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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

5 GARY L. GIBBS,

6
7 Plaintiff,

8 v.

9
10 CAROLYN W. COLVIN,
Commissioner of Social Security,

11
12 Defendant.

No. CV-12-392-JTR

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

13 Before the Court are cross-motions for summary judgment. ECF Nos. 18,
14 21. Attorney Dana C. Madsen represents Plaintiff; Special Assistant United States
15 Attorney Jeffrey R. McClain represents the Commissioner of Social Security
16 (Defendant). The parties have consented to proceed before a magistrate judge.
17 ECF No. 6. After reviewing the administrative record and the briefs filed by the
18 parties, the court **GRANTS** Defendant's Motion for Summary Judgment and
19 **DENIES** Plaintiff's Motion for Summary Judgment.

20 **JURISDICTION**

21 On October 13, 2009, Plaintiff filed a Title II application for a period of
22 disability and disability insurance benefits, along with a Title XVI application for
23 supplemental security income, both alleging disability beginning October 13, 1999.
24 Tr. 18; 120. Plaintiff reported that he could not work due to vision loss, severe
25 neck pain, and he explained that he frequently runs into objects due to his limited
26 vision and his limited range of motion in his neck. Tr. 124. Plaintiff's claim was
27 denied initially and on reconsideration, and he requested a hearing before an
28 administrative law judge (ALJ). Tr. 62-99. A hearing was held on September 15,

1 2010, at which vocational expert K. Diane Kramer, and Plaintiff, who was
2 represented by counsel, testified. Tr. 38-60. ALJ James W. Sherry presided. Tr.
3 36. The ALJ denied benefits on November 2, 2010. Tr. 18-26. The instant matter
4 is before this court pursuant to 42 U.S.C. § 405(g).

5 **STATEMENT OF FACTS**

6 The facts have been presented in the administrative hearing transcript, the
7 ALJ's decision, and the briefs of the parties and, thus, they are only briefly
8 summarized here. At the time of the hearing, Plaintiff was 36 years old, divorced,
9 and living with his 15 year old son in a single-wide trailer. Tr. 42-43. Plaintiff
10 completed the 11th grade, and eventually earned a GED. Tr. 43.

11 Plaintiff testified that he worked as a fork lift driver for Spokane Packaging
12 until 1999, when he was involved in a motorcycle accident. Tr. 44-46; 95; 239.
13 He was not wearing a helmet, and as a result, he was briefly unconscious, and he
14 was subsequently hospitalized for eight days. Tr. 239; 245. He was discharged to
15 a rehabilitation facility, where he spent an additional 17 days. Tr. 245. Upon
16 discharge from the rehabilitation facility, Plaintiff's diagnoses were: Moderate
17 closed head injury (approximately 24 hours or less loss of consciousness); C1-C2
18 stable fracture without spinal cord injury; alcohol dependence; and mixed
19 personality disorder with antisocial traits (possibly bipolar features). Tr. 245.

20 Plaintiff testified that as a result of the accident, he lost "peripheral vision
21 off the left side in both eyes." Tr. 46. He testified his neck injury left him with
22 limited range of motion, and turning his neck is "really painful." Tr. 46-47.
23 Plaintiff also testified that his short-term memory was detrimentally affected and is
24 "really bad." Tr. 47. He testified that he has headaches two-to-three times per
25 week, that last between four and five hours. Tr. 54. He does not take any
26 medication for his headaches. Tr. 54.

27 Plaintiff testified that his mother or son cooks and cleans for him. Tr. 49-50.
28 He testified that he spends his day watching television, or outside. Tr. 50-51. His

1 said his mother or girlfriend does his grocery shopping. Tr. 50-51.

2 STANDARD OF REVIEW

3 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the court set
4 out the standard of review:

5 A district court's order upholding the Commissioner's denial of
6 benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174
7 (9th Cir. 2000). The decision of the Commissioner may be reversed
8 only if it is not supported by substantial evidence or if it is based on
9 legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
10 Substantial evidence is defined as being more than a mere scintilla,
11 but less than a preponderance. *Id.* at 1098. Put another way,
12 substantial evidence is such relevant evidence as a reasonable mind
13 might accept as adequate to support a conclusion. *Richardson v.*
14 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to
15 more than one rational interpretation, the court may not substitute its
16 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
17 *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599
18 (9th Cir. 1999).

16 The ALJ is responsible for determining credibility, resolving conflicts in
17 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
18 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*,
19 although deference is owed to a reasonable construction of the applicable statutes.
20 *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

21 It is the role of the trier of fact, not this court, to resolve conflicts in
22 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one
23 rational interpretation, the court may not substitute its judgment for that of the
24 Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
25 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will
26 still be set aside if the proper legal standards were not applied in weighing the
27 evidence and making the decision. *Brawner v. Secretary of Health and Human*
28 *Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence exists to

1 support the administrative findings, or if conflicting evidence exists that will
2 support a finding of either disability or non-disability, the Commissioner's
3 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th
4 Cir. 1987).

5 SEQUENTIAL PROCESS

6 The Commissioner has established a five-step sequential evaluation process
7 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
8 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
9 through four, the burden of proof rests upon the claimant to establish a prima facie
10 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
11 burden is met once a claimant establishes that a physical or mental impairment
12 prevents him from engaging in his previous occupation. 20 C.F.R. §§
13 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
14 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
15 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist
16 in the national economy which claimant can perform. *Batson v. Commissioner of*
17 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an
18 adjustment to other work in the national economy, a finding of "disabled" is made.
19 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

20 ALJ'S FINDINGS

21 At step one of the sequential evaluation process, the ALJ found Plaintiff has
22 not engaged in substantial gainful activity since March 12, 2004, the amended
23 onset date.¹ Tr. 20. At step two, the ALJ found Plaintiff suffered from the severe
24 impairments of complete left homonymous hemianopsia (peripheral vision loss)
25 and a cervical spine fracture. Tr. 20. At step three, the ALJ found Plaintiff's
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27 ¹During the Administrative hearing, Plaintiff amended his onset date to
28 March 12, 2004. Tr. 20; 41-42.

1 impairments, alone and in combination, did not meet or medically equal one of the
2 listed impairments. Tr. 22. The ALJ determined that Plaintiff had the residual
3 functional capacity (“RFC”) to perform light work:

4 Specifically, the claimant can lift no more than 20 pounds at a time
5 and can frequently lift or carry 10 pounds. The claimant can stand/
6 walk 6 of 8 hours, sit 6 of 8 hours, push/pull within lifting restrictions
7 and occasionally crawl. Further, the claimant should avoid
8 concentrated exposure to irritants, such as fumes, odors, dust,
9 chemicals, and gases, as well as, poorly ventilated areas.
10 Additionally, the claimant can perform work requiring occasional
11 peripheral acuity and depth perception.

11 Tr. 22.

12 At step four, the ALJ found that Plaintiff is unable to perform any past
13 relevant work. Tr. 25. At step five, the ALJ concluded that considering Plaintiff’s
14 age, education, work experience, and residual functional capacity, jobs exist in
15 significant numbers in the national economy that Plaintiff can perform, such as
16 cleaner, survey worker, and mail clerk. Tr. 26. The ALJ concluded Plaintiff was
17 not disabled as defined by the Social Security Act. Tr. 26.

18 ISSUES

19 Plaintiff contends the ALJ erred by improperly weighing the medical
20 opinions. ECF No. 19 at 7-11. ²

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23 ²Plaintiff’s briefing includes a cursory observation that the ALJ found
24 Plaintiff had no psychological impairment at step two. ECF No. 19 at 10. It is far
25 from clear that Plaintiff intended to raise this as an issue, because Plaintiff’s
26 briefing failed to list discrete issues. The court ordinarily will not consider matters
27 on appeal that are not specifically and distinctly argued in an appellant’s opening
28 brief. See *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th

1 **DISCUSSION**

2 **A. Dennis Pollack, Ph.D.**

3 Plaintiff argues that the ALJ improperly weighed the opinion from Dennis
4 Pollack, Ph.D. ECF No. 19 at 9-10. On September 10, 2010, Dennis R. Pollack,
5 Ph.D., examined Plaintiff and completed a report about his findings. Tr. 228-33.
6 During the exam, Dr. Pollack administered several objective tests related to
7 intelligence, memory, personality and neuropsychological functioning. Tr. 230-32.
8 Dr. Pollack diagnosed Plaintiff with a cognitive disorder due to head trauma, and a
9 personality disorder, NOS. Tr. 233.

10 On September 12, 2010, Dr. Pollack completed a Mental Medical Source
11 Statement form. Tr. 234-37. In that form, Dr. Pollack found that Plaintiff was
12 markedly limited in both his ability to: (1) complete a normal workday and
13 workweek without interruptions from psychologically based symptoms and to
14 perform at a consistent pace without an unreasonable number and length of rest
15 periods; and (2) accept instructions and respond appropriately to criticism from
16 supervisors. Tr. 235. Additionally, Dr. Pollack found that Plaintiff would have
17 moderate limitation in his ability to be aware of normal hazards and take
18 appropriate precautions. Tr. 236.

19 The ALJ found Dr. Pollack’s opinion less persuasive than the opinion from
20 Dr. Bostwick. Specifically, the ALJ noted that Dr. Pollack’s check-marked
21 findings were internally inconsistent. Tr. 21. The ALJ explained that Dr. Pollack
22 assessed Plaintiff would be markedly limited in the ability to complete a normal
23 workweek, Dr. Pollack also opined Plaintiff would have no limitation in his ability
24 to maintain attention and concentration for extended periods, and Plaintiff has only
25 mild limitation in his ability to sustain an ordinary routine. Tr. 21. Also, the ALJ
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27 Cir. 2008). As a result of Plaintiff’s failure to specifically set forth a challenge to
28 the ALJ’s Step Two determinations, the court will not address this issue.

1 found that Dr. Pollack's assessed limitations are contradicted by Plaintiff's
2 activities of daily living. Tr. 21. In support, the ALJ cited Plaintiff's admission to
3 Dr. Bostwick that he does his own laundry, shopping, he performs automotive
4 repair, drag racing, reads, watches movies, performs yard work, and he plays video
5 games with his son. Tr. 21.

6 The medical opinions of three types of medical sources are recognized in
7 social security cases: "(1) those who treat the claimant (treating physicians); (2)
8 those who examine but do not treat the claimant (examining physicians); and (3)
9 those who neither examine nor treat the claimant (nonexamining physicians)."
10 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, a treating physician's
11 opinion should be accorded more weight than opinions of doctors who did not treat
12 the claimant, and an examining physician's opinion is entitled to greater weight
13 than a non-examining physician's opinion. *Id.* However, "[t]he ALJ is responsible
14 for determining credibility and resolving conflicts in medical testimony."
15 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).

16 An ALJ may properly reject a treating physician's opinion that is conclusory
17 and unsupported by clinical findings, particularly check-the-box style forms. *See*
18 *Batson*, 359 F.3d at 1195 (holding that the ALJ did not err in giving minimal
19 evidentiary weight to the opinions of the plaintiff's treating physician where the
20 opinion was in the form of a checklist, did not have supportive objective evidence,
21 was contradicted by other statements and assessments of the plaintiff's medical
22 condition, and was based on the plaintiff's subjective descriptions of pain). When
23 providing reasons for rejecting opinion evidence, the ALJ should provide "a
24 detailed and thorough summary of the facts and conflicting clinical evidence,
25 stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157
26 F.3d 715, 725 (9th Cir. 1998). The ALJ must do more than merely state his
27 conclusions: "[h]e must set forth his own interpretations and explain why they,
28 rather than the doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418,

1 421-22 (9th Cir. 1988)).

2 Plaintiff complains that the ALJ's reason for giving less weight to Dr.
3 Pollack's opinion is simply boilerplate and fails to provide sufficient specificity.
4 ECF No. 19 at 11. Plaintiff fails to recognize that the ALJ provided specific
5 examples from the record that support his reasoning. For example, the ALJ cited
6 to the internal inconsistency in Dr. Pollack's report. Tr. 21. Additionally, the ALJ
7 provided specific examples of the contradiction between Dr. Pollack's opinion of
8 Plaintiff's functional limits and Plaintiff's specific admissions to Dr. Bostwick that
9 evidenced his ability to independently perform activities of daily living. Tr. 21;
10 196-98.

11 The ALJ offered specific and legitimate reasons to discount the contradicted
12 opinions of Dr. Pollack; namely, internal inconsistency, and inconsistency with
13 Plaintiff's activities of daily living. Tr. 21. Both are supported by the record, and
14 are proper reasons to afford Dr. Pollack's opinion little weight. *See Roberts v.*
15 *Shalala*, 66 F.3d at 184 (rejecting an opinion that contains internal inconsistencies
16 is a specific and legitimate reason to discount the opinion; rejection of examining
17 psychologist's functional assessment which conflicted with his own written report
18 and test results); *Regennitter v. Commissioner of SSA*, 166 F.3d 1294, 1297 (9th
19 Cir. 1998) (inconsistencies with clinical observations can "satisfy the requirement
20 of a clear and convincing reason for discrediting a claimant's testimony"); *Rollins*
21 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (ALJ may reject the claimant's
22 testimony when inconsistent with the claimant's daily activities and contrary to the
23 medical evidence). The ALJ's reasoning is supported by the record.

24 **B. Donald Ankov, M.D.**

25 Plaintiff argues that the ALJ improperly rejected the opinion from Donald
26 Ankov, M.D. ECF No. 19 at 8. On July 9, 2009, Donald Ankov, M.D., completed
27 a form entitled, "Certification for Medicaid: GAX Decision." Tr. 226. In the
28 form, Dr. Ankov references two June 2009 eye exam records that revealed, in part,

1 that Plaintiff had bilateral vision field loss on the left and hemienopsia. Tr. 226.³
2 Dr. Ankov summarily concluded that Plaintiff would “likely meet the Listing
3 2.03.” Tr. 226.

4 The ALJ rejected Dr. Ankov’s opinion that Plaintiff met Listing 2.03
5 because the opinion was equivocal, cursory, and failed to provide a medical
6 explanation. Tr. 22. An ALJ may discredit treating physicians' opinions that are
7 conclusory, brief, and unsupported by the record as a whole, or by objective
8 medical findings. *Batson*, 359 F.3d at 1195.

9 As the ALJ found, Dr. Ankov’s opinion that Plaintiff’s vision impairment
10 would “likely” meet Listing 2.03 was not accompanied by an explanation, testing,
11 or clinical notes other than the notations from medical records from Plaintiff’s eye
12 exams. Tr. 226. Listing 2.03 requires contraction of the visual field in the better
13 eye with (a) the widest diameter subtending an angle around the point of fixation
14 no greater than 20 degrees; (b) a mean deviation of -22 or worse, determined by
15 automated static threshold perimetry as described in Listing 2.00(A)(6)(a)(v); or
16 (c) a visual field efficiency of 20 percent or less as determined by kinetic
17 perimetry. See 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 2.03. Dr. Ankov’s minimal
18 assessment provided insufficient data on which to determine if Plaintiff’s vision
19 impairment met Listing 2.03. As such, the ALJ’s rejection of Dr. Ankov’s opinion
20 that Plaintiff may meet Listing 2.03 was specific and legitimate, and supported by
21 the record.

22
23 _____
³Dr. Ankov noted:

24 6/18/09: bilateral field loss on left. Va without correction 2/50 on L),
25 20/40 on R), 20/30 both eyes.

26 Ophthalmology exam 6/17/09: corrected Va R) 20/230-2, L) 20/20.

27 Bilateral L)h. hemienopsia.

28 Tr. 226.

1 **C. Debra A. Stimpson, PA-C**

2 Finally, Plaintiff argues that the ALJ improperly rejected the opinion from
3 Debra Stimpson, PA-C. ECF No. 19 at 8. On June 16, 2009, Ms. Stimpson
4 completed a Physical Evaluation form. Tr. 180-83. In the form, Ms. Stimpson
5 found that Plaintiff's visual field defect would present an inability to perform one
6 or more basic work-related activities, and his neck impairment would pose a mild
7 interference with work-related activities. Tr. 182. Ms. Stimpson concluded that
8 Plaintiff was limited to sedentary work. Tr. 182. Also included in the record is a
9 chart note from Plaintiff's office visit with Ms. Stimpson on June 15, 2009. Tr.
10 184-87.

11 The ALJ gave little weight to Ms. Stimpson's opinion that Plaintiff was
12 limited to sedentary work because she failed to explain the correlation between
13 Plaintiff's visual field defect and her sedentary work rating. Tr. 24. Plaintiff
14 argues that Ms. Stimpson's evaluation was improperly rejected because Ms.
15 Stimpson examined Plaintiff, and upon examination noted that Plaintiff had a
16 decreased range of motion with left rotation. ECF No. 19 at 8.

17 The ALJ's reason is specific and legitimate and supported by substantial
18 evidence. As the ALJ noted, Ms. Stimpson failed to explain how or why
19 Plaintiff's visual impairment or his limited range of motion in his neck on his left
20 side rendered him unable to perform work other than sedentary work. The ALJ
21 may reject an opinion that is brief, conclusory, or inadequately supported by
22 clinical findings. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). A
23 careful review of Ms. Stimpson's Physical Evaluation and the chart notes from the
24 examination do not reveal facts or explanation that would support her opinion that
25 Plaintiff is limited to sedentary work. As such, the ALJ's rejection of Ms.
26 Stimpson's opinion was not error.

27 **CONCLUSION**

28 Having reviewed the record and the ALJ's conclusions, this court finds that

1 the ALJ's decision is supported by substantial evidence and free of legal error.

2 Accordingly,

3 **IT IS ORDERED:**

4 1. Defendant's Motion for Summary Judgment, **ECF No. 21**, is
5 **GRANTED.**

6 2. Plaintiff's Motion for Summary Judgment, **ECF No. 18**, is **DENIED.**

7 **IT IS SO ORDERED.** The District Court Executive is directed to file this
8 Order, provide copies to the parties, enter judgment in favor of Defendant, and
9 **CLOSE** this file.

10 DATED February 19, 2014.



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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE