

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 08, 2016

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES KINGSTON,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

No. 2:14-CV-00275-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF No. 16, 17. Attorney Dana C. Madsen represents James B. Kingston (Plaintiff); Special Assistant United States Attorney Christopher J. Brackett represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on March 23, 2011, Tr. 81-82, alleging disability since August 24, 2007, due to bipolar I disorder, hypomania, and "problems related to [s]ocial [e]nvironment." Tr. 214, 268. The applications were

1 denied initially and upon reconsideration. Tr. 138-141, 143-147. Administrative  
2 Law Judge (ALJ) Moira Ausems held a hearing on March 14, 2013, at which  
3 Plaintiff, represented by counsel, psychological medical expert (ME) Thomas  
4 McKnight, Jr., Ph.D., and vocational expert (VE) Diane K. Kramer testified. Tr.  
5 12-75. At the hearing, Plaintiff amended his alleged onset date to January 1, 2011.  
6 Tr. 27-28. The ALJ issued an unfavorable decision on May 13, 2013. Tr. 124-  
7 132. The Appeals Council denied review on July 2, 2014. Tr. 1-3. The ALJ's  
8 May 13, 2013, decision became the final decision of the Commissioner, which is  
9 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this  
10 action for judicial review on August 19, 2014. ECF No. 1, 4.

### 11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing transcript, the  
13 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
14 here.

15 Plaintiff was 40 years old at the amended date of onset. Tr. 214. Plaintiff  
16 has a high-school diploma and attended some college, but has no degree. Tr. 39-  
17 40. He last worked at the front desk of the Ramada Inn from August 2010 to  
18 January of 2011. Tr. 25-26. In addition to front desk work, Plaintiff has past work  
19 as a security guard. Tr. 69, 269.

20 At the administrative hearing, Plaintiff described mental health impairments  
21 causing anxiety, lack of concentration, racing thoughts, panic attacks, and suicide  
22 attempts. Tr. 50-53, 63.

23 On November 22, 2011, John F. Robinson, Ph.D., a State agency reviewer,  
24 opined that Plaintiff was capable of simple repetitive work as well as complex  
25 tasks. Tr. 108-109. He concluded that Plaintiff would have some attention and  
26 concentration issues episodically due to fluctuation in moods and would do best in  
27 jobs with limited contact with the general public and co-workers. Tr. 109.

28 On April 4, 2012, John Arnold, Ph.D., completed a

1 Psychological/Psychiatric Evaluation for the Washington State Department of  
2 Social and Health Services. Tr. 1367-1373. Dr. Arnold opined that Plaintiff had  
3 the following functional abilities:

4 [Plaintiff] will be able to remember locations and simple work like  
5 tasks. He will be able to understand, remember, and carry out simple  
6 verbal and written instructions. He will be able to concentrate and  
7 attend for short periods. He will be able to ask simple questions, request  
8 assistance and accept instructions. He will be able to adhere to basic  
standards of neatness and cleanliness.

9 Tr. 1368.

10 At the March 14, 2013, hearing, Dr. McKnight testified that Plaintiff's  
11 difficulty was caused by drug and alcohol problems, and he did not meet or equal a  
12 listing. Tr. 36.

13 On June 21, 2013, after the ALJ's decision, Plaintiff returned to Dr. Arnold  
14 for a second evaluation. Dr. Arnold diagnosed Plaintiff with Bipolar Disorder,  
15 NOS by history, Personality Disorder, with Antisocial, Schizoid & Dependent  
16 Features, and rule out Borderline Intellectual Functioning. Tr. 316. Then Dr.  
17 Arnold completed a Mental Medical Source Statement in which he opined that  
18 Plaintiff had five moderate, four marked, and one severe limitation in his mental  
19 functional abilities. Tr. 318-320.

## 20 STANDARD OF REVIEW

21 The ALJ is responsible for determining credibility, resolving conflicts in  
22 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
23 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
24 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
25 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
26 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
27 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
28 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put

1 another way, substantial evidence is such relevant evidence as a reasonable mind  
2 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.  
3 389, 401 (1971). If the evidence is susceptible to more than one rational  
4 interpretation, the court may not substitute its judgment for that of the ALJ.  
5 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial  
6 evidence will be set aside if the proper legal standards were not applied in  
7 weighing the evidence and making the decision. *Brawner v. Secretary of Health*  
8 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence  
9 supports the administrative findings, or if conflicting evidence supports a finding  
10 of either disability or non-disability, the ALJ's determination is conclusive.  
11 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### 12 **SEQUENTIAL EVALUATION PROCESS**

13 The Commissioner has established a five-step sequential evaluation process  
14 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
15 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one  
16 through four, the burden of proof rests upon the claimant to establish a prima facie  
17 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This  
18 burden is met once a claimant establishes that physical or mental impairments  
19 prevent him from engaging in his previous occupations. 20 C.F.R. §§  
20 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the  
21 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that  
22 (1) the claimant can make an adjustment to other work, and (2) specific jobs exist  
23 in the national economy which the claimant can perform. *Batson v. Comm'r of*  
24 *Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot make  
25 an adjustment to other work in the national economy, a finding of "disabled" is  
26 made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 27 **ADMINISTRATIVE DECISION**

28 On May 13, 2013, the ALJ issued a decision finding Plaintiff was not

1 disabled as defined in the Social Security Act.

2 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
3 activity since January 1, 2011, the amended date of onset. Tr. 126.

4 At step two, the ALJ determined Plaintiff had the following severe  
5 impairments: substance induced mood disorder versus bipolar affective disorder  
6 and polysubstance disorder in self-reported remission since January 5, 2012. Tr.  
7 127.

8 At step three, the ALJ found Plaintiff did not have an impairment or  
9 combination of impairments that met or medically equaled the severity of one of  
10 the listed impairments. Id.

11 At step four, the ALJ assessed Plaintiff's residual function capacity (RFC)  
12 and determined he could perform a full range of work at all exertional levels but  
13 had the following nonexertional limitations: "the claimant is able to perform  
14 simple, routine tasks that do not involve more than brief superficial contact with  
15 the general public, or that do not involve performance of tasks requiring  
16 cooperative teamwork endeavors with co-workers." Tr. 128. The ALJ concluded  
17 Plaintiff was not able to perform his past relevant work. Tr. 131.

18 At step five, the ALJ determined that, considering Plaintiff's age, education,  
19 work experience and RFC, and based on the testimony of the vocational expert,  
20 there were other jobs that exist in significant numbers in the national economy  
21 Plaintiff could perform, including the jobs of office cleaner I, electronics  
22 assembler, and sorter. Tr. 131-132. Thus, the ALJ determined Plaintiff was not  
23 under a disability within the meaning of the Social Security Act at any time from  
24 January 1, 2011, through the date of the ALJ's decision, May 13, 2013.<sup>1</sup> Tr. 132.

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25  
26 <sup>1</sup>The ALJ's heading stating that "[t]he claimant has not been under a  
27 disability, as defined in the Social Security Act, from August 24, 2007, through the  
28 date of this decision" is clearly a typographical or scrivener's error, as the body of



1 that “[t]he medical expert, Dr. McKnight, testified that the claimant had several  
2 measures of feigning or malingering.” Tr. 130.

3 An ALJ’s finding of malingering is sufficient to support an adverse  
4 credibility determination under Ninth Circuit jurisprudence. See *Benton v.*  
5 *Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). However, a finding of malingering  
6 must be supported by affirmative evidence. *Smolen*, 80 F.3d at 1283-1284.

7 As for the 2008 PAI, the “Validity” section of the report concluded that  
8 “there is no evidence to suggest that the respondent was motivated to portray  
9 himself in a more negative or pathological light than the clinical picture would  
10 warrant.” Tr. 329. Therefore, this report does not support a finding of  
11 malingering.

12 The clinical interpretation of the 2010 PAI included the opinion that “it is  
13 possible that the clinical scales may overrepresent or exaggerate the actual degree  
14 of psychopathology.” Tr. 342. However, this report predates the relevant time  
15 period, which begins January 1, 2011. Medical opinions that predate the alleged  
16 onset of disability are of limited relevance. See *Fair*, 885 F.2d at 600; *Carmickle*  
17 *v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008). Therefore, this  
18 report is not affirmative evidence to support a finding of malingering.

19 The ALJ’s citation to Dr. McKnight’s testimony that the record contained  
20 several measures of feigning or malingering is also not sufficient to make a finding  
21 of malingering. At the March 2014 hearing, Dr. McKnight’s testimony regarding  
22 malingering revolved around the 2008 and 2010 PAIs and the MMPI-2  
23 administered in August 2010. Tr. 33. All these tests were administered prior to  
24 the alleged onset date. Therefore, Dr. McKnight’s testimony regarding these tests  
25 are of limited relevance. See *Fair*, 885 F.2d at 600; *Carmickle*, 533 F.3d at 1165.  
26 The Court finds Dr. McKnight’s testimony is not affirmative evidence to support a  
27 finding of malingering.

28 The ALJ failed to support her finding of malingering with affirmative

1 evidence that pertained to the relevant time period. Therefore, the ALJ is required  
2 to provide specific, clear and convincing reasons to support her determination that  
3 claimant is less than fully credible. *Smolen*, 80 F.3d at 1281.

4 The ALJ found Plaintiff less than fully credible concerning the intensity,  
5 persistence, and limiting effects of his symptoms. The ALJ reasoned that Plaintiff  
6 was less than credible because (1) his reported symptoms were inconsistent with  
7 clinical findings, (2) he was able to work during periods of sobriety, (3) his  
8 activities of daily living (ADLs) were inconsistent with his testimony, and (4) he  
9 inconsistently reported his drug use. Tr. 129-130.

10 **1. Inconsistent with clinical findings**

11 The ALJ's first reason for finding Plaintiff less than credible, that Plaintiff's  
12 reported mental health symptoms were not consistent with the clinical findings, Tr.  
13 129, is not by itself a specific, clear and convincing reason to undermine Plaintiff's  
14 credibility. Although it cannot serve as the sole ground for rejecting a claimant's  
15 credibility, objective medical evidence is a "relevant factor in determining the  
16 severity of the claimant's pain and its disabling effects." *Rollins v. Massanari*, 261  
17 F.3d 853, 857 (9th Cir. 2001).

18 Here the ALJ provided several specific citations to clinical findings that  
19 were inconsistent with the claimant's reported symptoms:

20 The claimant's reported mental health symptoms are inconsistent with  
21 clinical findings. For example, he had perfect scores (30/30) on mental  
22 status exams (Exhibits B1F/7, B12F/14). The claimant was able to recall  
23 4 words after a short delay and calculate serial 3's and 7's (Exhibits  
24 B1F/7, B12F/14). The claimant was able to spell the word "world"  
25 forward and backward (Exhibit B1F/7). Medical expert, Thomas  
26 McKnight, PhD., testified that after reviewing the record, the claimant  
27 presented with no serious problems, and that his presentation was  
28 normal during the time that he was sober. For example, the claimant  
was noted to have no neurological problems (Exhibit 22F/36-38). The  
claimant's eye contact was good, and his behavior was appropriate  
(Exhibit B22F/8-9, 52, 59, 66-67). The claimant's speech, thought



1 process, and affect were normal (Exhibit B22F/8-9, 52, 59, 66-67). The  
2 claimant described his mood as ‘fine’ (Exhibit B22F/39). The claimant  
3 was noted to be oriented, have good judgment, and no suicidal ideation  
4 (Exhibit B22F/39). Although the claimant has alleged various side  
5 effects from the use of medications, the record indicates generally that  
6 those side effects are mild. Furthermore, the claimant reported that he  
7 liked his new medication changes, and was not experiencing any  
8 problems (Exhibit B22F/46-37, 49).

9 Tr. 129.

10 Plaintiff challenges the ALJ’s determination by stating that the evidence  
11 relied upon by the ALJ is outside the relevant time period, referring to the amended  
12 onset date of January 1, 2011. ECF No. 16 at 13. However, the ALJ supported her  
13 finding with citations to clinical findings from both prior to and after the amended  
14 onset date. See supra. Therefore, the citations to the clinical findings during the  
15 relevant time period (January 1, 2011, to May 13, 2013) are sufficient to support  
16 the ALJ’s determination that Plaintiff’s symptom reports were inconsistent with  
17 the clinical findings.

## 18 **2. Work During Period of Sobriety**

19 In discussing Plaintiff’s credibility, the ALJ noted that during sobriety,  
20 Plaintiff “has been able to function in an unrestricted manner including performing  
21 work activity.” Tr. 129. In support of this determination, the ALJ cited a summary  
22 of Plaintiff’s earnings. Tr. 242.

23 The ability to work prior to disability onset is not a specific, clear and  
24 convincing reason to find Plaintiff less than fully credible. All jobs held by  
25 Plaintiff were prior to the date of onset. Tr. 25-26, 242. Therefore, the fact that  
26 Plaintiff worked outside the period of time he alleged he was unable to work is not  
27 a specific, clear and convincing reason to find the Plaintiff less than fully credible.  
28 See *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036-1037 (9<sup>th</sup> Cir. 2007) (a brief  
attempt to work outside the relevant time period that failed because of the  
claimant’s impairments is not a clear and convincing reason the conclude the

1 claimant was not credible).

### 2 **3. Activities of Daily Living**

3 In discussing Plaintiff's credibility, the ALJ states that psychiatric  
4 assessments shows Plaintiff had no restriction in his ability to perform activities of  
5 daily living. The ALJ indicates Plaintiff "was able to drive, attend appointments  
6 and counseling sessions, and interact appropriately with others living in the sober  
7 house." Tr. 129.

8 A claimant's daily activities may support an adverse credibility finding if (1)  
9 the claimant's activities contradict his other testimony, or (2) "the claimant is able  
10 to spend a substantial part of his day engaged in pursuits involving performance of  
11 physical functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d  
12 625, 639 (9<sup>th</sup> Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989)).  
13 "General findings are insufficient; rather, the ALJ must identify what testimony is  
14 not credible and what evidence undermines the claimant's complaints." *Reddick v.*  
15 *Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998). "The ALJ must make 'specific findings  
16 relating to [the daily] activities' and their transferability to conclude that a  
17 claimant's daily activities warrant an adverse credibility determination." *Orn*, 495  
18 F.3d at 639. (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9<sup>th</sup> Cir. 2005)). A  
19 claimant need not be "utterly incapacitated" to be eligible for benefits. *Fair*, 885  
20 F.2d at 603.

21 Here, the ALJ failed to provide the specificity required by *Reddick* or *Orn*.  
22 The ALJ did not identify what testimony was not consistent with what daily  
23 activities. Additionally, the ALJ did not make any findings regarding any  
24 activities and their transferability to a work setting. Therefore, the Court finds this  
25 reason does not meet the clear and convincing standard.

### 26 **4. Reported Drug Use**

27 The ALJ's fourth reason for finding Plaintiff less than fully credible, that  
28 Plaintiff inconsistently reported his drug use, is not a specific, clear, and

1 convincing reason to undermine Plaintiff’s credibility.

2 An ALJ may properly consider evidence of a claimant’s substance use in  
3 assessing credibility. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (the  
4 ALJ’s finding that claimant was not a reliable historian regarding drug and alcohol  
5 usage supports negative credibility determination); *Verduzco v. Apfel*, 188 F.3d  
6 1087, 1090 (9th Cir. 1999) (conflicting or inconsistent testimony concerning  
7 alcohol or drug use can contribute to an adverse credibility finding).

8 In supporting her determination, the ALJ compared two statements by  
9 Plaintiff: (1) a psychological assessment dated September 24, 2008, in which he  
10 denied using drugs until March 2007, Tr. 327, and (2) a counseling note from  
11 December 14, 2012, in which he stated he had been using marijuana off and on  
12 since he was a teenager. Tr. 1614. The ALJ concluded that these two statements  
13 were contradictory and undermined Plaintiff’s credibility. Tr. 129. Additionally,  
14 the ALJ compared claimant’s report on November 22, 2010, that he was spending  
15 time with clean and sober friends, Tr. 1659, to reports from November 2, 2012, and  
16 January 14, 2013, indicating that his significant other at the time was not sober.  
17 Tr. 1596, 1631-1632. The ALJ concluded these statements were contradictory and  
18 also undermined Plaintiff’s credibility. Tr. 129.

19 Plaintiff challenges the ALJ’s determination by asserting that (1) the  
20 statements are outside of the relevant time period, and (2) the statements are not  
21 contradictory, but instead reflect Plaintiff’s struggle with substance abuse,  
22 representing the sobriety/relapse cycle. ECF No. 16 at 13.

23 First, the fact that some of the statements are outside the relevant time period  
24 is irrelevant. In determining a claimant’s credibility, the ALJ may consider  
25 “ordinary techniques of credibility evaluation, such as the claimant’s reputation for  
26 lying, prior inconsistent statements . . . and other testimony by the claimant that  
27 appears less than candid.” *Smolen*, 80 F.3d at 1284.

28 As for the statements being contradictory, the first set of statements

1 compared by the ALJ are potentially inconsistent. In March 2007, Plaintiff was 36  
2 years old, therefore his statement that he did not use any drugs until age 36 is  
3 inconsistent with his statement that he used marijuana as a teenager. But, the  
4 evaluation report only speaks to his use of alcohol and cocaine. Tr. 327. There is  
5 no evidence that the examiner inquired regarding marijuana.

6 The ALJ's second set of statements are not contradictory. Plaintiff's  
7 statement that he was spending time with clean and sober friends was made two  
8 years prior to the records stating that his significant other was drinking. These  
9 statements are not contemporaneous and, therefore, are not contradictory.

10 Considering the numerous errors in the ALJ's credibility determination, a  
11 new credibility determination is necessary. Therefore, the case is remanded.

## 12 **B. Evaluation of Medical Evidence**

13 Plaintiff contends that the ALJ gave improper weight to the opinions of Dr.  
14 McKnight and Dr. Robinson. ECF No. 16 at 15.

15 In weighing medical source opinions, the ALJ should distinguish between  
16 three different types of physicians: (1) treating physicians, who actually treat the  
17 claimant; (2) examining physicians, who examine but do not treat the claimant;  
18 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
19 Lester, 81 F.3d at 830. The ALJ should give more weight to the opinion of a  
20 treating physician than to the opinion of an examining physician. Orn, 495 F.3d at  
21 631. The ALJ should give more weight to the opinion of an examining physician  
22 than to the opinion of a nonexamining physician. Id.

23 The ALJ gave great weight to the opinions of Dr. Robinson, Dr. McKnight,  
24 and Dr. Arnold. Tr. 131.

### 25 **1. Dr. Robinson**

26 The ALJ gave Dr. Robinson's opinion "[s]ignificant weight" because "it is  
27 consistent with treatment records that show that while the claimant has some mood  
28 fluctuations, he was able to perform activities of daily living, including housework

1 and driving.”

2 Plaintiff challenges the weight given to Dr. Robinson because (1) he never  
3 examined the Plaintiff, and (2) the records do not support the conclusion that he  
4 was able to perform activities of daily living. ECF No. 16 at 15.

5 Pursuant to 20 C.F.R. §§ 404.1527(e)(2), 416.927(e)(2), the ALJ is required  
6 to consider the opinion of the State agency psychological consultant and weigh his  
7 opinion using the factors set forth in 20 C.F.R. §§ 404.1527(c), 416.927(c). While  
8 the Court recognizes that these factors require the ALJ to consider the examining  
9 relationship and the treating relationship, it also requires the ALJ to consider the  
10 supportability of the opinion and the provider’s familiarity with the agency’s  
11 disability programs and their evidentiary requirements. *Id.* Therefore, the  
12 examination of Plaintiff or the lack thereof is not a dispositive factor when  
13 assigning a medical opinion appropriate weight.

14 Second, Plaintiff asserts that the record supports a conclusion that he  
15 required supervision and monitoring. ECF No. 16 at 15. To support this assertion,  
16 Plaintiff cites to two locations in the record showing the distribution of Plaintiff’s  
17 medication was supervised by Spokane Mental Health. Tr. 927, 1378. The ALJ  
18 supported her determination that Plaintiff was able to perform activities of daily  
19 living by citations to record as well. Tr. 130. These citations reveal that Plaintiff  
20 was able to drive, was actively looking for work, was capable of taking his own  
21 medication, was in charge of assigning chores to residents, and was completing  
22 chores himself. Tr. 990, 992, 997 1189-1193. Here, there is evidence to support  
23 both Plaintiff’s assertion and the ALJ’s finding. Therefore, the Court will not  
24 disturb the ALJ’s conclusion. See *Tackett*, 180 F.3d at 1097 (if the evidence is  
25 susceptible to more than one rational interpretation, the court may not substitute its  
26 judgment for that of the ALJ).

27 Therefore, the law and the evidence of record supports the substantial weight  
28 given to Dr. Robinson’s opinion.

1           **2. Dr. McKnight**

2           Next, the ALJ gave Dr. McKnight’s opinion “significant weight” because “it  
3 is based on a comprehensive review of the record, and is consistent with other  
4 evidence which showed that when the claimant is abstaining from substance use,  
5 his mental health symptoms improved.” Tr. 130. Plaintiff challenges the weight  
6 given to Dr. McKnight’s opinion because (1) he disregarded evidence, and (2) he  
7 relied heavily upon records outside the relevant period. ECF No. 16 at 15-16.

8           First, Plaintiff asserts that Dr. McKnight disregarded the records from  
9 Spokane Mental Health showing that Plaintiff needed his medication  
10 administration supervised. ECF No. 16 at 15. There is no evidence to support  
11 Plaintiff’s assertion that Dr. McKnight ignored evidence from Spokane Mental  
12 Health. In fact, Dr. McKnight supported his opinion by referencing records from  
13 Frontier Behavioral Health, which was the same facility as Spokane Mental Health,  
14 just under a new name. Tr. 19, 36. Therefore, Dr. McKnight’s testimony does not  
15 support Plaintiff’s assertion that he disregarded evidence.

16           Second, Plaintiff asserts that Dr. McKnight relied on records from outside  
17 the relevant period. EFC No. 16 at 16. Dr. McKnight’s testimony was based on  
18 the record before him, which contained records from before and after Plaintiff’s  
19 amended date of onset. In his testimony, Dr. McKnight, cited to medical evidence  
20 that is both prior to and after the January 1, 2011, amended date of onset. Tr. 30-  
21 36. The Court acknowledges that Dr. McKnight’s testimony considered evidence  
22 from before and after Plaintiff’s amended date last insured, but since the case is  
23 being remanded for a new credibility determination, the ALJ is instructed on  
24 remand to call a new ME and clearly define the relevant time period for the ME  
25 prior to taking testimony from the ME.

26           **3. Dr. Arnold**

27           The ALJ gave “significant weight” to the March 7, 2012, opinion of Dr.  
28 Arnold finding the opinion was consistent with other opinions in the record and

1 that “while [Plaintiff] does have some limitations, he is able to complete his  
2 activities of daily living, including attending support groups and medical  
3 appointments.” Tr. 130. Plaintiff’s initial briefing, EFC No. 16, does not  
4 challenge the weight given to this opinion.

5 Notably, in his reply brief, Plaintiff asserts that the ALJ disregarded Dr.  
6 Arnold’s July 8, 2013, Mental Medical Source Statement that was completed  
7 following a second evaluation by Dr. Arnold on June 21, 2013. ECF No. 18 at 6;  
8 Tr. 312-321. Both the second evaluation and the Mental Medical Source  
9 Statement were completed after the ALJ’s May 13, 2013, decision and were not  
10 discussed by the Appeals Council in the denial of Plaintiff’s request for review.  
11 Tr. 1-4.

12 On remand, the ALJ will weigh the additional opinion from Dr. Arnold and  
13 explain the weight provided to each opinion in the record.

#### 14 **REMEDY**

15 The decision whether to remand for further proceedings or reverse and  
16 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
17 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
18 where “no useful purpose would be served by further administrative proceedings,  
19 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*  
20 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
21 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
22 (9th Cir. 1990). See also *Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)  
23 (noting that a district court may abuse its discretion not to remand for benefits  
24 when all of these conditions are met). This policy is based on the “need to  
25 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are  
26 outstanding issues that must be resolved before a determination can be made, and it  
27 is not clear from the record that the ALJ would be required to find a claimant  
28 disabled if all the evidence were properly evaluated, remand is appropriate. See

1 Benecke v. Barnhart, 379 F.3d 587, 595-96 (9th Cir. 2004); Harman v. Apfel, 211  
2 F.3d 1172, 1179-80 (9th Cir. 2000).

3 In this case, it is not clear from the record that the ALJ would be required to  
4 find Plaintiff disabled if all the evidence were properly evaluated. Further  
5 proceedings are necessary for the ALJ to determine Plaintiff's credibility regarding  
6 his symptom reporting and to consider and weigh all the opinions in the record.  
7 Upon reevaluating Plaintiff's credibility and the opinions in the record, the ALJ  
8 will provide a new RFC and call a vocational expert to testify regarding steps four  
9 and step five.

### 10 CONCLUSION

11 Accordingly, **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
13 **DENIED**.

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is  
15 **GRANTED**, in part, and the matter is **REMANDED** to the Commissioner for  
16 additional proceedings consistent with this Order.

17 3. Application for attorney fees may be filed by separate motion.

18 The District Court Executive is directed to file this Order and provide a copy  
19 to counsel for Plaintiff and Defendant. **Judgment shall be entered for**  
20 **PLAINTIFF** and the file shall be **CLOSED**.

21 DATED January 8, 2016.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

22  
23 \_\_\_\_\_  
24 JOHN T. RODGERS  
25 UNITED STATES MAGISTRATE JUDGE  
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