

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

Jul 17, 2020

SEAN F. McAVOY, CLERK

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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 SOMMAY R.,

10 Plaintiff,

11 v.

12
13 ANDREW M. SAUL,
14 COMMISSIONER OF SOCIAL
15 SECURITY,¹

16 Defendant.
17

No. 1:19-CV-03163-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

18 Nos. 13, 14. Attorney D. James Tree represents Sommay R. (Plaintiff);
19 Special Assistant United States Attorney Jeffrey E. Staples represents the
20 Commissioner of Social Security (Defendant). The parties have consented to
21 proceed before a magistrate judge. ECF No. 5. After reviewing the administrative
22 record and the briefs filed by the parties, the Court **DENIES** Defendant's Motion
23 for Summary Judgment; **GRANTS, in part**, Plaintiff's Motion for Summary
24

25 ¹Andrew M. Saul is now the Commissioner of the Social Security
26 Administration. Accordingly, the Court substitutes Andrew M. Saul as the
27 Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P.
28 25(d).

ORDER GRANTING PLAINTIFF'S MOTION - 1

1 Judgment; and **REMANDS** the matter to the Commissioner for additional
2 proceedings pursuant to 42 U.S.C. §§ 405(g), 1383(c).

3 **JURISDICTION**

4 Plaintiff filed applications for Supplemental Security Income (SSI) and
5 Disability Insurance Benefits (DIB) on January 29, 2016, Tr. 70-71, alleging
6 disability since May 30, 2010, Tr. 229, 236, due to passing out, right-sided body
7 weakness, pain, poor eyesight, his back, and a peptic ulcer, Tr. 270. The
8 applications were denied initially and upon reconsideration. Tr. 115-21, 123-27.
9 Administrative Law Judge (ALJ) Jesse K. Shumway held a hearing on May 14,
10 2018 and heard testimony from Plaintiff, medical expert Harvey Alpern, M.D., and
11 vocational expert Kimberly Mullinax. Tr. 32-55. At the hearing, Plaintiff
12 amended her alleged date of onset to January 29, 2016. Tr. 35. The ALJ issued an
13 unfavorable decision on June 19, 2018 dismissing Plaintiff's DIB application and
14 denying Plaintiff's SSI application by finding that Plaintiff was not disabled from
15 January 29, 2016, the date of application, through the date of the decision. Tr. 15-
16 25. The Appeals Council denied review on May 16, 2019. Tr. 1-5. The ALJ's
17 June 19, 2018 decision became the final decision of the Commissioner, which is
18 appealable to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff
19 filed this action for judicial review on July 17, 2019. ECF No. 1.

20 **STATEMENT OF FACTS**

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

24 Plaintiff was 51 years old at the amended date of onset and the date of
25 application. Tr. 229. Plaintiff completed his GED in 1990. Tr. 271. He reported
26 that his preferred language was Lao, and he could not speak or understand English.
27 Tr. 269. At the hearing, he had an interpreter. Tr. 34. His reported work history
28 was as a mechanic. Tr. 271. When applying for benefits Plaintiff reported that he

1 stopped working on June 1, 2011 because of his conditions, but that he had made
2 changes in his work activity due to his conditions as early as May 30, 2010. Tr.
3 270.

4 **STANDARD OF REVIEW**

5 The ALJ is responsible for determining credibility, resolving conflicts in
6 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
7 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
8 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
9 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
10 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
11 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
13 another way, substantial evidence is such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.
15 389, 401 (1971). If the evidence is susceptible to more than one rational
16 interpretation, the court may not substitute its judgment for that of the ALJ.
17 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
18 findings, or if conflicting evidence supports a finding of either disability or non-
19 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
20 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
21 evidence will be set aside if the proper legal standards were not applied in
22 weighing the evidence and making the decision. *Browner v. Secretary of Health*
23 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
27 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
28 proof rests upon the claimant to establish a prima facie case of entitlement to

1 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
2 claimant establishes that physical or mental impairments prevent him from
3 engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
4 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
5 shifts to the Commissioner to show (1) the claimant can make an adjustment to
6 other work, and (2) the claimant can perform specific jobs that exist in the national
7 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th
8 Cir. 2004). If the claimant cannot make an adjustment to other work in the
9 national economy, he is found “disabled.” 20 C.F.R. § 416.920(a)(4)(v).

10 ADMINISTRATIVE DECISION

11 On June 19, 2018, the ALJ issued a decision finding Plaintiff was not
12 disabled as defined in the Social Security Act from January 29, 2016 through the
13 date of the decision.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
15 activity since January 29, 2016, the amended date of onset and the date of
16 application. Tr. 18.

17 At step two, the ALJ determined that Plaintiff had the following severe
18 impairments: obesity and degenerative disc disease of the lumbar spine. Tr. 18.

19 At step three, the ALJ found that Plaintiff did not have an impairment or
20 combination of impairments that met or medically equaled the severity of one of
21 the listed impairments. Tr. 19.

22 At step four, the ALJ assessed Plaintiff’s residual function capacity and
23 determined that he could perform a range of light work with the following
24 limitations: “he requires a sit/stand option at will; he cannot climb ladders, ropes,
25 or scaffolds, and can only occasionally climb ramps and stairs, balance, stoop,
26 kneel, crouch, and crawl; and he can frequently reach, handle, finger, and feel.”
27 Tr. 19. The ALJ identified Plaintiff’s past relevant work as automobile mechanic
28 and found that he could not perform this past relevant work. Tr. 23.

1 At step five, the ALJ determined that, considering Plaintiff's age, education,
2 work experience and residual functional capacity, and based on the testimony of
3 the vocational expert, there were other jobs that exist in significant numbers in the
4 national economy Plaintiff could perform, including the jobs of production
5 assembler, cashier II, and storage facility rental clerk. Tr. 24. The ALJ concluded
6 Plaintiff was not under a disability within the meaning of the Social Security Act
7 from January 29, 2016, through the date of the ALJ's decision. Tr. 25.

8 ISSUES

9 The question presented is whether substantial evidence supports the ALJ's
10 decision denying benefits and, if so, whether that decision is based on proper legal
11 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
12 medical opinions in the record and (2) failing to properly weigh Plaintiff's
13 symptom statements.

14 DISCUSSION

15 1. Medical Opinions

16 Plaintiff argues the ALJ failed to properly consider and weigh the medical
17 opinions expressed by William Drenguis, M.D., Harvey Alpern, M.D., Spencer
18 Godfrey, ARNP, and Brent Packer, M.D. ECF No. 13 at 9-14.

19 In weighing medical source opinions, the ALJ should distinguish between
20 three different types of physicians: (1) treating physicians, who actually treat the
21 claimant; (2) examining physicians, who examine but do not treat the claimant;
22 and, (3) nonexamining physicians who neither treat nor examine the claimant.
23 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
24 weight to the opinion of a treating physician than to the opinion of an examining
25 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
26 should give more weight to the opinion of an examining physician than to the
27 opinion of a nonexamining physician. *Id.*

28 When an examining physician's opinion is not contradicted by another

1 physician, the ALJ may reject the opinion only for “clear and convincing” reasons,
2 and when an examining physician’s opinion is contradicted by another physician,
3 the ALJ is only required to provide “specific and legitimate reasons” to reject the
4 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be
5 met by the ALJ setting out a detailed and thorough summary of the facts and
6 conflicting clinical evidence, stating his interpretation thereof, and making
7 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is
8 required to do more than offer his conclusions, he “must set forth his
9 interpretations and explain why they, rather than the doctors’, are correct.”
10 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

11 **A. William Drenguis, M.D.**

12 On June 18, 2016, Dr. Drenguis completed a Physical Evaluation of
13 Plaintiff and provided an opinion as to his residual functional capacity. Tr. 401-05.
14 He opined that Plaintiff’s maximum standing and walking capacity with normal
15 breaks to be four hours and his maximum sitting capacity to be four hours. Tr.
16 404-05. He stated that Plaintiff “would do best alternating sitting and standing
17 every 30 to 45 minutes.” Tr. 405. He limited Plaintiff’s lifting and carrying to 20
18 pounds occasionally and 10 pounds frequently. *Id.* He limited Plaintiff to frequent
19 balancing, occasional climbing, stooping, kneeling, and crawling. *Id.* He also
20 limited Plaintiff to frequent reaching, handling, fingering, and feeling. *Id.* The
21 ALJ assigned the opinion great weight. Tr. 22.

22 Plaintiff argues that the ALJ’s residual functional capacity determination
23 limiting Plaintiff to light work is inconsistent with Dr. Drenguis’ opinion that
24 Plaintiff’s standing/walking and sitting were limited to four hours and that the ALJ
25 failed to provide any reason for rejecting this portion of the opinion. ECF No. 103
26 at 15. Defendant argues that the limitation to light work with an at will sit/stand
27 option is consistent with Dr. Drenguis’ opinion. ECF No. 14 at 8.

28 “The [residual functional capacity] assessment must always consider and

1 address medical source opinions. If the [residual functional capacity] assessment
2 conflicts with an opinion from a medical source, the adjudicator must explain why
3 the opinion was not adopted.” S.S.R. 96-8p. Here, the question is whether Dr.
4 Drengius’ opinion is consistent with the residual functional capacity assessment of
5 light work with an at will sit/stand option. The Court finds it is not.

6 Light work is defined as follows:

7
8 Light work involves lifting no more than 20 pounds at a time with
9 frequent lifting or carrying of objects weighing up to 10 pounds. Even
10 though the weight lifted may be very little, a job is in this category when
11 it requires a good deal of walking or standing, or when it involves
12 sitting most of the time with some pushing and pulling of arm or leg
13 controls. To be considered capable of performing a full or wide range
14 of light work, you must have the ability to do substantially all of these
15 activities.

16 20 C.F.R. § 416.967(b). “Since frequent lifting or carrying requires being on one’s
17 feet up to two-thirds of a workday, the full range of light work requires standing or
18 walking, off and on, for a total of approximately 6 hours of an 8-hour workday.”
19 S.S.R. 83-10. Therefore, even with a sit/stand option, a residual functional
20 capacity determination of light work means that Plaintiff would be expected to
21 have the capacity to stand/walk up to a maximum six hours in an eight hour day,
22 which is inconsistent with a maximum standing and walking capacity of four hours
23 opined by Dr. Drenguis. *See* 20 C.F.R. § 416.945(a)(1) (The “residual functional
24 capacity is the most you can still do despite your limitations.”).

25 The sit/stand option Defendant relies upon does not negate that by finding
26 Plaintiff capable of light work, the ALJ is finding that he can stand and/or walk for
27 a maximum of six hours a day. Standing and/or walking six hours a day, is
28 inconsistent with the opinion from Dr. Drenguis that Plaintiff can only stand and/or
walk for a maximum of four hours a day. Therefore, remand is appropriate for the
ALJ to properly address the opinion and form a new residual functional capacity

1 determination.

2 **B. Harvey Alpern, M.D.**

3 Dr. Alpern testified at the May 14, 2018 hearing. Tr. 35-40. He provided a
4 residual functional capacity opinion that included limiting Plaintiff's
5 standing/walking to two hours and sitting to six hours. Tr. 36. Later in his
6 testimony, he stated that "[a]ctually, four out of six for standing and that's not
7 unreasonable either." Tr. 37-38. He then stated, "[m]y final thought is that he
8 could stand and walk two, sit six." Tr. 40.

9 The ALJ gave the opinion "only partial weight" because "his vacillation
10 calls into question his confidence in his own opinion." Tr. 22. The ALJ then
11 found that "Notably, however, the assigned residual functional capacity allows for
12 either of the standing limitations espoused by Dr. Alpern, as it allows the claimant
13 to sit and stand at will."

14 The Court finds that the residual functional capacity determination did not
15 account for the standing limitations opined by Dr. Alpern. As addressed at length
16 above, a limitation to standing/walking a maximum of four hours is inconsistent
17 with the definition of light work. The "residual functional capacity is the most you
18 can still do despite your limitations." 20 C.F.R. § 416.945(a)(1). A finding that
19 Plaintiff can perform light work means he has the ability to stand and/or walk for a
20 maximum of six hours. Neither of Dr. Alpern's opinions of standing and/or
21 walking of four hours or two hours support a finding of the ability to perform light
22 work. Therefore, Dr. Alpern's opinion is to be readdressed on remand.

23 **C. Spencer Godfrey, ARNP and Brent Packer, M.D.**

24 On January 30, 2018, Nurse Godfrey completed a Psychical Functional
25 Evaluation form for the Washington State Department of Social and Health
26 Services. Tr. 426-428. He opined that Plaintiff was limited to sedentary work and
27 estimated that the limitation would persist with available medical treatment for
28 twelve months. Tr. 428. On February 19, 2018, Dr. Packer reviewed Nurse

1 Godfrey’s opinion and records from Tri-Cities Community Health and Trios
2 Health and appeared to confirm the limitation to sedentary work. Tr. 436.

3 The ALJ gave these opinions little weight for four reasons: (1) Nurse
4 Godfrey “completed a check-box form without substantial analysis in support of
5 the limitations assigned”; (2) the opinion was not supported by the objective
6 medical evidence; (3) the opinion was not consistent with Plaintiff’s level of
7 activity; and (4) the opinion was not consistent with Plaintiff’s limited course of
8 treatment. Tr. 22.

9 This case is being remanded for the ALJ to readdress the opinions of Dr.
10 Drengius and Dr. Alpern who both provided residual functional opinions that
11 placed Plaintiff’s functional abilities at less than light work. *See supra*. Therefore,
12 the ALJ will readdress the opinions limiting Plaintiff to sedentary work from Nurse
13 Godfrey and Dr. Packer on remand.

14 **2. Plaintiff’s Symptom Statements**

15 Plaintiff contests the ALJ’s determination that Plaintiff’s symptom
16 statements were unreliable. ECF No. 13 at 5-12.

17 It is generally the province of the ALJ to make determinations regarding the
18 reliability of Plaintiff’s symptom statements, *Andrews*, 53 F.3d at 1039, but the
19 ALJ’s findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
20 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
21 the ALJ’s reasons for rejecting the claimant’s testimony must be “specific, clear
22 and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81
23 F.3d at 834. “General findings are insufficient: rather the ALJ must identify what
24 testimony is not credible and what evidence undermines the claimant’s
25 complaints.” *Lester*, 81 F.3d at 834.

26 The ALJ found Plaintiff’s “statements concerning the intensity, persistence,
27 and limiting effects of these symptoms are not entirely consistent with the medical
28 evidence and other evidence in the record for the reasons explained in this

1 decision.” Tr. 20. The evaluation of a claimant’s symptom statements and their
2 resulting limitations relies, in part, on the assessment of the medical evidence. See
3 20 C.F.R. § 416.929(c); S.S.R. 16-3p. Therefore, in light of the case being
4 remanded for the ALJ to readdress the medical source opinions in the file, a new
5 assessment of Plaintiff’s subjective symptom statements is necessary.

6 **REMEDY**

7 The decision whether to remand for further proceedings or reverse and
8 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
9 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
10 where “no useful purpose would be served by further administrative proceedings,
11 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*
12 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
13 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280
14 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
15 (noting that a district court may abuse its discretion not to remand for benefits
16 when all of these conditions are met). This policy is based on the “need to
17 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are
18 outstanding issues that must be resolved before a determination can be made, and it
19 is not clear from the record that the ALJ would be required to find a claimant
20 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
21 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
22 F.3d 1172, 1179-80 (9th Cir. 2000).

23 This case is remanded for additional proceedings because there is no
24 vocational testimony in the record addressing a residual functional capacity similar
25 to that opined by Dr. Drenguis which limited Plaintiff to only four hours of
26 standing/walking and only four hours of sitting. Therefore, even if Dr. Drenguis’
27 opinion were credited as true, there is an outstanding issue at steps four and five.
28 In accord with S.S.R. 83-12, a vocational expert is required to address steps four

1 and five with such a residual functional capacity. Additional proceedings are
2 necessary for the ALJ to further address the medical source opinions in the record
3 and Plaintiff's symptom statements. Additionally, the ALJ will supplement the
4 record with any outstanding medical evidence pertaining to the period in question
5 and take testimony from a vocational expert.

6 **CONCLUSION**

7 Accordingly, **IT IS ORDERED:**

8 1. Defendant's Motion for Summary Judgment, **ECF No. 14**, is
9 **DENIED.**

10 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
11 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings
12 consistent with this order.

13 3. Application for attorney fees may be filed by separate motion.

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

17 DATED July 17, 2020.



A handwritten signature in black ink, appearing to be "M", is written above the name of the judge.

18
19
20 **JOHN T. RODGERS**
UNITED STATES MAGISTRATE JUDGE