

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Guadalupe M. v. Leland Dudek

Guadalupe M. v. Dudek · No. 23cv1872-MSB · Decided February 27, 2025

SUMMARY

This is an order from the United States District Court for the Southern District of California reviewing the denial of Guadalupe M.'s applications for Social Security disability insurance benefits and supplemental security income. The court upheld the ALJ's assessment of Plaintiff's subjective symptom allegations but found reversible error because the ALJ did not adequately specify the degree of limitation in each mental-function area or explain how the non-severe anxiety disorder was considered in the residual functional capacity assessment. The court ordered reversal of the Commissioner's decision and remand for further administrative proceedings.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Michael S. Berg
JURISDICTION	United States District Court for the Southern District of California
DECIDED	February 27, 2025
DOCKET	23cv1872-MSB
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff sought judicial review under 42 U.S.C. § 405(g) of the Commissioner's final decision denying disability insurance benefits and supplemental security income.
STANDARD OF REVIEW	The court reviews the Commissioner's decision for substantial evidence and legal error. It must uphold the decision when the evidence is susceptible to more than one rational interpretation, but may reverse for application of an incorrect legal standard or harmful error.
PRECEDENTIAL VALUE	Unpublished district court order; persuasive but not binding precedent outside the case.
PARTIES	Guadalupe M. v. Leland Dudek, Acting Commissioner of the Social Security Administration

TOPICS

judicial review of agency action

agency adjudication

administrative law

PRACTICE AREAS

Social Security disability

administrative law

judicial review of agency action

QUESTIONS PRESENTED

1. Whether the ALJ provided specific, clear, and convincing reasons for discounting Plaintiff's subjective allegations concerning pain, dizziness, and vertigo.
2. Whether the ALJ properly applied the special psychiatric review technique by assigning specific ratings to each paragraph B functional area.
3. Whether the ALJ was required to explain how Plaintiff's non-severe anxiety and depressive disorders were considered in the residual functional capacity assessment.
4. Whether the ALJ's errors were harmless.

HOLDINGS

1. The ALJ provided sufficiently specific, clear, and convincing reasons for partially discounting Plaintiff's allegations concerning dizziness and vertigo because the medical record repeatedly documented that Plaintiff denied those symptoms, contrary to his testimony that he experienced daily, hour-long episodes.
2. The ALJ erred by stating only that Plaintiff had no more than mild limitations in any functional area rather than making a specific finding as to the degree of limitation in each of the four paragraph B functional areas.
3. The ALJ reversibly erred by failing to discuss or explain how Plaintiff's non-severe anxiety and depressive disorders were considered in the RFC assessment.
4. The errors were not harmless because the absence of specific paragraph B ratings and any analysis of the mental impairments in the RFC prevented the court from determining whether the RFC was supported by substantial evidence.

KEY QUOTATIONS

"Because the ALJ's decision to partially discredit Plaintiff's testimony is supported by substantial evidence, and her analysis was free of legal error, the Court affirms her findings." (AR 28-29)

"For the foregoing reasons, the Court ORDERS that judgment be entered REVERSING the decision of the Commissioner and REMANDING this matter for further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g)." (Conclusion)

FACTUAL BACKGROUND

Plaintiff alleged disability beginning March 20, 2021, based principally on lumbar degenerative disc disease and dextroscoliosis, ischemic cardiomyopathy following an NSTEMI, obesity, anxiety, and symptoms including

dizziness and vertigo. The ALJ found the physical impairments severe, the anxiety and depressive disorders non-severe, and assessed a light-work residual functional capacity without mental limitations. Although the court upheld the ALJ's treatment of Plaintiff's dizziness and vertigo allegations, it found that the ALJ failed to assign specific degrees of limitation in each paragraph B functional area and failed to explain how the non-severe mental impairments were considered in the RFC.

PROCEDURAL HISTORY

Plaintiff applied for disability insurance benefits and supplemental security income in May 2021. After the applications were denied initially and on reconsideration, an administrative law judge denied benefits on August 30, 2022, and the Appeals Council denied review on August 30, 2023. Plaintiff then filed this action, and the district court reversed and remanded under sentence four of 42 U.S.C. § 405(g).

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g), including proper application of the special psychiatric review technique and an explanation of how Plaintiff's mental impairments are considered in the RFC assessment.

CASES CITED

- Buck v. Berryhill, 869 F.3d 1040, 1048-49 (9th Cir. 2017)
- Molina v. Astrue, 674 F.3d 1104, 1110 (9th Cir. 2012)
- Revels v. Berryhill, 874 F.3d 648, 654 (9th Cir. 2017)
- Desrosiers v. Secretary of Health & Human Services, 846 F.2d 573, 576 (9th Cir. 1988)
- Richardson v. Perales, 402 U.S. 389, 401 (1971)
- Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008)
- Lewis v. Apfel, 236 F.3d 503, 509 (9th Cir. 2001)
- Rounds v. Commissioner of Social Security Administration, 807 F.3d 996, 1002 (9th Cir. 2015)
- Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996)
- Trevizo v. Berryhill, 871 F.3d 664, 678 (9th Cir. 2017)
- Garrison v. Colvin, 759 F.3d 995, 1014-15 (9th Cir. 2014)
- Vasquez v. Astrue, 572 F.3d 586, 591 (9th Cir. 2009)
- Lingenfelter v. Astrue, 504 F.3d 1028, 1036 (9th Cir. 2007)
- Lambert v. Saul, 980 F.3d 1266, 1277 (9th Cir. 2020)
- Treichler v. Commissioner of Social Security Administration, 775 F.3d 1090, 1102 (9th Cir. 2014)
- Burch v. Barnhart, 400 F.3d 676, 680 (9th Cir. 2005)
- Brown-Hunter v. Colvin, 806 F.3d 487, 489 (9th Cir. 2015)

- Smartt v. Kijakazi, 53 F.4th 489, 498 (9th Cir. 2022)
- Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999)
- Keyser v. Commissioner, Social Security Administration, 648 F.3d 721, 725-26 (9th Cir. 2011)
- Valentine v. Commissioner of Social Security Administration, 574 F.3d 685, 690 (9th Cir. 2009)
- Samples v. Commissioner of Social Security Administration, 466 F. App'x 584, 586 (9th Cir. 2012)
- Craig H. v. Kijakazi, No. 22CV800-AJB(LR), 2023 WL 4679342, at *11-*13 (S.D. Cal. July 21, 2023)
- Gutierrez v. Apfel, 199 F.3d 1048, 1051 (9th Cir. 2000)
- Janice H. v. O'Malley, No. 22CV1833-W(MSB), 2024 WL 709395, at *6 (S.D. Cal. Feb. 21, 2024)
- Kitty S. v. Kijakazi, No. EDCV 21-00390-JEM, 2022 WL 2117160, at *5-*7 (C.D. Cal. June 13, 2022)
- Nasery v. Colvin, No. 16CV1534-CAB-KSC, 2017 WL 3393834, at *21 (S.D. Cal. Aug. 4, 2017)

OPINION

Moreno v. Kijakazi

PER CURIAM.

2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 GUADALUPE M.,1 Case No.: 23cv1872-MSB 12 Plaintiff,

ORDER

13 v. 14 LELAND DUDEK, Acting Commissioner of the Social Security Administration,2 15
 Defendant. 16 17 18 On October 12, 2023, Plaintiff Guadalupe M. (“Plaintiff”) filed a Complaint
 19 pursuant to 42 U.S.C. § 405(g), seeking judicial review of a decision by the Commissioner 20
 of Social Security (“Commissioner”), which denied his application for social security 21 disability
 insurance benefits and supplemental security income. (ECF No. 1 (“Compl.”), 22 at 1.) For the
 reasons set forth below, the Court ORDERS that judgment be entered 23 REVERSING the
 decision of the Commissioner and REMANDING this matter for further 24 administrative
 proceedings. 25 1 Under Civil Local Rule 7.1(e)(6)(b), “[o]pinions by the Court in [Social
 Security cases under 42 U.S.C. § 26 405(g)] will refer to any non-government parties by using
 only their first name and last initial.” 2 Leland Dudek became the Acting Commissioner of Social
 Security in February 2025. Pursuant to Rule 27 25(d) of the Federal Rules of Civil Procedure,
 Leland Dudek should be substituted as the defendant in 2 On May 18, 2021, Plaintiff filed
 applications for disability insurance benefits and 3 supplemental security income under Titles II
 and XVI of the Social Security Act, alleging 4 disability beginning on March 20, 2021. (AR3 306,
 313.) His applications were denied 5 initially on September 9, 2021 and upon reconsideration on
 February 2, 2022. (AR 184, 6 202.) On March 14, 2022, Plaintiff requested a hearing before an
 administrative law 7 judge (“ALJ”), which was then held on August 17, 2022. (AR 209, 54-81.)
 On August 30, 8 2022, ALJ Lauren Penn denied Plaintiff’s application after four levels of review.
 (AR 15- 9 35.) The Appeals Council denied Plaintiff’s request for review on August 30, 2023, 10

making the ALJ's decision the final decision of the Commissioner. (AR 1-9.) On October 11 12, 2023, Plaintiff filed the instant civil action in this Court seeking review of the 12 Commissioner's final decision. (ECF No. 1.) Pursuant to the Court's briefing schedule, 13 Plaintiff timely filed the Merit Brief on March 14, 2024 [ECF No. 13 ("Mot.")] and 14 Defendant timely filed the Responsive Brief on May 15, 2024 [ECF No. 17 ("Opp'n")].

15 II. SUMMARY OF THE ALJ'S FINDINGS

16 In rendering her decision, the ALJ followed the Commissioner's five-step 17 sequential evaluation process. See 20 C.F.R. § 404.1520. At step one, the ALJ found 18 Plaintiff had not engaged in substantial gainful activity since December 31, 2022, the 19 alleged onset date. (AR 23.) At step two, the ALJ found Plaintiff had the following 20 severe impairments that significantly limit his ability to perform basic work activities: 21 "lumbar degenerative disc disease and dextroscoliosis, ischemic cardiomyopathy 22 status/post-non ST-elevated myocardial infarction (NSTEMI), and obesity (20 CFR 23 404.1520(c) and 416.920(c))." (AR 24.) The ALJ also noted Plaintiff's alleged 24 impairments of "allergic rhinitis, hypertension, and tinnitus," but found they were non- 25 severe because they "cause no more than a minimal impact on the claimant's ability to 26 carry out work-related activities on an ongoing basis." (Id.) The ALJ further found 27 2 than mild mental limitations in his "understanding, remembering or applying 3 information; interacting with others; concentrating, persisting or maintaining pace; and 4 adapting or managing [him]self." (AR 24-25.) 5 At step three, the ALJ found that, although Plaintiff has severe impairments, 6 "medical evidence does not document listing-level severity, and no acceptable medical 7 source has mentioned findings equivalent in severity to the criteria of any listed 8 impairment, individually or in combination." (AR 25.) The ALJ then found Plaintiff had 9 the residual functional capacity ("RFC") to: 10 [P]erform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except can stand and walk for 6 hours and can sit for 6 hours; the claimant 11 can occasionally climb ramps and stairs, balance, stoop, kneel, crouch, and 12 crawl, but cannot climb ladders, ropes, or scaffolds or have concentrated exposure to hazards such as unprotected heights and dangerous moving 13 machinery. 14 15 (AR 26.) At step four, the ALJ found Plaintiff was unable to perform his past 16 relevant work as a construction worker. (AR 29.) Finally, the ALJ proceeded to step five 17 of the sequential evaluation process. The ALJ noted the vocational expert's testimony 18 that a hypothetical individual with Plaintiff's vocational profile and RFC could perform 19 the requirements of other occupations that exist in significant numbers in the national 20 economy, such as housekeeping cleaner, inspector, small products assembler, and 21 garment sorter. (AR 30.) These occupations require the ability to perform sedentary, 22 unskilled work. (Id.) Thus, the ALJ concluded Plaintiff was not disabled, as defined by 23 the Social Security Act from December 31, 2022, through the date of the decision, and 24 denied his applications for disability insurance benefits and supplemental security 25 income. (AR 31.)

26 III. DISPUTED ISSUES

27 Plaintiff raises the following issues as grounds for reversal and remand: 2 discounting

Plaintiff's subjective complaints and allegations of pain and physical dysfunction. 4 B. Whether the ALJ failed to consider the established impairment of anxiety disorder, resulting in an incomplete residual functional capacity assessment. 6 (Mot. at 1).

7 IV. STANDARD OF REVIEW

8 Section 405(g) of the Social Security Act allows unsuccessful applicants to seek
9 judicial review of the Commissioner's final decision. 42 U.S.C. § 405(g). The reviewing 10
court may enter a "judgment affirming, modifying, or reversing" the Commissioner's 11 decision.
Id. The reviewing court may also remand the case to the Social Security 12 Administration for
further proceedings. Id. 13 The scope of judicial review is limited, and the denial of benefits will
not be 14 disturbed if it is supported by substantial evidence in the record and contains no legal 15
error. *Buck v. Berryhill*, 869 F.3d 1040, 1048 (9th Cir. 2017) (citing *Molina v. Astrue*, 674 F.3d
1104, 1110 (9th Cir. 2012) (citation omitted)). "Substantial evidence means more 17 than a mere
scintilla but less than a preponderance. It means such relevant evidence as 18 a reasonable mind
might accept as adequate to support a conclusion." *Revels v. Berryhill*, 874 F.3d 648, 654 (9th
Cir. 2017) (quoting *Desrosiers v. Sec'y of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir.
1988)); see also *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Where the evidence is
susceptible to more than one rational 22 interpretation, the ALJ's decision must be upheld.
Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008). This includes deferring to the ALJ's
credibility determinations and 24 resolutions of evidentiary conflicts. See *Lewis v. Apfel*, 236 F.3d
503, 509 (9th Cir. 2001). 25 The ALJ's decision may also be reversed if it applies the wrong legal
standard, but 26 the reviewing court "may not reverse an ALJ's decision on account of an error
that is 27 harmless." *Rounds v. Comm'r Soc. Sec. Admin.*, 807 F.3d 996, 1002 (9th Cir. 2015) 2 A.
Whether the ALJ provided specific, clear, and convincing reasons for discounting 3 Plaintiff's
subjective symptom allegations 4 1. Summary of the parties' arguments 5 Plaintiff first argues that
the ALJ failed to provide specific, clear, and convincing 6 reasons for discounting his allegations
of pain and physical dysfunction. (Mot. at 11.) 7 Plaintiff asserts that, while the ALJ recognized
that Plaintiff had lumbar degenerative 8 disc disease and dextroscoliosis, ischemic
cardiomyopathy status/post NSTEMI, and 9 obesity, the ALJ merely cited the medical evidence
"without connecting how any 10 particular finding undermines Plaintiff's reported symptoms."
(Id. at 12-13.) According 11 to Plaintiff, the ALJ's failure to adequately consider his symptoms led
to an insufficient 12 RFC because it did not include Plaintiff's subjective symptoms. (Id. at 15.)
Although 13 Plaintiff appears to make a general assertion that the ALJ failed to consider all of his
14 subjective symptom testimony, he focuses on testimony regarding his vertigo and dizzy 15
spells. (AR 13-15.) 16 The Commissioner asserts that the ALJ reasonably found that Plaintiff's
subjective 17 complaints were inconsistent with the objective medical evidence in the record.
(Opp'n 18 at 8.) Furthermore, the Commissioner argues that Plaintiff's own "denials of dizziness
19 and vertigo over the course of his treatment contradicted his testimony that these 20 symptoms
were disabling." (Id. at 9.) Therefore, the Commissioner maintains that the 21 ALJ did not

arbitrarily discredit Plaintiff's testimony, and the ALJ's decision is free of error. (Id. at 12.)

2. Applicable law When evaluating claimant's allegations regarding subjective symptoms, such as pain, the ALJ must engage in a two-step analysis. See *Smolen v. Chater*, 80 F.3d 1273, 26 1281 (9th Cir. 1996), superseded, in part, on other grounds by 20 C.F.R. §§ 27 404.1529(c)(3), 416.929(c)(3); see also Social Security Ruling ("SSR") 16-3p, 2016 WL 2 produce the pain or other symptoms alleged." *Trevizo v. Berryhill*, 871 F.3d 664, 678 3 (9th Cir. 2017) (quoting *Garrison v. Colvin*, 759 F.3d 995, 1014–15 (9th Cir. 2014)). The claimant is not required to show that an underlying impairment could reasonably be expected to cause the severity of the pain alleged, but only that it could have reasonably caused some degree of the pain. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) 7 (citing *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)). 8 Second, if the first step has been satisfied and there is no evidence of malingering, 9 then the ALJ may reject the claimant's statements about the severity of his symptoms 10 "only by offering specific, clear and convincing reasons for doing so." *Trevizo*, 871 F.3d 11 at 678 (quoting *Garrison*, 759 F.3d at 1014–15). "The clear and convincing standard is 12 the most demanding required in Social Security cases." *Revels*, 874 F.3d at 648 (quoting 13 *Garrison*, 759 F.3d at 1014–15). General findings are insufficient, and the ALJ must 14 identify which specific pain and symptom statements are being discounted and what 15 evidence undermines those claims. See *Lambert v. Saul*, 980 F.3d 1266, 1277 (9th Cir. 16 2020) (citing *Treichler v. Comm'r Soc. Sec. Admin.*, 775 F.3d 1090, 1102 (9th Cir. 2014)); 17 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). An ALJ's failure to identify specific 18 statements and explain why they are not credible precludes meaningful review because 19 the reviewing court cannot determine if the ALJ's decision was supported by substantial 20 evidence, which constitutes reversible error. *Brown-Hunter v. Colvin*, 806 F.3d 487, 489 21 (9th Cir. 2015); see also SSR 16-3p. 22

3. Plaintiff's testimony Plaintiff testified at the administrative hearing that he stopped working as a labor 24 worker because of "[a]nxiety, plus the heart attacks . . . , [his] back, vertigo, dizziness, 25 and a host of other things." (AR at 61.) When pressed about the "other things," Plaintiff 26 testified that he would "just go out to the sun and . . . start getting very dizzy, agitated, 27 [anxious,] . . . forgets things, [and he's] afraid to go out because of what might happen." 2 deal with people. (Id. at 65.) 3 When asked about how often and how long he has vertigo episodes, Plaintiff 4 stated that he experiences vertigo episodes daily that last about an hour. (Id. at 64.) His 5 doctor told him this would occur "for life." (Id. at 70.) To feel better, he testified that 6 he needs to sit down. (Id. at 65.) Due to his dizziness and vertigo, plaintiff alleged that 7 he could not do a simple, sit-down job. (Id.) 8

4. The ALJ's findings 9 The ALJ acknowledged that Plaintiff alleged difficulty with lifting, squatting, 10 bending, standing, reaching, and kneeling, as well as ongoing vertigo and dizziness. (AR 11 27.) In assessing Plaintiff's subjective allegations, the ALJ observed that his statements 12 "about the intensity, persistence, and limiting effects of his symptoms . . . give rise to 13 some limitations." (AR 28.) However, the ALJ found that "his alleged difficulty with 14 dizziness, vertigo and using his hands

and assistive devices, is not entirely consistent with the evidence.” (Id.) She explained that, while claimant complained of dizziness and vertigo at times, which were treated with meclizine, he generally denied the same on multiple occasions, “especially later in the record.” (Id. (citing AR 659, 672, 1019, 1028, 1032, 1072, 1084, 1098, 1118, 1721, 1729, 1733, 1742).) Accordingly, she found that Plaintiff’s testimony and allegations did not support additional limitations: In sum, while the ALJ finds support for some of the claimant’s allegations, they are not supported by the evidence of record to the extent that they suggest a more restrictive residual functional capacity than found above, as indicated by the foregoing. (AR at 29.)

5. Analysis Because the ALJ determined that Plaintiff’s “medically determinable impairments could reasonably be expected to cause some of the alleged symptoms,” the first prong of the ALJ’s inquiry into Plaintiff’s subjective symptoms is satisfied. (See id. at 26.) As a 2 doing so. See *Brown-Hunter*, 806 F.3d at 489; *Trevizo*, 871 F.3d at 678; *Garrison*, 759 3 F.3d at 1014-15. 4 The Court finds that the ALJ appropriately assessed Plaintiff’s testimony here. 5 First, the ALJ sufficiently identified the discredited testimony by recognizing that Plaintiff 6 “alleged difficulty with dizziness, [and] vertigo” (AR 28.) She then explained that 7 this subjective symptom testimony was only partially consistent with the evidence 8 because Plaintiff was being treated with meclizine and he generally denied these 9 symptoms during multiple visits. (Id.) 10 Although the ALJ may not use the absence of objective medical evidence to 11 disregard a plaintiff’s subjective symptom testimony, objective medical evidence that is 12 contrary to such testimony would be a specific, clear, and convincing justification. See 13 *Smartt v. Kijakazi*, 53 F.4th 489, 498 (9th Cir. 2022). Here, the ALJ presented evidence 14 that was directly contrary to Plaintiff’s allegations. Plaintiff criticizes the ALJ’s 15 interpretation of the record as “patently false” because she implies that he “magically” 16 recovered after he stopped complaining of his dizziness around April 2022 to August 17 2022. (Mot. at 14.) But the ALJ makes no such finding. The ALJ acknowledges Plaintiff 18 very well may be experiencing dizziness and vertigo, but notable portions of the medical 19 record contradict his statements regarding the severity of his dizziness and vertigo. (AR 20 28.) Indeed, Plaintiff’s history of denials spans from March 2021 to August 2022. (See 21 AR 659, 672, 1019, 1028, 1032, 1072, 1084, 1098, 1118, 1721, 1729, 1733, 1742.) 22 Plaintiff even cites portions of the record where he explicitly denies dizziness and 23 vertigo. (See Mot. at 14 (citing AR 1060, 1724, 1725, 1734, 1742).) Though Plaintiff 24 characterizes these as examples where he is neither affirming nor negating feeling dizzy, 25 the record shows Plaintiff expressly denied dizziness and vertigo at those respective 26 visits. (See AR 1060, 1723, 1725, 1733, 1742 (all stating that the patient “denies: 27 dizziness, vertigo”).) While Plaintiff may have meant that such general denials were 2 that he has vertigo episodes daily and for an hour long, one would reasonably expect 3 that he would report such symptoms more consistently. 4 The Court must defer to the ALJ’s conclusions when the evidence is susceptible to 5 more than one rational interpretation. *Tommasetti*, 533 F.3d at 1038. Here, the ALJ’s 6 findings were rational interpretations of Plaintiff’s medical record and his conflicting 7 testimony. Because the ALJ’s

decision to partially discredit Plaintiff's testimony is supported by substantial evidence, and her analysis was free of legal error, the Court affirms her findings. *Id.* Whether the ALJ failed to consider Plaintiff's anxiety disorder as severe and thus created an incomplete residual functional capacity assessment. Summary of the parties' arguments Plaintiff's second issue has two discrete parts: (1) the ALJ incorrectly concluded Plaintiff's anxiety was non-severe and (2) the RFC is not supported by substantial evidence because the ALJ failed to include Plaintiff's anxiety. (Mot. at 16-19.) Plaintiff contends that the ALJ's severity analysis was flawed because she failed to evaluate evidence regarding physical manifestations of his anxiety disorder. (Id. at 16-17.) Plaintiff argues that the ALJ's failure to include his severe impairment resulted in an incomplete RFC. (Id. at 19.) In response, the Commissioner says the ALJ found that normal mental status examination findings, Plaintiff's activities, and the medical opinion evidence indicated that he did not have a severe mental impairment. (Opp'n at 13.) The Commissioner maintains the ALJ appropriately considered Plaintiff's anxiety disorder but found that it did not cause more than minimal limitation to his ability to work. (Id. at 16-17.) This argument is further undermined because, on two occasions where Plaintiff affirmatively 2 The ALJ determines the severity of a claimant's physical or mental impairments at step two of the disability evaluation. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 4 1999); see also 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). The ALJ must follow the "special psychiatric review technique" when assessing the severity of mental impairments. See *id.* § 404.1520a(a); *Keyser v. Comm'r, Soc. Sec. Admin.*, 648 F.3d 721, 7 725 (9th Cir. 2011). Under the special technique, the ALJ first determines whether the claimant has a medically determinable mental impairment and then rates the degree of functional limitation resulting from that impairment in the following functional areas: (1) understand, remember, or apply information; (2) interact with others; (3) concentrate, persist, or maintain pace; and (4) adapt or manage oneself. See *id.* (citing 20 C.F.R. § 404.1520a(c)(3)). The ALJ will rate each functional area on a five-point scale: none, mild, moderate, marked, or extreme. See 20 C.F.R. § 404.1520a(c)(4). In making this assessment, the ALJ's "'written decision must incorporate the pertinent findings and conclusions based on the technique' and 'must include a specific finding as to the degree of limitation in each of the functional areas.'" *Keyser*, 648 F.3d at 725 (citing 20 C.F.R. § 404.1520a(e)(4)). The RFC is a claimant's ability to do work-related activities on a sustained basis (i.e., eight hours a day, five days per week). *Titles II & XVI: Assessing Residual Functional Capacity in Initial Claims*, SSR 96-8P, 1996 WL 374184, at *1 (S.S.A. July 2, 1996). Thus, it represents the maximum amount of work a claimant can perform despite their limitations, based on all relevant evidence in the record. See 20 C.F.R. § 416.945(a)(1); 24 20 C.F.R. § 404.1545(a)(1). In making this finding, the ALJ must consider all the claimant's medically determinable impairments, including those that are non-severe.

See 20 C.F.R. § 404.1545(a)(2); see also *Buck*, 869 F.3d at 1049 (quoting SSR 96-8P, 1996 WL 374184, at *5). "The RFC therefore should be exactly the same regardless of claimant's

limitations is defective.” *Valentine v. Comm’r Soc. Sec. Admin.*, 574 F.3d 685, 3 690 (9th Cir. 2009); see also *Samples v. Comm’r Soc. Sec. Admin.*, 466 Fed. App’x 584, 4 586 (9th Cir. 2012).

5 3. The ALJ’s findings 6 The ALJ first acknowledged that Plaintiff had medically determinable mental 7 impairments of depressive disorder and anxiety disorder but found that they “do not 8 cause more than minimal limitation in the claimant’s ability to perform basic mental 9 work activities and are therefore nonsevere[sic].” (AR 24). The ALJ concluded that the 10 record did not show Plaintiff had more than a “mild limitation” in any of the four 11 functional areas. (Id.) She explains that Plaintiff’s July 2021 consultative examination 12 showed that he was able to recall two of three items after a five-minute delay, but his 13 memory was otherwise normal. (Id.) Plaintiff “exhibited normal behavior and was 14 cooperative with examiners and treatment providers” and “generally presented with a 15 normal mood albeit with a mildly anxious affect at times” (Id.) He also “retains the 16 capacity to prepare meals, drive a car, watch television, and complete housework” 17 (Id.) The ALJ further cited the opinions of Jerry Livesay, Ph.D., who reported that 18 Plaintiff had a mildly impaired ability to follow detailed instructions and perform daily 19 activities, and Susan Posey, Psy.D., who found that Plaintiff had no severe mental 20 impairments or associated limitations. (AR 25). 21 The ALJ concluded Plaintiff had the RFC to: 22 [P]erform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except can stand and walk for 6 hours and can sit for 6 hours; the claimant 23 can occasionally climb ramps and stairs, balance, stoop, kneel, crouch, and 24 crawl, but cannot climb ladders, ropes, or scaffolds or have concentrated exposure to hazards such as unprotected heights and dangerous moving 25 machinery. 26 27 (AR 26.) In reaching this finding, the ALJ explained that she considered all of 2 opinions and prior administrative medical findings. (Id.) 3 As part of his RFC analysis, the ALJ discussed the medical evidence, noting 4 Plaintiff’s history of cardiac impairments, lumbar degenerative disc disease, obesity, and 5 alleged difficulty with dizziness and vertigo. (AR 26–27.)

Notably, the ALJ did not 6 discuss any of Plaintiff’s medically determinable mental impairments in her RFC 7 assessment but instead stated in her step two discussion that the “[RFC] assessment 8 reflects the degree of limitation the undersigned has found in the ‘paragraph B’ mental 9 function analysis.” (AR 25.) 10 4. Analysis 11 a. The ALJ’s application of the special technique was flawed 12 Plaintiff argues that the ALJ first erred by not considering Plaintiff’s anxiety 13 disorder to be severe. (Mot. at 16.) Although Plaintiff applies the de minimis screening 14 test [Mot. at 17], the correct test for severity in psychiatric conditions is the special 15 technique. 20 C.F.R. § 404.1520a(a); *Keyser*, 648 F.3d at 725. The ALJ must rate the 16 degree of limitations, using the five-point scale, regarding Plaintiff’s ability to (1) 17 understand, remember, or apply information; (2) interact with others; (3) concentrate, 18 persist, or maintain pace; and (4) adapt or manage oneself. 20 C.F.R. § 404.1520a(c)(3)- 19 4). The ALJ must include these findings and specific degrees of limitations in her written 20 decision. *Keyser*, 648 F.3d at 725 (citing 20 C.F.R. § 404.1520a(e)(4)). 21 The ALJ’s discussion of Plaintiff’s anxiety was vague. Although the Commissioner 22 contends the ALJ properly considered Plaintiff’s anxiety disorder [Opp’n at 15],

the ALJ 23 did not give specific ratings for each functional area but instead concluded that Plaintiff 24 “has no more than mild limitations in any area.” (AR 24.) This does not pass muster as a 25 specific finding because any given functional area could have either a “none” or “mild” 26 rating. 27 The Plaintiff further argues that the ALJ should have evaluated “evidence 2 argument, which states the ALJ must evaluate “effects of the impairment on the 3 person’s ability to perform basic work activities.” While the ALJ certainly could consider 4 “physical manifestations” of Plaintiff’s mental impairments, Plaintiff does not provide 5 legal authority that mandates as such. The ALJ was required to follow the special 6 psychiatric review technique, and though her findings did not meet the specific ratings 7 requirement, she otherwise appropriately documented her application of the technique. 8 Keyser, 648 F.3d at 725 (citing 20 C.F.R. § 404.1520a(e)(4)). The ALJ discussed Plaintiff’s 9 medical examinations, the persuasiveness of his medical professionals’ opinions, and his 10 daily activities. (AR 24-25.) Accordingly, the ALJ satisfactorily incorporated Plaintiff’s 11 “significant history [with anxiety disorder], including examination and laboratory 12 findings” 20 C.F.R. § 404.1520a. 13 Substantial evidence supports the ALJ’s conclusion that Plaintiff’s anxiety disorder 14 was non-severe, since none of the functional areas would have amounted to anything 15 more than a mild limitation. The Court is not convinced that the additional record 16 evidence Plaintiff cited would have resulted in a higher rating for any of the functional 17 areas, especially since the ALJ already determined that Plaintiff’s memory loss was 18 “otherwise normal” [AR 24], and she already determined Plaintiff’s cardiac impairments 19 were severe [id.], so considering those physical manifestations in the mental 20 impairments would have been redundant.⁵ Nonetheless, because the ALJ erred in 21 making nonspecific ratings on the degree of limitations in each functional area, the 22 question now is whether the ALJ’s failure to fully comply with the special technique was 23 harmless error. 24 25 26 5 Plaintiff also points out that the reviewing State Agency physician initially determined that his anxiety was a “severe impairment.” (Mot. at 18.) The Commissioner believes this was a “scrivener’s error” 27 because Plaintiff’s spinal impairment was listed as non-severe on the same page. (Opp’n at 14.) Based 2 the claimant has a ‘colorable claim of mental impairment.’” Keyser, 648 F.3d at 726 3 (quoting Gutierrez v. Apfel, 199 F.3d 1048, 1051 (9th Cir.2000), superseded by 4 amendments to 20 C.F.R. § 404.1520a). However, that standard does not make sense in 5 this context. Unlike in Keyser, the ALJ here does not deny that Plaintiff has a mental 6 impairment. Instead, the Commissioner advocates that Buck v. Berryhill should control 7 here, which states that claimants “could not possibly have been prejudiced” at step two 8 when step two was decided in their favor. (Opp’n at 16 (citing Buck, 869 F.3d at 1049).) 9 The court in Craig H. v. Kijakazi aptly synthesizes Buck’s ruling. Because the RFC 10 “‘should be exactly the same regardless of whether certain impairments are considered 11 ‘severe’ or not’ . . . [,] a claimant generally cannot be prejudiced by the ALJ’s failure to 12 consider a particular impairment as severe at step two, as long as the ALJ finds that the 13 claimant has at least one severe impairment, and still addresses the non-severe 14 impairment when considering the claimant’s RFC.” Craig H. v. Kijakazi, No.

22CV800- 15 AJB(LR), 2023 WL 4679342, at *11 (S.D. Cal. July 21, 2023) (quoting Buck, 869 F.3d at 16 1049). 17 While the ALJ ultimately found step two in Plaintiff’s favor, which allowed the ALJ 18 to proceed to sequential steps, the ALJ did not adequately address Plaintiff’s non-severe 19 impairment. 20 b. The ALJ’s failure to include Plaintiff’s mental impairment in the RFC 21 assessment was reversible error 22 The ALJ did not include any explanation for why Plaintiff’s non-severe anxiety was 23 excluded in the RFC. (See AR 26-29.) Ninth Circuit courts have held that the ALJ’s 24 decision must include some discussion or analysis of how an individual’s non-severe 25 mental impairments were factored into the ultimate RFC determination. *Hutton v. Astrue*, 491 F. App’x 850, 850 (9th Cir. 2012) (“Regardless of [the mental limitation’s] 27 severity, however, the ALJ was still required to consider [plaintiff’s mental limitation] 2 step two analysis into the RFC analysis, rather than performing a “more detailed” 3 review). 4 The failure to assess a claimant’s mental impairments has resulted in reversal in 5 many cases in this circuit. See *Janice H. v. O’Malley*, No. 22CV1833-W (MSB), 2024 WL 6 709395, at *6 (S.D. Cal. Feb. 21, 2024); *Craig H.*, 2023 WL 4679342, at *12 (reversing 7 where “the ALJ’s discussion of Plaintiff’s RFC contain[ed] no analysis of Plaintiff’s mild 8 mental limitations”); *Kitty S. v. Kijakazi*, No. EDCV 21-00390-JEM, 2022 WL 2117160, at 9 *5-7 (C.D. Cal. June 13, 2022) (reversing where the ALJ made “mild step two paragraph B 10 findings” but did not discuss plaintiff’s mental impairments when assessing RFC). 11 Without such analysis, the Court is precluded from evaluating whether the ALJ properly 12 considered Plaintiff’s non-severe impairments when formulating the RFC. See *Craig H.*, 13 2023 WL 4679342 at *13 (finding that the court was precluded from “properly 14 evaluating . . . whether the ALJ properly discussed the limitations that he found to be 15 non-severe in formulating Plaintiff’s RFC”); see also, *Nasery v. Colvin*, No. 16CV1534- 16 CAB-KSC, 2017 WL 3393834, at *21 (S.D. Cal. Aug. 4, 2017) (finding that “it [was] not 17 possible to determine whether the ALJ actually considered any such ‘mild limitation’ in 18 plaintiff’s mental functioning as part of her residual functional capacity assessment.”). 19 The Court’s ability to properly evaluate the ALJ’s decision is further clouded by the ALJ’s 20 failure to give specific degrees of limitation for each functional area. For example, had 21 the ALJ rated all but one functional area as having no limitations, then perhaps the 22 Court would have been able to determine why the ALJ did not include Plaintiff’s mental 23 impairment in the RFC. 24 Like in *Craig H.*, the ALJ here used boilerplate language at the conclusion of step 25 two: “the following residual functional capacity assessment reflects the degree of 26 limitation the undersigned has found in the ‘paragraph B’ mental function analysis.” (AR 27 25.) However, merely stating Plaintiff’s mental limitations were incorporated into the 1 || here discusses the persuasiveness of medical opinions in support of her paragraph B 2 criteria analysis, the ALJ failed to explain “why none of Plaintiff’s mental limitations 3 || were ultimately discussed in the RFC assessment.” *Id.* While the ALJ did not need to A reflect mild mental impairments in the ultimate RFC, she should have “specifie[d] 5 reasons supported by substantial evidence for not including the non-severe impairment 6 ||in the RFC assessment.” See *Medlock v. Colvin*, No. CV 15-9609-KK, 2016 WL

6137399, 7 at *5 (C.D. Cal. Oct. 20, 2016). The ALJ's failure to include specific ratings at step two 8 || and discuss Plaintiff's mild mental impairments in the RFC assessment impedes this 9 || Court's ability to properly determine whether the RFC was supported by substantial 10 || evidence. These errors were thus not harmless.

11 C. CONCLUSION

12 For the foregoing reasons, the Court ORDERS that judgment be entered 13 || REVERSING the decision of the Commissioner and REMANDING this matter for further 14 || administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g). 15 IT IS SO ORDERED. 16 ||Dated: February 27, 2025 = _ 2 FF 18 Honorable Michael S. Berg United States Magistrate Judge 19 20 21 22 23 24 25 26 27 28