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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 KEVIN DUANE LONG,

10 Plaintiff,

11 v.

12  
13 CAROLYN W. COLVIN,  
14 Commissioner of Social Security,

15 Defendant.  
16

No. 2:15-CV-00087-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF  
18 No. 15, 16. Attorney Dana C. Madsen represents Kevin Duane Long (Plaintiff);  
19 Special Assistant United States Attorney Leisa A. Wolf represents the  
20 Commissioner of Social Security (Defendant). The parties have consented to  
21 proceed before a magistrate judge. ECF No. 14. After reviewing the  
22 administrative record and the briefs filed by the parties, the Court **GRANTS, in**  
23 **part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for  
24 Summary Judgment; and **REMANDS** the matter to the Commissioner for  
25 additional proceedings pursuant to 42 U.S.C. § 405(g).

26 **JURISDICTION**

27 Plaintiff filed an application for Supplemental Security Income (SSI) on  
28 April 26, 2010, alleging disability since June 22, 2009, due to a left shoulder

1 injury, hepatitis B, and drug problems. Tr. 217-220, 233, 238. The application  
2 was denied initially and upon reconsideration. Tr. 130-133, 137-140.  
3 Administrative Law Judge (ALJ) R.J. Payne held a hearing on October 28, 2011, at  
4 which Plaintiff, represented by counsel, and medical expert (ME) Sterling Emory  
5 More, M.D., testified. Tr. 40-71. The ALJ issued an unfavorable decision on  
6 November 10, 2011. Tr. 111-119. The Appeals Council granted review and  
7 remanded the case for additional proceedings on January 30, 2013. Tr. 124-127.  
8 The ALJ held a second hearing on August 20, 2013, at which Plaintiff, represented  
9 by counsel, and ME Stephen Rubin, Ph.D., testified. Tr. 72-105. The ALJ issued  
10 an unfavorable decision on September 13, 2013. Tr. 20-34. The Appeals Council  
11 denied review on February 5, 2015. Tr. 1-3. The ALJ's September 13, 2013,  
12 decision became the final decision of the Commissioner, which is appealable to the  
13 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
14 review on April 1, 2015. ECF No. 1, 3.

### 15 **STATEMENT OF FACTS**

16 The facts of the case are set forth in the administrative hearing transcripts,  
17 the ALJ's decision, and the briefs of the parties. They are only briefly summarized  
18 here.

19 Plaintiff was 45 years old at the date of application. Tr. 217. He completed  
20 his GED in 1981. Tr. 239. He has worked as a laborer and assembler, but has  
21 minimal earnings in the fifteen years leading up to the August 30, 2013, hearing.  
22 Tr. 226-228, 240. Plaintiff reported he stopped working in 2009 because of his  
23 conditions. Tr. 238.

24 At the administrative hearing, Plaintiff described (1) a left shoulder injury  
25 resulting in continued grinding and popping with movement and limited lifting of  
26 15 to 20 pounds, Tr. 86-87; (2) hepatitis causing abdominal pain, fatigue, and  
27 nausea, Tr. 87-88; (3) low back pain for the last 25 years, resulting in difficulty  
28 bending over and sitting still, Tr. 89-90; and (4) mental problems. Tr. 91. Plaintiff

1 testified to years of meth use followed by sobriety starting in November of 2010  
2 with no relapses. Tr. 89. Additionally, he testified that he had a medical marijuana  
3 card and used marijuana a couple times a week for pain. Tr. 88. Plaintiff stated he  
4 was in constant pain and occasional used aspirin. Tr. 97-98. He testified he hangs  
5 out, goes for bike rides, watches TV, plays his guitar, reads, does his laundry, helps  
6 with dishes, prepares cereals and soups, and attends church. Tr. 98-101.

7 Plaintiff underwent three separate psychological evaluations by Kayleen  
8 Islam-Zwart, Ph.D., on May 16, 2011, Tr. 495-499; Dennis Pollack, Ph.D., on  
9 October 21, 2011, Tr. 530-540; and John Arnold, Ph.D., on November 15, 2012.  
10 Tr. 587-590.

### 11 **STANDARD OF REVIEW**

12 The ALJ is responsible for determining credibility, resolving conflicts in  
13 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
14 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
15 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
16 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
17 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
18 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
19 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
20 another way, substantial evidence is such relevant evidence as a reasonable mind  
21 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
22 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
23 interpretation, the court may not substitute its judgment for that of the ALJ.  
24 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial  
25 evidence will be set aside if the proper legal standards were not applied in  
26 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
27 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence  
28 supports the administrative findings, or if conflicting evidence supports a finding

1 of either disability or non-disability, the ALJ's determination is conclusive.  
2 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### 3 **SEQUENTIAL EVALUATION PROCESS**

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

### 17 **ADMINISTRATIVE DECISION**

18 On September 13, 2013, the ALJ issued a decision finding Plaintiff was not  
19 disabled as defined in the Social Security Act.

20 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
21 activity since April 26, 2010, the date of application. Tr. 22.

22 At step two, the ALJ determined Plaintiff had the following severe  
23 impairments: left shoulder injury status post reconstruction; degenerative disk  
24 disease; and hepatitis B, status post treatment. Tr. 22.

25 At step three, the ALJ found Plaintiff did not have an impairment or  
26 combination of impairments that met or medically equaled the severity of one of  
27 the listed impairments. Tr. 30.

28 At step four, the ALJ assessed Plaintiff's residual function capacity (RFC)

1 and determined he could perform a range of light work:

2 [T]hat does not require more than frequent climbing of ramps or stairs,  
3 balancing, stooping, kneeling, or crouching, and no more than  
4 occasional climbing of ladders, ropes, or scaffolds, and crawling. He  
5 is capable of reaching in all directions, including overhead with the  
6 non-dominant left upper extremity on an occasional basis. He should  
7 avoid concentrated exposure to extreme cold and hazards, such as  
8 machinery and heights.

8 Tr. 30. The ALJ found that Plaintiff had no past relevant work. Tr. 33.

9 At step five, the ALJ determined that, considering Plaintiff's age, education,  
10 work experience and RFC, and based on the medical-vocational rule 202.20, there  
11 were other jobs that exist in significant numbers in the national economy Plaintiff  
12 could perform. Tr. 33-34. Thus, the ALJ determined Plaintiff was not under a  
13 disability within the meaning of the Social Security Act at any time from April 26,  
14 2010, through the date of the ALJ's decision, September 13, 2013. Tr. 34.

## 15 ISSUES

16 The question presented is whether substantial evidence supports the ALJ's  
17 decision denying benefits and, if so, whether that decision is based on proper legal  
18 standards. Plaintiff contends the ALJ erred by (1) failing to properly consider  
19 Plaintiff's credibility; (2) failing to accord weight to the opinions of examining  
20 psychologists; (3) failing to comply with the Appeals Council's order on remand;  
21 and (4) failing to find Plaintiff's mental health impairments severe at step two.

## 22 DISCUSSION

### 23 A. Credibility

24 Plaintiff contests the ALJ's adverse credibility determination in this case.  
25 ECF No. 15 at 9-11.

26 It is generally the province of the ALJ to make credibility determinations,  
27 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific  
28 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent

1 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s  
2 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d  
3 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).  
4 “General findings are insufficient: rather the ALJ must identify what testimony is  
5 not credible and what evidence undermines the claimant’s complaints.” *Lester*, 81  
6 F.3d at 834.

7 The ALJ found Plaintiff not entirely credible concerning the intensity,  
8 persistence, and limiting effects of his symptoms. Tr. 31. The ALJ reasoned that  
9 Plaintiff was less than fully credible because (1) his symptom reports were  
10 inconsistent with the medical evidence; (2) there was evidence of secondary gain;  
11 (3) his symptom reports were inconsistent with his activities of daily living; and (4)  
12 his statements regarding substance use were inconsistent. Tr. 27, 31-32.

13 While the ALJ’s decision contains references to secondary gain, the ALJ did  
14 not make a finding of malingering. Therefore, the proper standard to review the  
15 ALJ’s credibility determination is the specific, clear and convincing standard.

16 **1. Contrary to the objective medical evidence**

17 First, the ALJ found Plaintiff less than fully credible because his symptom  
18 reports were inconsistent with the medical evidence. Tr. 27, 31. In making this  
19 determination, the ALJ summarized Plaintiff’s testimony and provided citations to  
20 the record showing evidence inconsistent with Plaintiff’s testimony. Tr. 27, 31-32.

21 Although it cannot serve as the sole ground for rejecting a claimant’s  
22 credibility, objective medical evidence is a “relevant factor in determining the  
23 severity of the claimant’s pain and its disabling effects.” *Rollins v. Massanari*, 261  
24 F.3d 853, 857 (9th Cir. 2001).

25 Plaintiff does not challenge this conclusion in his briefing, but asserts that  
26 this reason alone is insufficient to support the ALJ’s determination. ECF No. 15 at  
27 10. As addressed below, the ALJ provided additional legally sufficient reasons for  
28 finding Plaintiff less than fully credible. As such, the ALJ’s finding that Plaintiff’s

1 symptom reports were inconsistent with the medical evidence supports the ALJ's  
2 unfavorable credibility determination.

### 3 **2. Secondary Gain**

4 The ALJ found that "the factor of 'secondary gain' is relevant in this case."  
5 Tr. 27. The ALJ may reasonably weigh a claimant's secondary gain motivations  
6 against his credibility. *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998).

7 To support his determination, the ALJ referenced statements Plaintiff made  
8 to Dr. Islam-Zwart in Exhibit 14F, denying any real interest in the use of  
9 medication or therapy to improve his situation; statements to Dr. Pollack at 16F that  
10 he spent most of his day sitting around his mother's house watching TV and  
11 playing the guitar; and statements to Dr. Toews at 20F that he was disinterested in  
12 doing anything to improve himself and was poorly motivated to work or seek  
13 vocational training. Tr. 27.

14 Plaintiff does not challenge the ALJ's conclusion that secondary gain is a  
15 relevant factor in Plaintiff's credibility. *See Carmickle v. Comm'r, Soc. Sec.*  
16 *Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the failure to challenge an issue  
17 in the opening brief waives the issue). Therefore, this is a specific, clear and  
18 convincing reason to find Plaintiff less than fully credible.

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

20 Third, the ALJ found Plaintiff less than fully credible because he "testified  
21 to a wide variety of activities of daily living." Tr. 32. To support this  
22 determination, the ALJ provided a summary of Plaintiff's activities, including  
23 hanging out, going for bike rides, watching TV, playing guitar, reading, using a  
24 computer, doing the dishes, doing the laundry, making simple meals, going to  
25 church, having friends, shopping for groceries, and riding the bus. *Id.*

26 A claimant's daily activities may support an adverse credibility finding if (1)  
27 the claimant's activities contradict his other testimony, or (2) "the claimant is able  
28 to spend a substantial part of his day engaged in pursuits involving performance of

1 physical functions that are transferable to a work setting.” *Orn v. Astrue*, 495 F.3d  
2 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).  
3 “The ALJ must make ‘specific findings relating to [the daily] activities’ and their  
4 transferability to conclude that a claimant’s daily activities warrant an adverse  
5 credibility determination.” *Orn*, 495 F.3d at 639 (quoting *Burch v. Barnhart*, 400  
6 F.3d 676, 681 (9th Cir. 2005)). A claimant need not be “utterly incapacitated” to  
7 be eligible for benefits. *Fair*, 885 F.2d at 603.

8 Here, the ALJ simply summarized Plaintiff’s testimony. Tr. 31-32. He did  
9 not set forth what activities of daily living contradict what testimony. Furthermore,  
10 he did not make any finding regarding how these activities of daily living transfer  
11 to a work setting. As such, this is not a specific, clear and convincing reason to  
12 support the ALJ’s credibility determination.

#### 13 **4. Statements of Drug and Alcohol Use**

14 Fourth, the ALJ found Plaintiff’s statements regarding his drug and alcohol  
15 use were inconsistent, and therefore undermined his credibility. Tr. 27. To  
16 support his determination the ALJ stated the following:

17 Although he testified he has been clean and sober from  
18 methamphetamines since November 2010 with no relapses, there were  
19 references to “needle sticks” in June 2011 and August 2011 (15F/19,  
20 24); at 22F/2, he stated he started using heroin “last August” when his  
21 brother died, which would have been August 2011, with last use on  
22 Superbowl Sunday 2011, which must have meant 2012. He also  
23 testified the last time he drank alcohol was “two years ago,” i.e., 2011,  
24 yet at 22F he reported being in prison for the past 8 months  
[approximately March 2012 to October 2012] and drinking beer daily  
prior to that.

25 Tr. 27.

26 In determining a claimant’s credibility, the ALJ may consider “ordinary  
27 techniques of credibility evaluation, such as the claimant’s reputation for lying,  
28 prior inconsistent statements . . . and other testimony by the claimant that appears



1 less than candid.” *Smolen*, 80 F.3d at 1284. Additionally, an ALJ may properly  
2 consider evidence of a claimant’s substance use in assessing credibility. *Thomas v.*  
3 *Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002) (the ALJ’s finding that claimant was  
4 not a reliable historian regarding drug and alcohol usage supports negative  
5 credibility determination); *Verduzco v. Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999)  
6 (conflicting or inconsistent testimony concerning alcohol or drug use can  
7 contribute to an adverse credibility finding). Again, Plaintiff failed to raise an  
8 objection to this rationale in his briefing. *See Carmickle*, 533 F.3d at 1161 n.2 (the  
9 failure to challenge an issue in the opening brief waives the issue). Therefore, this  
10 is a specific, clear and convincing reason to find Plaintiff less than fully credible.

## 11 **5. Conclusion**

12 In conclusion, the ALJ supported his unfavorable credibility determination  
13 with specific, clear and convincing reasons. Any error resulting from the ALJ’s  
14 reliance on Plaintiff’s activities of daily living in determining Plaintiff’s credibility  
15 is harmless because the ALJ provided other legally sufficient reasons supported by  
16 substantial evidence to find Plaintiff less than fully credible. *See Carmickle*, 533  
17 F.3d at 1163 (upholding an adverse credibility finding where the ALJ provided  
18 four reasons to discredit the claimant, two of which were invalid); *Batson*, 359  
19 F.3d at 1197 (affirming a credibility finding where one of several reasons was  
20 unsupported by the record); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.  
21 2008) (an error is harmless when “it is clear from the record that the . . . error was  
22 inconsequential to the ultimate nondisability determination”).

23 Plaintiff asserts the ALJ found him less than fully credible because of his  
24 noncompliance in the recovery of his shoulder injury. ECF No. 15 at 10. The  
25 ALJ’s reference to Plaintiff’s noncompliance was in the context of demonstrating  
26 that Plaintiff’s complaints were not consistent with the medical evidence in the  
27 record. Tr. 31. Therefore, the Court finds that the ALJ did not support his  
28 credibility determination on Plaintiff’s noncompliance leading to the further injury

1 of the left shoulder.

2 **B. Evaluation of Medical Evidence**

3 Plaintiff argues the ALJ failed to properly consider and weigh the medical  
4 opinions expressed by examining psychologists, Dr. Islam-Zwart, Dr. Arnold, and  
5 Dr. Pollack. ECF No. 15 at 12-13.

6 In weighing medical source opinions, the ALJ should distinguish between  
7 three different types of physicians: (1) treating physicians, who actually treat the  
8 claimant; (2) examining physicians, who examine but do not treat the claimant;  
9 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
10 *Lester*, 81 F.3d at 830. The ALJ should give more weight to the opinion of a  
11 treating physician than to the opinion of an examining physician. *Orn*, 495 F.3d at  
12 631. The ALJ should give more weight to the opinion of an examining physician  
13 than to the opinion of a nonexamining physician. *Id.*

14 When an examining physician’s opinion is not contradicted by another  
15 physician, the ALJ may reject the opinion only for “clear and convincing” reasons.  
16 *Lester*, 81 F.2d at 830. When an examining physician’s opinion is contradicted by  
17 another physician, the ALJ is only required to provide “specific and legitimate  
18 reasons” for rejecting the opinion of the examining physician. *Id.* at 830-831.  
19 Plaintiff appears to assert that the specific and legitimate standard is appropriate in  
20 this case, and Defendant agrees. ECF No. 15 at 12; ECF No. 16 at 11.

21 The specific and legitimate standard can be met by the ALJ “setting out a  
22 detailed and thorough summary of the facts and conflicting clinical evidence,  
23 stating [her] interpretation thereof, and making findings.” *Magallanes v. Brown*,  
24 881 F.2d 747, 751 (9th Cir. 1989). The ALJ cannot just offer his conclusions; he  
25 must set forth his own interpretations and explain why they, rather than the  
26 doctors’, are correct. *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir. 1988).

27 **1. Dr. Islam-Zwart/Dr. Arnold**

28 Dr. Islam-Zwart evaluated Plaintiff on May 16, 2011, at the request of

1 Washington State Department of Social and Health Services (DSHS) to evaluate  
2 his eligibility for public assistance. Tr. 495. Dr. Islam-Zwart completed a clinical  
3 interview, a Trails Making Test, and a Fifteen Item Memory Test. Tr. 495-499.  
4 Additionally, she reviewed Plaintiff's Statement of Health, Education, and  
5 Employment form from DSHS dated May 6, 2011. Tr. 491. On the Trails Making  
6 Test, the Trails A was within normal limits, but the Trails B took 141 seconds with  
7 one error, which fell in the severely impaired range. Tr. 499. The Fifteen Item  
8 Memory Test "was suggestive of malingering, but also may have been a function  
9 of his carelessness." *Id.*

10 Based upon the evaluation and testing, Dr. Islam-Zwart opined that Plaintiff  
11 had a significant interference with the following abilities: (1) to understand,  
12 remember, and persist in tasks by following complex instruction or three or more  
13 steps; (2) to learn new tasks; (3) to perform routine tasks without undue  
14 supervision; (4) to be aware of normal hazards and take appropriate precautions;  
15 (5) to communicate and perform effectively in a work setting with public contact;  
16 and (6) to communicate and perform effectively in a work setting with limit public  
17 contact. Tr. 493. Additionally, Dr. Islam-Zwart opined that Plaintiff had a very  
18 significant interference with maintaining appropriate behavior in a work setting.  
19 *Id.* Dr. Islam-Zwart further diagnosed Plaintiff with polysubstance dependence,  
20 most recently marijuana and concluded that alcohol or drug treatment would likely  
21 improve his ability to function in a work setting. Tr. 493. Dr. Islam-Zwart stated:

22 It is noteworthy that he reports having a medical marijuana card and  
23 smoking marijuana on a daily basis, the last time the day prior to the  
24 evaluation. Given the potential for Mr. Long's marijuana use to worsen  
25 his symptoms, evaluation and treatment as recommended seems  
26 warranted. Mr. Long denies any real interest in use of medication or  
27 therapy; and it is difficult to determine if there is a true need given his  
28 history of substance dependence and continued use of marijuana. . . .  
Mr. Long does seem unable to work at this time given his constellation  
of issues. He clearly has problems with focus and persistence, his work

1 history is limited, and responsible behavior will likely be challenging  
2 for him.

3 Tr. 499.

4 Dr. Arnold evaluated Plaintiff on November 15, 2012. Tr. 590. Dr. Arnold  
5 performed a clinical interview, MSE, reviewed medical records, and performed a  
6 Trails Making Test and a Rey 15-Item Test. Tr. 587. The testing results were  
7 within normal limits. Tr. 588.

8 Dr. Arnold opined that Plaintiff had a marked limitation in the ability to (1)  
9 understand, remember, and persist in tasks by following detailed instructions; (2)  
10 adapt to changes in a routine work setting; (3) communicate and perform  
11 effectively in a work setting; (4) complete a normal work day and work week  
12 without interruptions from psychologically based symptoms; and (5) maintain  
13 appropriate behavior in a work setting. Tr. 589. Additionally, Dr. Arnold opined  
14 that Plaintiff had a moderate limitation in the ability to (1) understand, remember,  
15 and persist in tasks by following very short and simple instructions; (2) perform  
16 activities within a schedule, maintain regular attendance, and be punctual within  
17 customary tolerances without special supervision; (3) perform routine tasks  
18 without special supervision; (4) be aware of normal hazards and take appropriate  
19 precautions; (5) ask simple questions or request assistance; and (6) set realistic  
20 goals and plan independently. Tr. 589. Dr. Arnold concluded that the impairments  
21 were not the result of alcohol or drug use and that the impairments would persist  
22 following sixty days of sobriety. *Id.*

23 The ALJ gave Dr. Islam-Zwart and Dr. Arnold's opinion "little weight"  
24 because (1) they were based on Plaintiff's self-report; (2) they were done for the  
25 purpose of qualifying for public assistance; and (3) they were not supported by the  
26 overall record. Tr. 28.

27 First, the ALJ rejected Dr. Islam-Zwart and Dr. Arnold's opinions because  
28 they were based on Plaintiff's self-reports. Tr. 29. A doctor's opinion may be

1 discounted if it relies on a claimant's unreliable self-report. *Bayliss v. Barnhart*,  
2 427 F.3d 1211, 1217 (9th Cir. 2005); *Tommasetti*, 533 F.3d at 1041. As addressed  
3 above, the ALJ determined Plaintiff to be less than fully credible and supported his  
4 determination with specific, clear and convincing reasons. Therefore, rejecting Dr.  
5 Islam-Zwart and Dr. Arnold's opinions because they were based on Plaintiff's self-  
6 report is a specific and legitimate reason.

7 Plaintiff argues that Dr. Islam-Zwart's opinion was based on a review of the  
8 records, objective testing, and personal observations. ECF No. 15 at 12. There is  
9 no evidence that Dr. Islam-Zwart reviewed any of Plaintiff's medical records.  
10 Instead, she reported that she reviewed a DSHS Statement of Health, Education,  
11 and Employment form. Tr. 491. The "Psychiatric History" section of the report  
12 contains seven paragraphs, all of which start with a variation of "Mr. Long states,"  
13 "Mr. Long report," "Mr. Long describes," or "Mr. Long maintains." Tr. 495-496.  
14 The objective testing performed was limited to a Mini-MSE, a Trails Making Test,  
15 and a Fifteen Item Memory Test, which was suggestive of malingering. Tr. 499.  
16 Here, there was testing and personal observations during the clinical interview, but  
17 there was also evidence supporting the ALJ's conclusion that the opinion was  
18 based on Plaintiff's self-report. Therefore, the ALJ's determination that Dr. Islam-  
19 Zwart relied on Plaintiff's self-report in forming her opinion is supported by the  
20 record. *See Sprague*, 812 F.2d at 1229-1230 (if substantial evidence supports the  
21 administrative findings, or if conflicting evidence supports a finding of either  
22 disability or non-disability, the ALJ's determination is conclusive).

23 Plaintiff asserts that Dr. Arnold's opinion is based on his clinical interview,  
24 a MSE, a review of the records, the Trails Making Test and the Rey 15-Item Test  
25 and that these are sufficient to show that the opinion was based on more than  
26 Plaintiff's statements. ECF No. 15 at 12-13. The testing performed by Dr. Arnold  
27 included a Rey Malingering test, in which Plaintiff scored fifteen out of fifteen,  
28 and a Trails Making test, in which Plaintiff completed Trails A in 45 seconds and

1 Trails B in 80 second. Dr. Arnold indicated these scores placed Plaintiff within  
2 normal limits. Tr. 588. Yet, he opined that Plaintiff had a number of marked  
3 limitations in cognitive factors. Tr. 589. Therefore, it was reasonable that the ALJ  
4 assessed the difference between the test results and the severity of limitations to be  
5 attributed to Dr. Arnold relying on Plaintiff's statements.

6 Second, the ALJ rejected Dr. Islam-Zwart and Dr. Arnold's opinions  
7 because the evaluations and opinions were "done for a purpose separate and apart  
8 from social security disability cases; i.e. they were done for the express purpose of  
9 obtaining public assistance benefits." Tr. 28. This is not a specific and legitimate  
10 reason for rejecting the opinions.

11 The ALJ was accurate that these evaluations were performed for the purpose  
12 of qualifying for public benefits. The Court acknowledges that the final  
13 responsibility for deciding the issue of disability is reserved to the Commissioner.  
14 S.S.R. 96-5p; 20 C.F.R. § 416.927(d). However, "our rules provide that  
15 adjudicators must always carefully consider medical source opinions about any  
16 issue, including opinions about issues that are reserved to the Commissioner."  
17 S.S.R. 96-5p. The regulations require every medical opinion to be evaluated,  
18 regardless of its source. 20 C.F.R. § 416.927(c). Furthermore, the purpose for  
19 which medical reports are prepared does not provide a legitimate basis for rejecting  
20 them. *Lester*, 81 F.3d at 832. Although Dr. Islam-Zwart and Dr. Arnold's opinion  
21 were prepared for the purpose of evaluating eligibility for DSHS benefits, the  
22 medical opinions which are the bases of the reports must be considered by the ALJ.  
23 Thus, this reason for rejecting Dr. Islam-Zwart and Dr. Arnold's opinions is  
24 improper.

25 Third, the ALJ rejected Dr. Islam-Zwart and Dr. Arnold's opinion because  
26 they were not supported by the overall record. Tr. 28. Here, the ALJ summarized  
27 Dr. Islam-Zwart and Dr. Arnold's evaluation and opinion, as well as the opinions  
28 of Dr. Pollock, Dr. Toews, and Dr. Rubin. Tr. 24-26. Then, the ALJ concluded

1 “that opinions set forth in DSHS questionnaires and reports are limited by the fact  
2 that these conclusions are not supported by commensurate clinical findings of  
3 abnormality contained in longitudinal medical records, absent consideration of the  
4 effects of active substance abuse.” Tr. 28. This determination is supported in the  
5 record. In Dr. Islam-Zwart’s report, she questions Plaintiff’s symptoms in light of  
6 his substance abuse. Tr. 28, 499. Additionally, Dr. Arnold’s testing showed  
7 Plaintiff to be within normal limits, yet he gave Plaintiff multiple marked  
8 limitations. Tr. 588-589. Being inconsistent with the records in the file is a  
9 specific and legitimate reason for giving Dr. Islam-Zwart and Dr. Arnold’s  
10 opinions little weight.

11 Defendant asserts that the ALJ’s decision to give Dr. Islam-Zwart’s and Dr.  
12 Arnold’s opinion little weight is supported by the fact that the definitions of  
13 “moderate,” “marked,” and “severe” are different from those in the Social Security  
14 Act Regulations. ECF No. 16 at 10. This is a post hoc rationalization that will not  
15 be considered by the Court. *See Orn*, 495 F.3d at 630 (“the Court cannot uphold  
16 the ALJ’s decision based on “grounds upon which [the ALJ] did not rely”).

## 17 **2. Dr. Pollack**

18 Dr. Pollack evaluated Plaintiff on October 17, 2011, at the request of  
19 Plaintiff’s attorney “to determine his intellectual, emotional, neuropsychological,  
20 and vocational status.” Tr. 530. Dr. Pollack completed a clinical interview, a  
21 Trails Making Test, a Minnesota Multiphasic Personal Inventory-2 (MMPI-2), and  
22 a Wechsler Adult Intelligence Scale-IV (WAIS-IV). Tr. 530-535. Additionally, he  
23 reviewed “extensive medical and school records.” Tr. 530. The Trails Making  
24 Test gave Plaintiff scores of 34 seconds for Part A and 100 seconds for Part B. Tr.  
25 353. The Part B score fell in the impaired range. *Id.* The MMPI-2 gave Plaintiff a  
26 moderately elevated F-scale score at T=82, suggesting he was overstating his  
27 difficulties. Tr. 534. The WAIS-IV gave Plaintiff a Full Scale IQ of 80, which is  
28 in the low average range and at the ninth percentile. Tr. 533. Dr. Pollack

1 completed a mental medical source statement, in which he opined that Plaintiff had  
2 a marked limitation in (1) the ability to perform activities within a schedule,  
3 maintain regular attendance, and be punctual within customary tolerances, and (2)  
4 the ability to complete an normal workday and workweek without interruptions  
5 from psychologically based symptoms and to perform at a consistent pace without  
6 an unreasonable number and length of rest periods. Tr. 538. Additionally, Dr.  
7 Pollack opined that Plaintiff had a moderate limitation in the ability to accept  
8 instructions and respond appropriately to criticism from supervisors. *Id.*

9 The ALJ gave Dr. Pollack’s opinion “little to no weight” because (1) it was a  
10 one-time evaluation performed at the request of Plaintiff’s representative; (2) it  
11 lacked any historical treatment notes; (3) the marked mental limitations were  
12 inconsistent with the provider’s narrative; and (4) it was inconsistent with other  
13 evidence in the record. Tr. 29.

14 Plaintiff challenges the weight the ALJ gave to Dr. Pollack’s opinion. ECF  
15 No. 15 at 13. Defendant did not contest Plaintiff’s challenge. ECF No. 16.

16 First, the ALJ noted that Dr. Pollack only saw Plaintiff once. Tr. 29. The  
17 fact that Plaintiff only saw Dr. Pollack once speaks to whether he is a treating or  
18 examining doctor, it does not meet the specific and legitimate standard required to  
19 reject the opinion of an examining doctor. While the fact that Dr. Pollack is an  
20 examining psychologist and not a treating psychologist affects the weight given to  
21 his opinion, the ALJ is still required to provide specific and legitimate reasons  
22 beyond his examining status to reject his opinion. *See* 20 C.F.R § 416.927(c);  
23 *Lester*, 81 F.2d at 830.

24 Furthermore, the ALJ rejecting the opinion because Plaintiff’s attorney  
25 arranged the evaluation does not meet the specific and legitimate standard. *See*  
26 *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998) (“in the absence of other  
27 evidence to undermine the credibility of a medical report, the purpose for which  
28 the report was obtained does not provide a legitimate basis for rejecting it”);



1 *Burkhart v. Bowen*, 856 F.2d 1335, 1339 (9th Cir. 1988) (the source of referral was  
2 found to be relevant where there was no objective medical basis for the opinion);  
3 *Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (the source of the referral was  
4 found to be relevant where the ALJ found “actual improprieties” to question the  
5 credibility of the medical report). The ALJ attempted to show “actual  
6 improprieties” by asserting that unsupported marked limitations were present in all  
7 evaluations done at the request of counsel. Tr. 29. However, marked limitations  
8 were also opined by Dr. Arnold and Dr. Islam-Zwart, who both examined Plaintiff  
9 at the request of DSHS, therefore, this assertion is without merit. This is not a  
10 specific and legitimate reason to reject Dr. Pollack’s opinion.

11 Second, the ALJ found that Dr. Pollack’s evaluation lacked historical  
12 treatment notes. Tr. 29. Dr. Pollack specifically stated that he reviewed “extensive  
13 medical and school records,” and referenced something of these records’ contents.  
14 Tr. 530. While the Court acknowledges that it is unclear what medical records Dr.  
15 Pollack reviewed, it is evident by the evaluation that he did have some historical  
16 treatment notes. Tr. 532 (referring to an attempted suicide at age twelve appearing  
17 in the medical records). Therefore, the ALJ’s assertion is not supported by the  
18 record and is, therefore, not a specific and legitimate reason to reject Dr. Pollack’s  
19 opinion.

20 Third, the ALJ found that Dr. Pollack’s opinion of marked and severe  
21 limitations were not supported by his evaluation report. Tr. 29. The ALJ found  
22 that “there are discrepancies that he did not appear to take into account, including  
23 the elevated scores on the MMPI and the questionable results of the Trail Making  
24 Tests.” *Id.* This assertion is not supported by Dr. Pollack’s treatment notes. Dr.  
25 Pollack specifically stated that the “results of the neuropsychological testing  
26 suggests a cognitive disorder which can only be clarified by additional  
27 neuropsychological testing.” *Id.* Then, Dr. Pollack stated that his office attempted  
28 to contact Plaintiff to return for additional testing, but the attempt was

1 unsuccessful. *Id.* As such, the opinion was “based upon the information and  
2 testing that are available.” *Id.* Therefore, the MMPI score and Trails Making Test  
3 were considered by Dr. Pollack in forming his opinion. As such, this reason is not  
4 supported by substantial evidence.

5 Fourth, The ALJ determined that the marked limitations opined by Dr.  
6 Pollack were inconsistent with the opinions of Dr. Toews, Dr. Rubin, and the state  
7 agency medical consultants, who found no evidence of a severe mental  
8 impairment. Tr. 29. In his decision, the ALJ summarized Dr. Pollack’s evaluation  
9 and opinion, along with the opinions of Dr. Pollack, Dr. Toews, Dr. Rubin, and  
10 Alfred Scottolini, M.D., a state agency medical consultant. Tr. 25-26, 32. Then,  
11 the ALJ set forth his findings. Tr. 29. This is sufficient under *Magallanes* as a  
12 specific and legitimate reason to reject Dr. Pollack’s opinion.

13 In conclusion, any error committed in the weight assigned to Dr. Islam-  
14 Zwart, Dr. Arnold, and Dr. Pollack is harmless because the ALJ provided specific  
15 and legitimate reasons for the weight assigned to each doctor. *See Tommasetti v.*  
16 *Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008) (an error is harmless when “it is clear  
17 from the record that the . . . error was inconsequential to the ultimate nondisability  
18 determination”).

### 19 **C. Appeal Council’s Order**

20 The ALJ heard Plaintiff’s case on remand from the Appeals Council. Tr. 20.  
21 In the January 30, 2013, order, the Appeals Council instructed the ALJ to “[o]btain  
22 evidence from a vocational expert to clarify the effect of the assessed limitations  
23 on the claimant’s ability to perform past relevant work and other work.” Tr. 127.  
24 At the hearing, the ALJ did not call a vocational expert. Tr. 72-105.

25 Pursuant to 20 C.F.R. § 416.1477(b), an ALJ “shall take any action that is  
26 ordered by the Appeals Council.” In his decision, the ALJ discussed the Appeals  
27 Council remand order:

28 The undersigned acknowledges the Appeals Council directive to

1 obtain vocational expert testimony. However, the overhead reaching  
2 limits are based on the claimant non-dominant left arm only, and  
3 would not significantly erode the job base at the sedentary or light job  
4 levels that did not expose the claimant to repetitive or continuous use  
5 of his shoulder, as was also found by the state agency Single  
Decisionmaker at Exhibit 7F and 4B/1, whose decision was affirmed  
by Dr. Scottolini at Exhibit 12F and 4B/1.

6 Tr. 33-34. The ALJ's assertion that limitations to the non-dominant hand does not  
7 affect Plaintiff's place on the Guidelines for Residual Functional Capacity  
8 Assessment is in contradiction with the agency's policy. S.S.R. 83-12 states that  
9 the loss of use of an upper extremity affects the size of the occupational base of all  
10 ranges of work, generally precludes the performance of sedentary work, "because  
11 most unskilled sedentary jobs require good use of both hands," and calls for the use  
12 of a vocational expert to determine the size of the remaining occupational base for  
13 a claimant with the compromised use of one or both of the upper extremities. As  
14 such, this claim is remanded for the ALJ to call a vocational expert to assess  
15 Plaintiff's ability to perform past relevant work or other work based on the RFC as  
16 determined by the ALJ.

#### 17 **D. Step Two**

18 The ALJ found Plaintiff's mental health impairments were not severe at step  
19 two. Tr. 22-30. Plaintiff asserts that if the ALJ had given proper weight to the  
20 opinions of Dr. Islam-Zwart, Dr. Arnold, and Dr. Pollack, his mental health  
21 impairments would have been found severe at step two. ECF No. 15 at 14. As  
22 discussed above, the ALJ provided legally sufficient reasons to reject the opinions  
23 of Dr. Islam-Zwart, Dr. Arnold, and Dr. Pollack. Therefore, the ALJ did not error  
24 in his determination based on the opinions of these three doctors.

25 Nonetheless, since the case is already being remanded, the Court directs the  
26 ALJ to make a new step two determination in light of Plaintiff's substance abuse.  
27 In the January 30, 2013, remand from the Appeals Council, the ALJ was instructed  
28 to determine if Plaintiff was disabled, considering impairments resulting from

1 substance abuse, before determining if the substance abuse was material. Tr. 126.  
2 But, the ALJ made the step two determination absent any impairments caused by  
3 Plaintiff's substance abuse. Tr. 26-27. This was in violation of the Appeals  
4 Council's order. See 20 C.F.R. § 416.1477(b) (an ALJ "shall take any action that  
5 is ordered by the Appeals Council"). Additionally, the ALJ failed to follow S.S.R.  
6 13-02p, which directs adjudicators to walk through the five step analysis twice.  
7 First, including any impairment caused by substance abuse, and, if found disabled,  
8 make a determination if the substance abuse is material and complete a second five  
9 step analysis. Upon remand, the ALJ will complete the full five step analysis  
10 including any impairments and their resulting limitations from substance abuse.  
11 Then, if Plaintiff is found disabled, the ALJ is instructed to determine materiality  
12 of Plaintiff's substance abuse and complete a new five step evaluation in accord  
13 with S.S.R. 13-02p.

#### 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 severe impairments  
6 at step two, complete the full five step evaluation including impairments and  
7 limitations resulting from substance abuse, and call a vocational expert to testify  
8 the Plaintiff's ability perform other work. Should Plaintiff be found disabled, the  
9 ALJ is then instructed to make a determination regarding the materiality of  
10 Plaintiff's substance abuse and complete a new five step analysis in accord with  
11 S.S.R. 13-02p.

## 12 CONCLUSION

13 Accordingly, **IT IS ORDERED:**

14 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is  
15 **DENIED**.

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

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

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

23 DATED February 4, 2016.



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

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE