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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 DONALD W. GRAY,
7 Plaintiff,
8 v.
9 CAROLYN W. COLVIN,
10 Commissioner of Social Security,
11 Defendant.

NO. CV-13-00187-JLQ

MEMORANDUM OPINION AND
ORDER RE: MOTIONS FOR
SUMMARY JUDGMENT

12 BEFORE THE COURT are Cross-Motions for Summary Judgment. (ECF
13 NO. 18 & 20). Plaintiff is represented by attorney **Dana C. Madsen**. Defendant
14 is represented by Assistant United States Attorney **Pamela J. DeRusha** and
15 Special Assistant United States Attorney **Nancy A. Mishalanie**. This matter was
16 previously before Magistrate Judge John T. Rodgers. It was reassigned to the
17 undersigned for all further proceedings on January 3, 2014. The court has
18 reviewed the administrative record and the parties' briefs. The case was submitted
19 for decision without oral argument via Order of this court on February 4, 2014.

20 This court's role on review of the decision of the Administrative Law Judge
21 (ALJ) is limited. The court reviews that decision to determine if it was supported
22 by substantial evidence and contains a correct application of the law. *Valentine v.*
23 *Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). This court is
24 obligated to affirm the ALJ's findings if they are supported by substantial
25 evidence and the reasonable inferences to be drawn therefrom. *Molina v. Astrue*,
26 674 F.3d 1104, 1110-11 (9th Cir. 2012). Substantial evidence is such relevant
27 evidence that a reasonable mind might accept as adequate to support the
28 conclusion.

1 maker proceeds to step two.

2 Step 2: Does the claimant have a medically severe impairment or
3 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
4 claimant does not have a severe impairment or combination of impairments, the
5 disability claim is denied. If the impairment is severe, the evaluation proceeds to
6 the third step.

7 Step 3: Does the claimant's impairment meet or equal one of the listed
8 impairments acknowledged by the Commissioner to be so severe as to preclude
9 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. Pt.
10 404 Subpt. P App. 1. If the impairment meets or equals one of the listed
11 impairments, the claimant is conclusively presumed to be disabled. If the
12 impairment is not one conclusively presumed to be disabling, the evaluation
13 proceeds to the fourth step.

14 Step 4: Does the impairment prevent the claimant from performing work he
15 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
16 is able to perform his previous work, he is not disabled. If the claimant cannot
17 perform this work, the inquiry proceeds to the fifth and final step.

18 Step 5: Is the claimant able to perform other work in the national economy
19 in view of his age, education and work experience? 20 C.F.R. §§ 404.1520(f),
20 416.920(f).

21 The initial burden of proof rests upon the Plaintiff to establish a prima facie
22 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921
23 (9th Cir. 1971). The initial burden is met once a claimant establishes that a
24 physical or mental impairment prevents her from engaging in her previous
25 occupation. The burden then shifts to the Commissioner to show (1) that the
26 claimant can perform other substantial gainful activity and (2) that a "significant
27 number of jobs exist in the national economy" which claimant can perform. *Kail*
28 *v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

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III. STANDARD OF REVIEW

“The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence and the [Commissioner] applied the proper legal standards.” *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989). “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). “[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence” will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989). This court may set aside a denial of benefits only if the basis for denial is not supported by substantial evidence or if it is based on legal error. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). It is the role of the trier of fact, not this court, to resolve conflicts in the evidence. *Richardson*, 402 U.S. at 400. If the evidence supports more than one rational interpretation, the court must uphold the decision of the ALJ. *Thomas*, 278 F.3d at 954 (9th Cir. 2002).

IV. STATEMENT OF FACTS

22 The facts are contained in the medical records, administrative transcript, and
23 the ALJ's decision, and are only briefly summarized here. At the time the ALJ
24 issued her decision in 2012, Plaintiff was 47 years-old. Plaintiff has a high school
25 education. Plaintiff has past work history as a home attendant/caregiver, janitor,
26 cleaner/housekeeper, and delivery route truck driver. Plaintiff claimed disability
27 based primarily on lower back pain and depression. Plaintiffs' most recent work
28 history was as a caregiver to his wife after she had a stroke in 2002. (ECF No. 12,

1 p. 52). She passed away in 2008 (*Id.* at 61), and Plaintiff understandably alleged
2 this contributed to his depression. Plaintiff has two children, both in their late-
3 teens, one who was still residing with Plaintiff at the time of the hearing. (*Id.* at
4 57-58).

5 **V. COMMISSIONER'S FINDINGS**

6 The ALJ found at **Step 1** that Plaintiff had not engaged in substantial
7 gainful activity since August 21, 2007, the alleged onset date. (ECF No. 12-2, p.
8 27). The ALJ noted that the medical records mentioned some intermittent work
9 activity between December 2008 and August 2010, but that work did not amount
10 to substantial gainful activity.

11 At **Step 2**, the ALJ found the medical evidence established the following
12 severe impairments: history of remote lumbar injury with reports of low back pain;
13 right upper extremity ulnar neuropathy, obesity, headaches, hypertension, and
14 depression (ECF No. 12-2, p. 28).

15 At **Step 3**, the ALJ found that Plaintiff did not have an impairment or
16 combination of impairments that meets or medically equals the Listings as
17 described in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d)) .
18 The ALJ specifically considered sections 1.00, 11.00, and 12.00 pertaining to the
19 musculoskeletal system, neurological, and mental disorders. The ALJ further
20 specifically considered Plaintiff's mental impairment and found it did not meet
21 Listing 12.04 (affective disorders).

22 At **Step 4**, the ALJ evaluated Plaintiff's residual functional capacity (RFC)
23 and found Plaintiff had the RFC to perform light work. The RFC also contained
24 additional limitations to account for Plaintiff's physical and mental impairments.
25 (ECF No. 12-2, p. 32). The ALJ then concluded that Plaintiff was capable of
26 performing his past relevant work as a cleaner/housekeeper.

27 At **Step 5** the ALJ concluded, relying on the testimony of a vocational
28 expert, that Plaintiff was capable of performing other work that exists in

1 significant numbers in the national economy. Specifically, the vocational expert
2 identified the jobs of mail clerk, office helper, and production assembler. (ECF
3 No. 12-2, p. 35).

4 The ALJ concluded that Plaintiff had not been under a disability, as defined
5 in the Social Security Act, from the alleged onset date of August 21, 2007, through
6 the date of the decision, June 21, 2012.

7 VI. ISSUES

8 Plaintiff identifies only one primary issue for review: 1) did the ALJ err in
9 assessing Plaintiff's credibility? Plaintiff claims that the ALJ gave insufficient
10 reasons for discrediting his testimony, and if such testimony was credited, it would
11 establish that he was "more limited from a physical and psychological standpoint
12 than the ALJ determined". (ECF No. 18, p. 7). The Defendant's brief identifies
13 two issues for review: 1) Plaintiff's credibility assessment; and 2) new evidence in
14 the form of the opinion of Dr. Pollack. (ECF No. 20). Plaintiff's brief suggested,
15 in the alternative and without much discussion, that Dr. Pollack's post-hearing
16 evaluation could merit remand. (ECF No. 18, p. 10). Therefore, the court will
17 address these two issues.

18 VII. DISCUSSION

19 A. Did the ALJ Err in Assessing Plaintiff's Credibility?

20 The ALJ found that Gray's medically determinable impairments could be
21 expected to produce the alleged symptoms, but that he was "not entirely credible
22 due to the paucity of findings to support the claimant's claim of total disability.
23 (ECF No. 12-2, p. 34). The ALJ then gave numerous reasons for her credibility
24 determination.

25 In deciding whether to accept a claimant's subjective symptom testimony,
26 the ALJ "must perform two stages of analysis: the *Cotton* analysis and an analysis
27 of the credibility of the claimant's testimony regarding the severity of her
28 symptoms." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). The *Cotton*

1 analysis comes from the Ninth Circuit's opinion in *Cotton v. Bowen*, 799 F.2d
2 1403 (9th Cir. 1986), and thereunder the claimant must: 1) produce objective
3 medical evidence of an impairment or impairments; and 2) show that the
4 impairment or combination of impairments could reasonably be expected to
5 produce some degree of symptom. *Smolen*, 80 F.3d at 1281-82. If a claimant
6 meets the *Cotton* test, then the ALJ may reject the claimant's testimony regarding
7 the severity of symptoms only based on specific, clear, and convincing reasons. *Id.*
8 at 1284.

9 The ALJ stated that the evidence of record lacked diagnostic studies
10 objectively confirming lumbar degenerative disc disease, and that Plaintiff's
11 treatment history was not significant, other than an ongoing prescription for
12 narcotics. (ECF No. 12-2, p. 34). The ALJ noted that no nerve conduction studies
13 were performed for the right ulnar neuropathy. (*Id.*). The ALJ noted that as to his
14 depression, Plaintiff had not sought mental health counseling and that he appeared
15 to be having no significant problems with his activities of daily living. (*Id.*).

16 The ALJ also stated she "suspects a deep disability conviction and possible
17 motivation by secondary gain in light of his family's income about to be coming to
18 a halt as his son turns 18." (*Id.* at 34).

19 The ALJ also noted Plaintiff's testimony concerning his positive urinalysis
20 for marijuana, which was in violation of his pain contract. Plaintiff "testified he
21 did not smoke marijuana, but had a neighbor who blew smoke in his face and his
22 urinalysis came up positive because of that." (*Id.* at 33). The ALJ also noted that
23 Dr. Akpangbo had written that Plaintiff had not been completely honest with her
24 and had not divulged that he broke a pain contract with a prior physician. (*Id.* at
25 30).

26 The ALJ's primary reason for finding Plaintiff not entirely credible was a
27 finding that Plaintiff's subjective testimony was not consistent with the objective
28 findings. This finding is amply supported by substantial evidence. Plaintiff saw

1 Dr. Jane Akpangbo in November 2010, and reported that he had been using a U-
2 Haul to help his girlfriend move and had hurt his lower back. Dr. Akpangbo
3 discussed with him that he had not been cooperative on prior visits, and she
4 emphasized the importance of him quitting smoking if the pain medication was
5 going to be effective. Dr. Akpangbo noted at an exam in October 2010, that
6 Plaintiff reported his pain level as an 8 or 9 “however, Donald was quite
7 comfortable and did not appear to be in that much pain at all.” (ECF No. 12, p.
8 433).

9 Dr. Chandler, who examined Plaintiff in January 2011, for purposes of a
10 psychological diagnosis, wrote that “no pain behaviors were observed during the
11 session.” (ECF No. 12, p. 439). Plaintiff informed Dr. Chandler that he was not
12 currently taking any medication for depression and he had never received inpatient
13 or outpatient mental health treatment. (*Id.* at 440). Dr. Chandler did **not** diagnose
14 Plaintiff with depression. In fact, she concluded: “Evidence suggests a cognitive
15 ability to adapt and function appropriately within a work setting and sustain
16 concentration and attention over the course of a traditional 8-hour/5-day
17 workweek.” (*Id.* at 442).

18 Plaintiff also underwent a physical exam with Dr. Peter Weir on January 18,
19 2011. Dr. Weir noted that Plaintiff did “not appear in discomfort” during the
20 exam, and “did not exhibit pain behavior” during the exam. (*Id.* at 446-447). Dr.
21 Weir’s range of motion exam concluded that Plaintiff’s hip, knee, ankle, and
22 shoulder joints were all within normal limits. Dr. Weir concluded:

23 The claimant’s complaints are subjective in nature. His physical
24 examination is unremarkable and there are not objective findings in support
25 of his subjective complaints. On the basis of my examination today, I am
26 unable to justify limiting the claimant’s ability to function in the workplace.
In my opinion, there are no functional limitations.

27 (*Id.* at 448).

28 The ALJ's conclusion that Plaintiff's subjective complaints were not

1 supported by the objective medical findings is supported by the record. The ALJ
2 also expressed concern that Plaintiff was motivated by secondary gain. In certain
3 circumstances such motivation can be an independent basis for discounting a
4 claimant's credibility. See Coleman v. Colvin, 524 Fed.Appx. 325 (9th Cir.
5 2013)("an independent reason exists for rejecting [claimant's] testimony (i.e., that
6 Ms. Coleman may be motivated by secondary gain), and Ms. Coleman offers no
7 argument to reject this reason."). Here, Plaintiff had testified that his primary
8 income was social security benefits that his minor son received after his wife's
9 death and that his son was going to be turning 18 a few months after the hearing.
10 (ECF No. 12, p. 67). That reason, standing alone, would not be sufficient to
11 support the ALJ's credibility determination.

12 However, the ALJ's credibility determination was based primarily on an
13 assessment that Plaintiff's subjective reporting was not consistent with the
14 objective medical findings. The ALJ also noted Plaintiff's odd testimony about
15 his positive test for marijuana use, and Dr. Akpangbo's note that he had not been
16 forthright about violating his pain contract. The foregoing are specific, clear and
17 convincing reasons supported by the record. It is the role of the ALJ to assess
18 credibility and weigh the evidence, "[w]here the evidence is susceptible to more
19 than one rational interpretation, it is the ALJ's conclusion that must be upheld."
20 *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

21 **B. Does Dr. Pollack's Post-Hearing Evaluation Merit Remand?**

22 Plaintiff saw Dr. Dennis Pollack, a clinical psychologist, for an examination
23 twice in October 2012. This was approximately six months after the hearing
24 before the ALJ, and four months after the ALJ's decision. Plaintiff submitted Dr.
25 Pollack's evaluation to the Appeals Council. The Appeals Council acknowledged
26 receipt of Dr. Pollack's November 13, 2012 report, and it was made part of the
27 record. (ECF No. 12, p. 5). Therefore, this court may consider Dr. Pollack's report
28 as part of the record. *Brewes v. Commissioner*, 682 F.3d 1157 (9th Cir. 2012).

1 However, the Appeals Council may consider new and material evidence “only
2 where it relates to the period on or before the date of the administrative law judge
3 hearing decision.” 20 CFR § 416.1470.

4 Dr. Pollack did not diagnose Plaintiff with depression. However, he did
5 diagnose him with a pain disorder and a learning disorder. (ECF No. 12, p. 458).
6 Dr. Pollack’s report appears to be based largely on Plaintiff’s subjective reporting.
7 The report does not indicate that Dr. Pollack reviewed past medical records. Dr.
8 Pollack did administer three tests: intelligence, personality, and
9 neuropsychological. Dr. Pollack’s assessment of Plaintiff’s condition was after
10 the ALJ’s decision, and nearly three years after the expiration of his last insured
11 status date for disability insurance benefits under Title II, which occurred in
12 December 2009.¹ The ALJ’s conclusion was that Plaintiff had not been under a
13 disability, as defined in the Social Security Act, from the alleged onset date of
14 August 21, 2007, through the date of the decision, June 21, 2012.

15 Dr. Pollack’s later assessment does not impact and is not relevant to the
16 ALJ’s assessment. Dr. Pollack’s report reflects that Plaintiff was referred to him
17 by Plaintiff’s attorney. A brief review of relevant case law reflects that it is not
18 uncommon for a claimant to be referred to Dr. Pollack after receiving an
19 unfavorable decision from the ALJ. In Stokely v. Colvin, 2013 WL 1819688
20 (E.D. Wash. 2013), Plaintiff saw Dr. Pollack nearly a year after the ALJ’s adverse
21 decision and the court, per Judge Imbrogno, stated: “Because this evidence was
22 acquired almost a year after the ALJ rendered her decision, it is neither relevant
23 nor probative to Plaintiff’s mental condition for purposes of this review.”

24 Similarly, in Merriweather v. Colvin, 2013 WL 4498748 (E.D. Wash. 2013),
25

26 ¹Plaintiff was also seeking supplemental security income
27 (SSI) under Title XVI. There is no onset date requirement for his
28 SSI application. *Waggoner v. Barnhart*, 49 Fed.Appx. 708 (9th Cir.
2002).

1 Plaintiff was examined by Dr. Pollack four to six months after the ALJ's decision.
2 That court stated: "Dr. Pollack's findings and conclusions are not relevant to the
3 period at issue and are tainted significantly by Plaintiff's unreliable self-report."
4 In yet another case, the court, per Judge Nielsen, found that the ALJ's conclusion
5 that "marked limitations are a consistent factor in Dr. Pollack's reports and are
6 inconsistent with his own narrative as well as with the longitudinal records," was
7 supported by substantial evidence. *Stearns v. Colvin*, 2013 WL 3244805 (E.D.
8 Wash. 2013).

9 Even if Dr. Pollack's evaluation was relevant, it is not of much assistance to
10 Plaintiff. Dr. Pollack assessed 20 different areas of potential mental functional
11 limitation on a check box form. In 13 of those categories, he found no limitation.
12 In another 5 categories, he found only mild limitation. In only two categories: 1)
13 ability to perform activities within a schedule, maintain attendance and
14 punctuality, and 2) ability to complete a normal workday and work week without
15 limitations, did Dr. Pollack find "marked limitations". (ECF No. 12, p. 459-462).

16 Ultimately, Dr. Pollack's conclusions are based almost exclusively on
17 Plaintiff's subjective reporting, which the ALJ found not entirely credible. A
18 physician's opinion may be discounted if it relies on a claimant's unreliable self-
19 report. *Bayliss v. Barnhart*. 427 F.3d 1211, 1217 (9th Cir. 2005) see also *Buckner-*
20 *Larkin v. Astrue*, 450 Fed.Appx. 626 (9th Cir. 2011)("if the ALJ determines that
21 the subjective complaints of the claimant are not credible, that is sufficient reason
22 for discounting a physician's opinion that is based on these complaints.") citing
23 *Bray v. Commissioner*, 554 F.3d 1219 (9th Cir. 2009).

24 The post-hearing evaluation and report do not merit remand. See *Quesada v.*
25 *Colvin*, 525 Fed.Appx. 627 (9th Cir. 2013)("the district court properly concluded
26 that the additional evidence [claimant] submitted to the Appeals Council would
27 not have changed the outcome in the case because it post-dated the ALJ's decision
28 and therefore was not relevant.").

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VIII. CONCLUSION

The Commissioner's and ALJ's decision is supported by substantial evidence in the record and is based on proper legal standards. It must therefore be affirmed. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment (ECF No. 18) is **DENIED**.
2. Defendant's Motion for Summary Judgment (ECF No. 20) is

GRANTED.

3. The Clerk is directed to enter Judgment dismissing the Complaint and the claims therein with prejudice.

IT IS SO ORDERED. The District Court Executive is directed to file this Order, enter Judgment as directed above, and close this file.

DATED this 18th day of February, 2014.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE