROCESS**

15 The Commissioner has established a five-step sequential evaluation process  
16 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
17 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through  
18 four, the burden of proof rests upon the claimant to establish a prima facie case of  
19 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is  
20 met once a claimant establishes that a physical or mental impairment prevents the  
21 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),  
22 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds  
23 to step five, and the burden shifts to the Commissioner to show that the claimant  
24 can perform other jobs present in significant numbers in the national economy.  
25 *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004).  
26 If a claimant cannot make an adjustment to other work in the national economy, a  
27 finding of "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

28 ///

1 **ADMINISTRATIVE DECISION**

2 On December 20, 2016, the ALJ issued a decision finding Plaintiff was not  
3 disabled as defined in the Social Security Act.

4 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
5 activity since the alleged onset date, December 16, 2014. Tr. 20.

6 At step two, the ALJ determined Plaintiff had the following severe  
7 impairment: diabetes with peripheral neuropathy, fibromyalgia, and gastroparesis.  
8 Tr. 21.

9 At step three, the ALJ found Plaintiff did not have an impairment or  
10 combination of impairments that meets or medically equals the severity of one of  
11 the listed impairments. Tr. 23.

12 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and  
13 determined he could perform light exertion level work with the following  
14 limitations: he can stand and/or walk four hours total in an eight-hour workday; he  
15 needs ready access to a restroom throughout the workday; he is limited to frequent  
16 handling, fingering, and feeling; he cannot climb ladders, ropes, or scaffolds and  
17 can perform all other postural activities occasionally; he can have occasional  
18 exposure to wetness and extreme cold and heat and can never have exposure to  
19 vibration or hazards, such as unprotected heights and moving mechanical parts.  
20 Tr. 24.

21 At step four, the ALJ determined Plaintiff was not able to perform his past  
22 relevant work. Tr. 28.

23 At step five, the ALJ determined that, considering Plaintiff's age, education,  
24 work experience and RFC and based on the testimony of the vocational expert,  
25 Plaintiff could perform other jobs present in significant numbers in the national  
26 economy, including the light exertion level jobs of production assembler,  
27 electronics worker, and cannery worker. Tr. 29-30. The ALJ alternatively found,  
28 considering Plaintiff's age, education, work experience and based on the testimony

1 of the vocational expert, that if Plaintiff was limited to sedentary work, with the  
2 same non-exertional limitations noted in the RFC, as well as the addition of mental  
3 limitations, including being limited to simple, routine and repetitive tasks with a  
4 reasoning level of two or less, only occasional superficial contact with the public,  
5 and no work at an assembly line pace, he would still be capable of performing jobs  
6 that exist in significant numbers in the national economy, such as produce sorter,  
7 order clerk, food and beverage, and bench hand. Tr. 30, 54-55. The ALJ thus  
8 concluded Plaintiff was not under a disability within the meaning of the Social  
9 Security Act at any time from December 16, 2014, through the date of the ALJ's  
10 decision, December 20, 2016. Tr. 30-31.

## 11 ISSUES

12 The question presented is whether substantial evidence supports the ALJ's  
13 decision denying benefits and, if so, whether that decision is based on proper legal  
14 standards. Plaintiff contends the ALJ erred (1) in his consideration of Plaintiff's  
15 mental impairments at step two and beyond; and (2) in his consideration of  
16 Plaintiff's subjective allegations. ECF No. 15 at 2, 3.

## 17 DISCUSSION<sup>1</sup>

### 18 A. Plaintiff's Symptom Testimony

19 Plaintiff challenges the ALJ's finding regarding Plaintiff's subjective  
20 allegations. ECF No. 15 at 9-14.

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21  
22 <sup>1</sup>In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held  
23 that ALJs of the Securities and Exchange Commission are "Officers of the United  
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies  
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in  
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161  
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not  
28 specifically addressed in an appellant's opening brief).

1           It is the province of the ALJ to make credibility determinations. Andrews,  
2 53 F.3d at 1039. However, the ALJ's findings must be supported by specific  
3 cogent reasons. Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
4 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's  
5 testimony must be "specific, clear and convincing." Lester v. Chater, 81 F.3d 821,  
6 834 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must  
7 identify what testimony is not credible and what evidence undermines the  
8 claimant's complaints." Lester, 81 F.3d at 834; Dodrill v. Shalala, 12 F.3d 915,  
9 918 (9th Cir. 1993).

10           In this case, the ALJ found Plaintiff's medically determinable impairments  
11 could reasonably be expected to cause the alleged symptoms; however, Plaintiff's  
12 statements concerning the intensity, persistence and limiting effects of those  
13 symptoms were not entirely consistent with the medical and other evidence of  
14 record. Tr. 25.

15           As determined by the ALJ, the record reflects clear indications of  
16 malingering and symptom exaggeration by Plaintiff. Tr. 21-23. An ALJ's finding  
17 of malingering is sufficient to support an adverse credibility determination under  
18 Ninth Circuit jurisprudence. See Benton v. Barnhart, 331 F.3d 1030, 1040 (9th  
19 Cir. 2003); see also LaGrand v. Commissioner Social Sec. Admin., 379 Fed. Appx.  
20 555, 556 (9th Cir. 2010) (citing Benton for the proposition that "[t]he ALJ was  
21 entitled to reject LaGrand's testimony because there was evidence of  
22 malingering"); Flores v. Commissioner of Social Security, 237 Fed. Appx. 251,  
23 252-253 (9th Cir. 2007) (citing Benton for the proposition that "an ALJ may reject  
24 a claimant's subjective pain testimony if the record contains affirmative evidence  
25 of malingering"); Robinson v. Astrue, 2011 WL 1261187 at \*11 (D. Or. 2011)  
26 (holding that evidence of malingering, by itself, is enough to discredit a claimant).

27           In July 2015, John Arnold, Ph.D., indicated Plaintiff exhibited questionable  
28 effort on exam and assessed various rule out diagnoses, including malingering. Tr.

1 21, 432. In September 2015, consultative examiner, Catherine MacLennan, Ph.D.,  
2 noted Plaintiff's mini mental status exam was "consistent with either intentionally  
3 poor performance or malingering." Tr. 21, 439. Dr. MacLennan indicated  
4 Plaintiff endorsed an unusually high number of problems, suggesting probable  
5 exaggeration; was overly dramatic in his presentation; and did not appear credible.  
6 Tr. 21, 440-441. In December 2015, Kathryn Olson, MS, MHP, noted Plaintiff  
7 reported he was receiving mental health treatment because it was required by  
8 DSHS in order to continue to receive monetary support in the interim of his  
9 disability application. Tr. 22, 631. It was noted Plaintiff paid more attention to the  
10 response to his responses than he did to the questions posed, indicative of  
11 secondary gain associated with his ongoing disability application. Tr. 22, 632.

12 The ALJ appropriately considered Plaintiff's symptom exaggeration,  
13 malingering and secondary gain motivation in discounting Plaintiff's subjective  
14 complaints.

15 The ALJ also indicated Plaintiff's alleged disabling physical symptoms were  
16 rebutted by the medical evidence of record. Tr. 24. A lack of supporting objective  
17 medical evidence is a factor which may be considered in evaluating an individual's  
18 credibility, provided it is not the sole factor. *Bunnell v. Sullivan*, 347 F.2d 341,  
19 345 (9th Cir. 1991) (Once a claimant produces objective medical evidence of an  
20 underlying impairment, an adjudicator may not reject the claimant's subjective  
21 complaints based solely on a lack of objective medical evidence to fully  
22 corroborate the alleged severity of pain.); *Robbins v. Soc. Sec. Admin.*, 466 F3d  
23 880, 883 (9th Cir. 2006) (An ALJ may not make a negative credibility finding  
24 "solely because" the claimant's symptom testimony "is not substantiated  
25 affirmatively by objective medical evidence.").

26 Plaintiff testified he is not able to sit or stand for long periods of time and  
27 could walk less than a block before needing to stop and rest, Tr. 59; he has  
28 neuropathy in his hands, arms and feet and stated it feels like his feet are going to



1 break every time he steps, Tr. 59-60, he had digestive issues which caused him to  
2 frequently use the bathroom, Tr. 61-62, and he needed his wife's help with bathing  
3 and dressing, Tr. 61. Tr. 24. However, treatment notes throughout the relevant  
4 time period consistently indicate that Plaintiff was in no distress, Tr. 378, 384, 396,  
5 445, 464, 509, 516, 705, 714, had either normal muscle strength or that his muscle  
6 strength was four and a half out of five, Tr. 516, 705, 721, had normal reflexes and  
7 normal range of motion, Tr. 378, 394, 705, and had normal coordination and gait,  
8 Tr. 472, 673, 705. Tr. 25-28. Further inconsistent with Plaintiff's alleged  
9 disabling physical symptoms, state agency medical consultant Mark Magdaleno,  
10 M.D., opined Plaintiff could perform medium exertion level work with some  
11 postural and environmental limitations, Tr. 120-121, and treating source Shellie  
12 Rabidou, PA-C, found Plaintiff capable of performing sedentary work, Tr. 409.

13 The objective medical evidence demonstrates Plaintiff was not as physically  
14 limited as he alleged.

15 The ALJ also held that Plaintiff's reported activities of daily living showed  
16 greater functional abilities than as alleged by Plaintiff. Tr. 24-25. It is well-  
17 established that the nature of daily activities may be considered when evaluating  
18 credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). The ALJ noted  
19 Plaintiff reported he was able to do his own self-care, managed his medications  
20 without assistance and took them as prescribed, tried to participate in regular  
21 household chores, could make himself meals, and played video games. Tr. 25.  
22 While one does not need to be "utterly incapacitated" to be disabled, *Fair*, 885  
23 F.2d at 603, it was proper for the ALJ to find Plaintiff's reported activities were  
24 inconsistent with his allegations of totally disabling symptoms and thus detracted  
25 from his overall credibility. See *Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir.  
26 2012) ("Even where [a claimant's daily] activities suggest some difficulty  
27 functioning, they may be grounds for discrediting the claimant's testimony to the  
28 extent that they contradict claims of a totally debilitating impairment.").

1           The ALJ additionally mentioned Plaintiff’s work activity after the alleged  
2 onset date. The ability to perform work can be considered in assessing credibility.  
3 *Bray v. Comm’r Social Security Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009)  
4 (finding the ALJ properly discounted a claimant’s testimony because she recently  
5 worked as a personal caregiver for two years and had since sought out other  
6 employment). As indicated above, Plaintiff testified at the administrative hearing  
7 that he had worked full-time for four and a half weeks in September 2015. Tr. 55-  
8 56. The ALJ properly considered Plaintiff’s work activity after the alleged onset  
9 date in assessing Plaintiff’s credibility.

10           The ALJ also noted Plaintiff received unemployment compensation benefits  
11 subsequent to the alleged disability onset date. Tr. 25. A disability claimant’s  
12 acceptance of unemployment benefits can constitute a valid reason in support of an  
13 ALJ’s adverse credibility determination. *Copeland v. Bowen*, 861 F.2d 536, 542  
14 (9th Cir. 1988) (upholding ALJ’s rejection of a claimant’s credibility where the  
15 claimant had accepted unemployment insurance benefits “apparently considering  
16 himself capable of work and holding himself out as available for work”); see also  
17 *Hasso v. Colvin*, 617 Fed. Appx. 780, 781 (9th Cir. 2015) (upholding adverse  
18 credibility determination based in part on the claimant’s “receipt of unemployment  
19 benefits”). Here, Plaintiff filed for and received unemployment benefits after he  
20 had stopped working, acknowledging at that time that he was ready, willing and  
21 able to work. Tr. 57-58; see Wash. Rev. Code § 50.20.010(c)(ii) (indicating “an  
22 individual must be ready, able, and willing, immediately to accept any suitable  
23 work which may be offered to him or her and must be actively seeking work”).  
24 Accordingly, Plaintiff’s acceptance of unemployment benefits while  
25 simultaneously seeking Social Security benefits was a proper basis to discount  
26 Plaintiff’s credibility.

27           The ALJ is responsible for reviewing the evidence and resolving conflicts or  
28 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.

1 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in  
2 evidence. Richardson, 402 U.S. at 400. The Court has a limited role in  
3 determining whether the ALJ's decision is supported by substantial evidence and  
4 may not substitute its own judgment for that of the ALJ even if it might justifiably  
5 have reached a different result upon de novo review. 42 U.S.C. § 405(g). After  
6 reviewing the record, the Court finds that the ALJ provided clear and convincing  
7 reasons, which are fully supported by the record, for discounting Plaintiff's  
8 subjective complaints. Accordingly, the ALJ did not err by finding Plaintiff's  
9 symptom allegations were not entirely credible in this case.

10 **B. Step Two**

11 Plaintiff's brief contends the ALJ erred at step two of the sequential  
12 evaluation process by failing to find Plaintiff had a severe mental impairment.  
13 ECF No. 15 at 3-8.

14 Plaintiff has the burden of proving he has a severe impairment at step two of  
15 the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 416.912.  
16 In order to meet this burden, Plaintiff must furnish medical and other evidence to  
17 show his impairment is severe. 20 C.F.R. § 416.912(a). The regulations provide  
18 that an impairment is severe if it significantly limits a claimant's ability to perform  
19 basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). "Basic work  
20 activities" are defined as the abilities and aptitudes necessary to do most jobs. 20  
21 C.F.R. §§ 404.1522(b), 416.922(b).

22 Step two is "a de minimis screening device [used] to dispose of groundless  
23 claims," *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), and an ALJ may  
24 find that a claimant lacks a medically severe impairment or combination of  
25 impairments only when this conclusion is "clearly established by medical  
26 evidence." S.S.R. 85-28; see *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir.  
27 2005). Applying the normal standard of review to the requirements of step two,  
28 the Court must determine whether the ALJ had substantial evidence to find that the

1 medical evidence clearly established that Plaintiff did not have a severe  
2 impairment. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (“Despite the  
3 deference usually accorded to the Secretary’s application of regulations, numerous  
4 appellate courts have imposed a narrow construction upon the severity regulation  
5 applied here.”); *Webb*, 433 F.3d at 687.

6 In this case, the ALJ concluded Plaintiff had the severe impairments of  
7 diabetes with peripheral neuropathy, fibromyalgia, and gastroparesis. Tr. 21.  
8 However, the ALJ specifically found that despite diagnoses throughout the record  
9 of major depressive disorder, generalized anxiety disorder, posttraumatic stress  
10 disorder, borderline intellectual functioning and somatic symptoms disorder,  
11 Plaintiff did not have a severe mental impairment. Tr. 21.

12 Although Plaintiff ultimately bears the burden of establishing his disability,  
13 see *Bowen*, 482 U.S. at 146, the ALJ has an affirmative duty to supplement  
14 Plaintiff’s medical record, to the extent it is incomplete, before rejecting his claim  
15 of a severe mental impairment. See 20 C.F.R. § 404.1512; S.S.R. 96-5p. “In  
16 Social Security cases the ALJ has a special duty to fully and fairly develop the  
17 record and to assure that the claimant’s interests are considered.” *Brown v.*  
18 *Heckler*, 713 F.2d 441, 443 (9th Cir. 1983). The ALJ’s duty to supplement  
19 Plaintiff’s record is triggered by ambiguous evidence, the ALJ’s own finding that  
20 the record is inadequate or the ALJ’s reliance on an expert’s conclusion that the  
21 evidence is ambiguous. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.  
22 2001).

23 Here, Dr. Martin testified as a medical expert at the administrative hearing  
24 with respect to Plaintiff’s mental health, and noted there were various diagnoses of  
25 mental impairments throughout the record and Plaintiff had been prescribed  
26 antidepressant medications. Tr. 44-46. However, Dr. Martin stated that because  
27 some of those reports suggested Plaintiff was either overreporting or exaggerating  
28 symptoms and/or not putting forth a reasonable effort on the exams, it was not

1 possible to establish any psychological diagnosis as a medically determinable  
2 impairment. Tr. 49.

3 After a careful review of the testimony of the medical expert and the record  
4 as a whole, the Court finds the medical evidence pertaining to Plaintiff's mental  
5 condition was sufficiently ambiguous to trigger the ALJ's duty to fully and fairly  
6 develop the record. Moreover, the Court finds a review of the available medical  
7 records demonstrates Plaintiff had mental issues sufficient to pass the de minimis  
8 threshold of step two of the sequential evaluation process. See Smolen, 80 F.3d at  
9 1290. The weight of the record evidence shows that Plaintiff's claim of a severe  
10 mental impairment was not "groundless." Smolen, 80 F.3d at 1290; Webb, 433  
11 F.3d at 688. The Court thus agrees with Plaintiff that the ALJ erred at step two of  
12 the sequential evaluation process.

13 Nevertheless, perhaps realizing that Plaintiff's allegations of mental  
14 limitations were not entirely without merit, the ALJ asked the medical expert to  
15 assume a valid underlying medically determinable mental impairment existed. Tr.  
16 54. Given this assumption, Dr. Martin limited Plaintiff to simple, routine,  
17 repetitive tasks (no detailed or complex instructions); no high-pressure or fast  
18 paced (i.e. production line) work; and minimal contact with the public. Tr. 54-55.  
19 The ALJ then asked a vocational expert a hypothetical that included Dr. Martin's  
20 mental restrictions based on assumed specific medically determinable mental  
21 impairments, and the vocational expert opined work existed in significant numbers  
22 in the national economy that such an individual could perform. Tr. 69-71. In the  
23 ALJ's decision, the ALJ alternatively determined, based on the testimony of the  
24 vocational expert, and considering Plaintiff's age, education, work experience, that  
25 if Plaintiff had the mental limitations noted by Dr. Martin, coupled with the  
26 limitations set forth in the RFC determination, he would still be capable of  
27 performing jobs such as produce sorter; order clerk, food and beverage; and bench  
28 hand, jobs that exist in significant numbers in the national economy. Tr. 30.

1 The Court finds that the ALJ's alternate step five determination is supported  
2 by substantial evidence and free of error. Accordingly, although the ALJ erred at  
3 step two, it was harmless error. See Johnson v. Shalala, 60 F.3d 1428, 1436 n. 9  
4 (9th Cir. 1995) (an error is harmless when the correction of that error would not  
5 alter the result); Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (an ALJ's  
6 decision will not be reversed for errors that are harmless).

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's findings, the Court finds the  
9 ALJ's decision should be affirmed. Therefore, **IT IS HEREBY ORDERED:**

10 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is  
11 **GRANTED.**

12 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED.**

13 The District Court Executive is directed to file this Order and provide a copy  
14 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant  
15 and the file shall be **CLOSED.**

16 DATED January 4, 2019.



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A handwritten signature in black ink, appearing to read "M" or "Rodgers".

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE