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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 DOUGLAS A. HARRIS, JR.,

7 Plaintiff,

8 v.

9 NANCY A. BERRYHILL, Deputy
10 Commissioner of Social Security for
11 Operations,

12 Defendant.

CASE NO. C17-1506 BHS

ORDER REVERSING AND
REMANDING FOR FURTHER
PROCEEDINGS

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15 **I. BASIC DATA**

16 Type of Benefits Sought:

17 (X) Disability Insurance

18 (X) Supplemental Security Income

19 Plaintiff's:

20 Sex: Male

21 Age: 36 at the time of alleged disability onset

22 Principal Disabilities Alleged by Plaintiff: Bipolar II disorder; obsessive compulsive disorder; racing thoughts; obsessive thoughts; anger; bad veins in legs removed in 2006; allergy to sunlight. AR at 107.

1 Disability Allegedly Began: May 31, 2010¹

2 Principal Previous Work Experience: heating and air conditioning service technician;
3 building maintenance worker; warehouse worker; delivery route driver.

4 Education Level Achieved by Plaintiff: High school diploma.

5 **II. PROCEDURAL HISTORY—ADMINISTRATIVE**

6 Before Administrative Law Judge (“ALJ”)²:

7 Date of Hearing: November 7, 2016

8 Date of Decision: February 24, 2017

9 Appears in Record at: AR 10-37

10 Summary of Decision:

11 The claimant has not engaged in substantial gainful activity since
June 3, 2011 (20 C.F.R. §§ 404.1571, et seq., and 416.971, et seq.);

12 The claimant has the following severe impairments: right knee
13 medial meniscus tear, status post arthroscopic repair; mild chronic
neurogenic motor unit changes of the bilateral upper extremities; right
14 rotator cuff tendinopathy; likely asthma versus perennial/seasonal allergic
rhinitis; obesity (ending in 2016); major depressive disorder, recurrent,
15 moderate; bipolar disorder; anxiety disorder; personality disorder NOS
(antisocial and/or borderline); attention deficit hyperactivity disorder
(ADHD); and posttraumatic stress disorder (PTSD) (20 C.F.R. §§
16 404.1520(c) and 416.920(c));

17 The claimant does not have an impairment or combination of
18 impairments that meets or medically equals the severity of one of the listed

19 ¹ Plaintiff was previously denied disability benefits in a September 21, 2011 initial level
20 determination. AR at 112, 118. Plaintiff did not seek reconsideration of that decision, and
therefore the relevant period here does not begin until September 22, 2011.

21 ² The ALJ held a hearing on December 20, 2013 and issued his original decision on July
22 1, 2014. AR at 43-75, 183-206. The Appeals Council remanded the matter back to the ALJ on
June 3, 2016. *Id.* at 207-10. The information here refers to the hearing and ALJ’s decision
following remand.

1 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§
2 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926);

3 After careful consideration of the entire record, the ALJ found that
4 the claimant has the residual functional capacity to perform medium work
5 as defined in 20 C.F.R. §§ 404.1567(c) and 416.967(c). He can
6 occasionally climb. He can frequently balance, stoop, kneel, crouch, and
7 crawl. He can occasionally reach overhead. He can have occasional
8 exposure to vibration, vibrating tools, machines, and vehicles. He can have
9 occasional exposure to pulmonary irritants such as dust, fumes, odors,
10 gases, pollens, airborne pollutants, and poor ventilation. He can have
11 occasional exposure to hazardous conditions such as proximity to
12 unprotected heights and moving machinery. He can adapt to a predictable
13 work routine in terms of assigned tasks and the procedures for
14 accomplishing those tasks. He can understand, carry out, and remember
15 instructions. He can use average judgment in making work-related
16 decisions. He is limited to occasional and superficial interaction with the
17 public and with coworkers.

18 The claimant is capable of performing past relevant work as a
19 building maintenance worker. This work does not require the performance
20 of work-related activities precluded by the claimant's residual functional
21 capacity (20 C.F.R. §§ 404.1565 and 416.965);

22 Born on XXXX, 1973,³ the claimant is a younger individual age 18-
49 (20 C.F.R. §§ 404.1563 and 416.963);

The claimant has at least a high school education and is able to
communicate in English (20 C.F.R. §§ 404.1564 and 416.964);

Transferability of job skills is not material to the determination of
disability because using the Medical-Vocational Rules as a framework
supports a finding that the claimant is "not disabled," whether or not he has
transferable job skills (See SSR 82-41 and 20 C.F.R. Part 404, Subpart P,
Appendix 2);

Considering the claimant's age, education, work experience, and
residual functional capacity, there are other jobs that exist in significant
numbers in the national economy that the claimant also can perform (20
C.F.R. §§ 404.1569, 404.1569(a), 416.969, and 416.969(a));

³ Dates of birth are redacted to the year. See Fed. R. Civ. P. 5.2(a)(2); LCR 5.2(a)(1).

1 The claimant has not been under a disability, as defined in the Social
2 Security Act, from September 22, 2011 through the date of this decision (20
C.F.R. §§ 404.1520(f) and 416.920(f)).

3 Before Appeals Council:

4 Date of Decision: August 4, 2017

5 Appears in Record at: AR 1-6

6 Summary of Decision: Denied review.

7 **III. PROCEDURAL HISTORY—THIS COURT**

8 Jurisdiction based upon: 42 U.S.C. § 405(g)

9 Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

10 **IV. STANDARD OF REVIEW**

11 Pursuant to 42 U.S.C. § 405(g), the Court may set aside Defendant Nancy
12 Berryhill's (the "Commissioner") denial of Social Security benefits when the ALJ's
13 findings are based on legal error or not supported by substantial evidence in the record as
14 a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005). "Substantial
15 evidence" is more than a scintilla, less than a preponderance, and is such relevant
16 evidence as a reasonable mind might accept as adequate to support a conclusion.
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747,
18 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving
19 conflicts in medical testimony, and resolving any other ambiguities that might exist.
20 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to
21 examine the record as a whole, it may neither reweigh the evidence nor substitute its
22 judgment for that of the ALJ. *See Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.

1 2002). “Where the evidence is susceptible to more than one rational interpretation, one
2 of which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” *Id.*

3 **V. EVALUATING DISABILITY**

4 The claimant, Douglas Harris, Jr. (“Harris”), bears the burden of proving he is
5 disabled within the meaning of the Social Security Act (“Act”). *Meanel v. Apfel*, 172
6 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the “inability to engage in
7 any substantial gainful activity” due to a physical or mental impairment which has lasted,
8 or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C.
9 §§ 423(d)(1)(A), 1382c(3)(A). A claimant is disabled under the Act only if his
10 impairments are of such severity that he is unable to do his previous work, and cannot,
11 considering his age, education, and work experience, engage in any other substantial
12 gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also*
13 *Tackett v. Apfel*, 180 F.3d 1094, 1098–99 (9th Cir. 1999).

14 The Commissioner has established a five-step sequential evaluation process for
15 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.
16 §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through
17 four. *Valentine v. Comm’r of Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At
18 step five, the burden shifts to the Commissioner. *Id.*

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Whether the ALJ properly evaluated the opinions of Andrew Forsyth, Ph.D. and
n Haney, M.D.

VII. DISCUSSION

The ALJ found that Harris’s statements concerning the intensity, persistence, and limiting effects of his mental⁴ symptoms were “not entirely consistent with the evidence.” AR at 20. The Ninth Circuit has “established a two-step analysis for determining the extent to which a claimant’s symptom testimony must be credited.” *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). The ALJ must first determine whether the claimant has presented objective medical evidence of an impairment that “‘could reasonably be expected to produce the pain or other symptoms alleged.’” *Id.* (quoting *Garrison v. Colvin*, 759 F.3d 995, 1014-15 (9th Cir. 2014)). At this stage, the claimant need only

⁴ The ALJ also found that Harris's statements regarding his physical symptoms were not entirely consistent with the evidence, but Harris does not challenge this finding. *See* Op. Br. (Dkt. # 16) at 12-18. The Court will therefore not address this aspect of the ALJ's decision.

1 show that the impairment could reasonably have caused some degree of the symptom; he
2 does not have to show that the impairment could reasonably be expected to cause the
3 severity of the symptom alleged. *Id.* The ALJ found that Harris met this step because his
4 medically determinable impairments could reasonably be expected to cause the
5 symptoms he alleged. AR at 20.

6 If the claimant satisfies the first step, and there is no evidence of malingering, the
7 ALJ may only reject the claimant's testimony "by offering specific, clear and convincing
8 reasons for doing so. This is not an easy requirement to meet." *Trevizo*, 871 F.3d at 678
9 (quoting *Garrison*, 759 F.3d at 1014-15).

10 As an initial matter, The Commissioner contends that the ALJ found evidence of
11 malingering, and was therefore entitled to discredit Harris's testimony. *See* Response,
12 Dkt. # 16 at 3. The ALJ noted that examining psychologist Victoria McDuffee, Ph.D.
13 suggested Harris "put forth less than full effort" on the Test of Memory and Malingering
14 ("TOMM"). AR at 21, 546. However, The Commissioner's own policies reject the use
15 of the TOMM, stating that "[t]ests cannot prove whether a claimant is malingering
16 because there is no test that, when passed or failed, conclusively determines the
17 claimant's motivation. Malingering requires a deliberate attempt to deceive." Soc. Sec.
18 Admin., Program Operations. Manual Sys. ("POMS"), DI 22510.006(D), *available at*
19 <https://secure.ssa.gov/apps10/poms.nsf/lnx/0422510006>. The Court will not accept as
20 evidence of malingering a test that the Commissioner has already found is insufficient to
21 do so. The ALJ was therefore required to provide clear and convincing reasons for
22 rejecting Harris's testimony. *See Orn v. Astrue*, 495 F.3d 625, 635 (9th Cir. 2007).

1 The ALJ gave four reasons for rejecting Harris’s testimony: (1) it was inconsistent
2 with Harris’s medical records, testing, and history; (2) it was inconsistent with Harris’s
3 daily activities; (3) the evidence showed a situational component to Harris’s claims; and
4 (4) Harris misreported his use of alcohol. AR at 20-23.

5 **1. Inconsistency with Medical Evidence**

6 The ALJ discounted Harris’s testimony because he found it inconsistent with the
7 medical evidence in the record. *Id.* at 21-22. The ALJ determined that Harris’s anxiety
8 and mood were largely stable between May 2010 and June 2011. *Id.* at 21. The ALJ
9 further noted that Harris’s mental status was “largely unremarkable” when he was
10 evaluated by Victoria McDuffee, Ph.D. in January 2012. *Id.* Harris reported anger issues
11 “but acknowledged that he could refrain from acting on his anger.” *Id.* at 22.

12 The ALJ’s position is not a reasonable interpretation of the evidence. In analyzing
13 the medical evidence, the ALJ “cannot simply pick out a few isolated instances” of
14 medical health that support his conclusion, but must consider those instances in the
15 broader context “with an understanding of the patient’s overall well-being and the nature
16 of [his] symptoms.” *Attmore v. Colvin*, 827 F.3d 872, 877 (9th Cir. 2016). Here, the ALJ
17 acknowledged medical evidence of Harris’s mental health issues, such as anxiety and
18 anger, but downplayed them because Harris was cooperative with his providers at times
19 and did not have any obvious crises due to his anger issues. *Id.* at 21-22. The record is
20 replete with evidence of ongoing psychological issues, however. Harris’s providers
21 regularly noted that he was anxious, depressed, and had a blunted affect. *See, e.g., id.* at
22 512, 515, 522, 525-26, 567, 573, 611, 620, 692, 707, 785, 1167, 1173. Moreover, Harris

1 regularly told providers he had thoughts of suicide, but had not acted on them because he
2 did not feel suicide was morally right. *See, e.g., id.* at 744, 1173.

3 Regarding Harris’s anger issues, the ALJ indicated that Harris’s testimony should
4 be discounted because he has not acted on his anger. This is not accurate, nor is it a
5 reasonable position. Certainly one does not have to physically harm someone to have
6 recognizable anger issues. Harris told one provider he hears voices telling him to
7 “initiate fights and kill people” on a daily basis. AR at 512. That provider found Harris’s
8 complaints serious enough that Harris was placed on a mental health hold and evaluated
9 by police to determine if he was at risk of endangering others before he was allowed to
10 leave the provider’s office. *Id.* In April 2013, another provider noted that Harris reported
11 moving from Colorado to Washington because he was concerned he would seek revenge
12 against individuals he perceived as having wronged him, and had “imagine[d] slitting the
13 throats or burning down the houses of those who, he feels, have betrayed [sic] in the
14 past.” *Id.* at 913.

15 Moreover, the record shows Harris did not always restrain himself. He reported
16 getting in three fights in a month in 2011, all of which ended with his opponent in the
17 hospital. *Id.* at 512. Harris sprained his hand punching a hole in a cabinet door after his
18 girlfriend broke up with him. *Id.* at 629. He injured his hand punching boxes on the
19 floor after a confrontation with a trespasser in his building. *Id.* at 744.

20 The ALJ’s determination that Harris’s symptom testimony was inconsistent with
21 the medical evidence is thus not supported by substantial evidence in the record, and the
22 ALJ erred in discounting Harris’s testimony on this basis.

2. Inconsistency with Daily Activities

The ALJ stated that Harris's daily activities were inconsistent with his alleged physical and mental symptoms. An ALJ may consider a claimant's daily activities in assessing his or her testimony. But daily activities that do not contradict a claimant's testimony or meet the threshold for transferrable work skills cannot form the basis of an adverse credibility determination. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007).

The ALJ's determination of inconsistency rests on weak grounds. The ALJ claimed Harris was inconsistent because he reported at one point that he did not drive because he was too nervous, but told examiner Wayne Dees, Psy.D. that he could drive despite not having a license. *See* AR at 23. In fact, Harris wrote in an adult function report that he did not drive because he had no license and was too nervous. *Id.* at 423. Dr. Dees noted only that Harris was [a]ble to drive, but has no license." *Id.* at 551. This hardly seems a significant inconsistency, if one exists at all.

The ALJ also faulted Harris because he testified that his parents do his grocery shopping, but Dr. Dees reported that Harris shopped for food with an EBT card. *Id.* at 23. Harris actually testified that he would go into the store and pick out what he needs, but wait in the car while his parents waited in line and checked out. *Id.* at 90. Dr. Dees did not contradict this; he merely noted that Harris "[s]hops for food with EBT card." *Id.* at 551. Again, this is not a significant inconsistency that would justify discrediting Harris's symptom testimony.

The record reveals slightly more inconsistency regarding Harris's physical exertional activities, but still not enough, standing alone, to justify rejecting Harris's

1 testimony. Harris testified in December 2013 that he had difficulty climbing stairs
2 because of his knees, and difficulty lifting or bending because of his lower back. *Id.* at
3 61. In October 2012, however, he told Dr. Dees that he “like[s] to hike and fish with
4 [his] dad.” *Id.* at 551. The ALJ also noted that Harris was exercising and attending
5 physical therapy in 2015 and 2016. *Id.* at 767, 1106, 1362. These statements could
6 possibly be interpreted as inconsistent, but, given the ALJ’s multiple other errors in
7 evaluating Harris’s testimony, do not alone justify the ALJ’s rejection of Harris’s
8 testimony. *See also infra* Part VII.A.5.

9 Finally, the ALJ claimed Harris’s testimony that he had difficulty leaving his
10 home was inconsistent because “there is no indication that he had any significant trouble
11 maintaining his schedule, attending his appointments, or getting around as necessary. AR
12 at 23. But the ALJ does not cite to anything in the record to support his position.
13 Moreover, the ALJ’s position would put Harris in an impossible situation with respect to
14 his medical appointments: either Harris attended those appointments and “contradicted”
15 his testimony that he had difficulty leaving his home, or he did not attend those
16 appointments, thereby failing to comply with treatment. *Cf. Fair v. Bowen*, 885 F.2d
17 597, 603 (9th Cir. 1989) (holding that “an unexplained, or inadequately explained, failure
18 to seek treatment or follow a prescribed course of treatment” can constitute a sufficient
19 reason for discrediting a claimant’s symptom testimony). The Court will not fault Harris
20 for trying to comply with his treatment, and the ALJ should not have done so, either. The
21 ALJ’s rejection of Harris’s testimony as inconsistent with his daily activities was thus not
22 supported by substantial evidence in the record.

3. Situational Component

The ALJ noted several statements in the record which he concluded showed that Harris had motivations beyond his disability for not working. First, the ALJ noted that Harris told Dr. McDuffee in January 2012 that he had left jobs in the past because he would get “dissatisfied” with them due to “hours, money, or being taken advantage of at the job sites.” AR at 22, 543. A claimant’s decision to leave work for reasons unrelated to a claimed disability may be a clear and convincing reason to find a claimant’s testimony unreliable. *See Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001). However, Dr. McDuffee indicated that Harris left his prior jobs because of his mental disabilities; Harris exhibited “self-sabotaging behaviors” and paranoid thoughts, and “reported a belief that’s [sic] others are taking advantage of him in the work setting, causing him to quit his jobs.” *Id.* at 545. Elsewhere in the record, Harris consistently reported that he left his prior jobs due to his anxiety and/or other conditions. *Id.* at 84, 365, 551, 715-16. The ALJ’s interpretation of a single vague record was insufficient from which to conclude that Harris was choosing not to work for reasons other than his claimed disabilities.

Second, the ALJ pointed to two statements in the record which he interpreted to mean that Harris was not looking for work because it might hamper his disability benefits claim. *Id.* During a phone checkup in November 2012, a provider noted that Harris “has not been looking for jobs [because] he worries that he will make too much money and lose his benefits and/or will need to take too much time off due to possible upcoming surgeries.” *Id.* at 629. In a record from January 2016, Harris’s mental health provider

1 | noted that Harris expressed frustration at the effectiveness of his treatment, stating that he
2 | “feels as though he has heard this all before, but it simply does not sink in.” AR at 748.
3 | In this second record, the provider went on to state that he and Harris “spoke about how
4 | [Sound Mental Health] services are necessary because it [sic] helps him build a case for
5 | SSI while at the same time ensuring that he has an agency he can depend on in times of
6 | crisis.” *Id.*

7 | The ALJ could not reasonably find, based on these two records, that Harris was
8 | exaggerating or misreporting his mental health symptoms. Both statements, relayed
9 | secondhand, contain ambiguities as to their meaning. And the second statement the ALJ
10 | referenced does not even appear to have been made by Harris. *See id.* While the ALJ is
11 | entitled to resolve ambiguities in the evidence, he must provide clear and convincing
12 | reasons to reject Harris’s testimony, and reference to two ambiguous statements about
13 | Harris’s efforts to seek alternative work and treatment without explanation does not
14 | satisfy this standard. *See generally Burrell v. Colvin*, 775 F.3d 1133, 1140 (9th Cir.
15 | 2014) (holding that “one weak reason,” even if supported by substantial evidence, “is
16 | insufficient to meet the ‘specific, clear and convincing’ standard” for rejecting a
17 | claimant’s testimony) (quoting *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012)).

18 | Third, the ALJ noted that Harris “had plans to move to Colorado and live with
19 | friends, but he was waiting on his Social Security hearing to happen.” The ALJ failed to
20 | explain how this was relevant to the veracity of Harris’s symptom testimony. It did not
21 | contradict his claims of anxiety, anger, or other disability. The ALJ thus erred in
22 | rejecting Harris’s testimony on the basis of a situational component.

1 Finally, the ALJ noted, with no further analysis, that Harris “acknowledged that
2 his felony conviction restricted his employment opportunities.” *Id.* at 23. The simple
3 fact of a felony conviction is not a clear and convincing reason to reject Harris’s
4 symptom testimony. *See Buck v. Astrue*, No. 3:10-cv-05519-KLS, 2011 WL 2600505, at
5 *11 (W.D. Wash. June 28, 2011) (holding that “the mere fact that a claimant has been
6 incarcerated or has a criminal history” is not a clear and convincing reason to reject a
7 claimant’s symptom testimony). Nor is the fact that Harris’s criminal history may have
8 posed a non-disability-related barrier to employment sufficient, as that does not
9 contradict his claims of disabling symptoms.

10 **4. Misreport of Alcohol Use**

11 The ALJ finally discounted Harris’s mental health symptom testimony because he
12 inconsistently reported his alcohol use. AR at 23, 195. At the hearing in November
13 2016, Harris testified that he had not used alcohol in “a couple years.” *Id.* at 89. The
14 ALJ noted that in January and October 2012, Harris reported that he drank “to get drunk”
15 one to two times per month. *Id.* at 544, 567. In November 2012, Harris reported that he
16 was not drinking, but stated only that it was because he was “broke.” *Id.* at 629. In April
17 2013, Harris reported that his last drink was about six months prior, and that the most he
18 had consumed in one day was 12-15 shots of liquor and 10-18 beers. *Id.* at 692. None of
19 this is inconsistent, nor does it indicate why Harris’s testimony about his mental health
20 symptoms should be discredited. *Cf. Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)
21 (“It’s not sufficient for the ALJ to make only general findings [regarding a claimant’s
22 symptom testimony]. . . . If the ALJ wished to reject [the claimant’s symptom]

1 testimony, he was required to point to specific facts in the record which demonstrate that
2 [the claimant's symptoms are less severe] than she claims.”)

3 The only possible inconsistency is the fact that several medical records from 2016
4 state that Harris was still drinking alcohol at that time, contrary to his hearing testimony.
5 A close reading of the medical record indicates, however, that these records may not be
6 accurate. In December 2012, a record from HealthPoint noted under “Social History” the
7 following: “There is a history of alcohol use. Beer and liquor approximately a variable
8 amount daily, was consumed monthly. Last alcoholic drink was two weeks ago.” AR at
9 617. That language was repeated word-for-word⁵ every time alcohol was addressed in
10 the “Social History” section of HealthPoint's records through June 30, 2016. *See id.* at
11 603, 1386, 1391, 1397, 1406, 1441, 1451, 1454, 1458, 1462, 1471, 1492, 1499, 1502.
12 Given the odd syntax of this language, as well as its inclusion in what is commonly a
13 boilerplate section of medical reports, it is highly doubtful that this record accurately
14 reflects Harris's alcohol consumption. This is further supported by the fact that the
15 appointments from March 3, 2014 and March 13, 2014 both state that Harris's last drink
16 was two weeks prior to each appointment, a temporal impossibility. *See id.* at 1462, 1471.

17 Regardless, in light of the remainder of the Court's analysis as to the ALJ's
18 rejection of Harris's symptom testimony, the Court will not uphold that determination
19 solely on a possible inconsistency between Harris's hearing testimony that he stopped
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22 ⁵ In April 2016, the first sentence was changed to: “The patient drinks alcohol.” *Id.* at
1386, 1391, 1397, 1406. The next two sentences remained the same. *Id.*

1 consuming alcohol two years prior, and questionable medical records suggesting he may
2 still be drinking. *See Burrell*, 775 F.3d at 1140.

3 **5. Harmful Error**

4 The ALJ's rejection of Harris's testimony cannot be considered harmless. The
5 Court cannot consider an error harmless unless it can "confidently conclude that no
6 reasonable ALJ, when fully crediting the testimony, could have reached a different
7 disability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055-56
8 (9th Cir. 2006). Here, the Court is unable to say that the ALJ would have reached the
9 same conclusion if he had correctly evaluated Harris's symptom testimony as compared
10 to the medical evidence, his daily activities, the alleged situational component, and
11 Harris's reports of alcohol use. The ALJ's errors were therefore harmful, and his
12 decision must be reversed.

13 **B. The ALJ Erred in Evaluating the Medical Opinions of Paul Connor, Ph.D.**

14 Dr. Connor examined Harris on March 11, 2013. AR at 714. He administered 15
15 different psychological tests, and spent an hour and a half interviewing Harris. *Id.* In a
16 thorough report, Dr. Connor opined that Harris performed in the average to high average
17 range for cognitive functioning, including learning and memory. *Id.* at 718. Harris
18 showed "fairly substantial troubles with focusing and maintaining attention over long
19 periods of time." *Id.* He also demonstrated poor impulse control. *Id.* at 718-19. Dr.
20 Connor opined that Harris's testing "supported his report of very significant emotional
21 distress," which "would likely be the greatest barrier to successful employment for him."
22 *Id.* at 719. Due to this emotional distress, Dr. Connor opined that Harris "may experience

1 greater troubles with memory and problem solving” in settings less controlled than the
2 testing environment. *Id.*

3 The ALJ gave little weight to Dr. Connor’s opinions. *Id.* at 25. He determined
4 that Dr. Connor’s opinions were (1) inconsistent with Harris’s mental health treatment
5 history; and (2) based on Harris’s self-reports, which the ALJ had rejected. *Id.* at 26,
6 197. Regarding Dr. Connor’s opinion that Harris may experience greater memory
7 problems outside the controlled testing environment, the ALJ determined that this was
8 contradicted by objective medical testing (both Dr. Connor’s testing and that of Dr.
9 McDuffee), and that the opinion was vague. *Id.* at 26, 197.

10 To reject the opinion of an examining doctor, even if it is contradicted by another
11 doctor, the ALJ must provide “specific and legitimate reasons that are supported by
12 substantial evidence in the record.” *See Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir.
13 1996) (citing *Andrews*, 53 F.3d at 1042). The ALJ can satisfy this requirement “by
14 setting out a detailed and thorough summary of the facts and conflicting clinical
15 evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157
16 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*, 881 F.2d at 751). The court may also
17 draw “specific and legitimate inferences from the ALJ’s opinion.” *Magallanes*, 881 F.2d
18 at 755.

19 **1. Consistency with Medical History**

20 The record does not support the ALJ’s rejection of Dr. Connor’s opinions as
21 inconsistent with Harris’s mental health treatment history. Much like his rejection of
22 Harris’s testimony, the ALJ cherry-picked several records to suggest that Harris’s anxiety

1 was stable, he was able to refrain from acting on his anger, and he had no objective
2 memory problems. *See* AR at 26. As discussed above, the medical record does not
3 support these conclusions. *See supra* Part VII.A.1. The ALJ thus erred in rejecting Dr.
4 Connor’s opinions on this basis.

5 **2. Reliance on Harris’s Self-Reports**

6 The ALJ’s second reason for rejecting Dr. Connor’s opinions also fails. An ALJ
7 may justifiably discount a treatment provider’s opinions if they “are based ‘to a large
8 extent’ on an applicant’s self-reports and not on clinical evidence, and the ALJ finds the
9 applicant not credible.” *Ghanim*, 763 F.3d at 1162 (*Tommasetti v. Astrue*, 533 F.3d 1035,
10 1041 (9th Cir. 2008)). “However, when an opinion is not more heavily based on a
11 patient’s self-reports than on clinical observations, there is no evidentiary basis for
12 rejecting the opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (citing
13 *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008)); *see Edlund v.*
14 *Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001).

15 Here, Dr. Connor’s opinion was based on much more than Harris’s self-reports, as
16 Dr. Connor administered 15 different psychological tests, and conducted a long clinical
17 interview. AR at 714. Clinical interviews and psychological testing “are objective
18 measures and cannot be discounted as a ‘self-report.’” *Buck v. Berryhill*, 869 F.3d 1040,
19 1049 (9th Cir. 2017). Furthermore, psychiatric evaluations “will always depend in part
20 on the patient’s self-report” because “unlike a broken arm, a mind cannot be x-rayed.”
21 *Id.* (internal quotation marks omitted) (quoting *Poulin v. Bowen*, 817 F.2d 865, 873 (D.C.
22 Cir. 1987)). “Thus, the rule allowing an ALJ to reject opinions based on self-reports does

1 not apply in the same manner to opinions regarding mental illness.” *Buck*, 869 F.3d at
2 1049. The ALJ therefore had no reasonable basis to reject Dr. Connor’s opinion as too
3 heavily based on Harris’s self-reports.

4 **3. Dr. Connor’s Memory and Problem-Solving Issues Opinion**

5 The ALJ’s treatment of Dr. Connor’s opinion that Harris may have greater
6 memory and problem-solving issues outside the testing environment has some support,
7 but still must be reversed. The ALJ is correct that Harris did not have memory issues on
8 objective medical testing. *See* AR at 545, 718. But that misses the point of Dr. Connor’s
9 opinion. Dr. Connor’s interpretation of his thorough examination and test results was
10 that Harris’s anxiety and impulse control problems, both of which were evident on
11 objective testing, may impact Harris’s functioning outside the testing environment. *See*
12 *id.* at 720. Harris’s performance on memory and problem-solving tests in the controlled
13 clinical environment was tangential to this conclusion. The fact that the ALJ might have
14 interpreted these test results differently is not a specific and legitimate reason to reject
15 them. *See Lovell v. Colvin*, No. 13-cv-05757 JRC, 2014 WL 3362465, at *8 (W.D.
16 Wash. July 9, 2014) (holding that the ALJ could not substitute her interpretation of test
17 results for those of the doctor who obtained them); *see also Mkrtchyan v. Colvin*, No.
18 C14-1209JLR, 2015 WL 2131222, at *6 (W.D. Wash. May 5, 2015) (stating that
19 “[b]ecause ALJs are as a rule not doctors, ‘courts have regularly warned ALJs not to
20 attempt to interpret test results or other raw medical data’”) (quoting *Worzalla v.*
21 *Barnhart*, 311 F. Supp. 2d 782, 796 (E.D. Wis. 2004)).
22

1 The ALJ also erred in rejecting Dr. Connor’s opinion on Harris’s memory and
2 problem-solving issues because they were too vague. The ALJ may reject a medical
3 opinion when it is “too vague to be useful.” *King v. Comm’r of Soc. Sec. Admin.*, 475 F.
4 App’x 209, 210 (9th Cir. 2012). But Dr. Connor’s opinion was very detailed, describing
5 Harris’s performance in six enumerated areas of functioning, and providing specific
6 behavioral observations. While Dr. Connor summarized this portion of his opinion in
7 more speculative terms, he stated with particularity the areas in which Harris struggled.
8 *See* AR at 717-719. It was then the ALJ’s responsibility to convert these medical
9 determinations into specific work limitations based on the entirety of the record. *See*
10 *Rounds v. Comm’r of Soc. Sec. Admin.*, 807 F.3d 996, 1006 (9th Cir. 2015) (“[T]he ALJ
11 is responsible for translating and incorporating clinical findings into a succinct RFC.”)
12 (citing *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008)). If he felt
13 unable to do so, or needed clarification about Dr. Connor’s opinions, then the ALJ could
14 have contacted Dr. Connor for more information. *See Tonapetyan v. Halter*, 242 F.3d
15 1144, 1150 (9th Cir. 2001) (holding that the ALJ “has an independent ‘duty to fully and
16 fairly develop the record to assure that the claimant’s interests are considered’”) (quoting
17 *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)). The ALJ thus erred in rejecting
18 Dr. Connor’s opinion on Harris’s memory and problem-solving difficulties in non-
19 clinical settings.

20 **4. Harmful Error**

21 The ALJ’s rejection of Dr. Connor’s opinions was harmful error. The Court has
22 determined that the ALJ did not give specific and legitimate reasons for rejecting Dr.

1 Connor's opinions. Had the ALJ correctly evaluated those opinions, he very well may
2 have reached a different disability determination. Accordingly, the ALJ's error must be
3 considered harmful.

4 **C. The ALJ Erred in Evaluating the Medical Opinions of Danielle Jenkins,**
5 **Psy.D.**

6 Dr. Jenkins examined Harris on October 14, 2014. AR at 782. She reviewed
7 several medical records, conducted a clinical interview, performed a mental status exam,
8 and administered two psychological tests: the Beck Depression Inventory ("BDI") and
9 Beck Anxiety Inventory ("BAI"). *Id.* at 782, 785-86. Based on these efforts, Dr. Jenkins
10 diagnosed Harris with bipolar disorder, anxiety disorder, cannabis dependence, attention
11 deficit hyperactive disorder, and made a rule-out diagnosis of posttraumatic stress
12 disorder. *Id.* at 783. She opined that Harris had severe limitations in his ability to learn
13 new tasks, adapt to changes in a routine work setting, and complete a normal work day
14 and week without interruptions from his psychologically-based symptoms. *Id.* at 784.

15 The ALJ gave little weight to Dr. Jenkins's opinions because they were
16 inconsistent with Harris's mental health treatment history, and based on Harris's self-
17 reports, which the ALJ had rejected. *Id.* at 25-26. The ALJ gave the same justifications
18 here as he did for rejecting Dr. Connor's opinions. *See id.* Just as those reasons were
19 insufficient to support rejection of Dr. Connor's opinions, they are insufficient to support
20 rejection of Dr. Jenkins's opinions. *See supra* Part VII.B.1-2. The ALJ thus erred in
21 rejecting Dr. Jenkins's opinions.
22

1 The ALJ's rejection of Dr. Jenkins's opinions must be considered harmful error.
2 As with his rejection of Dr. Connor's opinions, the ALJ may have reached a different
3 disability determination if he had appropriately evaluated Dr. Jenkins's opinions, and
4 thus the ALJ's error was harmful.

5 **D. The ALJ Erred in Evaluating the Medical Opinions of Wayne Dees, Psy.D.**

6 Dr. Dees examined Harris on October 3, 2012. AR at 550. Dr. Dees reviewed
7 several medical records, conducted a clinical interview, performed a mental status exam,
8 and administered the BDI and BAI. *Id.* at 550-58. He diagnosed Harris with bipolar
9 disorder, generalized anxiety disorder with panic and obsessive compulsive disorder
10 symptoms, cognitive disorder, and cannabis dependence. *Id.* at 552. Dr. Dees concluded
11 that Harris had severe limitations in his ability to adapt to changes in a routine work
12 setting, communicate and perform effectively in a work setting, and complete a normal
13 work day and week without interruptions from his psychologically-based symptoms. *Id.*
14 at 552-53. He also concluded that Harris had marked limitations in his ability to perform
15 activities within a regular schedule and maintain attendance without special supervision,
16 maintain appropriate behavior in a work setting, and set realistic goals and plan
17 independently. *Id.*

18 The ALJ gave little weight to Dr. Dees's opinions. *Id.* at 25-26. Once again, the
19 ALJ claimed that Dr. Dees's opinions were inconsistent with Harris's mental health
20 treatment history, and based on Harris's self-reports, which the ALJ had rejected. These
21 reasons fail for the same reasons they failed as to Drs. Connor and Jenkins. *See supra*
22 Part VII.B.1-2.

1 The ALJ gave three additional reasons for discounting Dr. Dees's opinions: (1)
2 Harris "was not honest in reporting his alcohol and marijuana use to Dr. Dees"; (2) Dr.
3 Dees's opinions were based on review of a limited set of records; and (3) Dr. Dees's
4 examination "was solely for the purpose of establishing eligibility for state benefits." *Id.*
5 at 25-26, 197.

6 **1. Harris's Misreporting of Alcohol and Marijuana Use**

7 The ALJ's rejection of Dr. Dees's opinion because of Harris's misreporting of his
8 alcohol and marijuana use finds some support in the record, but not enough to justify
9 discounting Dr. Dees's opinions. With regard to alcohol use, the record does not reveal a
10 clear inconsistency between Harris's reports to Dr. Dees and his reports elsewhere. Dr.
11 Dees noted that Harris drinks "maybe once a month or so." AR at 551. As discussed
12 above, Harris elsewhere reported drinking one to two times per month in this timeframe.
13 *See id.* at 544, 567. This is not so significant a discrepancy as to provide a specific and
14 legitimate reason for rejecting Dr. Dees's opinions.

15 Harris's reporting of his marijuana use contained more significant discrepancies.
16 Harris told Dr. Dees he smoked marijuana one to two times per week. *Id.* at 551. Less
17 than two weeks later, however, he reported to one of his providers that he was smoking
18 three to four bowls of marijuana per day. *Id.* at 567. While this discrepancy is troubling,
19 there is no indication that it impacted Dr. Dees's conclusions, nor did the ALJ provide
20 any explanation on that point. Dr. Dees diagnosed Harris with cannabis dependence in
21 spite of Harris's underreporting, but concluded that Harris's current impairments were
22 not the result of his drug use. *Id.* at 553. The ALJ apparently agreed, as he found that

1 Harris suffered from marijuana dependence, but that condition had not had a “significant
2 functional impact for any 12-month period.” *Id.* at 16. The ALJ therefore did not
3 provide a specific and legitimate reason for rejecting Dr. Dees’s opinions by pointing out
4 Harris’s misreports of marijuana and alcohol use. *See Edlund*, 253 F.3d at 1159.

5 **2. Limited Scope of Records Reviewed**

6 The ALJ was also not justified in discounting Dr. Dees’s opinions because they
7 were based on a limited number of records. The ALJ does not point to any records that
8 Dr. Dees did not review that might cause him to change his opinions, so this point is
9 largely irrelevant. Moreover, Dr. Dees actually examined Harris, and the Social Security
10 Administration’s (“SSA”) own regulations place more weight on opinions from doctors
11 who examine claimants than those who simply review medical records. *See* 20 C.F.R. §
12 404.1527(c)(1); *see also Lester*, 81 F.3d at 830-31 (noting that “[t]he opinion of an
13 examining physician is . . . entitled to greater weight than the opinion of a nonexamining
14 physician”). This was thus not a specific and legitimate reason for discounting Dr. Dees.

15 **3. Examination for the Purpose of Obtaining State Benefits**

16 The ALJ’s final reason for rejecting Dr. Dees’s opinions, that his examination was
17 performed for the purpose of obtaining state benefits, hardly warrants discussion.
18 Examining doctors regularly see claimants solely for the purpose of determining whether
19 they are eligible for benefits, and often do so at the request of the SSA. *See, e.g.,* POMS,
20 DI 22510.001, *available at* <https://secure.ssa.gov/apps10/poms.nsf/lnx/0422510001>. This
21 has no bearing on the accuracy of the doctors’ opinions, and is certainly not a specific
22 and legitimate reason to reject those opinions.

1 **4. Harmful Error**

2 Once again, the Court must conclude that the ALJ's rejection of Dr. Dees's
3 opinion was harmful error. Had the ALJ properly evaluated Dr. Dees's opinions, he may
4 have formulated a different residual functional capacity ("RFC"), and reached a different
5 disability determination. The ALJ thus harmfully erred here.

6 **E. The ALJ Erred in Evaluating the Medical Opinions of Andrew Forsyth,**
7 **Ph.D. and Steven Haney, M.D.**

8 Dr. Forsyth and Dr. Haney are consulting doctors who reviewed Harris's medical
9 records as part of his disability determination at the initial and reconsideration levels. *See*
10 AR at 124-28, 137-41, 156-57, 160-62, 173-74, 177-79. Each concluded, among other
11 things, that Harris "would need to be in settings with minimal interpersonal contacts as
12 this would be significantly less stressful for him." *Id.* at 127, 140, 162, 179.

13 The ALJ gave "significant weight" to Dr. Forsyth and Dr. Haney's opinions,
14 although he claimed to assess "more specific social limitations" than either doctor. *Id.* at
15 24. In the RFC, the ALJ limited Harris to "occasional and superficial interaction with the
16 public and with coworkers." *Id.* at 18.

17 Harris argues that the ALJ erred because he did not apply any social limitations on
18 Harris's interaction with supervisors. In his prior opinion, the ALJ addressed this issue,
19 stating that the social interaction opinions from Dr. Forsyth and Dr. Haney "appear[] to
20 apply to supervisors" as well as the public and coworkers. *Id.* at 196. However, the ALJ
21 rejected this further limitation because Harris "has not demonstrated difficulties with any
22 providers or others during the relevant period." *Id.*

1 The Court has little choice but to find error here. The ALJ rightly concluded in his
2 original decision that Dr. Forsyth and Dr. Haney’s social limitations would apply to
3 supervisors. He entirely ignored that part of their opinions in his current decision, and
4 thus essentially rejected it without giving any reasons for doing so. This was error. *See*
5 *Dennis v. Colvin*, No. 06:14-cv-00822-HZ, 2015 WL 3867506, at *8 (D. Or. June 20,
6 2015) (holding that when an ALJ gives great weight to a medical source’s opinion, he
7 errs if he fails to account for that opinion in the RFC); *see also Valentine*, 574 F.3d at 690
8 (holding that an ALJ must account for all of the claimant’s medically supportable
9 limitations when crafting the RFC).

10 Even if the Court were to consider the ALJ’s original reasons for omitting
11 supervisors from the social limitation in the RFC, the Court would still find error. The
12 record contradicts the ALJ’s statement that Harris had no trouble interacting with his
13 medical providers. In April 2016, Harris’s provider had to spend the majority of an
14 appointment that was supposed to be for back pain dealing with Harris being irate and
15 rude. AR at 1404-05. In October 2014, another provider noted that Harris used obscene
16 language and had a threatening demeanor. *Id.* at 1442. Dr. McDuffee also noted that
17 Harris had a problem complying with his treatment because of a “persecutory ideation.”
18 *Id.* at 545. The ALJ thus erred in failing to properly address the opinions of Dr. Forsyth
19 and Dr. Haney as they apply to Harris’s interaction with supervisors.

20 Because this error meant that the ALJ failed to address a possible work limitation,
21 it was harmful error. The Court cannot confidently conclude that the ALJ would have
22

1 reached the same result regardless of his mistreatment of Dr. Forsyth and Dr. Haney's
2 opinion, and therefore the ALJ committed harmful error.

3 **F. Scope of Remand**

4 Harris asks the Court to remand this matter for payment of benefits. Op. Br. at 18.
5 The Court may remand for an award of benefits when "the record has been fully
6 developed and further administrative proceedings would serve no useful purpose."
7 *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen*, 80 F.3d at
8 1290). But remand for an award of benefits "is a rare and prophylactic exception to the
9 well-established ordinary remand rule." *Leon v. Berryhill*, 880 F.3d 1041, 1044 (9th Cir.
10 2017). Thus, to remand for an award of benefits, the Court must determine that: "(1) the
11 ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence;
12 (2) there are no outstanding issues that must be resolved before a determination of
13 disability can be made; and (3) it is clear from the record that the ALJ would be required
14 to find the claimant disabled if he considered the claimant's evidence." *McCartey*, 298
15 F.3d at 1076-77 (citing *Smolen*, 80 F.3d at 1292).

16 These three conditions are not all met here, and thus the Court must remand for
17 further proceedings. While the ALJ harmfully erred, the Court is unable to conclude that
18 the ALJ would be required to find Harris disabled if he had properly considered the
19 evidence in the record. The Court is not in a position to translate Harris's testimony and
20 the medical evidence into an RFC, nor is it in a position to determine whether Harris
21 could perform his past work or other jobs available in significant numbers in the national
22 economy. Further proceedings are necessary to address these issues.

1 On remand, the ALJ should reevaluate Harris's mental health symptom testimony,
2 as well as the opinions of Dr. Connor, Dr. Jenkins, Dr. Dees, Dr. Forsyth, and Dr. Haney,
3 and conduct further proceedings as necessary to determine Harris's disability status.

4 **VIII. ORDER**

5 Therefore, it is hereby **ORDERED** that the Commissioner's final decision
6 denying supplemental security income benefits is **REVERSED** and this case is
7 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
8 405(g).

9 Dated this 9th day of July, 2018.

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12 **BENJAMIN H. SETTLE**
13 United States District Judge
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