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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER L. NICORA,
Plaintiff,
v.
CAROLYN W. COLVIN, Acting
Commissioner of Social Security,
Defendant.

NO. CV-12-5091-RHW

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

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 15, and Defendant's Motion for Summary Judgment, ECF No. 18. The motions were heard without oral argument. Plaintiff is represented by David Lybbert. Defendant is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Richard Rodriguez.

I. Jurisdiction

On May 7, 2008, Plaintiff filed a Title XVI application for supplemental security income (SSI). Plaintiff alleges he has been disabled beginning October 21, 2006.

His application was denied initially on January 5, 2009, and again denied on reconsideration on June 1, 2009. A timely request for a hearing was made. On September 16, 2010, Plaintiff appeared at a video hearing in Kennewick, Washington before Administrative Law Judge (ALJ) Moira Ausems, who was presiding in Spokane, Washington. Dr. Marian F. Martin, medical expert and Richard Cheney, vocational expert, also participated. Plaintiff was represented by

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1 attorney David Lybbert.

2 The ALJ issued a decision on February 17, 2011, finding that Plaintiff was
3 not disabled. Plaintiff timely requested review by the Appeals Council, which
4 denied his request for review on May 25, 2012. The Appeals Council's denial of
5 review makes the ALJ's decision the final decision of the Commissioner. 42
6 U.S.C. §405(h).

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

10 **II. Sequential Evaluation Process**

11 The Social Security Act defines disability as the "inability to engage in any
12 substantial gainful activity by reason of any medically determinable physical or
13 mental impairment which can be expected to result in death or which has lasted or
14 can be expected to last for a continuous period of not less than twelve months."
15 42 U.S.C. § 423(d)(1)(A). A claimant shall be determined to be under a disability
16 only if his impairments are of such severity that the claimant is not only unable to
17 do his previous work, but cannot, considering claimant's age, education and work
18 experiences, engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §423(d)(2)(A).

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

23 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R. §
24 404.1520(b). Substantial gainful activity is work done for pay and requires
25 compensation above the statutory minimum. 20 C.F.R. § 404.1574; *Keyes v.*
26 *Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in
27 substantial activity, benefits are denied. 20 C.F.R. § 404.1571. If he is not, the ALJ
28 proceeds to step two.

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

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

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

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

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

27 **III. Standard of Review**

28 The Commissioner's determination will be set aside only when the ALJ's

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

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

19 **IV. Statement of Facts**

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

22 At the time of the hearing, Plaintiff was 21 years old. He does not have any
23 prior work experience.¹ He graduated from an alternative high school. He attended
24 some classes at the community college from 2007 - 2009, but tended to withdraw
25

26 ¹He worked for two weeks for Amazon, in Seattle, Washington in 2009. The
27 ALJ considered this work as an unsuccessful work attempt. (Tr. 12.) Plaintiff
28 testified that he quit this job because he could not handle it.

1 from the classes before the end of the quarter. At the time of the hearing, Plaintiff
2 was living in an apartment with his girlfriend. He does not drive.

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

4 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
5 activity since May 7, 2008, the application date. (Tr. 12.)

6 At step two, the ALJ found Plaintiff has the following severe impairments:
7 bipolar disorder, anxiety disorder with reported panic attacks and agoraphobia,
8 and history of marijuana and alcohol abuse in reported remission. (Tr. 12.)

9 At step three, the ALJ found Plaintiff's impairments or combination of
10 impairments meet or medically equal section 12.04 (Affective Disorders), 12.06
11 (Anxiety-Related Disorders), and 12.09 (Substance Addiction Disorders) of CFR
12 Part 404, Subpart P, Appendix 1. (Tr. 15.)

13 At step four, the ALJ found Plaintiff has the residual functional capacity to
14 perform a full range of work at all exertional levels that does not involve
15 performance of more than semiskilled tasks (i.e. specific vocational preparation
16 (SVP 4) or that requires more than superficial contact with others. (Tr. 16.)

17 At step five, the ALJ considered Plaintiff's age, education, work experience,
18 and residual functional capacity, and determined that there are jobs that exist in
19 significant numbers in the national economy that he can perform. (Tr. 16.)

20 Specifically, the ALJ found Plaintiff could perform the requirements of
21 representative occupations such as assembler, housekeeper/cleaner, surveillance
22 systems monitor, or addresser. (Tr. 19.)

23 **VI. Issues for Review**

24 Plaintiff presents the following issues for review:

- 25 1. Whether the ALJ failed to adequately develop the record?
26 2. Whether sufficient evidence supports the ALJ's residual functional
27 capacity assessment?
28 3. Whether the ALJ erred in her credibility assessment of Plaintiff?

1 4. Whether the ALJ failed to give the proper weight to Dr. Nand's opinion?

2 5. Whether the ALJ presented the VE with a complete and accurate
3 hypothetical?

4 **VII. Discussion**

5 **1. Dr. Nand's Opinion**

6 Plaintiff argues the ALJ gave improper weight to Dr. Nand's testimony by
7 relying on the opinion of a non-examining physician over the statements of a
8 treating source.

9 When presented with conflicting medical opinions, the ALJ must determine
10 credibility and resolve the conflict. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th
11 Cir. 1992).

12 As the Ninth Circuit explained:

13 By rule, the Social Security Administration favors the opinion
14 of a treating physician over non-treating physicians. *See* 20 C.F.R. §
15 404.1527. If a treating physician's opinion is "well-supported by
16 medically acceptable clinical and laboratory diagnostic techniques
17 and is not inconsistent with the other substantial evidence in [the]
18 case record, [it will be given] controlling weight." *Id.* §
19 404.1527(d)(2). If a treating physician's opinion is not given
20 "controlling weight" because it is not "well-supported" or because it
21 is inconsistent with other substantial evidence in the record, the
22 Administration considers specified factors in determining the weight
23 it will be given. Those factors include the "[l]ength of the treatment
24 relationship and the frequency of examination" by the treating
25 physician; and the "nature and extent of the treatment relationship"
26 between the patient and the treating physician. *Id.* §
27 404.1527(d)(2)(I)-(ii). Generally, the opinions of examining
28 physicians are afforded more weight than those of non-examining
physicians, and the opinions of examining non-treating physicians are
afforded less weight than those of treating physicians. *Id.* §
404.1527(d)(1)-(2). Additional factors relevant to evaluating any
medical opinion, not limited to the opinion of the treating physician,
include the amount of relevant evidence that supports the opinion and
the quality of the explanation provided; the consistency of the
medical opinion with the record as a whole; the specialty of the
physician providing the opinion; and "[o]ther factors" such as the
degree of understanding a physician has of the Administration's
"disability programs and their evidentiary requirements" and the
degree of his or her familiarity with other information in the case
record. *Id.* § 404.1527(d)(3)-(6).

Orn v. Astrue, 495 F.3d 625, 631 (9th Cir. 2007).

1 An ALJ may discredit treating physician's opinions that are conclusory,
2 brief, and unsupported by the record as a whole, or by objective medical findings.
3 *Batson v. Comm'r Soc. Sec. Admin.*, 359 F.3d 1190, 1196 (9th Cir. 2004).

4 Dr. Nand is a treating physician. In April, 2010, Dr. Nand concluded that
5 Plaintiff had marked impairments² in the following areas: (1) ability to understand
6 and remember very short and simple instructions; (2) the ability to understand and
7 remember detailed instructions; (3) the ability to carry out detailed instructions;
8 (4) the ability to maintain attention and concentration for extended periods; (5) the
9 ability to interact appropriately with the general public; (6) the ability to respond
10 appropriately to changes in the work setting; and (7) the ability to travel in
11 unfamiliar places or use public transportation. (Tr. 308-09.)

12 Dr. Nand concluded that Plaintiff had moderate impairments³ in the
13 following areas: (1) the ability to perform activities within a schedule, maintain
14 regular attendance, and be punctual within customary tolerances; (2) the ability to
15 work in coordination with or proximity to others without being distracted by them;
16 (3) the ability to accept instructions and respond appropriately to criticism from
17 supervisors; (4) the ability to get along with co-workers or peers without
18 distracting them or exhibiting behavioral extremes; (5) the ability to maintain
19 socially appropriate behavior and to adhere to basic standards of neatness and
20 cleanliness; (6) the ability to be aware of normal hazards and take appropriate
21 precautions; (7) the ability to set realistic goals or make plans independently of
22 others. (Tr. 308-09).

23 A review of Dr. Nand's treatment notes, however, do not reflect these

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25 ²Marked Impairment is defined as: there is serious limitation in this area. The
26 ability to function is severely limited but not precluded. (Tr. 308.)

27 ³Moderate Impairment is defined as: there is moderate limitation in this area but
28 the individual is still able to function satisfactorily. (Tr. 308.)

1 significant limitations. For instance, in 2010, the treatment notes reflected that
2 Plaintiff was responding well to treatment, he was compliant with his medications,
3 and he had good coping skills. (Tr. 314, 318, 322, 326). Additionally, routinely
4 Dr. Nand suggested Plaintiff to participate in cognitive behavioral therapy. At the
5 hearing, Plaintiff testified that he started cognitive therapy, but stopped after two
6 appointments because he did not get along with the therapists. (Tr. 36.)

7 On the other hand, Dr. Genthe concluded that Plaintiff did not have these
8 significant limitations. In 2008, Dr. Genthe examined Plaintiff. After conducting
9 numerous tests, Dr. Genthe concluded that Plaintiff's psychological claims were
10 either fabricated, influenced by alcohol or drugs, influenced by medication
11 seeking, or were influenced by problematic personality traits. (Tr. 274.) Dr.
12 Genthe noted that Plaintiff's frequent changes in mood, as evidenced by the
13 treatment records, is rather unusual and suspect. (Tr. 274.) He noted there was
14 subtle information in the record that indicated Plaintiff used alcohol and
15 marijuana. (Tr. 274.) Interestingly, Plaintiff maintains he was in a manic state
16 during this examination, yet Dr. Genthe did not observe or recognize this during
17 the evaluation. Instead, Dr. Genthe indicated that Plaintiff presented an overall
18 normal mental status. (Tr. 274.)

19 In January, 2009, Dr. Hashmi evaluated Plaintiff for medication
20 management. At that time, Plaintiff reported that he was not taking any
21 medications. During the exam, Dr. Hashmi noted there was no evidence of
22 paranoia or delusional thought. Plaintiff was alert and oriented, well-groomed, and
23 articulate. Plaintiff reported he was attending community college part-time.

24 Dr. Martin, the expert who testified at the hearing, concluded that the
25 marked limitations identified by Dr. Nand were not borne out by the testing
26 performed by Dr. Genthe. Dr. Martin noted that Plaintiff responds well to
27 treatment and functions in the average to high average range cognitively.

28 The ALJ's rejection of Dr. Nand's limitations is supported by the record.

1 Dr. Nand’s opinions regarding Plaintiff’s limitations are not well-supported by
2 medically acceptable clinical and laboratory diagnostic techniques and are
3 inconsistent with other evidence in the record. As such, the ALJ was not required
4 to give Dr. Nand’s opinion controlling weight. Dr. Nand appears to rely
5 significantly on Plaintiff’s self-reported symptoms, which, as explained by Dr.
6 Genthe, are generally suspect. As such, the ALJ did not err in giving Dr. Nand’s
7 opinion less weight. *See Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007) (noting
8 that when an examining physician provides “independent clinical findings that
9 differ from the findings of the treating physician,” such findings are ‘substantial
10 evidence.’”).

11 **2. The ALJ’s Credibility Analysis**

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

20 In recognition of the fact that an individual’s symptoms can sometimes
21 suggest a greater level of severity of impairment than can be shown by the
22 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe
23 the kinds of evidence, including the factors below, that the ALJ must consider in
24 addition to the objective medical evidence when assessing the credibility of an
25 individual’s statements:

- 26 1. The individual’s daily activities; 2. The location, duration,
27 frequency, and intensity of the individual’s pain or other symptoms;
- 28 3. Factors that precipitate and aggravate the symptoms; 4. The type,
dosage, effectiveness, and side effects of any medication the

1 individual takes or has taken to alleviate pain or other symptoms; 5.
2 Treatment, other than medication, the individual receives or has
3 received for relief of pain or other symptoms; 6. Any measures other
4 than treatment the individual uses or has used to relieve pain or other
5 symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20
6 minutes every hour, or sleeping on a board); and 7. Any other factors
7 concerning the individual's functional limitations and restrictions due
8 to pain or other symptoms.

9 SSR 96-7P, 1996 WL 374186.

10 The ALJ noted that Plaintiff alleged symptoms at the hearing that are not
11 consistent with treatment notes, notably that Plaintiff is stable when he is
12 compliant with medication. Additionally, Plaintiff testified that he spent 2 days a
13 week in bed, yet the treatment records do not support this. Dr. Martin also testified
14 she saw a number of inconsistencies in the treatment notes.

15 The ALJ's credibility determination is supported by the record. Dr. Genthe
16 found Plaintiff to be an unreliable historian. While Plaintiff maintained he could
17 not handle working, Dr. Genthe did not believe that Plaintiff had significant
18 limitations that would affect his ability to work. The ALJ relied on Dr. Genthe's
19 opinion that Plaintiff may have been malingering during the evaluation, as well as
20 the fact that the record demonstrated issues of non-compliance, missed
21 appointments, and inconsistent statements concerning Plaintiff's drug and alcohol
22 use. The ALJ did not commit clear error in finding Plaintiff not credible in his
23 assertion that he is unable to work.

24 **3. Residual Functional Capacity**

25 Plaintiff asserts the ALJ erred in determining his residual functional
26 capacity. As set forth above, the ALJ properly relied on the opinions of Dr. Genthe
27 and Dr. Martin in determining the residual functional capacity. Consequently, the
28 resulting RFC and conclusion that Plaintiff is capable of performing the
requirements of representative occupations, such as assembler,
housekeeper/cleaner, surveillance systems monitor, or addresser, is supported by
substantial evidence.

1 **VIII. Conclusion**

2 Plaintiff has not met his burden of showing the ALJ committed legal error,
3 or that her conclusion that he was not disabled from October 21, 2006 to February
4 17, 2011, is not supported by substantial evidence. The ALJ properly found
5 Plaintiff capable of performing the requirements of an assembler,
6 housekeeper/cleaner, surveillance systems monitor, or addresser. Moreover, there
7 was no need for the ALJ to further develop the record as it was neither ambiguous
8 nor incomplete. The record demonstrates that when Plaintiff is medically
9 compliant, he responds well to treatment, and has the residual functional capacity
10 to work.

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

12 1. Plaintiff's Motion for Summary Judgment, ECF No. 15, is **DENIED**.

13 2. Defendant's Motion for Summary Judgment, ECF No. 18, is

14 **GRANTED.**

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

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

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

20 **DATED** this 7th day of May, 2014.

21 *s/Robert H. Whaley*

22 ROBERT H. WHALEY
23 United States District Judge

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