

1
2 **UNITED STATES DISTRICT COURT**
3 **EASTERN DISTRICT OF WASHINGTON**

4 Case No. CV-14-17-JPH

5
6 BENJAMIN C. L. KELLY,

7 Plaintiff,

8 vs.

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

11 Defendant.

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

12
13 **BEFORE THE COURT** are cross-motions for summary judgment.

14 ECF No. 15, 16. Attorney Joseph M. Linehan represents plaintiff (Kelly).

15 Special Assistant United States Attorney Jeffrey R. McClain represents
16 defendant (Commissioner). The parties consented to proceed before a

17 magistrate judge. ECF No. 8. Kelly filed a reply July 21, 2014. ECF No.

18 17. After reviewing the administrative record and the briefs filed by the

19 parties, the court **grants** defendant's motion for summary judgment, ECF
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ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT ~ 1

1 No. 16.

2 **JURISDICTION**

3 Kelly applied for supplemental security income (SSI) benefits
4 September 15, 2010 alleging disability beginning August 1, 2010 (Tr.
5 146-51). The claim was denied initially and on reconsideration (Tr. 90-93,
6 96-97). Administrative Law Judge (ALJ) Marie Palachuk held a hearing
7 July 24, 2012. Psychologist Jay Toews, Ed. D., a vocational expert and
8 Kelly testified (Tr. 43-69). On August 28, 2012, the ALJ issued an
9 unfavorable decision (Tr. 22-37). The Appeals Council denied review
10 November 27, 2013 (Tr. 1-6). Kelly appealed pursuant to 42 U.S.C. §§
11 405(g) on January 16, 2014. ECF No. 1, 5.

12 **STATEMENT OF FACTS**

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15 The facts have been presented in the administrative hearing
16 transcript, the decision below and the parties' briefs. They are only briefly
17 summarized here and throughout this order as necessary to explain the
18 Court's decision.

19 Kelly was 28 years old at onset and 30 at the hearing. He has a sixth
20 or tenth grade education. He has a long history of substance abuse. He has

1 reported “twenty felonies.” Criminal activities include armed robbery,
2 assault, grand theft, theft, burglaries, escapes, gun charges, domestic
3 violence, possessing marijuana and selling drugs. Kelly has been
4 incarcerated for a total of about ten years. He suffers anger control
5 problems, depression, social anxiety and cognitive limitations. Kelly
6 initially alleged he suffers from mental limitations. Currently he also
7 alleges sleep and stomach problems (Tr. 52, 54, 56, 161-62, 166, 233,
8 245, 287, 308, 314, 316).

10 **SEQUENTIAL EVALUATION PROCESS**

11 The Social Security Act (the Act) defines disability as the “inability
12 to engage in any substantial gainful activity by reason of any medically
13 determinable physical or mental impairment which can be expected to
14 result in death or which has lasted or can be expected to last for a
15 continuous period of not less than twelve months.” 42 U.S.C. §§
16 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a plaintiff shall
17 be determined to be under a disability only if any impairments are of such
18 severity that a plaintiff is not only unable to do previous work but cannot,
19 considering plaintiff’s age, education and work experiences, engage in
20

1 any other substantial work which exists in the national economy. 42
2 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
3 consists of both medical and vocational components. *Edlund v.*
4 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

5
6 The Commissioner has established a five-step sequential evaluation
7 process for determining whether a person is disabled. 20 C.F.R. §§
8 404.1520, 416.920. Step one determines if the person is engaged in
9 substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.
10 1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step
11 two, which determines whether plaintiff has a medially severe impairment
12 or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
13 416.920(a)(4)(ii).

14
15 If plaintiff does not have a severe impairment or combination of
16 impairments, the disability claim is denied. If the impairment is severe,
17 the evaluation proceeds to the third step, which compares plaintiff's
18 impairment with a number of listed impairments acknowledged by the
19 Commissioner to be so severe as to preclude substantial gainful activity.
20 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404

1 Subpt. P App. 1. If the impairment meets or equals one of the listed
2 impairments, plaintiff is conclusively presumed to be disabled. If the
3 impairment is not one conclusively presumed to be disabling, the
4 evaluation proceeds to the fourth step, which determines whether the
5 impairment prevents plaintiff from performing work which was
6 performed in the past. If a plaintiff is able to perform previous work that
7 plaintiff is deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
8 416.920(a)(4)(iv). At this step, plaintiff's residual functional capacity
9 (RFC) is considered. If plaintiff cannot perform past relevant work, the
10 fifth and final step in the process determines whether plaintiff is able to
11 perform other work in the national economy in view of plaintiff's residual
12 functional capacity, age, education and past work experience. 20 C.F.R.
13 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
14 (1987).

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17 The initial burden of proof rests upon plaintiff to establish a *prima*
18 *facie* case of entitlement to disability benefits. *Rhinehart v. Finch*, 438
19 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
20 Cir. 1999). The initial burden is met once plaintiff establishes that a

1 mental or physical impairment prevents the performance of previous
2 work. The burden then shifts, at step five, to the Commissioner to show
3 that (1) plaintiff can perform other substantial gainful activity and (2) a
4 “significant number of jobs exist in the national economy” which plaintiff
5 can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

7 **STANDARD OF REVIEW**

8 Congress has provided a limited scope of judicial review of a
9 Commissioner’s decision. 42 U.S.C. § 405(g). A Court must uphold a
10 Commissioner’s decision, made through an ALJ, when the determination
11 is not based on legal error and is supported by substantial evidence. *See*
12 *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180
13 F.3d 1094, 1097 (9th Cir. 1999). “The [Commissioner’s] determination
14 that a plaintiff is not disabled will be upheld if the findings of fact are
15 supported by substantial evidence.” *Delgado v. Heckler*, 722 F.2d 570,
16 572 (9th Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
17 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119
18 n 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
19 888 F.2d 599, 601-02 (9th Cir. 1989). Substantial evidence “means such

1 evidence as a reasonable mind might accept as adequate to support a
2 conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(citations
3 omitted). “[S]uch inferences and conclusions as the [Commissioner] may
4 reasonably draw from the evidence” will also be upheld. *Mark v.*
5 *Celebreeze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court
6 considers the record as a whole, not just the evidence supporting the
7 decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th
8 Cir. 1989)(quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

10 It is the role of the trier of fact, not this Court, to resolve conflicts in
11 evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than
12 one rational interpretation, the Court may not substitute its judgment for
13 that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*,
14 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by
15 substantial evidence will still be set aside if the proper legal standards
16 were not applied in weighing the evidence and making the decision.
17 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433
18 (9th Cir. 1987). Thus, if there is substantial evidence to support the
19 administrative findings, or if there is conflicting evidence that will support
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1 a finding of either disability or nondisability, the finding of the
2 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30
3 (9th Cir. 1987).

4 Plaintiff has the burden of showing that drug and alcohol addiction
5 (DAA) is not a contributing factor material to disability. *Ball v.*
6 *Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). The Social Security Act
7 bars payment of benefits when drug addiction and/or alcoholism is a
8 contributing factor material to a disability claim. 42 U.S.C. §§
9 423(d)(2)(C) and 1382(a)(3)(J); *Bustamante v. Massanari*, 262 F.3d 949
10 (9th Cir. 2001); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If
11 there is evidence of DAA and the individual succeeds in proving
12 disability, the Commissioner must determine whether DAA is material to
13 the determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If an
14 ALJ finds that the claimant is not disabled, then the claimant is not
15 entitled to benefits and there is no need to proceed the analysis to
16 determine whether substance abuse is a contributing factor material to
17 disability. However, if the ALJ finds that the claimant is disabled, then the
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1 ALJ must proceed to determine if the claimant would be disabled if he or
2 she stopped using alcohol or drugs.

3 **ALJ'S FINDINGS**

4 At step one the ALJ found Kelly did not work at substantial gainful
5 activity levels after onset (Tr. 24, 34). At step two, she found Kelly
6 suffers from alcohol and polysubstance abuse; generalized anxiety
7 disorder vs. anxiety disorder NOS; personality disorder with antisocial
8 features and borderline intellectual functioning (Tr. 34). At step three the
9 ALJ found Kelly disabled because these impairments met Listings 12.04C
10 and 12.09 (Tr. 35).

11
12 The ALJ proceeded to consider the effects of DAA. She found when
13 DAA is excluded the remaining medically determinable impairments
14 would cause at most mildly moderate limitations. She assessed an RFC
15 for a significant range of unskilled work (Tr. 35). The ALJ found Kelly
16 has no past relevant work (Tr. 35). She found when DAA is excluded,
17 there are a significant number of unskilled jobs Kelly could perform (Tr.
18 35-36). The ALJ found DAA is a contributing factor material the
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1 disability determination (Tr. 36), meaning he is barred from receiving
2 benefits.

3 **ISSUES**

4 Kelly alleges the ALJ erred at step two and when she weighed the
5 evidence of psychological limitations. ECF No. 15 at 10-14. The
6 Commissioner responds that the ALJ's step two findings were reasonable
7 and the evidence submitted after the ALJ's decision is insufficient to
8 undermine the ALJ's conclusions. ECF No. 16 at 4-9. With respect to the
9 second allegation, the Commissioner answers that the ALJ gave specific,
10 legitimate reasons supported substantial evidence for rejecting some of
11 the opinions. ECF No. 9-12. The Commissioner alleges the ALJ's
12 findings are factually supported and free of harmful legal error. She asks
13 the court to affirm. ECF No. 16 at 2.

16 **DISCUSSION**

17 *A. Credibility*

18 Kelly does not address the ALJ's credibility assessment, making it a
19 verity on appeal. *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155
20 (9th Cir. 2008). He challenges the ALJ's assessment of conflicting medical

1 evidence. The court addresses credibility because the ALJ considered it
2 when she weighed the medical evidence.

3 When presented with conflicting medical opinions, the ALJ must
4 determine credibility and resolve the conflict. *Batson v. Comm’r of Soc.*
5 *Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004)(citation omitted). The
6 ALJ’s credibility findings must be supported by specific cogent reasons.
7 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
8 affirmative evidence of malingering, the ALJ’s reasons for rejecting the
9 claimant’s testimony must be “clear and convincing.” *Lester v. Chater*, 81
10 F.3d 821, 834 (9th Cir. 1995).

11 The ALJ considered drug seeking behavior. In August 2011 Kelly
12 left the ER when told he was not going to be given narcotics, stating he
13 “would go to another ER for pain meds then.” A treating doctor at
14 Spokane Mental Health describes he “seems to be quite manipulative.”
15 The ALJ considered Kelly’s many inconsistent statements, including with
16 respect to substance use and past work. She considered Kelly’s history of
17 unexplained or inadequately explained non-compliance with medication
18 and medical treatment (Tr. 25-27, 30-31, 53-54, 62-63, 194, 217, 232,
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1 240-43, 247, 274, 287, 293, 308, 310, 314-16, 320-22, 324, 332-33, 338).
2 In May 2011, Kelly refused to undergo a rectal exam despite complaints
3 of rectal bleeding. Also in May 2011 he admitted he quit taking
4 prescribed psychotropic medications. A few days after a psychological
5 evaluation in October 2010, Kelly reported that he took one or two doses
6 of prescribed antidepressants and stopped. He did not follow up with
7 Spokane Mental Health after intake (Tr. 27, 196, 274, 278, 280, 282, 287,
8 322, 332).

10 The ALJ considered Kelly's ability to regularly socialize with his
11 girlfriend and relatives, leave home alone, watch television, walk nieces
12 and nephews to the park and play video games daily (Tr. 31-32, 57, 220,
13 244, 310).

15 The ALJ's reasons are clear, convincing and supported by
16 substantial evidence. Although lack of medical evidence cannot form the
17 sole basis for discounting pain testimony, it is a factor the ALJ can
18 consider when analyzing credibility. *Burch v. Barnhart*, 400 F.3d 676,
19 680 (9th Cir. 2005). The ALJ is permitted to consider inconsistent
20 statements and activities inconsistent with allegedly severe limitations.

1 *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). Unexplained
2 or inadequately explained failure to follow prescribed medical treatment
3 is properly considered. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

4 *B. Step two*

5 Kelly alleges the ALJ should have found at step two that Crohn's
6 disease is a severe impairment. He submits evidence not presented to the
7 ALJ, but considered by the Appeals Council, in support of this allegation.
8 ECF No. 15 at 10, referring to Tr. 209-215. The Commissioner answers
9 that the Appeals Council correctly found this evidence post-dated the
10 ALJ's decision, and therefore did not "affect the decision about whether
11 [Plaintiff] [was] disabled beginning on or before August 28, 2010." The
12 Commissioner also responds that this evidence does not undermine the
13 ALJ's step two determination. ECF No. 16 at 6-7.

14 The Commissioner is correct.

15 The court has considered the evidence presented for the first time to
16 the Appeals Council to determine whether the ALJ's decision is supported
17 by substantial evidence. *See Brewes v. Comm'r of Soc. Sec. Admin.*, 659
18 F.3d 1157, 1159-60, 1162-63 (9th Cir. 2011). The new evidence does not

1 change the fact that the ALJ's decision is supported by substantial
2 evidence.

3 The ALJ's decision is dated August 28, 2012 (Tr. 37). On
4 September 12, 2012 Kelly was seen at Skagit Regional Clinic (Tr. 213-
5 15). The new information is not within the relevant period, as it relates
6 to a time after the ALJ's decision. In this situation the remedy is to file a
7 new application for benefits. *See Ward v. Schweiker*, 686 F.2d 762, 765-
8 66 (9th Cir. 1982).

10 Even if relevant, however, the evidence does not undermine the
11 ALJ's findings or change the outcome in this case.

12 In order to find an impairment severe at step two, an impairment
13 must first be medically determinable. The existence of a medically
14 determinable impairment cannot be established in the absence of objective
15 medical abnormalities, i.e., medical signs and laboratory findings. SSR
16 96-4p. As the Commissioner accurately points out, at Kelly's post hearing
17 medical appointment further diagnostic evaluations and testing were
18 ordered. The record does not include a diagnosis of Crohn's disease (Tr.
19 213-15).
20

1 As the ALJ notes, abdominal and pelvic x-ray results are normal.
2 Kelly failed to keep colonoscopy appointments. He failed to undergo
3 EGD examinations as directed. He refused to undergo any rectal exams
4 for abdominal and rectal complaints, despite allegations of bleeding “bad
5 from bowel movements” since December 2010. An ER doctor opined in
6 January 2011 the diagnosis is likely IBS and anxiety (Tr. 27, 180, 295,
7 290, 295-97, 322, 339-42).

8
9 Moreover, any error at step two is harmless because the ALJ
10 resolved that step in Kelly’s favor. *See Stout v. Comm’r of Soc. Sec.*
11 *Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006)(citing *Burch v. Barnhart*, 400
12 F.3d 676, 682 (9th Cir. 2005)). The ALJ found Kelly disabled at step
13 three. It is because she found DAA is material that the ALJ found Kelly is
14 not entitled to benefits.

15
16 *C. Psychological limitations*

17 Kelly alleges the ALJ should have credited the opinions of
18 examining psychologists Debra D. Brown, Ph.D., and Mahlon Dalley,
19 Ph.D. ECF No. 15 at 11-14. The Commissioner responds that the ALJ
20 properly weighed the evidence of mental limitations. ECF No. 16 at 9-12.

1 The Commissioner is correct.

2 Dr. Brown performed evaluations in May 25, 2010 (Tr. 217-26) and
3 June 20, 2011 (Tr. 308-13). Dr. Brown's first opinion is inconsistent. She
4 opines neuropsychological testing is needed, and no further tests or
5 consultations are needed (Tr. 218, 222). Similarly Dr. Brown observes
6 during testing Kelly "could write a sentence" (Tr. 224) and he "cannot
7 read or write (Tr. 221).
8

9 At Dr. Brown's 2011 evaluation, the PAI was invalid due to
10 symptom exaggeration. Kelly was not receiving mental health services.
11 Kelly admitted he smoked marijuana a week ago, yet Dr. Brown notes
12 "no indication of current or recent alcohol or substance abuse"(Tr. 46, 49,
13 308-313).
14

15 Dr. Dalley evaluated Kelly June 22, 2005, more than five years
16 before onset (Tr. 34, 228-36). The ALJ properly gave this opinion no
17 weight because it had little relevance to the applicable time frame.
18 *Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir.
19 2008)(citation omitted). Moreover, Kelley reported no current or past
20 substance abuse (Tr. 229) and Dr. Dalley opined limitations would last a

1 maximum of six months (Tr. 231), further diminishing the relevance of
2 this opinion.

3 Dr. Dalley opined symptoms from depressive disorder NOS and
4 anxiety disorder NOS should not interfere with functioning at entry level
5 positions and Kelly may benefit from minimal contact with co-workers
6 and supervisors (Tr. 236).
7

8 The ALJ assessed an RFC that adequately captures the limitations
9 supported by the record. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169,
10 1174 (9th Cir. 2008) (an ALJ's assessment of a claimant adequately
11 captures restrictions related to concentration, persistence or pace where
12 the assessment is consistent with restrictions identified in the medical
13 testimony).
14

15 The ALJ properly weighed the contradictory evidence. The record
16 fully supports the assessed RFC when DAA is excluded. Although Kelly
17 alleges the ALJ should have weighed the evidence differently, the ALJ is
18 responsible for reviewing the evidence and resolving conflicts and
19 ambiguities. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041-42 (9th Cir.
20 2008)(internal citations omitted). The court will uphold the ALJ's

1 conclusion when the evidence is susceptible to more than one rational
2 interpretation. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

3
4 **CONCLUSION**

5 After review the Court finds the ALJ's decision is supported by
6 substantial evidence and free of harmful legal error.

7 **IT IS ORDERED:**

8 Defendant's motion for summary judgment, **ECF No. 16**, is
9 **granted.**

10 Plaintiff's motion for summary judgment, ECF No. 15, is denied.

11 The District Court Executive is directed to file this Order, provide
12 copies to counsel, enter judgment in favor of defendant and **CLOSE** the
13 file.
14

15 DATED this 24th day of July, 2014.

16 *S/ James P. Hutton*

17 JAMES P. HUTTON
18 UNITED STATES MAGISTRATE JUDGE
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20