

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

Apr 03, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TOMMY L SIMMONS,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:17-CV-00061-RHW

**ORDER GRANTING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

Before the Court are the parties’ cross-motions for summary judgment, ECF Nos. 15 & 21. Mr. Simmons brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner’s final decision, which denied his application for Supplemental Security Income under Title XVI of the Social Security Act, 42 U.S.C § 1381-1383F. After reviewing the administrative record and briefs filed by the parties, the Court is now fully informed. For the reasons set forth below, the Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES** Mr. Simmons’ Motion for Summary Judgment.

1 **I. Jurisdiction**

2 Mr. Simmons filed his application for Supplemental Security Income on
3 May 10, 2011. AR 181, 331-36. His amended alleged onset date of disability is
4 May 10, 2011. AR 24, 55. Mr. Simmons’ application was initially denied on
5 October 25, 2011, AR 204-12, and on reconsideration on November 14, 2011, AR
6 216-23.

7 A hearing with Administrative Law Judge (“ALJ”) R.J. Payne occurred on
8 March 14, 2013. AR 53-85. On April 2, 2013, the ALJ issued a decision finding
9 Mr. Simmons ineligible for disability benefits. AR 181-93. The Appeals Council
10 remanded the case back to the ALJ on February 24, 2014, so the ALJ could further
11 develop the record regarding Mr. Simmons’ mental impairments, view the new
12 evidence submitted to the Appeals Council after the ALJ’s decision, and reevaluate
13 Mr. Simmons’ after considering the additional material. AR 198-200.

14 Subsequent hearings with the ALJ occurred on November 25, 2014, AR 86-
15 114, and on May 12, 2015, AR 115-59. On May 27, 2015, the ALJ issued a second
16 decision again finding Mr. Simmons ineligible for disability benefits. AR 24-45.
17 The Appeals Council denied Mr. Simmons’ request for review on January 11,
18 2017, AR 1-3, making the ALJ’s ruling the “final decision” of the Commissioner.

1 Mr. Simmons timely filed the present action challenging the denial of
2 benefits, on February 13, 2017. ECF No. 3. Accordingly, Mr. Simmons' claims are
3 properly before this Court pursuant to 42 U.S.C. § 405(g).

4 II. Sequential Evaluation Process

5 The Social Security Act defines disability as the "inability to engage in any
6 substantial gainful activity by reason of any medically determinable physical or
7 mental impairment which can be expected to result in death or which has lasted or
8 can be expected to last for a continuous period of not less than twelve months." 42
9 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
10 under a disability only if the claimant's impairments are of such severity that the
11 claimant is not only unable to do his previous work, but cannot, considering
12 claimant's age, education, and work experience, engage in any other substantial
13 gainful work that exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a claimant is disabled within the meaning of the Social
16 Security Act. 20 C.F.R. §§ 404.1520(a)(4) & 416.920(a)(4); *Lounsbury v.*
17 *Barnhart*, 468 F.3d 1111, 1114 (9th Cir. 2006).

18 Step one inquires whether the claimant is presently engaged in "substantial
19 gainful activity." 20 C.F.R. §§ 404.1520(b) & 416.920(b). Substantial gainful
20 activity is defined as significant physical or mental activities done or usually done

1 for profit. 20 C.F.R. §§ 404.1572 & 416.972. If the claimant is engaged in
2 substantial activity, he or she is not entitled to disability benefits. 20 C.F.R. §§
3 404.1571 & 416.920(b). If not, the ALJ proceeds to step two.

4 Step two asks whether the claimant has a severe impairment, or combination
5 of impairments, that significantly limits the claimant’s physical or mental ability to
6 do basic work activities. 20 C.F.R. §§ 404.1520(c) & 416.920(c). A severe
7 impairment is one that has lasted or is expected to last for at least twelve months,
8 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1508-09 &
9 416.908-09. If the claimant does not have a severe impairment, or combination of
10 impairments, the disability claim is denied, and no further evaluative steps are
11 required. Otherwise, the evaluation proceeds to the third step.

12 Step three involves a determination of whether any of the claimant’s severe
13 impairments “meets or equals” one of the listed impairments acknowledged by the
14 Commissioner to be sufficiently severe as to preclude substantial gainful activity.
15 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526 & 416.920(d), 416.925, 416.926;
16 20 C.F.R. § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or
17 equals one of the listed impairments, the claimant is *per se* disabled and qualifies
18 for benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to the
19 fourth step.

1 Step four examines whether the claimant’s residual functional capacity
2 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f) &
3 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant is
4 not entitled to disability benefits and the inquiry ends. *Id.*

5 Step five shifts the burden to the Commissioner to prove that the claimant is
6 able to perform other work in the national economy, taking into account the
7 claimant’s age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),
8 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c). To meet this
9 burden, the Commissioner must establish that (1) the claimant is capable of
10 performing other work; and (2) such work exists in “significant Gallo in the
11 national economy.” 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*,
12 676 F.3d 1203, 1206 (9th Cir. 2012).

13 III. Standard of Review

14 A district court's review of a final decision of the Commissioner is governed
15 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the
16 Commissioner's decision will be disturbed “only if it is not supported by
17 substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1144,
18 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means “more than a
19 mere scintilla but less than a preponderance; it is such relevant evidence as a
20 reasonable mind might accept as adequate to support a conclusion.” *Sandgathe v.*

1 *Chater*, 108 F.3d 978, 980 (9th Cir.1997) (quoting *Andrews v. Shalala*, 53 F.3d
2 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining
3 whether the Commissioner’s findings are supported by substantial evidence, “a
4 reviewing court must consider the entire record as a whole and may not affirm
5 simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc.*
6 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879
7 F.2d 498, 501 (9th Cir. 1989)).

8 In reviewing a denial of benefits, a district court may not substitute its
9 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.
10 1992). If the evidence in the record “is susceptible to more than one rational
11 interpretation, [the court] must uphold the ALJ's findings if they are supported by
12 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
13 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
14 2002) (if the “evidence is susceptible to more than one rational interpretation, one
15 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,
16 a district court “may not reverse an ALJ's decision on account of an error that is
17 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is
18 inconsequential to the [ALJ's] ultimate nondisability determination.” *Id.* at 1115.
19 The burden of showing that an error is harmful generally falls upon the party
20 appealing the ALJ's decision. *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

1 **IV. Statement of Facts**

2 The facts of the case are set forth in detail in the transcript of proceedings
3 and only briefly summarized here. Mr. Simmons was 22 years old on the date the
4 application was filed. AR 43, 181, 331. He has at least a high school education and
5 is able to communicate in English. 30, 43. Mr. Simmons has a lengthy history of
6 drug use. See AR 31, 32, 36 Mr. Simmons has no past relevant work. AR 43.

7 **V. The ALJ's Findings**

8 The ALJ determined that Mr. Simmons was not under a disability within the
9 meaning of the Act from May 10, 2011, the date the application was filed, through
10 the date of the ALJ's decision. AR 25, 44.

11 **At step one**, the ALJ found that Mr. Simmons had not engaged in
12 substantial gainful activity since May 10, 2011 (citing 20 C.F.R. § 416.971 *et seq.*).
13 AR 27.

14 **At step two**, the ALJ found Mr. Simmons had the following severe
15 impairments: seizure disorder; insulin dependent diabetes; borderline intellectual
16 functioning; and personality disorder, not otherwise specified (citing 20 C.F.R. §
17 416.920(c)). AR 27.

18 **At step three**, the ALJ found that Mr. Simmons did not have an impairment
19 or combination of impairments that meets or medically equals the severity of one
20 of the listed impairments in 20 C.F.R. § 404, Subpt. P, App. 1. AR 27.

1 erred by: (1) improperly discrediting Mr. Simmons’ subjective complaint
2 testimony; (2) improperly evaluating the medical opinion evidence; (3) improperly
3 considering whether Mr. Simmons impairments met the listings at step three; and
4 (4) improperly assessing Mr. Simmons’ residual functional capacity and by
5 determining there are jobs Mr. Simmons can perform despite his limitations.

6 **VII. Discussion**

7 **A. The ALJ Properly Discounted Mr. Simmons’ Credibility.**

8 An ALJ engages in a two-step analysis to determine whether a claimant’s
9 testimony regarding subjective symptoms is credible. *Tommasetti v. Astrue*, 533
10 F.3d 1035, 1039 (9th Cir. 2008). First, the claimant must produce objective
11 medical evidence of an underlying impairment or impairments that could
12 reasonably be expected to produce some degree of the symptoms alleged. *Id.*
13 Second, if the claimant meets this threshold, and there is no affirmative evidence
14 suggesting malingering, “the ALJ can reject the claimant’s testimony about the
15 severity of [her] symptoms only by offering specific, clear, and convincing reasons
16 for doing so.” *Id.*

17 In weighing a claimant's credibility, the ALJ may consider many factors,
18 including, “(1) ordinary techniques of credibility evaluation, such as the claimant's
19 reputation for lying, prior inconsistent statements concerning the symptoms, and
20 other testimony by the claimant that appears less than candid; (2) unexplained or

1 inadequately explained failure to seek treatment or to follow a prescribed course of
2 treatment; and (3) the claimant's daily activities.” *Smolen*, 80 F.3d at 1284. When
3 evidence reasonably supports either confirming or reversing the ALJ's decision, the
4 Court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180
5 F.3d 1094, 1098 (9th Cir.1999). Here, the ALJ found that the medically
6 determinable impairments could reasonably be expected to produce the symptoms
7 Mr. Simmons alleges; however, the ALJ determined that Mr. Simmons’ statements
8 of intensity, persistence, and limiting effects of the symptoms were not entirely
9 credible. AR 32. The ALJ provided multiple clear and convincing reasons for
10 discrediting Mr. Simmons’ subjective complaint testimony. AR 32-38.

11 Mr. Simmons argues that the ALJ failed to properly discredit his subjective
12 complaint testimony regarding his allegations of total disability. Specifically, Mr.
13 Simmons contends that three of the reasons the ALJ provided for discrediting Mr.
14 Simmons, lack of medical treatment for his seizures and diabetes, inconsistent
15 statements, and lack luster earning records, are not clear and convincing. Mr.
16 Simmons does not contest the additional reasons the ALJ provided for discrediting
17 his subjective complaint testimony: inconsistency with the medical record, his
18 daily activities, complete lack of any mental health treatment, improvement of his
19 physical symptoms with treatment, and his motives for secondary gain. *See* AR 32-
20 38.

1 Contrary to Mr. Simmons’ contentions, the record is replete with Mr.
2 Simmons’ repeated failures and refusals to treat his symptoms, his inconsistent
3 statements regarding taking his medications, his improvement when he is
4 compliant with his treatment, and a complete lack of mental health treatment. *See*
5 *e.g.* AR 32-38, 91, 495-96, 497-98, 514, 511-21, 546-47, 556, 563, 603, 673-75. A
6 claimant’s statements may be less credible when treatment is inconsistent with the
7 level of complaints or a claimant is not following treatment prescribed without
8 good reason. *Molina*, 674 F.3d at 1114. “Unexplained, or inadequately explained,
9 failure to seek treatment . . . can cast doubt on the sincerity of [a] claimant’s []
10 testimony.” *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Additionally, an
11 ALJ may rely on ordinary techniques of credibility evaluation such as a witness’s
12 prior inconsistent statements. *Tommasetti*, 533 F.3d at 1039.

13 In addition, the ALJ noted the Mr. Simmons’ allegations of totally disabling
14 impairments are not supported by the medical evidence. AR 32, 34. An ALJ may
15 discount a claimant’s subjective symptom testimony that is contradicted by
16 medical evidence. *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
17 (9th Cir. 2008). Inconsistency between a claimant’s allegations and relevant
18 medical evidence is a legally sufficient reason to reject a claimant’s subjective
19 testimony. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

1 The ALJ noted significant inconsistencies with the medical record, which
2 demonstrates he is capable of a wide range of physical functioning, he has not been
3 recommended or proscribed aggressive treatment, and his objective clinical
4 evidence shows largely unremarkable findings. *See* AR 41. Further, no medical
5 professional has opined that Mr. Simmons is unable to perform work at the light
6 level. *Id.* An ALJ may discount a claimant’s subjective symptom testimony that is
7 contradicted by medical evidence. *Carmickle v. Comm’r of Soc. Sec. Admin.*, 533
8 F.3d 1155, 1161 (9th Cir. 2008). Inconsistency between a claimant’s allegations
9 and relevant medical evidence is a legally sufficient reason to reject a claimant’s
10 subjective testimony. *Tonapetyan*, 242 F.3d at 1148. The ALJ pointed out that Mr.
11 Simmons frequently provided contradictory information to his medical providers
12 and his physical and mental examinations were normal and unremarkable. AR 33,
13 34, 491-92, 495-96, 537-39.

14 The ALJ also noted that Mr. Simmons’ activities of daily living, and Mr.
15 Simmons’ statements regarding his daily activities did not support his allegations
16 of total disability. AR 38. Examples include Mr. Simmons’ statement that he has
17 no problems with daily activities, he rides his bike, he “go[es] on adventures,”
18 walks around downtown, talks to others, hangs out with friends, goes out to apply
19 for jobs, cleans the house, vacuums, washes dishes, and sweeps and mops. *See* AR
20 35, 38. Activities inconsistent with the alleged symptoms are proper grounds for

1 questioning the credibility of an individual’s subjective allegations. *Molina*, 674
2 F.3d at 1113 (“[e]ven where those activities suggest some difficulty functioning,
3 they may be grounds for discrediting the claimant’s testimony to the extent that
4 they contradict claims of a totally debilitating impairment”); *see also Rollins v.*
5 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

6 Further, the ALJ noted the lack of work and sporadic work prior to the
7 application date, and his statements demonstrating motive for secondary gain. AR
8 32, 33, 37, 40. “An ALJ may engage in ordinary techniques of credibility
9 evaluation, such as considering claimant’s reputation for truthfulness.” *Burch*, 400
10 F.3d at 680 (9th Cir. 2005); *see also Smolen*, 80 F.3d at 1284. If an individual has
11 shown little propensity to work throughout her lifetime, an ALJ may find his
12 testimony that he cannot work now less credible. *Thomas*, 278 F.3d at 959. The
13 ALJ stated that Mr. Simmons has not earned over a \$1,000.00 in any given year
14 and only had earnings in 2007 and 2011, he never performed any occupation at a
15 substantial gainful activity level, and Mr. Simmons testified that he thought a job
16 working with small objects “would be boring” and he would not want to do it for
17 his entire life. AR 32, 143, 347. Mr. Simmons reported to his treating physician,
18 Dr. Bender, that he was seeking disability benefits; after which Dr. Bender told
19 him that he should be a reasonable job candidate once they can control the seizures
20 with proper medication; Mr. Simmons did not appear for any scheduled

1 appointments with Dr. Bender again after this conversation. AR 40, 704. Mr.
2 Simmons then began seeing Dr. Powell, and the first thing Mr. Simmons said to
3 Dr. Powell, without prompting, was that he was there because his lawyer told him
4 to be there because he wants disability. AR 816.

5 Again, Mr. Simmons does not contest many of the reasons the ALJ provided
6 for discounting his credibility. When the ALJ presents a reasonable interpretation
7 that is supported by the evidence, it is not the role of the courts to second-guess it.
8 *Rollins*, 261 F.3d at 857. The Court “must uphold the ALJ's findings if they are
9 supported by inferences reasonably drawn from the record.” *Molina*, 674 F.3d
10 1104, 1111; *see also Thomas*, 278 F.3d 947, 954 (if the “evidence is susceptible to
11 more than one rational interpretation, one of which supports the ALJ’s decision,
12 the conclusion must be upheld”). The Court does not find the ALJ erred when
13 discounting Mr. Simmons’ credibility because the ALJ properly provided multiple
14 clear and convincing reasons for doing so.

15 **B. The ALJ Properly Evaluated the Medical Opinion Evidence.**

16 **a. Legal Standard.**

17 The Ninth Circuit has distinguished between three classes of medical
18 providers in defining the weight to be given to their opinions: (1) treating
19 providers, those who actually treat the claimant; (2) examining providers, those
20 who examine but do not treat the claimant; and (3) non-examining providers, those

1 who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th
2 Cir. 1996) (as amended).

3 A treating provider's opinion is given the most weight, followed by an
4 examining provider, and finally a non-examining provider. *Id.* at 830-31. In the
5 absence of a contrary opinion, a treating or examining provider's opinion may not
6 be rejected unless "clear and convincing" reasons are provided. *Id.* at 830. If a
7 treating or examining provider's opinion is contradicted, it may only be discounted
8 for "specific and legitimate reasons that are supported by substantial evidence in
9 the record." *Id.* at 830-31.

10 The ALJ may meet the specific and legitimate standard by "setting out a
11 detailed and thorough summary of the facts and conflicting clinical evidence,
12 stating his interpretation thereof, and making findings." *Magallanes v. Bowen*, 881
13 F.2d 747, 751 (9th Cir. 1989) (internal citation omitted). When rejecting a treating
14 provider's opinion on a psychological impairment, the ALJ must offer more than
15 his or her own conclusions and explain why he or she, as opposed to the provider,
16 is correct. *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

17 **b. Dr. John Arnold, Ph.D.**

18 Dr. Arnold is an examining psychologist who completed two questionnaires
19 for the Department of Social and Health Services in May 2012 and February 2013.
20 AR 581-94. Dr. Arnold opined that Mr. Simmons was able to remember locations

1 and simple work like tasks; he could understand, remember, and carryout simple
2 verbal and written instructions; he was able to concentrate for short and moderate
3 periods; he was able to ask simple questions, request assistance, and accept
4 instructions; he was able to adhere to basis standards of neatness and cleanliness;
5 he could right the bus; his prognosis was guarded; and if he stopped using
6 marijuana his psychological symptoms would improve. *Id.*

7 The ALJ did not completely discount Dr. Arnold’s opinion, but assigned it
8 little weight. AR 41-42. Mr. Simmons argues that Dr. Arnold’s opinion deserved
9 significant weight because he examined Mr. Simmons twice, Dr. Carstens (who
10 only reviewed Dr. Arnold’s 2013 opinion and nothing else) agreed with the
11 assessment, and it is consistent with testing by Dr. Carroll. However, the ALJ
12 provided multiple valid reasons, supported by the record, to discount this opinion,
13 none of which are actually contested by Mr. Simmons. AR 41-42. The ALJ
14 discounted the opinion because Dr. Arnold did not have the whole record to
15 review, Dr. Arnold did not have access to the testing performed or perform tests to
16 support his opinions, the opinions are heavily based on Mr. Simmons subjective
17 complaints that have been discredited by the ALJ, and the limitations opined by
18 Dr. Arnold are inconsistent with Mr. Simmons actions and complete lack of mental
19 health treatment. *Id.* An ALJ may reject a doctor’s opinion when it is inconsistent
20 with other evidence in the record. *See Morgan v. Comm’r of the Soc. Sec. Admin.,*

1 169 F.3d 595, 600 (9th Cir. 1999). An ALJ may properly reject an opinion that
2 provides restrictions that appear inconsistent with the claimant’s level of activity.
3 *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (an ALJ may give less
4 weight to a medical opinion that conflicts with the claimant’s own assessment of
5 his impairments). Additionally, “an ALJ need not accept the opinion of a doctor if
6 that opinion is brief, conclusory, and inadequately supported by clinical findings.”
7 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). Furthermore, an ALJ
8 may discount even a treating provider’s opinion if it is based largely on the
9 claimant’s self-reports and not on clinical evidence, and the ALJ finds the claimant
10 not credible. *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

11 Mr. Simmons does not contest any of the valid reasons the ALJ provided for
12 assigning little weight to Dr. Arnold’s opinions. When the ALJ presents a
13 reasonable interpretation that is supported by the evidence, it is not the role of the
14 courts to second-guess it. *Rollins*, 261 F.3d 853, 857. The Court “must uphold the
15 ALJ's findings if they are supported by inferences reasonably drawn from the
16 record.” *Molina*, 674 F.3d 1104, 1111; *see also Thomas*, 278 F.3d 947, 954 (if the
17 “evidence is susceptible to more than one rational interpretation, one of which
18 supports the ALJ’s decision, the conclusion must be upheld”). Thus, the Court
19 finds the ALJ did not err in his consideration of Dr. Arnold’s opinions.

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1 **c. Dr. Aaron Audet, M.D.**

2 Dr. Audet is a treating doctor who stated that Mr. Simmons was compliant
3 with his medication, and opined that Mr. Simmons would be absent from work
4 four days per month; he is capable of handling moderate stress in a work place; he
5 cannot work around heights, hazardous machinery, or operate a motor vehicle; if
6 he had a seizure it would briefly disrupt the work activity of his coworkers; and he
7 needs additional supervision. AR 734-37.

8 The ALJ did not completely discount Dr. Audet’s opinion, but assigned the
9 opinion some weight. AR 40. Mr. Simmons contends that Dr. Audet’s opinion
10 should be afforded significant weight because he is a treating doctor and had the
11 records of Mr. Simmons’ treatment for his seizure disorder. However, the ALJ
12 provided multiple valid reasons, supported by the record, to assign some weight to
13 this opinion, none of which are again contested by Mr. Simmons. AR 40. The ALJ
14 agreed with the majority Dr. Audet’s opinion and provided limitations associated
15 with the majority of the opinion. *Id.* The ALJ specifically noted that he agreed that
16 Mr. Simmons is capable of handling moderate stress in a work place; he cannot
17 work around heights, hazardous machinery, or operate a motor vehicle; if he had a
18 seizure it would briefly disrupt the work activity of his coworkers. *Id.* However,
19 the ALJ did not agree that Mr. Simmons would be absent from work four days per
20 week, because this was based on Mr. Simmons being compliant with his

1 medication, which is clearly fought by the record. *Id.* The record continuously
2 documents non-compliance with medical treatment, including just two months
3 prior to Dr. Audet’s opinion. *See* AR32-38, 40, 495-96, 497-98, 514, 511-21, 546-
4 47, 556, 563, 603, 673-75. An ALJ may reject a doctor’s opinion when it is
5 inconsistent with other evidence in the record. *See Morgan*, 169 F.3d at 600.
6 Additionally, the ALJ did not agree that Mr. Simmons would need additional
7 supervision, because there is no support for such and no suggestion in the record
8 the Mr. Simmons would need additional supervision. AR 40. “An ALJ need not
9 accept the opinion of a doctor if that opinion is brief, conclusory, and inadequately
10 supported by clinical findings.” *Bayliss*, 427 F.3d at 1216.

11 Mr. Simmons provides his own reasons for why more weight should be
12 afforded to this opinion, but again he does not contest any of the valid reasons the
13 ALJ provided for assigning some weight to Dr. Audet’s opinion. When the ALJ
14 presents a reasonable interpretation that is supported by the evidence, it is not the
15 role of the courts to second-guess it. *Rollins*, 261 F.3d 853, 857. The Court “must
16 uphold the ALJ’s findings if they are supported by inferences reasonably drawn
17 from the record.” *Molina*, 674 F.3d 1104, 1111; *see also Thomas*, 278 F.3d 947,
18 954 (if the “evidence is susceptible to more than one rational interpretation, one of
19 which supports the ALJ’s decision, the conclusion must be upheld”). Thus, the
20 Court finds the ALJ did not err in his consideration of Dr. Audet’s opinion.

1 **d. Dr. William Bender, M.D.**

2 Dr. Bender is a treating physician who opined in January 2014 that: “I have
3 told him that my hope is we will get control of them with medication, and that he
4 should be a reasonable job candidate. His prior history of seizures on the job date
5 to a time when he was not on as effective a treatment regimen.” AR 704.

6 The ALJ afforded Dr. Bender’s statement significant weight because Dr.
7 Bender had substantial treatment notes to support his opinion and is a specially
8 trained neurologist, giving him specific knowledge in the area of seizure disorders
9 and Mr. Simmons abilities; the treatment notes supported that proper medication
10 could be effective in controlling Mr. Simmons’ seizure activity; and this statement
11 was made after Mr. Simmons told Dr. Bender he was seeking disability due to his
12 seizures and Mr. Simmons did not appear for another scheduled appointment with
13 Dr. Bender after this statement was made, indicating a disinterest in optimal
14 control for his seizure disorder and elements of secondary gain. AR 40.

15 Mr. Simmons agrees that this opinion should be given significant weight but
16 argues that the treatment notes should have little bearing on his residual functional
17 capacity except with regard to seizures because the opinion does not include
18 specific restrictions or state that it is taking into account Mr. Simmons’ intellectual
19 functioning or personality disorder.

1 Not only does Mr. Simmons not contest the weight afforded this opinion,
2 there is no argument or indication that the ALJ erred or that Dr. Bender’s opinion
3 had any bearing on any the residual functional capacity outside of the severity of
4 the seizures. Furthermore, it is the ALJ’s duty to explain why “significant
5 probative evidence has been rejected,” rather than explain why it was not. *Vincent*
6 *on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394–95 (9th Cir. 1984).

7 When the ALJ presents a reasonable interpretation that is supported by the
8 evidence, it is not the role of the courts to second-guess it. *Rollins v. Massanari*,
9 261 F.3d 853, 857 (9th Cir. 2001). The Court “must uphold the ALJ’s findings if
10 they are supported by inferences reasonably drawn from the record.” *Molina v.*
11 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278
12 F.3d 947, 954 (9th Cir. 2002) (if the “evidence is susceptible to more than one
13 rational interpretation, one of which supports the ALJ’s decision, the conclusion
14 must be upheld”). Thus, the Court finds the ALJ did not err in his consideration of
15 Dr. Bender’s opinion.

16 **e. Dr. James M. Haynes, M.D. and Dr. Nancy Winfrey, Ph.D.**

17 Dr. Haynes is a neurologist and a medical expert that testified at hearings in
18 March 2013 and November 2014. AR 57, 90-100. Dr. Haynes provided an opinion
19 regarding Mr. Simmons’ functioning capacity after reviewing the entire record,
20 and was subject to cross examination. *Id.* Dr. Winfrey is a medical expert that

1 testified at the November 2014 hearing. AR 100-12. Dr. Winfrey provided an
2 opinion regarding Mr. Simmons' functioning capacity after reviewing the entire
3 record at the time and was subject to cross examination. *Id.*

4 The ALJ afforded significant weight to the opinions of Dr. Haynes and Dr.
5 Winfrey. AR 39, 41. Significant weight was afforded as the doctors are experts in
6 their fields; viewed the entire longitudinal record, whereas other doctors only had a
7 portion of the record; and the doctors testified at the hearings and were subject to
8 cross examination. AR 39, 41. Mr. Simmons, very briefly, agrees that these
9 opinions should be afforded significant weight because they were able to view the
10 longitudinal record and were subject to cross examination, but states that
11 controlling weight should be given to Mr. Simmons' treating and examining
12 doctors.

13 Mr. Simmons brief and unsupported contention does not establish error. The
14 Court has already found that the ALJ properly weighed the contested medical
15 opinions and provided multiple valid and uncontested reasons for the weight each
16 was assigned. *See Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir. 2001)
17 (“[T]he regulations give more weight to ... the opinions of specialists concerning
18 matters relating to their specialty over that of nonspecialists.”). Great weight may
19 legitimately be given to the opinion of a non-examining expert who testifies at a
20 hearing. *Andrews v. Shalala*, 53 F.3d 1035, 1042 (9th Cir. 1995).

1 It is the ALJ, and not the claimant, who is responsible for weighing the
2 evidence for probity and credibility. *See Sample v. Schweiker*, 694 F.2d 639, 643
3 (9th Cir. 1982). When the ALJ presents a reasonable interpretation that is
4 supported by the evidence, it is not the role of the courts to second-guess it. *Rollins*
5 *v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The Court “must uphold the
6 ALJ's findings if they are supported by inferences reasonably drawn from the
7 record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *see also Thomas v.*
8 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002) (if the “evidence is susceptible to more
9 than one rational interpretation, one of which supports the ALJ’s decision, the
10 conclusion must be upheld”). Furthermore, it is the ALJ’s duty to explain why
11 “significant probative evidence has been rejected,” rather than explain why it was
12 not. *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394–95 (9th Cir.
13 1984). Thus, the Court finds the ALJ did not err in his consideration of the
14 opinions of Dr. Haynes and Dr. Winfrey.

15 **C. The ALJ properly considered the listings at step three.**

16 Mr. Simmons contends that the ALJ erred at step three of the sequential
17 evaluation process. Specifically, Mr. Simmons argues that the ALJ erred by not
18 finding his personality disorder meets the paragraph B criteria of listing 12.08, and
19 by not finding his seizure disorder meets listing 11.02. A claimant is presumptively
20 disabled and entitled to benefits if he or she meets or equals a listed impairment.

1 The listings describe, for each of the major body systems, impairments which are
2 considered severe enough alone to prevent a person from performing gainful
3 activity. 20 C.F.R. §§ 404.1525, 416.925.

4 At step three of the sequential evaluation process, it is the claimant's burden
5 to prove that his impairments meet or equal one of the impairments listed. *Oviatt v.*
6 *Com'r of Soc. Sec. Admin.*, 303 F. App'x 519, 523 (9th Cir. 2008); *Hoopai v.*
7 *Astrue*, 499 F.3d 1071, 1074–75 (9th Cir.2007); *Burch v. Barnhart*, 400 F.3d 676,
8 683 (9th Cir.2005). To meet a listed impairment, a disability claimant must
9 establish that his condition satisfies each element of the listed impairment in
10 question. *See Sullivan v. Zebley*, 493 U.S. 521, 530 (1990); *Tackett v. Apfel*, 180
11 F.3d 1094, 1099 (9th Cir.1999). To equal a listed impairment, a claimant must
12 establish symptoms, signs, and laboratory findings at least equal in severity and
13 duration to each element of the most similar listed impairment. *Tackett*, 180 F.3d at
14 1099-1100 (quoting 20 C.F.R. 404.1526).

15 The degrees of severity of a claimant's functional limitations are assessed
16 using the four criteria in paragraph B of the listings (the "B criteria"): activities of
17 daily living; social functioning; concentration, persistence, or pace; and episodes of
18 decompensation. See 20 C.F.R. pt. 404, subpt. P, app. 1, 12.00C. The B criteria are
19 met when at least two of the following are met: marked limitations in activities of
20 daily living; marked limitations in social functioning; marked limitations in

1 concentration, persistence, or pace; or repeated episodes of decompensation. The
2 ALJ made specific findings in each of the four functional areas, per 20 C.F.R. §§
3 404.1520a, 416.920a. AR 28. In activities of daily living, the ALJ found a mild
4 restriction. *Id.* In social functioning, the ALJ found mild difficulties. *Id.* With
5 regard to concentration, persistence or pace, the ALJ found moderate difficulties.
6 *Id.* The ALJ found no documented episodes of decompensation of extended
7 duration. *Id.*

8 Importantly, Mr. Simmons’ arguments are based only on the acceptance of
9 the opinion of Dr. Arnold, which the ALJ properly assigned little weight, and the
10 opinion of non-examining psychologist Dr. Carstens, to which the ALJ assigned
11 little weight and Mr. Simmons does not contest. Additionally, The ALJ’s findings
12 are supported by the medical expert testimony of Dr. Winfrey, who opined after
13 reviewing the evidence, that Mr. Simmons’ mental impairments did not meet or
14 equal a listed impairment. AR 100-12.

15 In order to establish that his seizure disorder was “equivalent” to Listing
16 11.02, Mr. Simmons needed to present, among other evidence, “[a]t least one
17 detailed description of a typical seizure.” Listing 11.00(A). The ALJ found that
18 Mr. Simmons’ did not meet the requirements of Listing 11.02 because he “has not
19 had seizures documented by detailed description of a typical seizure pattern,
20 including all associated phenomena; occurring more frequently than once a month,

1 in spite of at least three months of prescribed treatment with daytime episodes” AR
2 27. Mr. Simmons does not argue that he has met this condition. The ALJ’s
3 determination is further supported by the medical expert testimony of Dr. Haynes
4 who stated that Mr. Simmons’ impairments did not meet or equal the seizure
5 listing. AR 39, 91, 93.

6 The ALJ properly considered whether Mr. Simmons’ impairments met a
7 listing and did not err in determine that no listing was met.

8 **D. The ALJ properly assessed Mr. Simmons’ residual functional capacity**
9 **and did not err at step five of the sequential evaluation process.**

10 Mr. Simmons very briefly argues that his assessed residual functional
11 capacity and the resulting step five finding did not account for all of his limitations.
12 Specifically, he contends that he will miss one to four days of work per month and
13 he cannot sustain attention or concentrate for long periods or follow directions. Mr.
14 Simmons does not base this contention on any opinion or reference in the record.
15 The Court has already found no error in the ALJ’s treatment of the credibility,
16 testimony, medical opinions, and the record. Additionally, the ALJ specifically
17 noted that he considered *all symptoms* in assessing the residual functional capacity.
18 AR 29 (emphasis added). The ALJ’s determination is supported by the opinions of
19 the medical sources and by the testimony of the vocational expert, which is not
20 challenged.

1 1. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

2 2. Defendant's Motion for Summary Judgment, **ECF No. 21**, is

3 **GRANTED**.

4 3. Judgment shall be entered in favor of Defendant and the file shall be

5 **CLOSED**.

6 **IT IS SO ORDERED**. The District Court Executive is directed to enter this Order,
7 forward copies to counsel and **close the file**.

8 **DATED** this 3rd day of April, 2018.

9 *s/Robert H. Whaley*
10 **ROBERT H. WHALEY**
Senior United States District Judge