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

**Dec 31, 2020**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KENNETH T.,  
  
Plaintiff,  
  
v.  
  
ANDREW SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,  
  
Defendant.

No. 2:19-CV-00347-JTR

ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 13, 17. Attorney Dana Madsen represents Kenneth T. (Plaintiff); Special Assistant United States Attorney Jeffrey McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant’s Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on August 1, 2011, alleging disability since

1 February 1, 2010<sup>1</sup>, due to back problems, shoulder problems, panic attacks,  
2 anxiety, degenerative bone disease, arthritis, inability to do any lifting, high stroke  
3 risk, and diabetes. Tr. 105. The applications were denied initially and upon  
4 reconsideration. Tr. 163-66, 172-73. Administrative Law Judge (ALJ) Lori Freund  
5 held a hearing on February 27, 2013, Tr. 51-84, and issued an unfavorable decision  
6 on May 3, 2013. Tr. 20-38. The Appeals Council denied review on June 17, 2014.  
7 Tr. 1-5. Plaintiff filed an action for judicial review on August 6, 2014. Tr. 732-33.  
8 This Court remanded the claim for further proceedings on September 1, 2015. Tr.  
9 739-63.

10 ALJ Freund held three remand hearings, on July 27, 2016, October 4, 2017,  
11 and April 11, 2018, and heard testimony from medical experts Marian Martin and  
12 Allan Duby. Tr. 576-697. The ALJ issued a partially favorable decision on May  
13 17, 2018. Tr. 516-39. The Appeals Council denied review on September 6, 2019.  
14 Tr. 466-69. Plaintiff filed the present action for judicial review on October 16,  
15 2019. ECF No. 1.

## 16 **STATEMENT OF FACTS**

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

20 Plaintiff was 48 years old as of the alleged onset date. Tr. 105. He attended  
21 special education classes until he quit school in the ninth grade. Tr. 267, 384.  
22 Plaintiff attempted to obtain his GED but was unable to complete the classes. Tr.  
23 384. His work history consisted primarily of long-haul truck driving, until he rolled  
24 a semi-truck in 2010, resulting in spinal injuries and the loss of his commercial  
25 driver's license. Tr. 266, 384, 1575.

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26  
27 <sup>1</sup> Plaintiff later amended his alleged onset date to April 9, 2011, the day after  
28 a prior unfavorable decision. Tr. 57.



1 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),  
2 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds  
3 to step five, and the burden shifts to the Commissioner to show (1) the claimant  
4 can make an adjustment to other work; and (2) the claimant can perform specific  
5 jobs that exist in the national economy. *Batson v. Comm’r of Soc. Sec. Admin.*, 359  
6 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment to  
7 other work in the national economy, the claimant will be found disabled. 20 C.F.R.  
8 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 9 ADMINISTRATIVE FINDINGS

10 On May 17, 2018, the ALJ issued a decision finding Plaintiff was not  
11 disabled prior to December 26, 2017, but became disabled on that date.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
13 activity since the amended alleged onset date. Tr. 519.

14 At step two, the ALJ determined Plaintiff had the following severe  
15 impairments: bilateral osteoarthritis of the acromioclavicular joints, status post  
16 surgery; bilateral carpal tunnel syndrome, status post release; left-sided ulnar  
17 neuropathy; mild hearing loss; degenerative disc disease – cervical spine;  
18 degenerative disc disease – lumbar spine, status post fusion; gastroesophageal  
19 reflux disease with Barrett’s esophagus and hiatal hernia; chronic obstructive  
20 pulmonary disease; borderline intellectual functioning; unspecified depressive  
21 disorder; generalized anxiety disorder; somatic symptom disorder; and alcohol and  
22 cannabis use disorders. Tr. 519-20.

23 At step three, the ALJ found Plaintiff did not have an impairment or  
24 combination of impairments that met or medically equaled the severity of one of  
25 the listed impairments. Tr. 520-24.

26 The ALJ assessed Plaintiff’s residual functional capacity and determined he  
27 could perform work at a light exertional level with the following limitations:  
28

1 he could sit for up to two hours at a time and six hours total in an eight-  
2 hour day; he could stand and/or walk up to one hour at a time and four  
3 hours total; he could occasionally push or pull bilaterally; he could  
4 occasionally reach overhead bilaterally but could frequently reach in all  
5 other directions; he would need to avoid climbing ladders, ropes, or  
6 scaffolds, but he could occasionally balance, stoop, kneel, crouch,  
7 crawl, and climb ramps or stairs; he should avoid concentrated exposure  
8 to extreme cold, excessive vibration, airborne irritants/particulates,  
9 hazards, and moving machinery; he should avoid all unprotected  
10 heights; he could perform simple and repetitive tasks that do not involve  
11 fast-paced, time-production work; and he would work best away from  
12 the public but could have occasional interaction with co-workers and  
13 supervisors, as long as he was not required to perform tandem tasks.

14 Tr. 524-25.

15 At step four, the ALJ found Plaintiff was unable to perform his past relevant  
16 work as a tractor-trailer truck driver. Tr. 536.

17 At step five, the ALJ determined that, prior to the established onset date,  
18 considering Plaintiff's age, education, work experience and residual functional  
19 capacity, there were jobs that existed in significant numbers in the national  
20 economy that he was capable of performing, specifically identifying the  
21 representative occupations of courier, house sitter, and office helper. Tr. 536-37.

22 Applying the Medical-Vocational Guidelines, the ALJ found Plaintiff  
23 changed age categories on December 26, 2017, and thus became disabled on that  
24 date according to Rule 202.02. Tr. 537.

25 The ALJ concluded Plaintiff was not disabled prior to December 26, 2017,  
26 but became disabled on that date. Tr. 538.

### 27 **ISSUES**

28 The question presented is whether substantial evidence supports the ALJ's  
decision denying benefits and, if so, whether that decision is based on proper legal  
standards.

Plaintiff contends the ALJ erred by (1) failing to follow the 2015 remand

1 order; (2) improperly discrediting Plaintiff’s symptom claims; and (3) failing to  
2 properly consider and weigh the opinion evidence.<sup>2</sup>

### 3 DISCUSSION

#### 4 1. Evaluation of medical opinions

5 Plaintiff argues the ALJ failed to follow the remand order from this Court  
6 and improperly considered and weighed the medical opinions from Dr. Pollack,  
7 Dr. Higgins, Mr. Jeter, and Ms. Merritt. ECF No. 13 at 17-20.

##### 8 A. The remand order

9 The 2015 order from this Court found the ALJ erred in failing to address the  
10 opinion from Angela Merritt, Plaintiff’s vocational rehabilitation counselor, and  
11 gave some insufficient reasons for rejecting the opinions from Dr. Pollack and Mr.  
12 Jeter. Tr. 754-58. On remand, the ALJ was directed to reevaluate the medical  
13 evidence, including those opinions. Tr. 759-60.

14 Plaintiff argues the ALJ failed to comply with the remand order when she  
15 evaluated the various opinions. ECF No. 13 at 17-19. However, Plaintiff has not  
16 identified any specific aspect of the order the ALJ failed to follow. The order from  
17 this Court directed the ALJ to reassess the opinions but did not direct the ALJ to  
18 accept any of the opinions outright. The ALJ discussed each of the opinions and  
19 acknowledged and retracted the prior analysis that was deemed insufficient by this  
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21 <sup>2</sup> Though Plaintiff lists the ALJ’s assessment of his subjective statements in  
22 his assignments of error, he has failed to offer any legal arguments in support of  
23 this position and did not brief the issue with any specificity. ECF No. 13 at 20. The  
24 Ninth Circuit has made clear that the court will not “manufacture arguments for an  
25 appellant” and therefore will not consider claims that were not actually argued in  
26 appellant’s opening brief. *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977  
27 (9th Cir. 1994). Because Plaintiff failed to provide adequate briefing, the Court  
28 declines to consider this issue.

1 Court. Tr. 521-24, 527-28, 534.

2 To the extent Plaintiff implies the ALJ failed to offer sufficient reasons for  
3 rejecting portions of the medical opinions, each source will be discussed in turn.

4 **B. Dr. Pollack and Dr. Higgins**

5 When a treating or examining physician’s opinion is contradicted by another  
6 physician, the ALJ is required to provide “specific and legitimate reasons,” based  
7 on substantial evidence, to reject the opinion. *Andrews v. Shalala*, 53 F.3d 1035,  
8 1041 (9th Cir. 1995); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995). The  
9 specific and legitimate standard can be met by the ALJ setting out a detailed and  
10 thorough summary of the facts and conflicting clinical evidence, stating their  
11 interpretation thereof, and making findings. *Magallanes v. Bowen*, 881 F.2d 747,  
12 751 (9th Cir. 1989). The ALJ is required to do more than offer her conclusions, she  
13 “must set forth her interpretations and explain why they, rather than the doctors’,  
14 are correct.” *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988). Dr. Pollack  
15 and Dr. Higgins’ opinions are contradicted by the state agency doctors and the  
16 medical expert who testified at the remand hearings. *Compare* Tr. 456-65 *with* Tr.  
17 114-15, 142-44, 591-602, 650-59.

18 In February 2013, Dr. Pollack conducted a consultative psychological  
19 evaluation. Tr. 456-65. He diagnosed Plaintiff with polysubstance abuse in  
20 remission, major depressive disorder, and a pain disorder associated with both  
21 psychological factors and general medical condition. Tr. 460. He opined Plaintiff  
22 was markedly impaired in his ability to perform within a schedule, maintain  
23 regular attendance, be punctual within customary tolerances, and complete a  
24 normal workweek without interruptions from psychologically-based symptoms and  
25 perform at a consistent pace without an unreasonable number and length of rest  
26 periods. Tr. 462-63. He assessed a number of other moderate limitations in work-  
27 related areas of functioning. Tr. 462-65.

28 Plaintiff attended another consultative exam with Dr. Higgins in 2016. 1458-

1 65. Dr. Higgins diagnosed Plaintiff with generalized anxiety disorder, major  
2 depressive disorder, and borderline intellectual functioning. Tr. 1461. She opined  
3 he was limited to simple instructions and judgments, did not have the ability to  
4 interact appropriately with the public, and was unable to respond appropriately to  
5 typical work situations or to changes in a routine work setting. Tr. 1461-62.

6 In the 2013 unfavorable decision, the ALJ offered a number of reasons for  
7 assigning little weight to Dr. Pollack's opinion, two of which were deemed invalid  
8 by this Court. Tr. 754-56. On remand, the ALJ retracted the reasoning that was  
9 deemed insufficient, and gave Dr. Pollack's opinion partial weight, noting it was  
10 partially consistent with other evidence in the record, but finding Dr. Pollock's  
11 opinions regarding concentration to be inconsistent with his exam findings and  
12 inconsistent with Dr. Higgins and Dr. Martin's opinions. Tr. 521-24. The ALJ also  
13 noted that the record indicated Plaintiff's mental condition stabilized after this  
14 exam. Tr. 534.

15 The ALJ gave Dr. Higgins' opinion great weight excepting the portion  
16 regarding Plaintiff's inability to respond appropriately to work situations and  
17 changes, noting that the opinion was somewhat equivocal and poorly explained,  
18 and inconsistent with other opinions in the record. Tr. 523-24, 535.

19 Plaintiff argues the ALJ did not give clear and convincing reasons for  
20 discounting the findings of Dr. Pollack and Dr. Higgins, arguing that the ALJ  
21 should not have given greater weight to Dr. Martin because all of the evidence  
22 indicated Plaintiff was not able to work. ECF No. 13 at 18.

23 The Court finds no error in the ALJ's analysis. An ALJ may reasonably  
24 consider the supportability and consistency of an opinion. 20 C.F.R. §§  
25 404.1527(c), 416.927(c) ("The better an explanation a source provides for a  
26 medical opinion, the more weight we will give that medical opinion. . . . Generally,  
27 the more consistent a medical opinion is with the record as a whole, the more  
28 weight we will give to that medical opinion."). The ALJ reasonably discussed the



1 medical record and found various portions of the opinions to be unsupported or  
2 inadequately explained. Plaintiff has not offered any explanation as to how the  
3 ALJ's evaluation of the record was incorrect or why she erred in relying on the  
4 testimony of the medical expert. Plaintiff fails to address any of the ALJ's  
5 rationale, and simply offers an alternative interpretation of the evidence and urges  
6 a re-weighing of the opinions. The Court finds the ALJ offered specific and  
7 legitimate reasons for discounting portions of these two consultative exams.

8 **C. Mr. Jeter and Ms. Merritt**

9 An ALJ may discount the opinion of an "other source," such as a physical  
10 therapist, if they provide "reasons germane to each witness for doing so." *Molina*  
11 *v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012); *Dodrill v. Shalala*, 12 F.3d 915,  
12 918-19 (9th Cir. 1993).

13 In August 2011, Plaintiff had a functional capacity assessment with Mr.  
14 Jeter, a physical therapist. Tr. 329-33. Mr. Jeter opined Plaintiff was only capable  
15 of sedentary work at the time, required standing/walking breaks on a regular basis,  
16 and had a very limited ability to lift or carry items. Tr. 329.

17 At the end of 2011, Plaintiff completed a 30-day community-based  
18 assessment through vocational rehabilitation, where he worked part-time with  
19 Goodwill Industries. Tr. 297-302. His vocational counselor, Angela Merritt,  
20 completed an outcome report at the conclusion of the placement, and noted that  
21 Plaintiff's physical barriers and attendance issues rendered him unemployable in  
22 the community at that time. She noted he struggled with stamina and endurance  
23 and needed additional rest periods and a sit/stand work-station. *Id.*

24 In the 2013 unfavorable decision, the ALJ failed to discuss Ms. Merritt's  
25 opinion and gave insufficient reasons for disregarding Mr. Jeter's opinion. Tr. 757-  
26 58. On remand, the ALJ gave little weight to Mr. Jeter's opinion, noting it was a  
27 one-time examining opinion, appeared based on observations that were not noted  
28 elsewhere in the record, was unsupported by other evidence, and was inconsistent

1 with other acceptable source opinions. Tr. 527. The ALJ also assigned little weight  
2 to Ms. Merritt’s opinion, noting she was not a medical source and based her  
3 opinion on her observations of Plaintiff, and found her opinion inconsistent with  
4 objective medical findings and Plaintiff’s activities. Tr. 528.

5 Plaintiff argues these opinions and the weight of the evidence support a  
6 finding that Plaintiff was limited to no more than sedentary work, requiring a  
7 finding of disability as of age 50 under the Medical Vocational Guidelines. ECF  
8 No. 13 at 18-19. Plaintiff has not advanced any argument regarding the specific  
9 reasons offered by the ALJ for assigning little weight to these opinions.

10 The Court finds the ALJ offered germane reasons for disregarding both  
11 opinions. The consistency of a medical opinion with the record as a whole is a  
12 germane factor for an ALJ to consider in evaluating the weight due to an “other  
13 source.” 20 C.F.R. §§ 416.927(c)(2)(4), 416.927(f). An ALJ may also discount  
14 third-party evidence that is similar to the claimant’s reports for the same reasons as  
15 she discounts the claimant. *Molina v. Astrue*, 674 F.3d 1104, 1114 (9th Cir. 2012).  
16 The ALJ reasonably discussed the record and the conflicting opinions and  
17 objective records in assigning little weight to Mr. Jeter and Ms. Merritt. Therefore,  
18 the ALJ’s decision is supported by substantial evidence.

19 **CONCLUSION**

20 Accordingly, **IT IS ORDERED:**

- 21 1. Defendant’s Motion for Summary Judgment, **ECF No. 17**, is  
22 **GRANTED.**  
23 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 13**, is **DENIED**  
24 The District Court Executive is directed to file this Order and provide a copy

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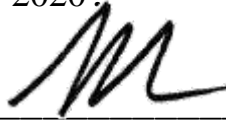
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1 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant  
2 and the file shall be **CLOSED**.

3 **IT IS SO ORDERED.**

4 DATED December 31, 2020.

A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE