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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON

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

Apr 30, 2018

SEAN F. MCAVOY, CLERK

5
6 MICHAELLE MARIE OSBORNE,

No. 2:17-CV-0146-JTR

7 Plaintiff,

ORDER GRANTING, IN PART,
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

8
9 v.

10 COMMISSIONER OF SOCIAL
11 SECURITY,

12 Defendant.
13

14 **BEFORE THE COURT** are cross-motions for summary judgment. ECF
15 No. 13, 14. Attorney Jeffrey Schwab represents Michaelle Marie Osborne
16 (Plaintiff); Special Assistant United States Attorney Ryan Lu represents the
17 Commissioner of Social Security (Defendant). The parties have consented to
18 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
19 record and the briefs filed by the parties, the Court **GRANTS, IN PART,**
20 Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for
21 Summary Judgment; and **REMANDS** the matter to the Commissioner for
22 additional proceedings pursuant to 42 U.S.C. § 405(g).

23 **JURISDICTION**

24 Plaintiff filed applications for Disability Insurance Benefits and
25 Supplemental Security Income on March 14, 2014, and February 13, 2014,
26 respectively, alleging disability since July 1, 2012, due to anxiety, depression,
27 fearfulness, PTSD, panic attacks, fatigue and body aches. Tr. 367, 374, 443. The
28 applications were denied initially and upon reconsideration. Administrative Law

ORDER GRANTING, IN PART, PLAINTIFF'S MOTION . . . - 1

1 Judge (ALJ) Mark Kim held hearings on July 27, 2016, Tr. 43-70, and November
2 1, 2016, Tr. 71-109, and issued an unfavorable decision on November 22, 2016,
3 Tr. 21-32. The Appeals Council denied Plaintiff's request for review on February
4 21, 2017. Tr. 1-6. The ALJ's November 2016 decision thus became the final
5 decision of the Commissioner, which is appealable to the district court pursuant to
6 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on April 20, 2017.
7 ECF No. 1, 4.

8 **STATEMENT OF FACTS**

9 Plaintiff was born on June 1, 1967, and was 45 years old on the alleged onset
10 date, July 1, 2012. Tr. 367, 374. Plaintiff earned a GED and has completed some
11 college. Tr. 75-76. She has past work as a caregiver, a unit clerk and a cashier.
12 Tr. 97, 101-102. Plaintiff stated she believed she could no longer work due to her
13 physical issues and inability to stay focused. Tr. 93.

14 Plaintiff testified at the administrative hearing on November 1, 2016, that
15 she had nerve issues with her legs (beginning in September 2016), pain in her right
16 shoulder, problems with her neck causing tingling and reduced strength in her
17 arms/hands (brachial plexus), and heart issues/chest pain. Tr. 78-81. Plaintiff also
18 described anxiety/PTSD, Tr. 83-86, 94, migraine headaches, Tr. 88, tremors, Tr.
19 90-91, and difficulty with concentration, Tr. 92.

20 Plaintiff has a long history of alcohol-related problems. Plaintiff testified
21 she had been sober since September 2016 and had a six-month period of sobriety
22 prior to the September relapse. Tr. 77-78.

23 **STANDARD OF REVIEW**

24 The ALJ is responsible for determining credibility, resolving conflicts in
25 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
26 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with
27 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
28 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed

1 only if it is not supported by substantial evidence or if it is based on legal error.
2 Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
3 defined as being more than a mere scintilla, but less than a preponderance. Id. at
4 1098. Put another way, substantial evidence is such relevant evidence as a
5 reasonable mind might accept as adequate to support a conclusion. Richardson v.
6 Perales, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
7 rational interpretation, the Court may not substitute its judgment for that of the
8 ALJ. Tackett, 180 F.3d at 1097; Morgan v. Commissioner of Social Sec. Admin.,
9 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
10 administrative findings, or if conflicting evidence supports a finding of either
11 disability or non-disability, the ALJ's determination is conclusive. Sprague v.
12 Bowen, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
13 supported by substantial evidence will be set aside if the proper legal standards
14 were not applied in weighing the evidence and making the decision. Brawner v.
15 Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988).

16 **SEQUENTIAL EVALUATION PROCESS**

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

1 an adjustment to other work in the national economy, a finding of “disabled” is
2 made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

3 **ADMINISTRATIVE DECISION**

4 On November 22, 2016, the ALJ issued a decision finding Plaintiff was not
5 disabled as defined in the Social Security Act.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since July 1, 2012, the alleged onset date. Tr. 23.

8 At step two, the ALJ determined Plaintiff had the following severe
9 impairments: cervical spine degenerative disk disease, right brachial plexopathy,
10 right shoulder impingement, posttraumatic stress disorder (PTSD), major
11 depressive disorder, generalized anxiety disorder, and alcohol dependence. Tr. 23.

12 At step three, the ALJ found Plaintiff did not have an impairment or
13 combination of impairments that meets or medically equals the severity of one of
14 the listed impairments. Tr. 24.

15 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and found
16 Plaintiff could perform light exertion work, with the following nonexertional
17 limitations: she should never climb ladders, ropes, and scaffolds or crawl; she can
18 occasionally push and pull with her bilateral upper extremities, but she should
19 never reach overhead with her dominant right upper extremity and only
20 occasionally reach overhead with her non-dominant left upper extremity; she can
21 occasionally reach in all other directions with the bilateral upper extremities; she
22 can frequently handle, finger, and feel with her dominant right hand; she should
23 avoid all exposure to excessive vibrations and hazards like moving machinery and
24 unprotected heights; she can perform simple, routine tasks in a low stress
25 environment, defined as only occasional changes; and she can have occasional
26 interaction with the public and coworkers. Tr. 25-26.

27 At step four, the ALJ found Plaintiff was unable to perform her past relevant
28 work as a caregiver, unit clerk and cashier. Tr. 30.

1 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,
2 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830.

3 In making findings regarding the medical opinion evidence of record, the
4 ALJ must set forth specific, legitimate reasons that are based on substantial
5 evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989).
6 The ALJ must also set forth the reasoning behind his or her decisions in a way that
7 allows for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th
8 Cir. 2015) (finding a clear statement of the agency’s reasoning is necessary
9 because the Court can affirm the ALJ’s decision to deny benefits only on the
10 grounds invoked by the ALJ). “Although the ALJ’s analysis need not be
11 extensive, the ALJ must provide some reasoning in order for us to meaningfully
12 determine whether the ALJ’s conclusions were supported by substantial evidence.”
13 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014).

14 **1. Dr. Duris**

15 Dr. Duris completed a Department of Social and Health Services (DSHS)
16 Psychological/Psychiatric evaluation of Plaintiff on November 25, 2014. Tr. 1348-
17 1352. Dr. Duris diagnosed PTSD; alcohol dependence, in sustained partial
18 remission; and major depressive disorder, recurrent (marked), controlled with
19 medication. Tr. 1350. He opined that Plaintiff had “marked” restrictions in her
20 abilities to adapt to changes in a routine work setting, communicate and perform
21 effectively in a work setting, complete a normal work day and work week without
22 interruptions from psychologically based symptoms, and maintain appropriate
23 behavior in a work setting. Tr. 1350-1351.

24 The ALJ accorded only “partial weight” to Dr. Duris’ report, finding the
25 noted limitations were not supported by the record and that Dr. Duris’ own
26 examination findings showed Plaintiff had no abnormalities, thus the limitations
27 were based on Plaintiff’s unreliable subjective reporting. Tr. 29.

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1 Dr. Duris' findings are not unsupported by the evidence of record. As noted
2 by Plaintiff, ECF No. 13 at 12, the evidentiary record reveals Plaintiff continued to
3 have mental health issues throughout the relevant time period in this case with no
4 indication that her symptoms resolved. Tr. 575 (depressed and tearful); 582-584
5 (alcohol intoxication and anxiety); 586-587 (alcohol intoxication, anxiety and
6 PTSD); 805 (anxiety with depression and alcohol abuse); 969-970 (noted
7 limitations by Dr. Burdge); 1170, 1178 and 1181 (PTSD and depression); 1194
8 (suicidal gesture); 1227 (PTSD); 1370-1372 (PTSD, depression and anxiety); 1387
9 (anxious and depressed); and 1436 (significant underlying general anxiety with
10 acute situational exacerbation). Furthermore, the ALJ does not indicate what
11 record evidence specifically undermined Dr. Duris' opinions. See *Brown-Hunter*,
12 806 F.3d at 492. The ALJ erred by finding the mental limitations assess by Dr.
13 Duris lacked record support.

14 Contrary to the second reason provided by the ALJ for according only
15 partial weight to Dr. Duris' report, there is no indication that Dr. Duris' assessed
16 limitations were based entirely on Plaintiff's subjective reporting. Instead, the
17 record reflects Dr. Duris completed Personality Assessment Inventory (PAI)
18 testing, Tr. 1349, as well as the preliminary mental status exam, Tr. 1351-1352.
19 The ALJ must not substitute his own interpretation of the examination findings for
20 that of the examining medical professional. See *Day v. Weinberger*, 522 F.2d
21 1154, 1156 (9th Cir. 1975) (finding it is improper for an ALJ to act as his own
22 medical expert). While the "Mental Status Exam" results found Plaintiff within
23 normal limits, Tr. 1352, it is apparent that other testing revealed deficits upon
24 which Dr. Duris relied in completing his assessment.

25 The Court concludes the ALJ erred by failing to provide cogent, specific,
26 and legitimate reasons for rejecting examining physician Duris' assessed mental
27 limitations. A remand is required for reconsideration of Dr. Duris' assessment and
28 for further development of the record.

1 **2. Dr. Burdge**

2 Almost a year earlier, on December 16, 2013, Dr. Burdge also performed a
3 psychological/psychiatric evaluation of Plaintiff on behalf of DSHS. Tr. 967-972.
4 Dr. Burdge diagnosed PTSD; major depressive disorder, single episode,
5 unspecified; and alcohol dependence, in sustained partial remission. Tr. 968. He
6 opined that Plaintiff would have a “marked” limitation in her ability to perform
7 activities within a schedule, maintain regular attendance, and be punctual within
8 customary tolerances without special supervision and “severe” limitations in her
9 abilities to complete a normal work day and work week without interruptions from
10 psychologically based symptoms and to maintain appropriate behavior in a work
11 setting. Tr. 969-970. Dr. Burdge recommended a chemical dependency
12 assessment or treatment, but also opined that her impairments would persistent
13 following 60 days of sobriety. Tr. 970.

14 The ALJ rejected the report of Dr. Burdge finding that, as with Dr. Duris,
15 the noted limitations were not supported by the record and that the examination
16 findings showed very little abnormality, thus the limitations were based on
17 Plaintiff’s unreliable subjective reporting. Tr. 29. The ALJ additionally noted that
18 Plaintiff’s sobriety was questionable at the time of the exam based on evidence that
19 Plaintiff was admitted to the hospital for alcohol withdrawal both before and after
20 the date of Dr. Burdge’s examination. Tr. 29.

21 As discussed above with respect to Dr. Duris, the evidence of record shows
22 that Plaintiff continued to have mental health issues throughout the relevant time
23 period in this case with no indication that her symptoms resolved. See supra. The
24 ALJ additionally failed to indicate what specific record evidence undermined Dr.
25 Burdge’s opinions. The ALJ’s first reason is thus unsupported.

26 Likewise, there is no indication that Dr. Burdge’s assessed limitations were
27 based on Plaintiff’s subjective reporting. The record reflects Dr. Burdge
28 completed PAI testing which revealed post-traumatic stress, issues related to

1 alcohol abuse and depression, Tr. 968, as well as a preliminary mental status exam
2 which was not entirely within normal limits, Tr. 971-972. Dr. Burdge relied on
3 testing and observations in completing his assessment; therefore, the ALJ's second
4 reason for according only partial weight to Dr. Burdge's opinions is also
5 unsupported.

6 Finally, the ALJ's suggestion that Plaintiff's sobriety was questionable is
7 unfounded. The ALJ did not find that Plaintiff's alcohol abuse was material in this
8 case. See 20 C.F.R. §§ 404.1535(a), 416.935(a); *Bustamante v. Massanari*, 262
9 F.3d 949 (9th Cir. 2001). In any event, Dr. Burdge specifically found that
10 Plaintiff's impairments were not the result of alcohol or drug use. Tr. 970.

11 Based on the foregoing, the ALJ shall additionally reassess the evaluation of
12 Dr. Burdge on remand and provide a detailed analysis related to the weight
13 assigned to his opinions.

14 **3. Dr. Packer**

15 On January 22, 2016, Dr. Packer reviewed Plaintiff's medical records for
16 DSHS and assessed Plaintiff's physical functioning capacity based on that review.
17 Tr. 1462-1463. Dr. Packer opined that Plaintiff could perform sedentary work,
18 with only two hours of standing and walking and with gross/fine restrictions,
19 primarily related to cervical radiculopathy. Tr. 1462. He additionally opined that
20 Plaintiff's physical condition appeared to be independent of any current drug
21 addiction or alcoholism. Tr. 1462.

22 The ALJ accorded "partial weight" to Dr. Packer's assessment, finding the
23 limitation to sedentary work with an inability to stand or walk for six hours was not
24 supported by the medical evidence of record. Tr. 30.

25 The ALJ failed to describe what specific evidence contradicted the opinions
26 of Dr. Packer. See *Brown-Hunter*, 806 F.3d at 492 (finding the agency must set
27 forth reasoning behind its decisions in a way that allows for meaningful review). If
28 the ALJ fails to specify his rationale, a reviewing court will be unable to review

1 those reasons meaningfully without improperly “substitut[ing] our conclusions for
2 the ALJ’s, or speculat[ing] as to the grounds for the ALJ’s conclusions.” Brown-
3 Hunter, 806 F.3d at 492 quoting Treichler, 775 F.3d at 1103. Because the ALJ
4 failed to identify what evidence specifically contradicted the opinions of Dr.
5 Packer, the Court finds the ALJ’s rationale for discounting the report is not
6 properly supported. Moreover, as argued by Plaintiff, ECF No. 13 at 15-16, there
7 is extensive objective medical evidence which would appear to conflict with the
8 ALJ’s finding that there was “no evidence” supporting Dr. Packer’s conclusions.
9 Tr. 1486-1487 (markedly decreased tone in right upper limb, markedly decrease
10 sensory to pinprick and vibration in right shoulder, and marked abnormalities on
11 EMG testing); 1492 (results of MRI of the brachial plexus); 1490 (results of MRI
12 of cervical spine); 1398 (right shoulder impingement); 1391 (right hand flexor
13 tendonitis); 1416 (results of shoulder x-ray); and 1518 (results of MRI of right
14 shoulder). Accordingly, the Court finds the ALJ erred by failing to provide cogent,
15 specific, and legitimate reasons for according “partial weight” to Dr. Packer’s
16 assessed physical limitations.

17 **B. Plaintiff’s Subjective Complaints**

18 Plaintiff also contends the ALJ erred by improperly rejecting her subjective
19 complaints. ECF No. 13 at 16-19.

20 It is the province of the ALJ to make credibility determinations. Andrews,
21 53 F.3d at 1039. However, the ALJ’s findings must be supported by specific
22 cogent reasons. Rashad v. Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). Once
23 the claimant produces medical evidence of an underlying medical impairment, the
24 ALJ may not discredit testimony as to the severity of an impairment because it is
25 unsupported by medical evidence. Reddick, 157 F.3d 715, 722 (9th Cir. 1998).
26 Absent affirmative evidence of malingering, the ALJ’s reasons for rejecting the
27 claimant’s testimony must be “specific, clear and convincing.” Smolen, 80 F.3d at
28 1281; Lester, 81 F.3d at 834. “General findings are insufficient: rather the ALJ

1 must identify what testimony is not credible and what evidence undermines the
2 claimant's complaints." Lester, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,
3 918 (9th Cir. 1993).

4 The ALJ concluded Plaintiff's medically determinable impairments could
5 reasonably be expected to cause her alleged symptoms; however, Plaintiff's
6 statements concerning the intensity, persistence and limiting effects of those
7 symptoms were not entirely consistent with the medical and other evidence of
8 record. Tr. 27. The ALJ listed the following reasons for finding Plaintiff's
9 subjective complaints not persuasive in this case: (1) the objective medical
10 evidence did not support the level of impairment claimed; (2) Plaintiff's activities
11 were inconsistent with her allegations of disabling functional limitations; (3)
12 Plaintiff failed to follow through with medical treatment and continued to drink
13 throughout her treatment; (4) Plaintiff gave inconsistent reports regarding her
14 alcohol use; and (5) Plaintiff admitted she was told not to work so she could obtain
15 disability benefits. Tr. 27-28.

16 While some of the reasons provided by the ALJ for discounting Plaintiff's
17 testimony may be supported by the evidence of record, this matter must be
18 remanded for additional proceedings to remedy defects in light of the ALJ's
19 erroneous determination regarding the medical opinion evidence of record. See
20 *supra*. Accordingly, on remand, the ALJ shall also reconsider Plaintiff's
21 statements and testimony and reassess what statements, if any, are not credible and,
22 if deemed not credible, what specific evidence undermines those statements.

23 **C. Step Five**

24 Plaintiff next contends the ALJ erred at step five of the sequential evaluation
25 process by relying on the vocational expert's testimony in response to an
26 incomplete hypothetical; a hypothetical that did not reflect all of Plaintiff's
27 limitations. ECF No. 13 at 19-20.

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1 As determined above, the ALJ erred by providing inadequate reasoning for
2 rejecting the opinions of Drs. Duris, Burdge and Packer. See supra.
3 Consequently, the ALJ's RFC determination is not supported by substantial record
4 evidence in this case and must be reevaluated.

5 On remand, the ALJ shall reassess Plaintiff's RFC and, if necessary, obtain
6 supplemental testimony from a vocational expert with respect to the new RFC
7 determination.

8 CONCLUSION

9 Plaintiff argues the ALJ's decision should be reversed and remanded for the
10 payment of benefits. The Court has the discretion to remand the case for additional
11 evidence and findings or to award benefits. *Smolen*, 80 F.3d at 1292. The Court
12 may award benefits if the record is fully developed and further administrative
13 proceedings would serve no useful purpose. *Id.* Remand is appropriate when
14 additional administrative proceedings could remedy defects. *Rodriguez v. Bowen*,
15 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court finds that further
16 development is necessary for a proper determination to be made.

17 On remand, the ALJ shall reconsider Plaintiff's physical and psychological
18 limitations. The ALJ shall reassess the opinions of Drs. Duris, Burdge and Packer
19 and all other medical evidence of record relevant to Plaintiff's claim for disability
20 benefits. The ALJ shall further develop the record by directing Plaintiff to undergo
21 consultative physical and psychological examinations. The ALJ shall reevaluate
22 Plaintiff's subjective complaints, formulate a new RFC determination, obtain
23 supplemental testimony from a vocational expert, if necessary, and take into
24 consideration any other evidence or testimony relevant to Plaintiff's disability
25 claim.

26 If the ALJ determines Plaintiff is disabled and her disability involves drug
27 and alcohol abuse ("DAA"), the ALJ shall conduct an additional analysis. See 42
28 U.S.C. § 423(d)(2)(C) ("An individual shall not be considered to be disabled for

1 purposes of this subchapter if alcoholism or drug addiction would . . . be a
2 contributing factor material to the Commissioner’s determination that the
3 individual is disabled.”). In that case, the ALJ must then determine whether DAA
4 is “material” to the finding that Plaintiff is disabled, i.e., whether Plaintiff’s
5 impairments would disable her independent of the limitations resulting from DAA.
6 20 C.F.R. §§ 404.1535, 416.935.

7 **IT IS ORDERED:**

8 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is
9 **GRANTED IN PART.**

10 2. Defendant’s Motion for Summary Judgment, **ECF No. 14**, is
11 **DENIED.**

12 3. The matter is **REMANDED** to the Commissioner for additional
13 proceedings consistent with this Order.

14 4. An application for attorney fees may be filed by separate motion.

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

18 DATED April 30, 2018.

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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE