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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 JOSEPH SCHNEIDERMAN,

10 Plaintiff,

11 v.
12

13 CAROLYN W. COLVIN,
14 Commissioner of Social Security,

15 Defendant.
16

No. 2:14-CV-00120-JTR

ORDER GRANTING
DEFENDANT'S MOTION TO
ALTER OR AMEND JUDGMENT

17 **BEFORE THE COURT** is Defendant's Motion to Alter or Amend
18 Judgment Pursuant to FED R. CIV. P. 59(e). ECF No. 24. Attorney Dustin D.
19 Deissner represents Joseph Schneiderman (Plaintiff); Special Assistant United
20 States Attorney Catherine Escobar represents the Commissioner of Social Security
21 (Defendant). Plaintiff has not responded to Defendant's Motion. After reviewing
22 the administrative record and the pending motion, the Court **GRANTS**
23 Defendant's Motion to Alter or Amend Judgment Pursuant to FED R. CIV. P. 59(e).

24 **BACKGROUND AND STANDARD OF REVIEW**

25 Plaintiff filed for disability insurance benefits and supplemental security
26 income on March 2, 2009. Benefits were denied initially and on reconsideration.
27 After a hearing on June 8, 2010, administrative law judge (ALJ) Marie Palachuk
28 denied benefits and the Appeals Council subsequently denied review. Plaintiff

ORDER GRANTING DEFENDANT'S MOTION
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1 filed a civil action in district court to obtain judicial review of the agency's
2 decision. Plaintiff and Defendant filed cross-Motions for Summary Judgment. On
3 June 6, 2015, the Court entered an Order granting in part Plaintiff's Motion for
4 Summary Judgment and remanded the case for additional proceedings. ECF No.
5 22. Defendant timely filed a Motion to Alter or Amend Judgment on July 6, 2015.
6 ECF No. 24.

7 Under FED R. CIV. P 59(e), it is appropriate to alter or amend a judgment if
8 "(1) the district court is presented with newly discovered evidence, (2) the district
9 court committed clear error or made an initial decision that was manifestly unjust,
10 or (3) there was an intervening change in controlling law." *United Nat. Ins. Co. v.*
11 *Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009) (citing *Zimmerman v.*
12 *City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)).

13 **ISSUE**

14 Defendant argues the Court should amend its judgment and affirm the ALJ's
15 decision because the Court clearly erred in rejecting the ALJ's adverse credibility
16 finding. Specifically, Defendant argues that the Court erred "because it
17 acknowledged the ALJ identified valid reasons [for rejecting the ALJ's credibility
18 finding] and because it rejected some reasons merely because substantial evidence
19 supported a different interpretation of the record." ECF No. 24 at 2-3.

20 **DISCUSSION**

21 It is generally the province of the ALJ to make credibility determinations,
22 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995), but the ALJ's findings
23 must be supported by specific cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229,
24 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's
25 reasons for rejecting the claimant's testimony must be "specific, clear and
26 convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). "General
27 findings are insufficient: rather the ALJ must identify what testimony is not
28 credible and what evidence undermines the claimant's complaints." *Lester v.*

1 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

2 As set forth in the Court’s summary judgment Order, the ALJ identified
3 seven reasons for discrediting Plaintiff: (1) Plaintiff was able to work, and was
4 looking for full time work, during his period of alleged disability, (2) Plaintiff
5 could perform activities of daily living (ADL), including taking care of his son, (3)
6 at times, Plaintiff reported that his pain was decreasing or at least manageable, (4)
7 Plaintiff failed to do his home physical therapy exercises and he was discharged
8 from physical therapy because of missed appointments, (5) one examining
9 physician diagnosed Plaintiff with “probable partial malingering,” (6) Plaintiff
10 stopped working for reasons other than his disability, and (7) a written summary of
11 a surveillance video tape made by an investigator for the Washington Department
12 of Labor and Industries described Plaintiff performing activities that he claimed his
13 impairments prevented him from doing. ECF No. 22 (citing Tr. 35-37).

14 The Court found reasons (4) and (6) were specific, clear, and convincing
15 reasons to find Plaintiff less than credible. ECF No. 22 at 12-13, 15-16. The Court
16 found reasons (2), (3), (5), and (7) based on legal error or not supported by
17 substantial evidence. *Id.* at 9-17. The Court found reason (1) was, in part, a clear
18 and convincing reason. *Id.* at 7-9. Defendant argues the Court clearly erred in
19 rejecting the ALJ’s reasons (1), (2), (5), and (7).

20 **A. Ability to work and seeking work**

21 Defendant argues that the Court clearly erred in finding that the ALJ
22 partially erred in discounting Plaintiff’s credibility on account of Plaintiff working,
23 and seeking work, during his period of alleged disability. ECF No. 24 at 7-9.

24 The ALJ found Plaintiff less than credible because Plaintiff held numerous
25 jobs over the course of the relevant period. Tr. 35-36 (citing Tr. 93, 658, 1122
26 (announcer for the Spokane Chiefs, a local hockey team, in at least 2008 and
27 2010); Tr. 509 (worked “a seven-day-a-week schedule” in September 2006); Tr.
28 559, 632-34 (worked seasonally for the Spokane Indians, a local baseball team,

1 doing music and “sound effects” in 2007 and 2008); Tr. 94, 96-97 (disc jockey for
2 Citadel Broadcast Company between approximately 2005 and 2007); Tr. 97, 873
3 (did two sports radio shows for Protective Communications after leaving Citadel
4 Broadcast Company)).

5 The Court found this reason partially supported. ECF No. 22 at 7-9. The
6 Court found the ALJ did not err in citing to Plaintiff’s disc jockey work for two
7 radio companies or his work for the Spokane Chiefs. *Id.* at 8. The Court found the
8 ALJ erred in using Plaintiff’s work for the Spokane Indians as a reason to discredit
9 him. *Id.* The Court found substantial evidence supported Plaintiff’s assertion that
10 he had to stop working for the Spokane Indians because his impairments prevented
11 him from accessing the announcer booth. *Id.* The Court further found that the ALJ
12 should not have used the fact that Plaintiff sought additional work to discredit
13 Plaintiff. *Id.* at 8-9. The Court noted that Plaintiff was never able to find a job that
14 would accommodate his impairments. *Id.* at 9.

15 Defendant argues in the instant Motion for Reconsideration that “[t]he
16 ability to perform full-time work is not consistent with Plaintiff’s claimed inability
17 to work due to his impairments.” ECF No. 24 at 8 (citing 42 U.S.C. 423(d)(1)(A),
18 1382c(a)(3)(A)). The Court partially agreed with this argument: “Plaintiff’s ability
19 to perform [his jobs with the radio companies and with the Spokane Chiefs] would
20 tend to indicate that the severity of his impairments is not as serious as he alleges.”
21 ECF No. 22 at 8. Defendant does not contest the Court’s finding regarding
22 Plaintiff’s work for the Spokane Indians.

23 Defendant also argues that the Court committed clear error by finding the
24 ALJ improperly discredited Plaintiff because Plaintiff sought full time work during
25 his period of alleged disability. ECF No. 24 at 8. Defendant argues that this is
26 clear error because “Plaintiff actually attributed his inability to find work to the
27 increased digitization of his previous employment.” *Id.* The Court found that the
28 ALJ’s observation that Plaintiff stopped working for reasons other than his alleged

1 disability, i.e., increased digitization of the radio industry, was a clear and
2 convincing reason to discount Plaintiff's credibility. ECF No. 22 at 15-16. But the
3 Court disagrees that this reason somehow diminishes Plaintiff's credibility when
4 considering his attempts to find other work. In *Webb v. Barnhart*, 433 F.3d 683,
5 688 (9th Cir. 2005), the ALJ's adverse credibility determination was based, in part,
6 on the fact that the claimant had sought employment. The Ninth Circuit reversed
7 the ALJ's credibility determination reasoning, in part, that the fact that "[the
8 claimant] sought employment suggests no more than that he was doing his utmost,
9 in spite of his health, to support himself." *Id.* This is essentially the rationale
10 applied by the Court when it reasoned that Plaintiff should not be penalized for
11 attempting to find work. ECF No. 22 at 9 (citing *Reddick v. Chater*, 157 F.3d 715,
12 722 (9th Cir. 1998)). Given the Court's holding in *Webb*, the Court disagrees that
13 its finding was clear error, despite the existence of contrary authority. *See, e.g.*,
14 *Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009) (among
15 the specific findings supporting the ALJ's adverse credibility determination was
16 the fact that the claimant had sought employment).

17 **B. Activities of Daily Living (ADL)**

18 Defendant argues that the Court clearly erred in concluding that the ALJ
19 should not have used Plaintiff's ADL to discredit Plaintiff based on the fact that
20 there was no indication the range of activities performed by Plaintiff would
21 transfer to a work setting. ECF No. 24 at 9-11. Defendant argues that
22 inconsistencies between Plaintiff's testimony and his ADL is a reason discredit
23 Plaintiff independent of whether Plaintiff's ADL would be transferrable to a work
24 setting. *Id.* at 9-10. Defendant further argues that the fact that Plaintiff
25 experiences pain while doing activities does not mean the ALJ erred in using
26 Plaintiff's ADL to discredit him. *Id.* at 10-11.

27 The ALJ found that Plaintiff engaged in various activities that were
28 inconsistent with his testimony of disabling symptoms. Tr. 35-36 (citing Tr. 565

1 (independent with self-care tasks); Tr. 627-28, 632 (“Likes to keep busy,” cares for
2 his son and six horses, coaches son’s hockey team, and walks for exercise); Tr.
3 238, 242 (cooks for his son, takes son to school, runs errands, looks for work, visits
4 with friends, takes son to football, baseball, and hockey activities); Tr. 489
5 (Plaintiff reported “rodeoing, playing sports, and riding horses” in June 2006); Tr.
6 693 (reported driving son to athletic events in Coeur d’Alene, Idaho)).

7 The Court reviewed the evidence underlying the ALJ’s reasoning and
8 concluded:

9
10 Substantial evidence does not support the ALJ’s conclusion that
11 Plaintiff’s ADL are contrary to his symptom reporting. The ALJ cited
12 many activities that Plaintiff reported participating in prior to the
13 onset of his impairments. But there is little evidence that Plaintiff
14 continued to actively engage in these activities since the onset of his
15 impairments. The record substantially reflects that Plaintiff had to
16 stop engaging in these activities altogether or could only engage in
17 them with significant pain. There is little indication that Plaintiff is
18 able to spend a substantial part of his day engaged in pursuits
19 involving performance of physical functions that are transferable to a
20 work setting. *Orn [v. Astrue]*, 495 F.3d 625, 639 (9th Cir. 2007)].
21 Thus, citing to Plaintiff’s ADL was not a specific, clear, and
22 convincing reason to undermine Plaintiff’s credibility.

23 ECF No. 22 at 11.

24 Upon reconsideration, the Court finds that it clearly erred by finding the ALJ
25 improperly relied on Plaintiff’s ADL to discredit him.

26 The Court clearly erred when it found the ALJ’s reasoning deficient because
27 “[t]here is little indication that Plaintiff is able to spend a substantial part of his day
28 engaged in pursuits involving performance of physical functions that are
transferable to a work setting.” *Id.* (citing *Orn*, 495 F.3d at 639). As argued by
Defendant, this is only one of two ways that the ALJ may use a claimant’s ADL to
discredit the claimant. ECF No. 24 at 9. Contradiction between a claimant’s

1 symptom reporting and the claimant's ADL is also justification to discredit the
2 plaintiff, regardless if the claimant's ADL are transferrable to a work setting. *See*
3 *Orn*, 495 F.3d at 639. The Court found that the ALJ mischaracterized the extent of
4 Plaintiff's ADL and cited to evidence in the record that Plaintiff was no longer able
5 to engage in the activities and hobbies used by the ALJ to discredit him. ECF No.
6 22 at 10. Defendant does not contest the Court's finding that the ALJ
7 mischaracterized the extent of Plaintiff's ADL. Nevertheless, Defendant points out
8 that Plaintiff testified that he spends ninety percent of his time on the couch, he can
9 only sit for fifteen minutes, and stand for five minutes at a time. ECF No. 24 at 9-
10 10 (citing Tr. 84, 88). The relevant period in this case stretches back to 2002.
11 Between 2002 and the date of the ALJ's decision, the ALJ cited to substantial
12 evidence that Plaintiff performed activities that were inconsistent with his
13 testimony at the hearing, even if later in the relevant time period Plaintiff had to
14 reduce his activity level. Given that substantial evidence supports the ALJ's
15 finding, the Court should not have substituted its interpretation of the evidence in
16 place of the ALJ's. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

17 The Court further clearly erred in finding that the ALJ should have
18 accounted for the fact that Plaintiff experiences significant pain while driving and
19 attending his son's sporting events. "[I]f despite his claims of pain, a claimant is
20 able to perform . . . activities that involve many of the same physical tasks as a
21 particular type of job, it would not be farfetched for an ALJ to conclude that the
22 claimant's pain does not prevent the claimant from working." *Fair v. Bowen*, 885
23 F.2d 597, 603 (9th Cir. 1989). As argued by Defendant, the mere fact that Plaintiff
24 experiences daily pain does not necessarily mean he is disabled and does not serve
25 as a basis to second guess the ALJ's finding that Plaintiff's ADL contradict his
26 symptom reporting.

27 **C. Malingering diagnosis**

28 Defendant argues that the Court clearly erred by finding that the ALJ erred

1 by using Dr. Bot’s malingering diagnosis to discredit Plaintiff. ECF No. 24 at 3-7.

2 The ALJ found Plaintiff less than credible because David B. Bot, Ph.D.,
3 diagnosed Plaintiff with “probable partial malingering” based on Plaintiff’s
4 “symptom magnification” and “refusal to cooperate with the examination.” Tr. 36
5 (citing Tr. 688-89).

6 The Court determined that substantial evidence did not support Dr. Bot’s
7 malingering diagnosis. ECF No. 22 at 13-15. The Court cited points in the record
8 where other medical sources found Plaintiff put forth his best effort. *Id.* at 14. The
9 Court also questioned Dr. Bot’s finding that Plaintiff’s behavior at the evaluation
10 evidenced symptom magnification, when, at other points in the record, Plaintiff
11 demonstrated similar behavior. *Id.* at 14-15.

12 Upon reconsideration, the Court agrees with Defendant that its reasoning in
13 this regard constitutes clear error. Although the Court found the weight of the
14 evidence suggested that Plaintiff was not a malingerer, this does refute Dr. Bot’s
15 diagnose of probable malingering, a diagnosis which he made drawing on his
16 professional experience. As argued by Defendant, the Court’s conclusion to the
17 contrary was “a medical judgment that the Court [was] not qualified to make.”
18 ECF No. 24 at 6; *see Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir. 1996) (noting
19 that ALJ “must not succumb to the temptation to play doctor and make [his] own
20 independent medical findings.”). Dr. Bot’s observation that Plaintiff failed to
21 cooperate during evaluations is also a reason to discredit Plaintiff. *See Thomas v.*
22 *Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

23 **D. Surveillance video**

24 Defendant argues that the Court clearly erred in second-guessing the ALJ’s
25 reliance on a medical evaluation that contained the evaluating physicians’
26 description of a surveillance video that showed Plaintiff supervising a garage sale.
27 ECF No. 24 at 11-13.

28 The ALJ noted that in August 2008, an investigator for the Washington

1 Department of Labor and Industries videotaped Plaintiff supervising a yard sale.
2 Tr. 36. The video apparently shows Plaintiff standing “bent over” for sixty to
3 ninety minutes, walking (mostly with a cane), and carrying objects weighing 20-40
4 pounds. Tr. 36-37 (citing Tr. 705-06).

5 The Court found,

6 [T]he ALJ’s reliance on this description of the surveillance video
7 troubling for several reasons. First, the video itself does not appear to
8 be in the record—only a description of the video written by Drs.
9 Haynes and Harper in their October 2008 evaluation for purposes of
10 Plaintiff’s employment benefits. The ALJ did not claim to have seen
11 the video itself. Second, there is no evidence that Plaintiff was ever
12 able to review the video prior to the hearing or contest the contents of
13 the video, failure of which might raise due process concerns.
14 *Hubbard*, 225 Fed. App’x at 723; *Bagoyan Sulakhyan*, 456 Fed.
15 App’x at 682. Third, even absent due process issues, the doctors’
16 subjective description of the video could just as well support
17 Plaintiff’s symptom reporting. The video apparently showed Plaintiff
18 standing “bent over” and using a walk when walking. The fact that he
19 at times was able to carry certain objects with one hand (while using
20 his cane in the other) does not necessarily mean he was not disabled.
21 *See Fair*, 885 F.2d at 603 (claimant need not be “utterly
22 incapacitated” to be eligible for benefits).

23 ECF No. 22 at 16-17.

24 Upon reconsideration, the Court finds that it clearly erred in finding the ALJ
25 improperly relied on the description of the surveillance video to discredit Plaintiff.
26 First, the foundational concerns expressed by the Court are not justified as Social
27 Security hearings follow relaxed evidentiary rules; evidence is admissible as long
28 as it is “pertinent.” *Richardson v. Perales*, 402 U.S. 389, 400 (1971). The video
description is pertinent to Plaintiff’s allegations of disability. Second, the Court’s
due process concerns are also unjustified because the regulatory framework
allowed Plaintiff to subpoena the video, but he failed to do so. As argued by
Defendant, “A claimant’s due process rights are not violated when he does not use

1 the procedural due process protections afforded him by the regulations.” ECF No.
2 24 at 12 (citing *Richardson*, 402 U.S. at 404-05). Finally, simply because the
3 video description could be interpreted to support Plaintiff’s claims, this is not
4 necessarily a reason to reject the video description. As argued by Defendant,
5 Plaintiff has the burden to prove he is disabled and the Court should uphold the
6 ALJ’s findings unless the evidence compels a contrary result. ECF No. 24 at 13
7 (citations and quotation marks omitted). The Court clearly erred in finding fault
8 with the ALJ’s reliance on the surveillance video description to discredit Plaintiff.

9 **CONCLUSION**

10 Upon reconsideration, the Court finds that it clearly erred in rejecting a
11 number of the reasons provided by the ALJ to discredit Plaintiff. Consistent with
12 the above analysis, the Court finds the ALJ’s following reasons specific, clear, and
13 convincing reasons for finding Plaintiff less than credible:

14 1. Plaintiff was able to work for two radio companies and the Spokane
15 Chiefs during his period of alleged disability, despite his allegations of disabling
16 pain;

17 2. Plaintiff’s testimony contradicted his ADL;

18 3. Plaintiff failed to do his home physical therapy exercises and he was
19 discharged from physical therapy because of missed appointments;

20 4. Dr. Bot diagnosed Plaintiff with “probable partial malingering” and
21 found that Plaintiff likely exaggerated his symptoms;

22 5. Plaintiff stopped working for reasons other than his disability; and,

23 6. A written summary of a surveillance video tape made by an
24 investigator for the Washington Department of Labor and Industries described
25 Plaintiff performing activities that he claimed his impairments prevented him from
26 doing.

27 The Court finds that the ALJ’s adverse credibility determination contains the
28 following errors:

1 1. The ALJ should not have used Plaintiff's work for the Spokane
2 Indians as a reason to discredit Plaintiff as substantial evidence supports that
3 Plaintiff stopped this work because of his impairments;

4 2. The ALJ should not have used Plaintiff's attempts to find work as a
5 reason to discredit Plaintiff because Plaintiff should not be penalized for trying his
6 utmost to support himself despite his impairments; and,

7 3. The ALJ's finding that Plaintiff reported that his pain was decreasing
8 or at least manageable is not supported by substantial evidence.

9 The Court must next address whether these errors were harmless. *See*
10 *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195-97 (9th Cir. 2004)
11 (applying harmless error standard where one of the ALJ's several reasons
12 supporting an adverse credibility finding was held invalid). An error is harmless
13 when "it is clear from the record that the . . . error was inconsequential to the
14 ultimate nondisability determination." *Tommasetti v. Astrue*, 533 F.3d 1035, 1038
15 (9th Cir. 2008). As discussed *supra*, the ALJ provided several specific, clear, and
16 convincing reasons for finding Plaintiff less than credible. These reasons are
17 "specific findings related to [Plaintiff's] ability to perform vocational functions,
18 and they clearly demonstrate that to the extent the ALJ found [Plaintiff's]
19 testimony incredible, the ALJ did not do so arbitrarily." *Carmickle v. Comm'r,*
20 *Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008). Given the number of
21 the ALJ's valid reasons for discrediting Plaintiff, the Court finds the ALJ's errors
22 inconsequential to the ultimate nondisability determination and harmless. *See id.*
23 at 1160, 1163 (upholding adverse credibility finding where ALJ provided four
24 reasons to discredit claimant, two of which were invalid).

25 Furthermore, as noted by Defendant, ECF No. 24 at 13 n.4, the Court's
26 remand instructions concerning the need to reevaluate the opinions of Drs. Walter
27 Balek and George Weilepp are premised on the conclusion that the ALJ should
28 credit Plaintiff's subjective complaints. *See* ECF No. 22 at 20-21. As the Court

1 now affirms the ALJ's adverse credibility determination, there is no need to
2 reevaluate these medical opinions.

3 Having reviewed the record, Defendant's Motion, and the ALJ's findings,
4 the Court finds it clearly erred in reversing the ALJ's decision and remanding for
5 further proceedings. Accordingly,

6 **IT IS ORDERED:**

7 1. Defendant's Motion to Alter or Amend Judgment Pursuant to FED R.
8 CIV. P. 59(e), **ECF No. 24**, is **GRANTED**.

9 2. The Court's Order Granting In Part Plaintiff's Motion for Summary
10 Judgment dated June 5, 2015, (**ECF No. 22**) is **AMENDED** to the extent it is
11 inconsistent with this decision, including (1) Defendant's Motion for Summary
12 Judgment (**ECF No. 21**) is **GRANTED**; and (2) Plaintiff's Motion for Summary
13 Judgment (**ECF No. 20**) is **DENIED**.

14 The District Court Executive is directed to file this Order and provide a copy
15 to counsel for Plaintiff and Defendant. An **Amended** Judgment shall be entered
16 for **Defendant** and the file shall be **CLOSED**.

17 DATED August 3, 2015.

A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE