

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

**Dec 27, 2019**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

No. 2:18-cv-00350-SAB

SERGEY L.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION,

Defendant.

**ORDER GRANTING  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT;  
DENYING DEFENDANT’S  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court are Plaintiff’s Motion for Summary Judgment, ECF No. 11, and Defendant’s Cross-Motion for Summary Judgment, ECF No. 12. The motions were heard without oral argument. Plaintiff is represented by David L. Lybbert; Defendant is represented by Assistant United States Attorney Timothy Durkin and Special Assistant United States Attorney Franco L. Becia.

**Jurisdiction**

On May 14, 2014, Plaintiff filed an application for Title II disability insurance benefits as well as a Title XVI application for supplemental security income. Plaintiff’s application was denied initially and on reconsideration. On July 14, 2017, a video hearing was held before an ALJ. Plaintiff testified, as did a

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1 reviewing medical expert, Dr. Robert Thompson M.D., and a vocational expert.  
2 The ALJ issued a decision on January 18, 2018, finding that Plaintiff was not  
3 disabled. Plaintiff timely requested review by the Appeals Council, which denied  
4 the request. The Appeals Council's denial of review makes the ALJ's decision the  
5 final decision of the Commissioner. Plaintiff filed a timely appeal with the United  
6 States District Court for the Eastern District of Washington. The matter is before  
7 this Court under 42 U.S.C. § 405(g).

### 8 **Sequential Evaluation Process**

9 The Social Security Act defines disability as the "inability to engage in any  
10 substantial gainful activity by reason of any medically determinable physical or  
11 mental impairment which can be expected to result in death or which has lasted or  
12 can be expected to last for a continuous period of not less than twelve months."

13 42 U.S.C. § 1382c(a)(3)(A). A claimant shall be determined to be under a  
14 disability only if his impairments are of such severity that the claimant is not only  
15 unable to do his previous work, but cannot, considering claimant's age, education,  
16 and work experiences, engage in any other substantial gainful work which exists  
17 in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

18 The Commissioner has established a five-step sequential evaluation process  
19 for determining whether a person is disabled. 20 C.F.R. § 416.920(a)(4); *Bowen v.*  
20 *Yuckert*, 482 U.S. 137, 140-42 (1987).

21 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
22 § 404.1520(b). Substantial gainful activity is work done for pay and requires  
23 compensation above the statutory minimum. *Id.*; *Keyes v. Sullivan*, 894 F.2d 1053,  
24 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity, benefits are  
25 denied. 20 C.F.R. § 404.1520(b). If he is not, the ALJ proceeds to step two.

26 Step 2: Does the claimant have a medically-severe impairment or  
27 combination of impairments? 20 C.F.R. § 404.1520(c). If the claimant does not  
28 have a severe impairment or combination of impairments, the disability claim is

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1 denied. A severe impairment is one that lasted or must be expected to last for at  
2 least 12 months and must be proven through objective medical evidence. 20 C.F.R.  
3 § 404.1509. If the impairment is severe, the evaluation proceeds to the third step.

4 Step 3: Does the claimant's impairment meet or equal one of the listed  
5 impairments acknowledged by the Commissioner to be so severe as to preclude  
6 substantial gainful activity? 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404 Subpt. P.  
7 App. 1. If the impairment meets or equals one of the listed impairments, the  
8 claimant is conclusively presumed to be disabled. *Id.* If the impairment is not one  
9 conclusively presumed to be disabling, the evaluation proceeds to the fourth step.  
10 Before considering Step 4, the ALJ must first determine the claimant's residual  
11 functional capacity. 20 C.F.R. § 404.1520(e). An individual's residual functional  
12 capacity is his ability to do physical and mental work activities on a sustained  
13 basis despite limitations from his impairments.

14 Step 4: Does the impairment prevent the claimant from performing work he  
15 has performed in the past? 20 C.F.R. § 404.1520(f). If the claimant is able to  
16 perform his previous work, he is not disabled. *Id.* If the claimant cannot perform  
17 this work, the evaluation proceeds to the fifth and final step.

18 Step 5: Is the claimant able to perform other work in the national economy  
19 in view of his age, education, and work experience? 20 C.F.R. § 404.1520(g).  
20 The initial burden of proof rests upon the claimant to establish a prima facie case  
21 of entitlement to disability benefits. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.  
22 1999). This burden is met once a claimant establishes that a physical or mental  
23 impairment prevents him from engaging in his previous occupation. *Id.* At step  
24 five, the burden shifts to the Commissioner to show that the claimant can perform  
25 other substantial gainful activity. *Id.*

### 26 **Standard of Review**

27 The Commissioner's determination will be set aside only when the ALJ's  
28 findings are based on legal error or are not supported by substantial evidence in

1 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)  
2 (citing 42 U.S.C. § 405(g)). Substantial evidence is “more than a mere scintilla,”  
3 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but “less than a preponderance.”  
4 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial  
5 evidence is “such relevant evidence as a reasonable mind might accept as  
6 adequate to support a conclusion.” *Richardson*, 402 U.S. at 401. The Court must  
7 uphold the ALJ’s denial of benefits if the evidence is susceptible to more than one  
8 rational interpretation, one of which supports the decision of the administrative  
9 law judge. *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). The Court  
10 reviews the entire record. *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). “If  
11 the evidence can support either outcome, the court may not substitute its judgment  
12 for that of the ALJ.” *Matney*, 981 F.2d at 1019.

13 A decision supported by substantial evidence will be set aside if the proper  
14 legal standards were not applied in weighing the evidence and making the  
15 decision. *Browner v. Sec’y of Health & Human Servs.*, 839 F.2d 432, 433 (9th  
16 Cir. 1988). An ALJ is allowed “inconsequential” errors as long as they are  
17 immaterial to the ultimate nondisability determination. *Stout v. Comm’r, Soc. Sec.*  
18 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

### 19 **Statement of Facts**

20 At the time of the hearing, Plaintiff was 43 years old. His immigrated to the  
21 United States from the Ukraine at the age of 20. His work history consists of  
22 periodic employment in a meat cutting shop. Plaintiff alleges that worsening back  
23 pain and right leg pain preclude him from working. Multiple MRI exams confirm  
24 disc bulge and and neural narrowing along Plaintiff’s spine, and physical  
25 examinations confirm a decreased range of motion in his lumbar spine, weakness  
26 in his legs, and, intermittently, findings of positive straight leg raising (SLR). The  
27 dispute in this case primarily resolves around the functional limitations resulting  
28 from plaintiff’s ailments, and the ALJ’s decision to not reference a medical report

1 submitted after the hearing.

### 2 **The ALJ's Findings**

3 The ALJ found that Plaintiff met the insured status requirements of the  
4 Social Security Act through December 31, 2017. AR 17. At step one, the ALJ  
5 found Plaintiff has not engaged in substantial gainful activity since March 14,  
6 2014. AR 19.

7 At step two, the ALJ found Plaintiff has the following severe impairments:  
8 degenerative disc disease of the lumbar and cervical spine; hypertension; diabetes  
9 mellitus; and obesity. AR 19.

10 At step three, the ALJ found that Plaintiff's impairments or combination of  
11 impairments do not meet or medically equal any Listing. AR 23. The ALJ  
12 concluded that Plaintiff has the residual functional capacity to perform light work  
13 as defined in 20 CFR § 4567(a) and § 416.967(b). The ALJ found Plaintiff  
14 capable of lifting and carrying up to 10 pounds frequently, and up to 20 pounds  
15 occasionally. The ALJ found him capable of occasional overhead reaching, and  
16 that Plaintiff can sit, stand, and walk for six hours in a normal workday with  
17 normal work breaks. TR 24.

18 At step four, the ALJ found Plaintiff was not able to perform his past  
19 relevant work. At step five, the ALJ found Plaintiff was not disabled on the basis  
20 that he could perform other work which exists in significant numbers in the  
21 national economy, including positions such as parking lot valet, courier, café  
22 attendant, final assembler, escort vehicle-driver, and document preparer. AR 33.

### 23 **Discussion**

24 Plaintiff alleges three errors. First, that the ALJ erred by not considering a  
25 medical report provided after the hearing. Second, that the ALJ improperly  
26 discredited Plaintiff's symptom testimony. Third, that the ALJ erred at Step 2, by  
27 failing to include in his findings any cardiac limitations, despite multiple hospital  
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1 visits for chest pain, EKG reports supporting decreasing cardiac health, and  
2 Plaintiff's symptom testimony.

3 Dr. Thompson, a reviewing medical expert, testified at the hearing after  
4 reviewing the medical records submitted. Plaintiff had attempted to procure a  
5 statement from his treating physician, Dr. Irene Kimura, but was unable to procure  
6 the letter until after the hearing. Counsel for Plaintiff promptly provided Dr.  
7 Kimura's statement to the ALJ upon receipt of the report, months before the  
8 ALJ's decision was issued.

9 20 C.F.R. § 416.1435 governs the submission of written evidence to ALJ's  
10 in social security hearings. Subsection (a) requires, generally, that parties must  
11 "make every effort to ensure that the administrative law judge receives all of the  
12 evidence and must inform (the ALJ) about or submit any written evidence no later  
13 than 5 business days before the date of the scheduled hearing." Subsection (b)  
14 provides the standards for accepting late evidence, stating that "the administrative  
15 law judge will accept the evidence if he or she has not yet issued a decision and  
16 you did not inform us about or submit the evidence before the deadline  
17 because: . . . (3)(iv) You actively and diligently sought evidence from a source  
18 and the evidence was not received or was received less than 5 business days prior  
19 to the hearing." (emphasis added.)

20 The ALJ's decision states that Plaintiff should have provided notice of the  
21 request for Dr. Kimura's report, under subsection (a), and that his failure to do so  
22 makes the excuses under subsection (b) inapplicable. AR 16. Subsection (b)  
23 excuses both the failure to inform and the failure to submit, and states that the ALJ  
24 will accept the evidence if the decision has not been issued and the petitioner can  
25 show one of the listed circumstances. One circumstance is when a petitioner seeks  
26 the evidence, but does not receive it in a timely manner. This is precisely what  
27 Plaintiff alleges occurred. The ALJ's decision not to consider Dr. Kimura's report  
28 was error, and it was not harmless.

1 The ALJ's decision at step five was based on the assumption that Plaintiff  
2 would not miss at least 2 days of work per month due to his conditions. AR 79.  
3 When the vocational expert was asked whether two absences per month would be  
4 work-preclusive, the expert testified that it would be. Id. Dr. Kimura's report  
5 states that she believed Plaintiff would miss two or more days per month due to  
6 symptom flareups. ECF No. 11, Ex. A. Thus, the ALJ's decision not to consider  
7 Dr. Kimura's report cuts to the heart of the vocational hypothetical used in his  
8 decision.

9 Likewise, the decision to discredit Plaintiff's symptom testimony was based  
10 primarily upon Dr. Thompson's review of the corroborating medical evidence,  
11 and the ALJ's determination that Plaintiff's self-reported limitations were  
12 exaggerated in light of the medical evidence in the record. AR 27. Dr. Kimura's  
13 report largely confirms Plaintiff's described limitations, and thus the  
14 determination of whether Plaintiff's symptom testimony is credible would change  
15 if the medical record included Dr. Kimura's report. However, Dr. Kimura's report  
16 appears to largely corroborate the ALJ's decision to not include a cardiac disorder  
17 at step two, as the diagnosis of "Chronic chest pain with activity with EKG  
18 findings 2016" is crossed out in that report. ECF No. 11, Ex. A, at 3. Thus, a  
19 remand is appropriate, for reconsideration and a new decision incorporating Dr.  
20 Kimura's report.

21 Accordingly, **IT IS HEREBY ORDERED:**

- 22 1. Plaintiff's Motion for Summary Judgment, ECF No. 11, is **GRANTED**.
- 23 2. Defendant's Motion for Summary Judgment, ECF No. 12, is **DENIED**.
- 24 3. The decision of the Commissioner is **reversed** and **remanded** for  
25 further administrative proceedings consistent with this Order. On  
26 remand, the ALJ shall offer Plaintiff an opportunity for a new  
27 consultative examination, further develop the record, and issue a new  
28 decision. This remand is made pursuant to sentence four of 42 U.S.C. §

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1 405(g).

2 4. The District Court Executive is directed to enter judgment in favor of  
3 Plaintiff and against Defendant.

4 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
5 file this Order, provide copies to counsel, and close the file.

6 **DATED** this 27th day of December 2019.



11 *Stanley A. Bastian*

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13 Stanley A. Bastian  
14 United States District Judge  
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