

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

Sep 12, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LEANNA K.

Plaintiff,

vs.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:17-CV-0344-LRS

**ORDER GRANTING  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT,  
INTER ALIA**

**BEFORE THE COURT** are the Plaintiff's Motion For Summary Judgment (ECF No. 15) and the Defendant's Motion For Summary Judgment (ECF No. 17).

**JURISDICTION**

Plaintiff, applied for Title XVI Supplemental Security Income benefits (SSI) on February 20, 2014. The application was denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on September 1, 2016 before Administrative Law Judge (ALJ) Jesse Shumway. Plaintiff testified at the hearing, as did Medical Expert (ME) Nancy Winfrey, Ph.D., and Vocational Expert (VE) Polly Peterson. On October 17, 2016, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review. The Commissioner's final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT- 1**



1 legal standards were not applied in weighing the evidence and making the decision.  
2 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.  
3 1987).

#### 4 **ISSUES**

5 Plaintiff argues the ALJ erred in: 1) improperly weighing the medical  
6 opinions; and 2) improperly rejecting Plaintiff's testimony about her symptoms.

#### 8 **DISCUSSION**

##### 9 **SEQUENTIAL EVALUATION PROCESS**

10 The Social Security Act defines "disability" as the "inability to engage in any  
11 substantial gainful activity by reason of any medically determinable physical or  
12 mental impairment which can be expected to result in death or which has lasted or can  
13 be expected to last for a continuous period of not less than twelve months." 42  
14 U.S.C. §1382c(a)(3)(A). The Act also provides that a claimant shall be determined  
15 to be under a disability only if her impairments are of such severity that the claimant  
16 is not only unable to do her previous work but cannot, considering her age, education  
17 and work experiences, engage in any other substantial gainful work which exists in  
18 the national economy. *Id.*

19 The Commissioner has established a five-step sequential evaluation process for  
20 determining whether a person is disabled. 20 C.F.R. § 416.920; *Bowen v. Yuckert*,  
21 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines if she is engaged  
22 in substantial gainful activities. If she is, benefits are denied. 20 C.F.R. §  
23 416.920(a)(4)(i). If she is not, the decision-maker proceeds to step two, which  
24 determines whether the claimant has a medically severe impairment or combination  
25 of impairments. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant does not have a severe  
26 impairment or combination of impairments, the disability claim is denied. If the  
27 impairment is severe, the evaluation proceeds to the third step, which compares the

28 **ORDER GRANTING DEFENDANT'S**

**MOTION FOR SUMMARY JUDGMENT- 3**

1 claimant's impairment with a number of listed impairments acknowledged by the  
2 Commissioner to be so severe as to preclude substantial gainful activity. 20 C.F.R.  
3 § 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or  
4 equals one of the listed impairments, the claimant is conclusively presumed to be  
5 disabled. If the impairment is not one conclusively presumed to be disabling, the  
6 evaluation proceeds to the fourth step which determines whether the impairment  
7 prevents the claimant from performing work she has performed in the past. If the  
8 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §  
9 416.920(a)(4)(iv). If the claimant cannot perform this work, the fifth and final step  
10 in the process determines whether she is able to perform other work in the national  
11 economy in view of her age, education and work experience. 20 C.F.R. §  
12 416.920(a)(4)(v).

13 The initial burden of proof rests upon the claimant to establish a prima facie  
14 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th  
15 Cir. 1971). The initial burden is met once a claimant establishes that a physical or  
16 mental impairment prevents her from engaging in her previous occupation. The  
17 burden then shifts to the Commissioner to show (1) that the claimant can perform  
18 other substantial gainful activity and (2) that a "significant number of jobs exist in the  
19 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,  
20 1498 (9th Cir. 1984).

## 21 22 **ALJ'S FINDINGS**

23 The ALJ found the following: 1) Plaintiff has "severe" medical impairments  
24 consisting of learning disorders of math and written expression, a major depressive  
25 disorder, an anxiety disorder, somatization disorder, and a borderline personality  
26 disorder; 2) Plaintiff does not have an impairment or combination of impairments that  
27 meets or equals any of the impairments listed in 20 C.F.R. § 404 Subpart P, App. 1;  
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## **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT- 4**

1 3) Plaintiff has the residual functional capacity (RFC) to perform a full range of work  
2 at all exertional levels, but with the following non-exertional limitations: she is  
3 limited to simple, routine, and repetitive tasks with a GED reasoning level of 2 (4<sup>th</sup>  
4 to 5<sup>th</sup> grade level) or less and math level of 1 (1<sup>st</sup> to 3<sup>rd</sup> grade level); and she needs a  
5 routine, predictable work setting that requires no more than simple decision-making;  
6 4) Plaintiff's RFC allows her to perform other jobs existing in significant numbers  
7 in the national economy, including silver wrapper, fruit cutter and potato chip sorter.  
8 Accordingly, the ALJ concluded the Plaintiff is not disabled.

## 10 **MEDICAL OPINIONS**

11 It is settled law in the Ninth Circuit that in a disability proceeding, the opinion  
12 of a licensed treating or examining physician or psychologist is given special weight  
13 because of his/her familiarity with the claimant and his/her condition. If the treating  
14 or examining physician's or psychologist's opinion is not contradicted, it can be  
15 rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725  
16 (9<sup>th</sup> Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). If contradicted, the  
17 ALJ may reject the opinion if specific, legitimate reasons that are supported by  
18 substantial evidence are given. *Id.* “[W]hen evaluating conflicting medical opinions,  
19 an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory,  
20 and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211,  
21 1216 (9<sup>th</sup> Cir. 2005). The opinion of a non-examining medical advisor/expert need  
22 not be discounted and may serve as substantial evidence when it is supported by other  
23 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,  
24 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995).

25 Nurse practitioners, physicians' assistants, and therapists (physical and mental  
26 health) are not “acceptable medical sources” for the purpose of establishing if a  
27 claimant has a medically determinable impairment. 20 C.F.R. § 416.913(a). Their  
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## **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT- 5**

1 opinions are, however, relevant to show the severity of an impairment and how it  
2 affects a claimant's ability to work. 20 C.F.R. § 416.913(d).

3 At the outset, it is noted that the ALJ did not find the existence of any "severe"  
4 physical impairments and Plaintiff does not challenge that finding. Therefore, the  
5 issue here concerns the extent of Plaintiff's limitations arising from her "severe"  
6 mental impairments.

7 Plaintiff was referred by the Washington Department of Social and Health  
8 Services (DSHS) to Kayleen Islam-Zwart, Ph.D., for re-evaluation in March 2014.  
9 At the behest of DSHS, Dr. Islam-Zwart had twice previously evaluated the Plaintiff:  
10 once in January 2011 and once in December 2011. In the 2014 evaluation, the doctor  
11 diagnosed Plaintiff with somatization disorder; major depressive disorder, recurrent,  
12 moderate; disorder of written expression, mathematics disorder, and personality  
13 disorder (not otherwise specified). She assigned the Plaintiff a GAF score of 48<sup>1</sup>  
14 indicating serious impairment in social, occupational or school functioning. (AR at  
15 p. 436). According to Dr. Islam-Zwart:

16 [Plaintiff] presents with complaints of multiple health concerns,  
17 cognitive problems, and depression. She is somatically preoccupied.  
18 She also reports sleeping excessively and there are indications of  
19 maladaptive personality features. [Plaintiff's] presentation is  
20 such that she is unable to work at this time and her prognosis for  
21 the future seems poor given the range and nature of her difficulties.

22 (AR at p. 436).

23 The doctor's mental status examination revealed the Plaintiff to be "oriented

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24 <sup>1</sup> A Global Assessment of Functioning (GAF) score of 41-50 means  
25 "serious" symptoms or "serious" impairment in either social, occupational, or  
26 school functioning. *American Psychiatric Ass'n, Diagnostic & Statistical Manual*  
27 *of Mental Disorders*, (4<sup>th</sup> ed. Text Revision 2000)(DSM-IV-TR).

1 X4,” with good eye contact and appropriate affect, “although she seemed a little  
2 subdued.” (AR at p. 435). She was tearful for portions of the evaluation and “seemed  
3 generally distressed.” (*Id.*). She “did not exhibit any motor limitations or pain  
4 behaviors” and “maintained a relaxed posture sitting leaned forward in the chair  
5 resting her arms on the desk.” (*Id.*). There was no indication of cognitive difficulty  
6 and Plaintiff seemed of average intelligence. (*Id.*). There was no indication of  
7 delusional thought processes. (*Id.*). Plaintiff’s score on the “Mini-Mental Status  
8 Exam” was 26 out of 30, indicating normal cognition and she “exhibited mental  
9 control within normal limits.” (*Id.*). Plaintiff’s score on Trails A of the Trail Making  
10 Test was within normal limits and her score on Trails B fell in “the moderately  
11 impaired range.” (AR at p. 436). On the Fifteen Item Memory Test, Plaintiff recalled  
12 15 of 15 items and therefore, “her performance was not indicative of malingering of  
13 memory problems.” (*Id.*).

14 On the DSHS form which accompanied her narrative report, Dr. Islam-Zwart  
15 checked boxes indicating Plaintiff had marked limitations in her abilities to perform  
16 activities within a schedule, maintain regular attendance, and being punctual within  
17 customary tolerances without special supervision; communicate and perform  
18 effectively in a work setting; and maintain appropriate behavior in a work setting. A  
19 “marked” limitation “means a very significant limitation on the ability to perform one  
20 or more basic work activities.” (AR at p. 430). The doctor also checked a box  
21 indicating Plaintiff had was “severely” limited in her ability to complete a normal  
22 work day and work week without interruptions from psychologically based  
23 symptoms. A “severe” limitation “means the inability to perform the particular  
24 activity in regular competitive employment or outside of a sheltered workshop.” (AR  
25 at p. 430). Dr. Islam-Zwart did not recommend a protective payee and did not  
26 believe that vocational training or services would minimize or eliminate barriers to  
27 Plaintiff being employed. (*Id.*). She opined that Plaintiff would be impaired  
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**ORDER GRANTING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT- 7**

1 “indefinitely.” (*Id.*).

2 In March 2016, Plaintiff was evaluated by John Arnold, Ph.D., at the behest of  
3 DSHS. He diagnosed Plaintiff with “unspecified personality disorder w/borderline  
4 features,” “persistent depressive disorder, late onset,” “GAD” (generalized anxiety  
5 disorder), “R/O (Rule Out] somatic symptom disorder,” and “R/O SLD” (specific  
6 learning disorder). (AR at p. 733). He indicated that Plaintiff had “marked”  
7 limitations with regard to a number of basic work activities and that the overall  
8 severity of her condition was “marked.” (AR at pp. 733-34). He opined that Plaintiff  
9 would be impaired for 15 months “with available treatment;” he did not recommend  
10 a protective payee; and he opined that vocational training would minimize or  
11 eliminate barriers to employment. (AR at p. 734).

12 In May 2014, Michael Regets, Ph.D., conducted a record review for the  
13 Washington State Disability Determination Services. One of the records he reviewed  
14 was Dr. Islam-Zwart’s March 2014 evaluation. He opined that Plaintiff was mildly  
15 limited with regard to restriction of activities of daily living; moderately limited in  
16 maintaining social functioning and concentration, persistence or pace; and that there  
17 was no evidence of episodes of decompensation of extended duration. (AR at p.  
18 105). He indicated that Plaintiff’s activities of daily living were the most informative  
19 in assessing the credibility of Plaintiff’s statements regarding her limitations and that  
20 objective medical findings revealed Plaintiff was capable of doing more than what  
21 she claimed. (AR at pp. 105-06). He recommended that Plaintiff work in settings  
22 that are routine and predictable. (AR at p. 108). On reconsideration, Steven Haney,  
23 M.D., concurred with Dr. Regets’ opinion. (AR at pp. 118-122).

24 At the hearing, Dr. Winfrey, the medical expert, largely concurred with Drs.  
25 Regets and Haney. Dr. Winfrey opined that the restriction on daily living activities  
26 was mild and would be none were it not for Plaintiff’s problems with money  
27 management which the doctor attributed to Plaintiff’s difficulties with math, as much  
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**ORDER GRANTING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT- 8**



1 as her impulsiveness. (AR at p. 59). Dr. Winfrey considered Plaintiff to be  
2 moderately limited in terms of social functioning, but noted that Plaintiff “seems to  
3 have a good pool of friends” and “her social skills seem fine.” (*Id.*). She rated  
4 Plaintiff as moderately limited in terms of concentration, persistence and pace, noting  
5 that Plaintiff’s mental status exams were in the spectrum of “okay to pretty good.”  
6 (*Id.*). Dr. Winfrey opined that Plaintiff needed a job that was simple, routine,  
7 repetitive and involved no math. (AR at p. 60). She opined that she did not think  
8 Plaintiff was limited in interacting with the public because the record suggested her  
9 anxiety arose when she was alone and she described having a number of friends,  
10 taking the bus places, and getting out to shop. (AR at p. 61). Dr. Winfrey agreed that  
11 Plaintiff had a somatization disorder, but opined it would not cause any further  
12 restrictions and noted that it was not mentioned in the Frontier Behavioral Health  
13 (FBH) records or in Dr. Arnold’s evaluation. (AR at pp. 61-62; p. 854). Dr. Winfrey  
14 considered it to be the “lowest on [Plaintiff’s] list of health issues.” (AR at p. 62).

15 The ALJ found the opinions of “the State agency psychological consultants,”  
16 Drs. Regets and Haney, “were mostly consistent with the medical evidence” and  
17 therefore, gave them “great weight.” (AR at p. 29). He found the opinion of Dr.  
18 Winfrey to be “fully consistent” with the medical evidence (*Id.*). The ALJ accepted  
19 Dr. Winfrey’s opinion that Plaintiff was not limited in interacting with the public,  
20 while Drs. Regets and Haney thought she was so limited.

21 The ALJ gave “little weight” to Dr. Islam-Zwart’s opinion, finding it was  
22 “inconsistent with the medical evidence of record and contradicted by her own one-  
23 time examination.” (AR at p. 29). He acknowledged Dr. Islam-Zwart had seen the  
24 Plaintiff twice previously in 2011, but because those opinions had been submitted  
25 before the period at issue (February 20, 2014 (date of application) to October 17,  
26 2016 (date of decision)), he gave them “little weight.” (AR at p. 29, fn. 2). Citing  
27 a “Function Report” Plaintiff completed for the Social Security Administration in  
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**ORDER GRANTING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT- 9**

1 May 2014, the ALJ noted that Plaintiff goes out with friends and visits with family  
2 members regularly, and admits getting along with authority figures. (AR at p. 30; pp.  
3 273-75).

4 Plaintiff contends the ALJ should have given more weight to Dr. Islam-Zwart's  
5 March 2014 evaluation because of her two previous evaluations. However, in  
6 addition to being outside the relevant adjudicative period, in her January 2011  
7 evaluation, Dr. Islam-Zwart opined that vocational training would minimize or  
8 eliminate barriers to Plaintiff's employment and that a protective payee was not  
9 necessary (AR at p. 440), and in her December 2011 evaluation, while she now  
10 thought that vocational training would not minimize or eliminate barriers to  
11 employment, she also noted that Plaintiff's PAI (Personality Assessment Inventory)  
12 results were invalid, indicating a "cry for help" or malingering (AR at p. 454), and  
13 that a R/O (Rule Out) Malingering diagnosis was appropriate.

14 The opinions of non-examining physicians, Drs. Winfrey, Regets and Stanley,  
15 are supported by other evidence in the record and consistent with the other evidence.  
16 As the ALJ noted, the clinician at Frontier Behavioral Health (FBH), Sal Birdtail,  
17 wrote that Plaintiff was making progress and insofar as concerned her medication  
18 management, she was meeting monthly with an FBH psychiatrist and this was "going  
19 well at this time." (AR at p. 30; p. 854). As the ALJ also noted, throughout the  
20 record, Plaintiff was oriented as to time, place, and person with normal mood and  
21 affect. (AR at p. 30). These are specific and legitimate reasons for discounting the  
22 limitations opined by Drs. Islam-Zwart and Dr. Arnold, as are Plaintiff's daily living  
23 activities which include going out with friends, shopping, attending appointments,  
24 and visiting family on a regular basis, and the fact that Plaintiff has essentially no  
25 work history such as might shed light on the extent of her limitations in the  
26 workplace. (AR at pp. 27-28).

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28 **ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT- 10**

1 **SYMPTOM TESTIMONY**

2 Where, as here, the Plaintiff has produced objective medical evidence of an  
3 underlying impairment that could reasonably give rise to some degree of the  
4 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ’s  
5 reasons for rejecting the Plaintiff’s testimony must be clear and convincing. *Garrison*  
6 *v. Colvin*, 759 F.3d 95, 1014 (9<sup>th</sup> Cir. 2014); *Burrell v. Colvin*, 775 F.3d 1133, 1137  
7 (9<sup>th</sup> Cir. 2014). If an ALJ finds a claimant’s subjective assessment unreliable, “the  
8 ALJ must make a credibility determination with findings sufficiently specific to  
9 permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit [the]  
10 claimant’s testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9<sup>th</sup> Cir.2002). Among  
11 other things, the ALJ may consider: 1) the claimant's reputation for truthfulness; 2)  
12 inconsistencies in the claimant's testimony or between his testimony and his conduct;  
13 3) the claimant’s daily living activities; 4) the claimant's work record; and 5)  
14 testimony from physicians or third parties concerning the nature, severity, and effect  
15 of claimant's condition. *Id.* Subjective testimony cannot be rejected solely because  
16 it is not corroborated by objective medical findings, but medical evidence is a  
17 relevant factor in determining the severity of a claimant’s impairments. *Rollins v.*  
18 *Massanari*, 261 F.3d 853, 857 (9<sup>th</sup> Cir. 2001).

19 Plaintiff’s daily living activities, her lack of a work record, and testimony from  
20 Dr. Winfrey and the opinions of the State agency physicians, constitute substantial  
21 evidence in support of the RFC found by the ALJ. It follows that they also constitute  
22 clear and convincing reasons for discounting Plaintiff’s testimony that she cannot  
23 perform any substantially gainful activity.

24  
25 **CONCLUSION**

26 The evidence may well support more than one rational interpretation of the  
27 evidence. Be that as it may, ALJ Shumway rationally interpreted the evidence and

1 “substantial evidence”- more than a scintilla, less than a preponderance- supports his  
2 decision that Plaintiff is not disabled.

3 Defendant’s Motion For Summary Judgment (ECF No. 17) is **GRANTED** and  
4 Plaintiff’s Motion For Summary Judgment (ECF No. 15) is **DENIED**. The  
5 Commissioner's decision is **AFFIRMED**.

6 **IT IS SO ORDERED.** The District Executive shall enter judgment  
7 accordingly, forward copies of the judgment and this order to counsel of record, and  
8 **CLOSE** the file.

9 **DATED** this  12th  day of September, 2018.

10  
11 *s/Lonny R. Suko*

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13 LONNY R. SUKO  
14 Senior United States District Judge

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28 **ORDER GRANTING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT- 12**