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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8
9 BRANDON L. CHAVEZ,

10 Plaintiff,

11 v.

12 CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

13 Defendant.
14

NO. CV-12-564-RHW

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

15 Before the Court are Plaintiff's Motion for Summary Judgment, ECF No.
16 15, and Defendant's Motion for Summary Judgment, ECF No. 21. The motions
17 were heard without oral argument. Plaintiff is represented by Thomas Doran.
18 Defendant is represented by Assistant United States Attorney Pamela De Rusha
19 and Special Assistant United States Attorney Franco L. Becia.

20 **I. Jurisdiction**

21 On December 16, 2008, Plaintiff filed a Title II application for disability
22 insurance benefits (DIB) and a Title XVI application for supplemental security
23 income (SSI). Plaintiff alleges he has been disabled beginning March 1, 2008, due
24 to DDD (degenerative disc disease), ankylosing spondylitis, and stenosis. (Tr.
25 168.)

26 His application was denied initially on March 26, 2009, and again denied on
27 reconsideration on June 19, 2009. A timely request for a hearing was made. On
28 June 3, 2010, Plaintiff appeared at a hearing held in Spokane, Washington before

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1 Administrative Law Judge (ALJ) Marie Palalchuk. Dr. Peter Schosheim, medical
2 expert, and Daniel R. Mckinney, Sr., vocational expert, also participated. Plaintiff
3 was represented by attorney Thomas Doran.

4 The ALJ issued her decision on June 18, 2010, finding that Plaintiff was not
5 disabled. Plaintiff timely requested review by the Appeals Council, which denied
6 his request for review on August 13, 2012. The Appeals Council's denial of
7 review makes the ALJ's decision the final decision of the Commissioner. 42
8 U.S.C. §405(h).

9 Plaintiff filed a timely appeal with the U.S. District Court for the Eastern
10 District of Washington on October 10, 2012. The instant matter is before this
11 Court pursuant to 42 U.S.C. § 405(g).

12 **II. Sequential Evaluation Process**

13 The Social Security Act defines disability as the "inability to engage in any
14 substantial gainful activity by reason of any medically determinable physical or
15 mental impairment which can be expected to result in death or which has lasted or
16 can be expected to last for a continuous period of not less than twelve months."

17 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
18 only if his impairments are of such severity that the claimant is not only unable to
19 do his previous work, but cannot, considering claimant's age, education and work
20 experiences, engage in any other substantial gainful work which exists in the
21 national economy. 42 U.S.C. §423(d)(2)(A).

22 The Commissioner has established a five-step sequential evaluation process
23 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a)(4); *Bowen*
24 *v. Yuckert*, 482 U.S. 137, 140-42 (1987).

25 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §
26 404.1520(b). Substantial gainful activity is work done for pay and requires
27 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*
28 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in

1 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If he is not, the ALJ
2 proceeds to step two.

3 Step 2: Does the claimant have a medically-severe impairment or
4 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not
5 have a severe impairment or combination of impairments, the disability claim is
6 denied. A severe impairment is one that lasted or must be expected to last for at
7 least 12 months and must be proven through objective medical evidence. 20
8 C.F.R. § 404.1508-09. If the impairment is severe, the evaluation proceeds to the
9 third step.

10 Step 3: Does the claimant's impairment meet or equal one of the listed
11 impairments acknowledged by the Commissioner to be so severe as to preclude
12 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R.
13 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
14 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
15 impairment is not one conclusively presumed to be disabling, the evaluation
16 proceeds to the fourth step.

17 Step 4: Does the impairment prevent the claimant from performing work he
18 has performed in the past? 20 C.F.R. § 404.1520(e). If the claimant is able to
19 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform
20 this work, proceed to the fifth and final step.

21 Step 5: Is the claimant able to perform other work in the national economy
22 in view of his age, education, and work experience? 20 C.F.R. § 404.1520(f).

23 The initial burden of proof rests upon the claimant to establish a prima facie
24 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
25 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
26 mental impairment prevents him from engaging in his previous occupation. *Id.* At
27 step five, the burden shifts to the Commissioner to show that the claimant can
28 perform other substantial gainful activity. *Id.*

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1 **III. Standard of Review**

2 The Commissioner’s determination will be set aside only when the ALJ’s
3 findings are based on legal error or are not supported by substantial evidence in
4 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
5 (citing 42 .S.C. § 405(g)). Substantial evidence is “more than a mere scintilla,”
6 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but “less than a preponderance.”
7 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
8 evidence is “such relevant evidence as a reasonable mind might accept as adequate
9 to support a conclusion.” *Richardson*, 402 U.S. at 401. The Court must uphold the
10 ALJ’s denial of benefits if the evidence is susceptible to more than one rational
11 interpretation, one of which supports the decision of the administrative law judge.
12 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). “If the evidence can
13 support either outcome, the court may not substitute its judgment for that of the
14 ALJ.” *Matney*, 981 F.2d at 1019.

15 A decision supported by substantial evidence will be set aside if the proper
16 legal standards were not applied in weighing the evidence and making the
17 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
18 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are
19 immaterial to the ultimate nondisability determination.” *Stout v. Comm’r, Soc. Sec.*
20 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

21 **IV. Statement of Facts**

22 The facts have been presented in the administrative transcript and the ALJ’s
23 decision and will only be summarized here.

24 At the time of the hearing, Plaintiff was 34 years old. He has an A.A.
25 degree, and took classes for two quarters at Eastern Washington University. He
26 testified that he was not able to sit through class, and did not receive any credit.

27 He has prior employment as an automobile detailer; casino worker; mobile
28 home repairer; and car dealer. He also worked as an escrow assistant, a notary, and

1 a mortgage closer. Plaintiff had no income for 2005, 2007, 2009, and 2010. (Tr.
2 160.) In 2008, Plaintiff earned \$11,202, and he testified that he no longer worked
3 after March 1, 2008. He states he can no longer work because he is concerned that
4 he keeps falling because of the tingling in his legs. He also has muscle spasms and
5 on his bad days, he is home-bound. He testified that he cannot lift a gallon of milk.

6 Plaintiff was involved in a motor vehicle accident at the age of 19, and
7 fractured his L2 and L4 vertebrae. In July, 2007, he fell 10 feet in a creek, landing
8 on his back. He experienced significant pain after this fall. On January 1, 2009, he
9 fell down 10 stairs and exacerbated his back problems. He continues to have pain.

10 Plaintiff has three children. Two of them live with Plaintiff and his fiancé on
11 a 50/50 custody arrangement with their mother. However, he cannot pick up or
12 carry his children.

13 **V. The ALJ's findings**

14 The ALJ found that Plaintiff met the insured status requirements of the
15 Social Security Act through December 31, 2011. (Tr. 23.)

16 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
17 activity since March 1, 2008, the alleged onset date. (Tr. 23.)

18 At step two, the ALJ found Plaintiff has the following severe impairments:
19 multi-level degenerative disc disease from L2 to S1, anterolisthesis grade 1-2 at
20 L5-S1, severe foraminal stenosis at L5-S1, central stenosis and facet arthrosis, and
21 status post fusion. (Tr. 23.)

22 At step three, the ALJ found Plaintiff does not have an impairment or
23 combination of impairments that meets or medically equals one of the listed
24 impairments in 20 CFR Part 404, Subpart P. Appendix 1. (Tr. 24.) Specifically, the
25 ALJ considered whether Plaintiff met or medically equaled Listing 1.04 (Disorders
26 of the Back).

27 The ALJ determined that Plaintiff had the residual functional capacity to lift
28 and/or carry up to 10 pounds occasionally and less than 10 pounds frequently,

1 stand and/or walk two hours in an eight hour workday, and sit about six hours in
2 an eight hour workday, with a sit/stand option as needed. Plaintiff cannot climb
3 ladders, ropes or scaffold, and he can occasionally climb ramps and stairs, balance,
4 stoop, kneel, crouch, and crawl. Plaintiff should avoid exposure to heavy
5 vibration, hazardous machinery, and unprotected heights. (Tr. 25.)

6 At step four, the ALJ concluded that Plaintiff was capable of performing
7 past relevant work as a mortgage closer and a notary, and therefore has not been
8 under a disability, as defined in the Social Security Act from March 1, 2008
9 through June 18, 2010. (Tr. 28.)

10 **VI. Issues for Review**

11 Plaintiff presents the following issues for review:

12 1. Whether the ALJ's decision is supported by substantial evidence in the
13 record?

14 **VII. Discussion**

15 Here, it is undisputed that Plaintiff has significant problems with his lower
16 back. (Tr. 26.) The primary issue on appeal is whether Plaintiff's testimony that
17 these problems with his lower back prevents him from performing any work at all
18 is credible.

19 An ALJ's assessment of a claimant's credibility is entitled to "great weight."
20 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir.1990). When there is no
21 evidence of malingering, the ALJ must give "specific, clear and convincing
22 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*
23 *Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted). If the ALJ's
24 credibility finding is supported by substantial evidence in the record, the
25 reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278
26 F.3d 947, 959 (9th Cir. 2002).

27 In recognition of the fact that an individual's symptoms can sometimes
28 suggest a greater level of severity of impairment than can be shown by the

1 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe
2 the kinds of evidence, including the factors below, that the ALJ must consider in
3 addition to the objective medical evidence when assessing the credibility of an
4 individual's statements:

- 5 1. The individual's daily activities; 2. The location, duration,
- 6 frequency, and intensity of the individual's pain or other symptoms;
- 7 3. Factors that precipitate and aggravate the symptoms; 4. The type,
- 8 dosage, effectiveness, and side effects of any medication the
- 9 individual takes or has taken to alleviate pain or other symptoms; 5.
- 10 Treatment, other than medication, the individual receives or has
- 11 received for relief of pain or other symptoms; 6. Any measures other
- 12 than treatment the individual uses or has used to relieve pain or other
- 13 symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20
- 14 minutes every hour, or sleeping on a board); and 7. Any other factors
- 15 concerning the individual's functional limitations and restrictions due
- 16 to pain or other symptoms.

17 SSR 96-7P, 1996 WL 374186.

18 In her Order, the ALJ concluded that Plaintiff's statements concerning the
19 intensity, persistence and limiting effects of his symptoms were not credible to the
20 extent they were inconsistent with his residual functional capacity assessment. (Tr.
21 26.)

22 The ALJ's credibility assessment is supported by substantial evidence in the
23 record. Plaintiff earned \$11,202 in 2008, yet he asserts he was unable to work
24 after March 1, 2008. He attributes this to hard work during January and February.
25 This is questionable, especially given that he earned \$17,172 in 2006, nothing in
26 2007, and then, in a mere 2 months earned \$11,202. The ALJ relied on this
27 inconsistency to find Plaintiff less than credible. (Tr. 27.) The ALJ also noted the
28 lack of any indication in the treatment records of any restrictions placed on
Plaintiff by any treating physicians. The ALJ also relied on Dr. Scottolini's
identification of inconsistencies in the record. Dr. Scottolini noted that while
Plaintiff stated that he had ankylosing spondylitis and this was disabling, there is
no clinical evidence to support this diagnosis. (Tr. 362.) Dr. Scottolini noted that

1 there was no anatomic basis to explain his “falling down 3-4 times per week.” (Tr.
2 362.) Also, the ALJ noted that an EMG and nerve conduction was normal and did
3 not show any radicular symptoms. (Tr. 26.)

4 Dr. Staley noted that Plaintiff was seen by Dr. Shuster in March, 2009. At
5 that time, Dr. Shuster suggested possible treatment options including physical
6 therapy with core emphasis program, physiatry evaluation, dorsal column
7 stimulator, epidural injections for diagnostic and therapeutic treatment,
8 acupuncture, a swimming program, and use of a corset. (Tr. 341.) Dr. Shuster
9 believed that his symptoms may be more muscular in nature, and surgery may
10 make it worse. There is nothing in the record indicating Plaintiff attempted to
11 follow up on these treatment options, except for the epidural injections. Also,
12 Plaintiff has been asked repeatedly by his treatment providers to stop smoking, but
13 it does not appear that he has been able to stop smoking.

14 In March, 2010, the Plaintiff insisted that he could not lay down to complete
15 a CT scan, and became combative and confrontational with the staff. As a result,
16 the follow-up appointment with Dr. Shuster was cancelled. (Tr. 411-414.)
17 Additionally, the ALJ relied on the fact that Plaintiff was able to travel to New
18 York for 10 days in June, 2009. This is clearly inconsistent with Plaintiff’s
19 statement that he is unable to complete even sedentary work on a regular and
20 continuing basis.

21 As set forth above, the Court is not permitted to engage in second-guessing.
22 Because there is substantial evidence to support the ALJ’s credibility
23 determination, Plaintiff has not shown that the ALJ committed clear error in
24 determining that Plaintiff is able to perform sedentary work.

25 Accordingly, **IT IS HEREBY ORDERED:**

26 1. Plaintiff’s Motion for Summary Judgment, ECF No. 15, is **DENIED**.

27 2. Defendant’s Motion for Summary Judgment, ECF No. 21, is

GRANTED.

28 3. The decision of the ALJ denying benefits is **affirmed**.

1 4. The District Court Executive is directed to enter judgment in favor of
2 Defendant and against Plaintiff.

3 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
4 file this Order and provide copies to counsel, and **close the file**.

5 **DATED** this 14th day of April, 2014.

6
7 *s/Robert H. Whaley*

8 ROBERT H. WHALEY
9 Senior United States District Judge

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