UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Rivera Velez v. O'Malley, Commissioner of Social Security

Rivera Velez · No. 24-cv-04005-RMI · Decided September 3, 2025

OPINION

Rivera Velez v. O'Malley, Commissioner of Social Security
PER CURIAM.
1 2 3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6 EUREKA DIVISION
7 8 DOMINIC R. V., Case No. 24-cv-04005-RMI 9 Plaintiff,
ORDER RESOLVING SOCIAL
10 v. SECURITY APPEAL
11 MARTIN O'MALLEY, et al., Re: Dkt. Nos. 16, 17 12 Defendants. 13 14 Plaintiff seeks judicial review of an administrative law judge ("ALJ") decision finding that 15 Plaintiff was not disabled under Title II and Title XVI of the Social Security Act. See Admin. Rec. 16 ("AR") at 1.1 The Appeals Council of the Social Security Administration declined to review the 17 ALJ's decision. Id. As such, the ALJ's decision is a "final decision" of the Commissioner of 18 Social Security, appropriately reviewable by this court. See 42 U.S.C. § 405(g), 1383(c)(3). Both 19 parties have consented to the jurisdiction of a magistrate judge (dkts. 5, 6), and both parties have 20 filed briefs (dkts. 16, 17, 18). For the reasons stated below, the decision of the ALJ is REVERSED 21 and the case is REMANDED FOR FURTHER PROCEEDINGS consistent with this order.
22 BACKGROUND
23 Plaintiff was born on March 29, 1985. AR at 115. Plaintiff reports having a "difficult" 24 childhood. AR at 556. In middle school, Plaintiff was placed in a residential school for children 25 with severe emotional disturbances after acting "aggressively" towards peers and adults at school. 26 27 1 The Administrative Record ("AR"), which is independently paginated, has been filed in ten 1 AR at 634, 637, 936, 942, 945. Plaintiff has suffered from a learning disorder since he was a child, 2 and was diagnosed with attention deficit hyperactivity disorder ("ADHD"), Specific Reading 3 Disorder, and Autism Spectrum Disorder. AR at 951, 601, 667, 2190. Plaintiff reports that he has 4 taken medication for ADHD since he was eight years old. AR 2184. Plaintiff graduated from high 5 school and was in special education throughout school. AR at 94. 6 Since childhood, Plaintiff reports being "confused and sad." Id. Since approximately 2000, 7 the year Plaintiff's father passed away, Plaintiff consistently reports symptoms such as depressed 8 mood

(id. at 956), hopelessness (id. at 964, 1285, 1309, 1341, 2149, 2188), anxiety (id. at 956), 9 paranoia (id. at 131, 955), withdrawal (id. at 555, 593, 482, 902, 909, 1285, 1306), memory 10 problems, which worsened after contracting COVID in 2022 (id. at 129), trouble concentrating on 11 things (id. at 1350), and avoidance (id. at 124, 1306). Regarding his avoidance, for example, he 12 testified in 2023, that he no longer went on short walks in the park, as he used to, because he was 13 "scared of getting COVID again." AR 122. Plaintiff's efforts to try to obtain help for depression, 14 anxiety, and general life stress is reflected in the record. AR 866, 902, 909, 1285, 1296. 15 In addition to his mental health conditions, Plaintiff suffers from several physical ailments. 16 Plaintiff is morbidly obese and has struggled with his weight since approximately 2012 and suffers 17 from hypertriglyceridemia with chest pains. AR 475, 905, 2179. He reports that he has physical 18 issues related to the obesity, including back pain (id. at 1259, 1270, 1315, 2179), pain in his feet 19 (id. at 600), and asthma (id. at 2061). He also reports that it is hard for him to stand, bend, or sit 20 for long periods of time. Id. at 463. 21 Plaintiff has also been diagnosed with a series of conditions in his right eye, including 22 exotropia in his right eye (meaning it is turned outward), presbyopia, myopia, and astigmatism 23 with suspected glaucoma bilaterally, but is "afraid" of getting surgery. AR at 124. He refuses to 24 get glasses because he does not like "people staring at me for too long" and worries that people 25 would stare at a thick lens. Id. Plaintiff takes medication for high blood pressure (id. at 2185) and 26 has a history of taking psychiatric medication (id.). 27 The record also indicates that Plaintiff suffers from some form of severe sleep apnea. 1 and involuntarily each day (id. at 905, 221, 593, 596, 608, 1285). He testified that he falls asleep 2 "most days" and will sleep for three hours if no one wakes him up. AR at 128. Plaintiff starting 3 using a CPAP machine in 2015 (id. at 1617), but he reports that even when he was using it, he did 4 not use it throughout the whole night (id. at 904). Additionally, since his CPAP machine was 5 recalled in approximately 2022, Plaintiff has not used the machine out of fear that the recalled 6 machine could harm him. AR at 126, 608, 1617.

7 PROCEDURAL HISTORY

8 Plaintiff was initially determined to be disabled on March 29, 2003, based on Oppositional 9 Defiant Disorder and Speech/Language Impairment. AR at 141, 555. In 2005, the Agency 10 contracted with Dr. Rosemarie Ratto to perform a Consultative Examination in connection with 11 Plaintiff's "Age 18 Redetermination." AR at 637-41. On March 24, 2005, the date of the 12 comparison point decision ("CPD"), Plaintiff was again determined to be disabled. AR at 20, 141, 13 591. At the time of the CPD, Plaintiff had the following medically determinable impairments: 14 ADHD, severe emotional disturbance, and a learning disorder. Id. These impairments were found 15 to meet section 12.02, which is the listing for neurocognitive disorders, of 20 C.F.R. Part 404, 16 Subpart P, Appendix 1 (20 C.F.R. Part 404.1520(d) and 416.920(d)). Id. On June 16, 2023, during 17 a continuing disability review, Plaintiff was found no longer disabled as of March 23, 2015, due to 18 a finding that Plaintiff had experienced medical improvement from that date forward and thus was 19 no longer disabled. AR at 22.

20 August 2018 Hearing

21 On August 28, 2018, the ALJ held a hearing with Plaintiff. AR at 89. At the time of the 22 hearing, there was an outstanding psychological evaluation by Dr. Rosemarie Ratto, Ph.D. ("Dr. 23 Ratto"). Plaintiff testified that the last time he had worked was in approximately 2013, as a 24 delivery driver for Pizza Hut. AR at 92. He reported that the job had lasted about five to six 25 months, and that he "was just fired" at the end. AR at 93. He reported that he got "bad headaches" 26 and that his feet were "hurting really bad" during the job. Id. As a result of these symptoms, he 27 testified, he did not try looking for another job. Id. 1 Regarding his mental state, Plaintiff explained that he had tried to get help at Kaiser Permanente, 2 but that it is "like they just want me to figure it out, figure how to help myself by myself." AR at 3 94. Plaintiff also explained that he feels "depressed, hopeless" and "tries to ignore it." AR at 95. 4 Plaintiff explained that his memory is "somewhat good" but that he has difficulty concentrating 5 and gets "distracted a lot". AR at 97. In fact, when he explained his feelings of depression and 6 hopelessness at the hearing, he lost his train of thought. Id. Plaintiff noted that, because of his 7 struggles with focusing on a single task, he would require a five-minute break every thirty 8 minutes. AR at 98, 110. 9 Regarding his physical ailments, Plaintiff testified that, because of his issues with his right 10 eye, he cannot read for more than four minutes without getting a headache. AR at 100. He also 11 explained that his obesity stems from his mental health issues, testifying that "it's hard to lose 12 weight when . . . I have a lot of stress in my life" related to "stuff from the past." AR 94. 13 When asked about his sleep quality, Plaintiff testified that he slept "very good" with the 14 sleep apnea mask, but that he "sometimes" forgot to put it on. AR at 100. Plaintiff further 15 explained that, even though he used the mask approximately five times per week, he woke up 16 "[p]robably three times" per night and is often "so tired" that he does not put his mask back on 17 after he wakes up. AR 100-101. When asked by his attorney how many days per week he felt 18 tired, Plaintiff responded, "Oh, the whole week." AR 101. Plaintiff explained that he was able to 19 assist his mother with groceries at the grocery store, and that he is able to go to the movies with 20 his friend, and that people are generally "too judgmental" of him. AR 102. 21 At the hearing, a vocational expert ("VE") testified, and answered hypotheticals posed by 22 the ALJ, and identified a handful unskilled jobs that could be available to Plaintiff under the ALJ's 23 hypothetical (e.g., hand packager and auditing clerk). AR at 108, 109. Plaintiff's attorney, at the 24 hearing, clarified and confirmed with the VE that a person who was off task more than 15 percent 25 of the time would "fall under off task" as more than six minutes per hour, and as a result, would 26 not be employable in the jobs listed by the expert during the hearing. AR at 110-11. 27 Evaluations by Dr. Ratto 1 Ratto on August 20, 2018. AR at 600, 953. Pursuant to Dr. Ratto's report, the sole purpose of the 2 evaluation was to aid in the assessment of occupational disability and to provide diagnostic 3 impressions to the Social Security Administration. AR at 956. Dr. Ratto reviewed approximately 4 three years of Plaintiff's medical records from Kaiser Permanente, among other records, and 5 conducted the following objective assessments of

Plaintiff: Pre-Test Interview/History/Mental 6 Status Exam; Bender-Gestalt II; Trails A& B; Wechsler Adult Intelligence Scale-IV (WAIS-IV); 7 Wechsler Memory Scale-IV (WMS-IV); Beck Depression Inventory-II (BDl-ll); and, Beck 8 Anxiety Inventory (BAI). AR at 953. 9 During the evaluation, Dr. Ratto noted that Plaintiff had significant problems concentrating 10 during testing and staying awake. AR at 955. Dr. Ratto further noted in her evaluation that 11 Plaintiff indicated "problems with sleeping and using the sleep machine nightly." Id. Dr. Ratto, 12 based on her two meetings with Plaintiff, diagnosed Plaintiff with Major Depressive Disorder, 13 Binge Eating Disorder, ADHD with predominantly inattentive presentation, and History of a 14 Learning Disorder. AR at 956. Dr. Ratto found that Plaintiff exhibited a "marked" level of 15 impairment in the following "work-related abilities": carry out short and simple instructions, 16 understand and remember detailed instructions, carry out detailed instructions, maintain adequate 17 pace and persistence to perform complex/detailed tasks, adapt to changes in job routine, withstand 18 the stress of a routine work day, interact appropriately with co-workers, supervisors, and public on 19 a regular basis (id. at 957), and "moderate to marked" impairment in the following work-related 20 abilities: ability to understand and remember short and simple instructions, and ability to maintain 21 adequate pace and persistence to perform simple tasks. Id. 22 Telehealth Evaluations by Dr. San Pedro 23 At the request of Plaintiff's counsel, Plaintiff underwent a telehealth psychological 24 evaluation performed by Lara San Pedro, Psy. D ("Dr. Pedro") on February 10 and 17, 2023. AR 25 at 2183. Dr. Pedro conducted a clinical interview of Plaintiff as well as a clinical observation, and 26 reviewed reports by Dr. Ratto, as well as reports related to Plaintiff's development, academic, 27 psychiatric, and medical history. AR at 2183-2186. Dr. Pedro observed that Plaintiff "often closed 1 Pedro's report makes the following conclusions with respect to cognitive, emotional, and autism- 2 related assessments. 3 • Cognitive Test Results. Pursuant to Dr. Pedro's report, Plaintiff scored a 58 in verbal 4 comprehension, described as "Significantly Impaired", and a 69 in working memory, 5 described as "Impaired". Id. 6 • Emotional Functioning Results. Dr. Pedro reports that Plaintiff met the criteria for 7 depressive disorder in the severe range. AR 2188. He reported symptoms of feeling 8 down, depressed, or hopeless, trouble falling asleep and sleeping too much, poor 9 appetite, trouble concentrating, and being restless. Id. 10 • Autism-Related Assessment Results. Pursuant to the report, overall, Plaintiff's scores 11 indicated a very likely probability of DSM-5 autism spectrum disorder at severity level 12 2 or 3, requiring substantial support. AR at 2190. 13 Based on these results, Dr. Pedro concluded that Plaintiff has "severe functional 14 limitations" and that his symptoms make it "difficult to remember instructions, procedures, rules 15 and task lists, and complete tasks in an accurate and timely manner." AR at 2197. 16 Evaluation by Katherine Jacobson, LCSW 17 On approximately March 22, 2022, Katherine Jacobson, Licensed Clinical Social Worker 18 ("LCSW"), assessed Plaintiff. She opined that Plaintiff exhibited "severe" challenges in both 19 vocational and health areas, noting that Plaintiff's mental health symptoms prevented him from 20 working, and that Plaintiff's depression has made it difficult for him to connect with mental and 21 physical health

professionals. AR at 2178-79.

22 April 2023 Hearing

23 Following remand from the Appeals Council on April 2, 2020, Plaintiff testified before the 24 ALJ again on April 20, 2023. AR at 115-140. At the hearing, Plaintiff appeared in person and was 25 represented by his attorney, Kate Walsham. AR at 115. Plaintiff confirmed at the hearing that he 26 used a CPAP machine to sleep "most of the time" but also that he had not been using the machine 27 since the recall. AR at 125. He testified that he was supposed to be getting a new machine but had 1 choke on the little filter if it breaks off, and I just don't want to be in that situation." Id. He 2 explained that he sleeps on an adjustable bed, and that it is "okay" but that he wakes up "sore" 3 both in the middle of the night and in the morning. AR at 127. He explained that he typically goes 4 to sleep about four hours after he wakes up. Id. Although a VE appeared at the hearing, he simply 5 adopted the testimony of the 2018 VE. AR 139. 6 Summary of the ALJ's Most Recent Decision 7 The ALJ denied Plaintiff's claim in a hearing decision dated June 13, 2023. The ALJ in 8 this case engaged in the required five step sequential evaluation process.2 At Step One, the ALJ 9 determined that Plaintiff had not performed substantial gainful activity through the date of his 10 decision, and thus did not address in detail Plaintiff's recent work activity. AR at 20. At Step Two, 11 the ALJ determined that Plaintiff had severe physical and mental impairments, including myopia, 12 glaucoma, obesity, major depressive disorder, binge-eating disorder, ADHD, history of learning 13 disorder, and autism. AR at 20. The ALJ acknowledged Plaintiff's allegation of sleep apnea but 14 found that this condition did not constitute a severe medically determinable impairment during the 15 adjudicatory period. AR at 23. The ALJ observed that the condition appeared to be "overall 16 managed with use of a CPAP machine." AR 23. 17 At Step Three, the ALJ found that, since March 1, 2015, none of Plaintiff's conditions, 18 considered individually and in combination, met or equaled any listed impairment. AR at 21. In 19 formulating Plaintiff's residual functioning capacity ("RFC"), the ALJ determined that Plaintiff 20 could perform less than the full range of light work, as defined in the applicable regulations. AR 21 23. In reaching this determination, the ALJ found that Plaintiff's determinable impairments "could 22 reasonably be expected to cause the alleged symptoms" but that his "statements concerning the 23 intensity, persistence and limiting effects of these symptoms are not entirely consistent with the 24 objective medical evidence and other evidence for the reasons explained in this decision." AR at 25 24. The ALJ found these statements to "affect the claimant's ability to work only to the extent 26 27 2 The ALJ refers the process as an eight-step evaluation for the Title II claim and a seven-step 1 they can reasonably be accepted as consistent with the objective medical and other evidence." AR 2 25. 3 The ALJ also noted Dr. Pedro's observations of Plaintiff as "extremely fatigued" during 4 her evaluation, with mildly slurred and slow responses. AR at 28. The ALJ, however, gave "little 5 weight" to the opinion of Dr. Pedro, finding her report of "marked and extreme limitations" to be 6 "inconsistent with the record as a whole." AR at 29. The ALJ reported that Plaintiff has been able 7 to visit friends, drive to the hearing, make

appointments, groom himself, and travel to Modesto 8 and Nevada, which "are contrary" to what would be expected of someone who has the type of 9 marked and extreme limitations found by Dr. San Pedro. Id. The ALJ further provided that Dr. 10 Ratto's evaluation "may indicate exacerbation of the claimant's symptoms, lack of cooperation 11 due to extreme sleepiness, possibly related to sleep apnea with unknown compliance with use of 12 the CPAP, or other causes" but that "Dr. Ratto's opinion that the claimant had marked limitations 13 is inconsistent with the record." Id. 14 Ultimately, based on the vocational expert's testimony, the ALJ concluded that Plaintiff 15 could work as an office clerk, hand packager, or auditing clerk. AR 31. Accordingly, the ALJ 16 determined that Plaintiff was not disabled. Id. 17 Plaintiff appeals.

18 STANDARDS

19 The Social Security Act limits judicial review of the Commissioner's decisions to final 20 decisions made after a hearing. 42 U.S.C. § 405(g). The Commissioner's findings "as to any fact, 21 if supported by substantial evidence, shall be conclusive." Id. A district court has limited scope of 22 review and can only set aside a denial of benefits if it is not supported by substantial evidence or if 23 it is based on legal error. Flaten v. Sec'y of Health & Human Servs., 44 F.3d 1453, 1457 (9th Cir. 24 1995). The phrase "substantial evidence" appears throughout administrative law and directs courts 25 in their review of factual findings at the agency level. See Biestek v. Berryhill, 139 S. Ct. 1148, 26 1154 (2019). Substantial evidence is defined as "such relevant evidence as a reasonable mind 27 might accept as adequate to support a conclusion." Id. at 1154 (quoting Consol. Edison Co. v. 1 1997). "In determining whether the Commissioner's findings are supported by substantial 2 evidence," a district court must review the administrative record as a whole, considering "both the 3 evidence that supports and the evidence that detracts from the Commissioner's conclusion." 4 Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). The Commissioner's conclusion is upheld 5 where evidence is susceptible to more than one rational interpretation. Burch v. Barnhart, 400 6 F.3d 676, 679 (9th Cir. 2005). However, courts "review only the reasons provided by the ALJ in 7 the disability determination and may not affirm the ALJ on a ground upon which he did not rely." 8 Garrison v. Colvin, 759 F.3d 995, 1010 (9th Cir. 2014).

9 ANALYSIS

10 The court finds that the ALJ erred at Step Two and Step Three of the analysis. 11 Step Two Errors 12 Plaintiff raises seven claims in this court – including the claim that the ALJ erred by failing 13 to find Plaintiff's obstructive sleep apnea as a severe impairment. See generally Pl. Br. (dkt. 16) at 14 5, 24-25. The court's review of the ALJ's decision bears out the fact that the ALJ did not properly 15 consider the evidence of Plaintiff's sleep apnea at Step Two. See AR at 23. As discussed above, 16 multiple doctor notes report that Plaintiff is generally healthy but suffers from obesity and 17 obstructive sleep apnea. See, e.g., AR at 968, 591. Furthermore, the court finds that the ALJ 18 appears to have not considered that evidence at Step Three by properly evaluating Plaintiff's sleep 19 apnea symptoms and limitations in light of the requirements set forth under

Listing 12.02 20 (Neurocognitive disorders). See id. at 21-22. Neither does it appear that the ALJ considered this 21 evidence when formulating the RFC. See id. at 23-30. What is puzzling is the fact that the ALJ 22 twice uses evidence of Plaintiff's extreme fatigue due to sleep apnea to justify giving less weight 23 to the opinions of Dr. Prado and Dr. Ratto (see id. at 21, 29), but that he did so without explicitly 24 considering its effects on Plaintiff's work-related abilities. See, e.g., AR 29 ("The evaluation by 25 Dr. Ratto . . . may indicate exacerbation of the claimant's symptoms, lack of cooperation due to 26 extreme sleepiness possibly related to sleep apnea with unknown compliance with use of the 27 CPAP, or other causes, but Dr. Ratto's opinion that the claimant had marked limitations is 1 Defendant submits that the ALJ's failure in this regard was harmless error. See Def.'s Opp. 2 (dkt. 17) at 11-13. The gist of Defendant's argument is that (1) Plaintiff has not shown that he was 3 prejudiced as a result of the ALJ's omission; (2) that the ALJ considered Plaintiff's other severe 4 impairments; and (3) Plaintiff's treatment record since disability cessation does not establish 5 functional limitations directly attributable to sleep apnea – as Plaintiff's condition is managed with 6 the CPAP machine; and (4) Plaintiff does not articulate what additional limitations are warranted 7 due to obstructive sleep apnea beyond the already restrictive RFC. See id. at 11-13. 8 Step Two's evaluation is a de minimus test intended to weed out patently groundless 9 claims and the most minor of impairments. See Bowen v. Yuckert, 482 U.S. 137, 153-54 (1987); 10 Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2005) (stating that the step two inquiry is a de 11 minimus screening device to dispose of groundless claims) (quoting Smolen v. Chater, 80 F.3d 12 1273, 1290 (9th Cir. 1996)); Webb v. Barnhart, 433 F.3d 683, 687 (9th Cir. 2005) (step two is a 13 "de minimis threshold"). An impairment is non-severe at Step Two only if the evidence establishes 14 a slight abnormality that has only a minimal effect on an individual's ability to work. Smolen, 80 15 F.3d at 1290. 16 Given the record of evidence supporting Plaintiff's obstructive sleep apnea, and given the 17 fact that the ALJ was clearly aware of it, the court concludes that the ALJ erred in finding that 18 condition to be subjected to weeding out at Step Two as patently groundless, or as the most minor 19 of impairments. Instead, the court finds that Plaintiff's obstructive sleep apnea warrants serious 20 consideration in the development of a full and fair disability record, both at Step Three and in the 21 ultimate formulation of Plaintiff's RFC. In fact, it appears to the court that the combination of the 22 physical and mental conditions described in Plaintiff's brief and Reply (see, e.g., Pl. Reply (dkt. 23 18) at 9) may indeed be disabling – however – due to the ALJ's failure to properly develop the 24 record and properly engage the five-step sequential evaluation process, further proceedings are 25 necessary. 26 Moreover, to the extent the ALJ dismissed Plaintiff's sleep apnea as non-severe for lack of 27 evidence indicating "ongoing, severely limiting pathology," the ALJ failed to fully and fairly 1 ALJ's duty "to conduct an appropriate inquiry," by, for example, ordering a consultative 2 examination, "subpoenaing [Plaintiff']s physician, or submitting further questions to [Plaintiff's 3 physicians]," or questioning Plaintiff himself. See Smolen, 80 F.3d at 1288. 4 Harmlessness 5 The failure to find a disability severe at Step Two is considered harmless if the

non-severe 6 disability is nonetheless taken into account at Steps Four and Five. Lewis v. Astrue, 498 F.3d 909, 7 911 (9th Cir. 2007). Here, however, the court cannot conclude that the omissions at Step Two 8 were harmless. The ALJ appears to have factored in Plaintiff's other severe impairments at Steps 9 Four and Five, given that the ALJ found Plaintiff to have the RFC to perform less than the full 10 range of light work, but there is no indication that the ALJ factored in Plaintiff's sleep apnea in 11 this step of the analysis.3 Because the Step Two findings of non-severity as to Plaintiff's sleep 12 apnea appear to have affected other parts of the ALJ's analysis, remand is required. 13 Step Three Errors 14 While Step Two errors are sufficient to warrant remand on their own, see Hiler v. Astrue, 15 687 F.3d 1208, 1212 (9th Cir. 2012), the court also discerns error in the ALJ's Step Three analysis 16 and will address it now for the sake of efficiency. The ALJ assessed Plaintiff with a moderate 17 limitation in interacting with others. AR at 21. The ALJ suggests that Plaintiff has been able to 18 socialize with friends and goes to a movie. AR at 21. In fact, the record is replete with evidence of 19 Plaintiff's avoidance of others, often at the expense of his mental and physical health. While the 20 record shows that Plaintiff can visit one of his friends, and has gone to the movies, the record also 21 shows that he is now afraid of going outside even for a five-minute walk because of COVID. He 22 also does not get glasses because he fears people looking at him, and fears that glasses will 23 exacerbate that fear. Katherine Jacobson, LCSW, furthermore, concluded that Plaintiff's mental 24 health symptoms prevented him connecting with mental and physical healthcare professionals, 25 suggesting that Plaintiff struggles to connect even with the very people trained to care for him. See 26 3 Furthermore, as Plaintiff points out, had the ALJ properly considered Dr. Ratto's opinion, 27 Plaintiff may have met, as he had before, the B Criteria of Listing 12.02 (Neurocognitive 1 generally AR at 2178-79. That Plaintiff has been to the movies with a friend is not substantial 2 evidence of his ability to work with multiple other people in light of the many, many days that he 3 has spent inside, avoiding people, and the evidence of him avoiding getting care for himself, 4 including getting glasses or surgery to correct his right eye. 5 Finally, the ALJ found Plaintiff to have only a moderate limitation in understanding, 6 remembering, or applying information. In reaching this conclusion, the ALJ discredits Dr. Ratto's 7 2018 evaluation because Plaintiff had trouble staying awake after testing began. See AR at 21-22. 8 That evaluation by Dr. Ratto found Plaintiff's testing scores related to memory to be extremely 9 low. Similarly, Dr. Pedro performed a comprehensive evaluation of Plaintiff and found that he 10 would have marked to extreme impairments in understanding, remembering, and carrying out 11 short instructions. The ALJ again, as noted above, assigned Dr. Pedro's findings little weight 12 because Plaintiff appeared sleepy during her evaluation of him. Given the record evidence that 13 Plaintiff reports symptoms of sleepiness every day, rejection of multiple psychological evaluations 14 based on this symptom was error. 15 In short, the court determines that it was error for the ALJ to find Plaintiff's sleep apnea as 16 non-severe at Step Two, and for the ALJ to discount the findings of Dr. Ratto and Dr. San Pedro 17 as inconsistent with the record. The ALJ's failure to develop the record at Step Two

is not 18 harmless, as proper consideration of Plaintiff's impairments may impact the ALJ's RFC analysis 19 and his ultimate disability determination. This is especially true where the VE testified that 20 Plaintiff, if off-task such as to make him ineligible for the jobs that were identified by the ALJ, 21 and could even lead to a determination of disability – and where there is evidence in the record 22 that the sleep apnea in combination with Plaintiff's other issues could cause him to be off-task at 23 that level. Accordingly, the court REMANDS for further proceedings to develop the record as to 24 the effect of Plaintiff's sleep apnea, and its interaction with his other impairments, on his ability to 25 function in the workplace. The ALJ should also reconsider whether Plaintiff meets any of the 26 paragraph B criteria in light of the findings of Dr. Ratto and Dr. Prado as discussed above, or order 27 further testing as needed.

1 CONCLUSION

2 Accordingly, this case is REMANDED for further proceedings consistent with the 3 holdings and instructions provided herein. A separate judgment shall issue. 4 IT IS SO ORDERED. 5 Dated: September 3, 2025 7

BERT M. ILLMAN

8 United States Magistrate Judge 9 10 11 12 13 © 15 16 = 17 Z 18 19 20 21 22 23 24 25 26 27 28