

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

Nov 02, 2020

SEAN F. MCAVOY, CLERK

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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON  
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9 TRACEY H.,

10 Plaintiff,

11 v.

12  
13 ANDREW M. SAUL,  
14 COMMISSIONER OF SOCIAL  
15 SECURITY,

16 Defendant.  
17

No. 2:19-CV-0425-JTR

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT

18 **BEFORE THE COURT** are cross-motions for summary judgment. ECF  
19 No. 12, 13. Attorney Lora Lee Stover represents Tracey H. (Plaintiff); Special  
20 Assistant United States Attorney Jeffrey E. Staples represents the Commissioner of  
21 Social Security (Defendant). The parties have consented to proceed before a  
22 magistrate judge. ECF No. 6. After reviewing the administrative record and the  
23 briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary  
24 Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

25 **JURISDICTION**

26 Plaintiff filed applications for Disability Insurance Benefits and  
27 Supplemental Security Income, alleging disability since December 24, 2014, due to  
28 birth defect: deformed right foot (club foot); deformed right ankle; skin cancer:

ORDER GRANTING DEFENDANT'S MOTION . . . - 1

1 basil cell and squamous cell carcinoma; injured right shoulder (multiple  
2 operations); chronic headaches; nerve problems (extremities fall asleep); stomach  
3 ulcer; GERD (treated with heavy medication); inner ear-brain syndrome (balance  
4 and hearing issues); and hearing loss. Tr. 254, 261, 295. At the time of the  
5 administrative hearing, Plaintiff amended the alleged onset date to December 1,  
6 2015. Tr. 29, 68. The applications were denied initially and upon reconsideration.  
7 Administrative Law Judge (ALJ) Marie Palachuk held a hearing on November 28,  
8 2018, Tr. 65-102, and issued an unfavorable decision on January 14, 2019, Tr. 29-  
9 40. The Appeals Council denied Plaintiff's request for review on November 14,  
10 2019. Tr. 1-5. The ALJ's January 2019 decision thus became the final decision of  
11 the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
12 405(g). Plaintiff filed this action for judicial review on December 19, 2019. ECF  
13 No. 1.

#### 14 **STATEMENT OF FACTS**

15 Plaintiff was born on September 25, 1970, Tr. 254, and was 45 years old on  
16 the amended alleged disability onset date, December 1, 2015, Tr. 68. He  
17 completed two years of college and had additionally obtained a real estate sales  
18 license. Tr. 296. He reported past work in auto sales and real estate sales. Tr.  
19 297. He indicated he stopped working because of his conditions in late 2015. Tr.  
20 79, 295, 297.

21 Plaintiff testified at the administrative hearing on November 28, 2018, that  
22 his most significant impairment was his right club foot and deformed ankle. Tr.  
23 78, 80-81. He described his right foot as "mush inside," Tr. 78, and indicated that,  
24 despite three surgeries, being on his feet caused extreme pain, Tr. 81. He was  
25 nevertheless able to work as an automobile salesperson with this condition and  
26 would walk over 12 miles on the lot on a regular day. Tr. 79. He stated he also  
27 had issues with his neck that caused shoulder pain and numbness in his arms and  
28 hands. Tr. 82. Carpal tunnel surgery in 2016 did not alleviate his symptoms. Tr.

1 83-34. Plaintiff testified his dominant right hand was worse than the left and  
2 numbness in the hand made it very difficult for him to write. Tr. 84. He indicated  
3 he injured his left elbow, had undergone two surgeries for the injury, and was no  
4 longer able to straighten his left arm. Tr. 85. At the time of the hearing, he was  
5 also experiencing left shoulder pain. Tr. 86. Plaintiff additionally described  
6 having recently undergone a surgery for sleep apnea and having had multiple  
7 surgeries for tinnitus. Tr. 87-88. He stated he also had severe headaches at a rate  
8 of about twice a week. Tr. 88.

9 With respect to his mental impairments, Plaintiff testified he had been taking  
10 psychotropic medication which helped control his symptoms related to post-  
11 traumatic stress disorder and panic disorder. Tr. 90. He was also attending  
12 counseling sessions twice per month. Tr. 90.

13 Plaintiff indicated he lived in a studio apartment owned by his father and  
14 received help with chores from his mother and girlfriend. Tr. 91-92. However, he  
15 reported he was able to perform about 70% of the daily chores on his own  
16 (cooking, cleaning, shopping, laundry, etc.). Tr. 92.

### 17 **STANDARD OF REVIEW**

18 The ALJ is responsible for determining credibility, resolving conflicts in  
19 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
20 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with  
21 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
22 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
23 only if it is not supported by substantial evidence or if it is based on legal error.  
24 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
25 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
26 1098. Put another way, substantial evidence is such relevant evidence as a  
27 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
28 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one

1 rational interpretation, the Court may not substitute its judgment for that of the  
2 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,  
3 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the  
4 administrative findings, or if conflicting evidence supports a finding of either  
5 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*  
6 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision  
7 supported by substantial evidence will be set aside if the proper legal standards  
8 were not applied in weighing the evidence and making the decision. *Brawner v.*  
9 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 10 **SEQUENTIAL EVALUATION PROCESS**

11 The Commissioner has established a five-step sequential evaluation process  
12 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*  
13 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
14 proof rests upon the claimant to establish a prima facie case of entitlement to  
15 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a  
16 claimant establishes that a physical or mental impairment prevents the claimant  
17 from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant  
18 cannot perform past relevant work, the ALJ proceeds to step five, and the burden  
19 shifts to the Commissioner to show (1) the claimant can make an adjustment to  
20 other work; and (2) the claimant can perform specific jobs that exist in the national  
21 economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th  
22 Cir. 2004). If a claimant cannot make an adjustment to other work in the national  
23 economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

### 24 **ADMINISTRATIVE DECISION**

25 On January 14, 2019, the ALJ issued a decision finding Plaintiff was not  
26 disabled as defined in the Social Security Act.

27 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
28 activity since December 1, 2015, the amended alleged disability onset date. Tr. 32.

1 At step two, the ALJ determined Plaintiff had the following severe  
2 impairments: obesity, degenerative disc disease of the lumbar and cervical spine,  
3 congenital right club foot, left foot neuritis, degenerative joint disease of the right  
4 shoulder post rotator cuff repair, left triceps tendon repair, anxiety disorder, bipolar  
5 disorder, and personality disorder. Tr. 32.

6 At step three, the ALJ found Plaintiff did not have an impairment or  
7 combination of impairments that meets or medically equals the severity of one of  
8 the listed impairments. Tr. 34.

9 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
10 Plaintiff could perform sedentary exertion level work with the following  
11 limitations: he can never climb ladders, ropes or scaffolds, but all other postural  
12 activities are limited to occasional performance (balancing, stooping, kneeling,  
13 crouching, crawling, and climbing ramps or stairs); he is limited to occasional  
14 overhead reaching with the left upper extremity; he must avoid concentrated  
15 exposure to extreme cold, industrial noise and hazards; and he must have minimal  
16 interaction with the public and only superficial interaction with coworkers (no  
17 tandem tasks or collaborative work). Tr. 35.

18 At step four, the ALJ found Plaintiff was not able to perform his past  
19 relevant work as a real estate sales agent or automobile salesperson. Tr. 38-39.

20 At step five, the ALJ determined that, based on the testimony of the  
21 vocational expert, and considering Plaintiff's age, education, work experience, and  
22 RFC, Plaintiff was capable of making a successful adjustment to other work that  
23 exists in significant numbers in the national economy, including the jobs of  
24 document preparer, printed circuit board assembler, and surveillance system  
25 monitor. Tr. 39-40.

26 The ALJ thus concluded Plaintiff was not under a disability within the  
27 meaning of the Social Security Act at any time from December 1, 2015, the alleged  
28 onset date, through the date of the ALJ's decision, January 14, 2019. Tr. 40.



1           It is well-established that the nature of daily activities may be considered  
2 when evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).  
3 For daily activities to discount subjective symptom testimony, the activities do not  
4 need to be equivalent to full-time work; it is sufficient that a claimant’s activities  
5 “contradict claims of a totally debilitating impairment.” See *Molina v. Astrue*, 674  
6 F.3d 1104, 1112-1113 (9th Cir. 2012). A claimant, however, need not be utterly  
7 incapacitated to receive disability benefits, and completion of certain routine  
8 activities is insufficient to discount subjective symptom testimony. *Id.* at 1112-  
9 1113 (noting that a “claimant need not vegetate in a dark room in order to be  
10 eligible for benefits” (quotation marks omitted)); *Benecke v. Barnhart*, 379 F.3d  
11 587, 594 (9th Cir. 2004) (“One does not need to be ‘utterly incapacitated’ in order  
12 to be disabled.”).

13           Plaintiff indicated he had difficulty standing and walking due to his club foot  
14 and deformed ankle, conditions he has had since birth. Tr. 36, 78-79, 81. Plaintiff  
15 described his right foot as “mush inside;” however, he testified he had worked as  
16 an automobile salesperson despite this condition and would walk over 12 miles on  
17 the lot on a regular day. Tr. 78-79. Plaintiff also stated he had pain and numbness  
18 throughout his back and upper extremities and was unable to straighten his left  
19 arm. Tr. 81. Yet, Plaintiff has a history of heavy weightlifting and bodybuilding  
20 over several decades, which continued into the relevant time period. Tr. 37, 1203-  
21 1204 (October 23, 2018 medical report noting Plaintiff’s weightlifting history),  
22 642 (report that Plaintiff checked into a 24-hour fitness facility eight times in  
23 August, seven times in September and two times in November, all in 2016).  
24 Despite assertions of needing assistance with chores, Plaintiff wrote in his function  
25 report that he was able to complete activities of self-care independently, care for  
26 pets (two dogs), and prepare his own meals. Tr. 36, 328-329. Plaintiff also  
27 reported to an investigator he spent his days “helping his father with projects,  
28 working on his place, and doing maintenance like painting and taking care of odds

1 and ends around his home.” Tr. 37, 630. Plaintiff additionally told the investigator  
2 he helped physically restrain a shoplifter at a gas station in May 2016. Tr. 37, 641.

3 It appears it was proper for the ALJ to note Plaintiff’s activities of daily  
4 living as contrary to his subjective complaints. However, even if it were improper  
5 for the ALJ to find Plaintiff’s level of activity inconsistent with his subjective  
6 complaints, see *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) (“the mere  
7 fact that a plaintiff has carried on certain daily activities, such as grocery shopping,  
8 driving a car, or limited walking for exercise, does not in any way detract from her  
9 credibility as to her overall disability”), the Court would find this error harmless  
10 given the ALJ’s other supported reasons for finding Plaintiff less than fully  
11 credible (see *infra*). *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1160, 1163  
12 (9th Cir. 2008) (upholding adverse credibility finding where ALJ provided four  
13 reasons to discredit claimant, two of which were invalid); *Batson v. Comm’r, Soc.*  
14 *Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (affirming credibility finding  
15 where one of several reasons was unsupported by the record).

16 The ALJ next noted inconsistencies in Plaintiff’s statements. Tr. 37.  
17 Inconsistencies in a disability claimant’s testimony supports a decision by the ALJ  
18 that a claimant lacks credibility with respect to her claim of disabling pain. *Nyman*  
19 *v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1986).

20 The ALJ indicated Plaintiff gave differing accounts regarding why he quit  
21 working. Tr. 37. At the administrative hearing, he testified he stop working  
22 because of the pain caused by having to be on his feet which ultimately led to him  
23 being fired due to “lack of performance.” Tr. 80-81. However, Plaintiff reported  
24 to a treatment provider that he “had to quit work, secondary to not being able to do  
25 writing more than a few sentences.” Tr. 37, 568, 1131. The ALJ further noted that  
26 Plaintiff’s assertion that he was unable to work due to his defective foot/ankle was  
27 inconsistent with Plaintiff’s ability to work for decades with the same condition  
28 and without evidence of significant exacerbation of the impairment over this



1 period. Tr. 37. The ALJ found the foregoing inconsistencies detracted from  
2 Plaintiff's reliability regarding his impairments, and Plaintiff makes no argument  
3 to the contrary. See Carmickle, 533 F.3d at 1161 (the Court will not ordinarily  
4 consider matters on appeal that were not specifically and distinctly argued in a  
5 party's opening brief).

6 Finally, the ALJ found objective and observational evidence did not support  
7 the level of limitation alleged by Plaintiff. Tr. 37. An ALJ may discount a  
8 claimant's allegations if they conflict with the medical evidence of record.  
9 Carmickle, 533 F.3d at 1161 (contradiction with the medical record is a sufficient  
10 basis for rejecting a claimant's subjective testimony); Lingenfelter v. Astrue, 504  
11 F.3d 1028, 1040 (9th Cir. 2007) (an ALJ may consider whether alleged symptoms  
12 are consistent with the medical evidence).

13 With regard to Plaintiff's lower extremities complaints, the investigator  
14 noted Plaintiff had a normal gait and pace, Tr. 642, which was consistent with  
15 multiple treatment records, Tr. 477 (gait without coordination deficits), 532  
16 (normal gait, no limp), 594 (walks without limp), 646 (walks without limp), 861  
17 (walks without limp), 939 (ambulating normally), 999 (normal gait), 1209 (normal  
18 gait), 1246 (normal gait). Tr. 37. As to Plaintiff's assertions of upper extremity  
19 pain and numbness, carpal tunnel release surgery was noted as successful despite  
20 Plaintiff missing follow-up appointments, and Plaintiff had been released to  
21 activities without restriction. Tr. 37, 587

22 Medical expert Robert H. Smiley, M.D., testified at the administrative  
23 hearing that with Plaintiff's back and ankle problems, he would be limited to  
24 sedentary level work with overhead reaching limited to occasional and some  
25 postural and environmental limitations. Tr. 72, 74, 77. The ALJ accorded  
26 "considerable weight" to the testimony of Dr. Smiley, and the RFC determination  
27 is consistent with his testimony. Tr. 37-38. The ALJ also accorded partial weight  
28 to the opinions of state agency consultants who determined that Plaintiff could

1 perform a range of light work with limits on fingering and reaching and noted the  
2 record lacked any opinion evidence regarding Plaintiff's mental limitations. Tr.  
3 38. Plaintiff's brief does not specifically and distinctly dispute the opinions of Dr.  
4 Smiley or the state agency consultants, nor has Plaintiff challenged the ALJ's  
5 finding that objective and observational evidence contradicted Plaintiff's  
6 subjective complaints. See Carmickle, 533 F.3d at 1161 (the Court will not  
7 ordinarily consider matters on appeal that were not specifically and distinctly  
8 argued in a party's opening brief).

9       The ALJ is responsible for reviewing the evidence and resolving conflicts or  
10 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
11 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in  
12 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in  
13 determining whether the ALJ's decision is supported by substantial evidence and  
14 may not substitute its own judgment for that of the ALJ even if it might justifiably  
15 have reached a different result upon de novo review. 42 U.S.C. § 405(g). After  
16 reviewing the record, the Court finds the ALJ provided clear and convincing  
17 reasons, supported by substantial evidence, for finding Plaintiff's symptom  
18 allegations were not entirely credible in this case.

19 **B. Residual Functional Capacity**

20       Plaintiff's brief provides a cursory assertion that his limitations were not  
21 adequately addressed by the ALJ's RFC assessment. ECF No. 12 at 16.

22       Plaintiff's three-sentence argument fails to identify any contradictory  
23 medical source opinion evidence, and Plaintiff does not argue that the ALJ erred  
24 by rejecting the opinion of any specific medical professional of record. It appears  
25 Plaintiff merely reasserts his contention that his subjective complaints should have  
26 been accorded weight in this case. However, as noted in Section A above, the  
27 ALJ's determination regarding Plaintiff's subjective allegations is supported by  
28 substantial evidence. *Supra*.

1 The Court finds Plaintiff has failed to advance a specific, valid error with  
2 respect to the ALJ's evaluation of the medical evidence or her determination  
3 regarding Plaintiff's residual functional capacity.

4 **CONCLUSION**

5 As determined above, the ALJ did not err by finding Plaintiff's symptom  
6 allegations were not entirely credible, and Plaintiff has not demonstrated any error  
7 with respect to the ALJ's evaluation of the medical evidence of record. As such,  
8 the Court finds the ALJ's decision is supported by substantial evidence and free of  
9 error.

10 Having reviewed the record and the ALJ's findings, the Court finds the  
11 ALJ's decision should be affirmed. Therefore, **IT IS HEREBY ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 13**, is  
13 **GRANTED.**

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED.**  
15 **IT IS SO ORDERED.** The District Court Executive is directed to file this  
16 Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall  
17 be entered for Defendant and the file shall be **CLOSED.**

18 DATED November 2, 2020.

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

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE