

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

Jan 31, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GERALD P.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI,  
ACTING COMMISSIONER OF  
SOCIAL SECURITY,<sup>2</sup>

Defendant.

No. 2:21-CV-00037-ACE

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

**ECF Nos. 19, 21**

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 19, 21. Attorney Chad Hatfield represents Gerald P. (Plaintiff); Special Assistant United States Attorney Jeffrey E. Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and the

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<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

<sup>2</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 briefs filed by the parties, the Court **GRANTS** Plaintiffs’ Motion for Summary  
2 Judgment and **DENIES** Defendant’s Motion for Summary Judgment.

3 **JURISDICTION**

4 Plaintiff protectively filed an application for Disability Insurance Benefits  
5 and Supplemental Security Income on August 2, 2018, alleging disability since  
6 January 27, 2018. Tr. 17, 92, 185-200. The applications were denied initially and  
7 upon reconsideration. Tr. 126-29, 132-37. Administrative Law Judge (ALJ) Mary  
8 Ann Lunderman held a hearing on July 20, 2020, Tr. 34-69, and issued an  
9 unfavorable decision on September 1, 2020. Tr. 14-32. Plaintiff requested review  
10 by the Appeals Council and the Appeals Council denied the request for review on  
11 November 13, 2020. Tr. 1-6. The ALJ’s September 1, 2020 decision became the  
12 final decision of the Commissioner, which is appealable to the district court  
13 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on  
14 January 15, 2021. ECF No. 1.

15 **STANDARD OF REVIEW**

16 The ALJ is tasked with “determining credibility, resolving conflicts in  
17 medical testimony, and resolving ambiguities.” *Andrews v. Shalala*, 53 F.3d 1035,  
18 1039 (9th Cir. 1995). The ALJ’s determinations of law are reviewed *de novo*, with  
19 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
20 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
21 only if it is not supported by substantial evidence or if it is based on legal error.  
22 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
23 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
24 1098. Put another way, substantial evidence is such relevant evidence as a  
25 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
26 *Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305  
27 U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational  
28 interpretation, the Court may not substitute its judgment for that of the ALJ.

1 *Tackett*, 180 F.3d at 1098; *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595,  
2 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or  
3 if conflicting evidence supports a finding of either disability or non-disability, the  
4 ALJ’s determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230  
5 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be  
6 set aside if the proper legal standards were not applied in weighing the evidence  
7 and making the decision. *Brawner v. Sec’y of Health and Human Servs.*, 839 F.2d  
8 432, 433 (9th Cir. 1988).

### 9 SEQUENTIAL EVALUATION PROCESS

10 The Commissioner has established a five-step sequential evaluation process  
11 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a),  
12 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through  
13 four the claimant bears the burden of establishing a prima facie case of disability.  
14 *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes  
15 that a physical or mental impairment prevents the claimant from engaging in past  
16 relevant work. 20 C.F.R. § 404.1520(a)(4), 416.920(a)(4). If a claimant cannot  
17 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to  
18 the Commissioner to show (1) that Plaintiff can perform other substantial gainful  
19 activity and (2) that a significant number of jobs exist in the national economy  
20 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir.  
21 1984); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant cannot  
22 make an adjustment to other work in the national economy, the claimant will be  
23 found disabled. 20 C.F.R. § 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 24 ADMINISTRATIVE FINDINGS

25 On September 1, 2020 the ALJ issued a decision finding Plaintiff was not  
26 disabled as defined in the Social Security Act. Tr. 14-32.

1 At step one, the ALJ found Plaintiff, who meets the insured status  
2 requirements of the Social Security Act through March 31, 2023, had not engaged  
3 in substantial gainful activity since his alleged onset date. Tr. 20.

4 At step two, the ALJ determined Plaintiff had the following severe  
5 impairments: obesity, bilateral peroneal tendonitis, left ankle and foot  
6 osteoarthritis, and mild cervical degenerative disc disease. *Id.*

7 At step three, the ALJ found Plaintiff did not have an impairment or  
8 combination of impairments that met or medically equaled the severity of one of  
9 the listed impairments. *Id.*

10 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
11 he could perform light work, with the following limitations:

12 [S]tanding and walking must be limited to two hours in an eight hour  
13 day. The climbing of ramps and stairs must be limited to frequently,  
14 while the climbing of ladders, ropes, or scaffolds must be entirely  
15 precluded from work duties as assigned. In addition, stooping  
16 (bending at the waist), kneeling, crouching (bending at the knees), and  
17 crawling must be limited to occasionally. Finally, within the assigned  
18 work area concentrated exposure to extreme cold and vibration must  
19 be avoided.

19 Tr. 21.

20 At step four, the ALJ found Plaintiff was unable to perform past relevant  
21 work. Tr. 25.

22 At step five, the ALJ found that, based on the testimony of the vocational  
23 expert, and considering Plaintiff's age, education, work experience, and RFC,  
24 Plaintiff could perform jobs that existed in significant numbers in the national  
25 economy, including the jobs of small products assembler II, electronics worker,  
26 and marker. Tr. 26-27.

1 The ALJ thus concluded Plaintiff was not under a disability within the  
2 meaning of the Social Security Act at any time from at any time from the alleged  
3 onset date through the date of the decision. *Id.*

#### 4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying  
6 her disability insurance benefits under Title II and Title XVI of the Social Security  
7 Act. The question presented is whether substantial evidence supports the ALJ's  
8 decision denying benefits and, if so, whether that decision is based on proper legal  
9 standards. Plaintiff raises the following issues for review: (1) whether the ALJ  
10 properly evaluated the medical opinion evidence; (2) whether the ALJ properly  
11 evaluated Plaintiff's symptom complaints; (3) whether the ALJ conducted a proper  
12 step-three analysis; and (4) whether the ALJ conducted a proper step-five analysis.  
13 ECF No. 19 at 6.

#### 14 DISCUSSION

##### 15 A. Medical Opinions

16 Plaintiff contends the ALJ improperly evaluated the medical opinion  
17 evidence. ECF No. 19 at 8.

18 For claims filed on or after March 27, 2017, new regulations apply that  
19 change the framework for how an ALJ must evaluate medical opinion evidence.  
20 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL  
21 168819, 82 Fed. Reg. 5844-01, (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c.  
22 The new regulations provide the ALJ will no longer give any specific evidentiary  
23 weight to medical opinions or prior administrative medical findings. *Revisions to*  
24 *Rules*, 2017 WL 168819, 82 Fed. Reg. 5844, at 5867-68; *see* 20 C.F.R. §§  
25 404.1520c(a), 416.920c(a). Instead, the ALJ must consider and evaluate the  
26 persuasiveness of all medical opinions or prior administrative medical findings  
27 from medical sources. 20 C.F.R. §§ 404.1520c(a) and (b), 416.920c(a) and (b).  
28

1 The factors for evaluating the persuasiveness of medical opinions and prior  
2 administrative findings include supportability, consistency, the source's  
3 relationship with the claimant, any specialization of the source, and other factors  
4 (such as the source's familiarity with other evidence in the file or an understanding  
5 of Social Security's disability program). 20 C.F.R. §§ 404.1520c(c)(1)-(5),  
6 416.920c(c)(1)-(5).

7 Supportability and consistency are the most important factors, and the ALJ  
8 must explain how both factors were considered. 20 C.F.R. §§ 404.1520c(b)(2),  
9 416.920c(b)(2). The ALJ may explain how the ALJ considered the other factors,  
10 but is not required to do so, except in cases where two or more opinions are equally  
11 well-supported and consistent with the record. *Id.* Supportability and consistency  
12 are explained in the regulations:

13  
14 (1) *Supportability*. The more relevant the objective medical evidence  
15 and supporting explanations presented by a medical source are to  
16 support his or her medical opinion(s) or prior administrative medical  
17 finding(s), the more persuasive the medical opinions or prior  
18 administrative medical finding(s) will be.

19 (2) *Consistency*. The more consistent a medical opinion(s) or prior  
20 administrative medical finding(s) is with the evidence from other  
21 medical sources and nonmedical sources in the claim, the more  
22 persuasive the medical opinion(s) or prior administrative medical  
23 finding(s) will be.

24 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2).

25 The Ninth Circuit recently addressed the issue of whether the new regulatory  
26 framework displaces the longstanding case law requiring an ALJ to provide  
27 specific and legitimate reasons to reject an examining provider's opinion. *Woods*  
28 *v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022). The Court held that the new  
regulations eliminate any hierarchy of medical opinions, and the specific and

1 legitimate standard no longer applies. *Id.* at 788-89, 792. The Court reasoned the  
2 “relationship factors” remain relevant under the new regulations, and thus the ALJ  
3 can still consider the length and purpose of the treatment relationship, the  
4 frequency of examinations, the kinds and extent of examinations that the medical  
5 source has performed or ordered from specialists, and whether the medical source  
6 has examined the claimant or merely reviewed the claimant’s records. *Id.* at 790,  
7 792. Even under the new regulations, an ALJ must provide an explanation  
8 supported by substantial evidence when rejecting an examining or treating doctor’s  
9 opinion as unsupported or inconsistent. *Id.* at 792.

10 *1. Dr. McGinnis*

11 In August 2018, Plaintiff’s podiatrist, Shani McGinnis, DPM, completed a  
12 Documentation Request Form for Medical or Disability Condition on behalf of  
13 Washington State DSHS and rendered an opinion of Plaintiff’s level of  
14 functioning. Tr. 284-87. Dr. McGinnis reported Plaintiff’s diagnosis was chronic  
15 tendonitis. Tr. 284. Dr. McGinnis indicated Plaintiff’s condition limited his  
16 ability to work, look for work, or prepare for work, and explained Plaintiff “cannot  
17 stand or [weight bear] on feet for more than 20 min[utes an hour].” *Id.* She further  
18 indicated Plaintiff was unable to participate in such activities “if standing/walking”  
19 but that he could participate 31-40 hours per week “if [a] sit down job.” *Id.* Dr.  
20 McGinnis opined Plaintiff was limited to sedentary work but that his condition was  
21 not permanent and would likely limit his ability to work for three months. Tr. 285.  
22 Dr. McGinnis noted she was providing and monitoring Plaintiff’s treatment plan,  
23 which consisted of physical therapy and injections at that time, but she also  
24 explained “if not better [with physical therapy], then MRI” would be indicated. *Id.*

25 Three months later, in November 2018, Dr. McGinnis completed another  
26 Documentation Request Form for Medical or Disability Condition on behalf of  
27 DSHS and rendered an opinion of Plaintiff’s level of functioning. Tr. 456-59. Dr.  
28 McGinnis reported MRI results showed a peroneal tendon tear that required

1 surgical correction. Tr. 456. She opined Plaintiff was unable to work, look for  
2 work, or prepare for work, explaining Plaintiff was “unable to bear weight, or  
3 stand for any length of time.” *Id.* She indicated Plaintiff was severely limited,  
4 defined on the form as unable to lift at least two pounds or unable to stand or walk.  
5 Tr. 457. Dr. McGinnis opined the condition was not permanent, but would limit  
6 Plaintiff’s ability to work, look for work, or train for work for six to 12 months. *Id.*

7 Thirteen month later, in December 2019, Dr. McGinnis completed a third  
8 Documentation Request Form for Medical or Disability Condition on behalf of  
9 DSHS and rendered an opinion of Plaintiff’s level of functioning. Tr. 462-64. Dr.  
10 McGinnis opined “Plaintiff has had a slower recovery process for the L[eft]  
11 surgical foot” and was also “having [increased] pain [and instability] on the R[ight]  
12 foot, requiring rehab.” Tr. 462. Dr. McGinnis opined Plaintiff was limited to 1-10  
13 hours work, looking for work, or preparing for work, explaining Plaintiff was  
14 “unable to work on his feet. As he is still recovering from surgical procedure . . .  
15 slower progress [and] requiring more time for rehab.” *Id.* She opined Plaintiff was  
16 limited to sedentary work requiring sitting only, with no walking or standing. Tr.  
17 463. She opined the condition was not permanent, but would limit Plaintiff’s  
18 ability to work, look for work, or train or work for six to 12 months. *Id.* Dr.  
19 McGinnis explained Plaintiff was attending physical therapy but if this was not  
20 successful he would “need another MRI [with] possible surgical correction of  
21 R[ight] foot and will maybe need further work up on the L[eft] foot.” *Id.*

22 The ALJ considered Dr. McGinnis’ opinions together. Tr. 25. The ALJ  
23 concluded the opinions were not particularly persuasive because they were  
24 temporary in nature and the record did not support permanent sedentary  
25 limitations. *Id.* Plaintiff contends the ALJ erred because Plaintiff’s limitations  
26 lasted more than 12 months, meeting the durational requirement, the ALJ provided  
27 boilerplate findings to reject the medical opinion and incorrectly found Plaintiff  
28 demonstrated unremarkable physical exam findings since his most recent surgery,



1 and because the opinions are consistent with and supported by the longitudinal  
2 record, including treatment notes. ECF No. 19 at 9. Defendant contends the ALJ  
3 reasonably concluded Dr. McGinnis' limitations were temporary, reasonably found  
4 Dr. McGinnis' opinion inconsistent with other evidence in the record, and that the  
5 ALJ's conclusions are supported by substantial evidence. ECF No. 21 at 7-8.

6 First, the ALJ found Dr. McGinnis' opinions were "temporary in nature and  
7 for periods of three to 12 months in the context of an injury or surgical procedure."  
8 Tr. 25. Limitations lasting less than 12 months are not enough to meet the  
9 durational requirement for a finding of disability. 20 C.F.R. §§ 404.1505(a),  
10 416.905(a) (requiring a claimant's impairment to last or be expected to last for a  
11 continuous period of not less than twelve months); *Carmickle v. Comm'r of Soc.*  
12 *Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008) (affirming the ALJ's finding that  
13 treating physician's short-term excuse from work was not indicative of "claimant's  
14 long-term functioning"). Here, as described *supra*, in August 2018 Dr. McGinnis  
15 initially determined Plaintiff's limitations would last for three months, based on a  
16 diagnosis of tendonitis. Tr. 284-85. After an MRI within those three months  
17 indicated a more serious injury that required surgical repair, however, Dr.  
18 McGinnis explained Plaintiff's limitations, including inability to bear weight or  
19 stand for any length of time, were expected to last another six to 12 months. Tr.  
20 456-58. By December 2019, well over a year from her initial opinion, Dr.  
21 McGinnis explained Plaintiff's recovery from surgery was slower than expected  
22 and that Plaintiff remained "unable to work on his feet. As he is *still* recovering  
23 from [a] surgical procedure . . . slower progress . . . requiring more time for rehab."  
24 *Id.* (emphasis added). She noted continued problems with the left foot/ankle and  
25 that he was also experiencing increased instability in the right foot and extended  
26 her estimate of how long Plaintiff would be so limited another six to 12 months at  
27 that time. Tr. 462-64. Defendant contends the ALJ reasonably found the  
28 limitations were not permanent, but as Defendant is well aware, under the

1 regulations an impairment does not have to be permanent, it must last or be  
2 expected to last for a continuous period of not less than twelve months. ECF No.  
3 21 at 6-7; 20 C.F.R. §§ 404.1505(a), 416.905(a).

4 Dr. McGinnis' opinions also appear consistent with treatment records  
5 showing ongoing recovery and issues with his ankles. In August 2019, for  
6 example, Plaintiff's physical therapist reported to Dr. McGinnis that Plaintiff was  
7 making gains but "continue[d] to have limitations with prolonged standing,  
8 walking and uneven surfaces that does put him at higher fall risk," and "his  
9 progress will be slower due to the longevity of symptoms and limitations in  
10 functional activities prior to surgery." Tr. 531. In October 2019, Dr. McGinnis  
11 noted "it has been 7.5 months since surgery. He has been starting to make  
12 consistent progress with his left ankle." Tr. 609-10. In February 2020, however,  
13 she noted he was having difficulty finding transportation to physical therapy at that  
14 time. Tr. 621. Upon physical exam instability was observed bilaterally, he had left  
15 foot reproducible pain, and his gait was altered; he also had right ankle swelling,  
16 and stiffness and pain were noted with palpation. Tr. 622. Dr. McGinnis noted his  
17 reports of continued bilateral ankle pain and indicated they were waiting on  
18 approval of an MRI on the right side; she provided steroid injections in both ankles  
19 and indicated Plaintiff was to continue with weight bearing, strengthening, and  
20 balance exercises bilaterally. Tr. 621-22.

21 The ALJ's conclusion that Dr. McGinnis' opinions were not particularly  
22 persuasive because they were temporary in nature is not supported by substantial  
23 evidence.

24 Next, the ALJ found Dr. McGinnis' opinions were not supported by the  
25 record. Supportability and consistency are the most important factors an ALJ must  
26 consider when determining how persuasive a medical opinion is. 20 C.F.R. §§  
27 404.1520c(b)(2), 416.920c(b)(2). The more relevant objective evidence and  
28 supporting explanations that support a medical opinion, and the more consistent an

1 opinion is with the evidence from other sources, the more persuasive the medical  
2 opinion is. 20 C.F.R. §§ 404.1520c(c)(1)-(2), 416.920c(c)(1)-(2). Additionally,  
3 the consistency of a medical opinion with the record as a whole is a relevant factor  
4 in evaluating that medical opinion. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.  
5 2007). The ALJ must consider all the relevant evidence in the record, however,  
6 and may not point to only those portions of the records that bolster his findings.  
7 *See, e.g., Holohan v. Massanari*, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding  
8 that an ALJ cannot selectively rely on some entries in plaintiff’s records while  
9 ignoring others).

10 The ALJ concluded the “record does not support permanent sedentary  
11 limitations. For example, following [Plaintiff’s] most recent surgery, there was  
12 only slightly decreased ankle range of motion” but “otherwise the [Plaintiff’s]  
13 physical examination was generally unremarkable.” Tr. 25 (citing Tr. 448-54). In  
14 support of her conclusion, the ALJ cited to one finding, decreased range of motion  
15 in his ankles, from the physical exam at Plaintiff’s March 2019 consultative  
16 examination (CE). *Id.* Review of the CE report, however, shows findings upon  
17 physical exam including antalgic gait, Plaintiff was unable to perform heel  
18 walking, he could only perform toe walking with “difficulty due to . . . pain,” and  
19 he could only perform tandem walk “with difficulty.” Tr. 453. The consultative  
20 examiner, Dr. Sindu, opined Plaintiff was limited in his ability to stand and walk  
21 based on his exam findings. Tr. 454. In the explanation used to discount Dr.  
22 McGinnis’ opinion, however, the ALJ found that the physical exam at the CE  
23 showed “only slightly decreased ankle range of motion.” Tr. 25. While earlier in  
24 the decision the ALJ did note other findings from the 2019 CE, she also misstated  
25 the record, as she found that Plaintiff was able to perform all walking tests and  
26 concluded the exam was “nearly unremarkable.” Tr. 23; *see* Tr. 453. Review of  
27 the evidence into 2020 shows ongoing pain with objective findings including  
28 persistent antalgic gait and reduced range of motion, and his providers note

1 continued weakness and instability resulting in limitations in his ability to balance  
2 and stand. *See, e.g.*, Tr. 496-8, 516-17, 531, 633-34.

3 The ALJ erred in selectively citing evidence from one physical exam to  
4 discount Dr. McGinnis' opinion, and also misstated findings from the same exam,  
5 resulting in a mischaracterization of the record. Additionally, the record as a  
6 whole, including the physical exam cited by the ALJ, shows relevant evidence that  
7 the ALJ did not discuss. Further, the ALJ failed to articulate how the factors of  
8 consistency and supportability were considered as required by the new regulations.  
9 The ALJ's conclusion that Dr. McGinnis' opinions are not particularly persuasive  
10 because they are not supported by the record is not supported by substantial  
11 evidence.

## 12 2. *Other Opinions*

13 Plaintiff contends the ALJ also improperly evaluated the medical opinions of  
14 treating providers Chad Mongrain, DO, and Tracy Johnston, DPT, PT. ECF No.  
15 19 at 10-14. As the case is remanded due to the errors in evaluating Dr. McGinnis'  
16 opinions, upon remand the ALJ shall reassess all medical opinions in the record.

17 Upon remand the ALJ is instructed to update the medical evidence of record,  
18 including obtaining an updated consultative examination. The ALJ shall reconsider  
19 all medical evidence with the assistance of medical expert testimony. The ALJ is  
20 to reassess all medical opinions with the factors required by the regulations and to  
21 incorporate the limitations into the RFC or give reasons supported by substantial  
22 evidence to reject each opinion.

## 23 **B. Plaintiff's Symptom Claims**

24 Plaintiff contends the ALJ erred by improperly rejecting Plaintiff's symptom  
25 testimony. ECF No. 19 at 17-19.

26 It is the province of the ALJ to make determinations regarding a claimant's  
27 subjective statements. *Andrews*, 53 F.3d at 1039. However, the ALJ's findings  
28 must be supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229,

1 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an  
2 underlying medical impairment, the ALJ may not discredit testimony as to the  
3 severity of an impairment merely because it is unsupported by medical evidence.  
4 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence  
5 of malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be  
6 “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.  
7 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). “General findings are  
8 insufficient: rather the ALJ must identify what testimony is not credible and what  
9 evidence undermines the claimant’s complaints.” *Lester* at 834; *Dodrill v. Shalala*,  
10 12 F.3d 915, 918 (9th Cir. 1993).

11 The ALJ concluded Plaintiff’s medically determinable impairments could  
12 reasonably be expected to cause the alleged symptoms; however, Plaintiff’s  
13 statements concerning the intensity, persistence, and limiting effects of those  
14 symptoms were not entirely supported by the medical and other evidence of record.  
15 Tr. 23.

16 *1. Inconsistent with Objective Medical Evidence*

17 The ALJ found that Plaintiff’s allegations were not consistent with objective  
18 findings. Tr. 23-24. An ALJ may not discredit a claimant’s symptom testimony  
19 and deny benefits solely because the degree of the symptoms alleged is not  
20 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 856  
21 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*  
22 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400 F.3d 676, 680  
23 (9th Cir. 2005). However, the objective medical evidence is a relevant factor,  
24 along with the medical source’s information about the claimant’s pain or other  
25 symptoms, in determining the severity of a claimant’s symptoms and their  
26 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),  
27 416.929(c)(2).

1 Here, the ALJ noted that physical exam in August 2018 revealed tenderness  
2 to palpation of the left ankle with significant swelling and fluctuation and a painful  
3 gait; an MRI was ordered along with use of a lace up ankle brace and decrease in  
4 walking. Tr. 22 (citing Tr. 336).<sup>3</sup> The ALJ noted MRI of the left ankle in  
5 September 2018 showed a complete rupture of the peroneus brevis tendon;  
6 sequelae of mild sprains at the medial and lateral ligament structures with partial-  
7 thickness tearing of the anterior talofibular ligament; mild Achilles tendinopathy  
8 with subtle partial-thickness undersurface tears; and small tibiotalar joint effusion.  
9 Tr. 22 (citing Tr. 365-66, 422-23). The ALJ noted a CE in October 2018 showed  
10 no findings upon physical exam aside from mild degenerative disc disease of the  
11 cervical spine. Tr. 22 (citing Tr. 433-34, 437). The consultative examiner,  
12 however, also noted Plaintiff's reports of chronic tendonitis and explained he had  
13 reviewed some orthopedic records suggesting bilateral ankle osteoarthritis, but that  
14 he had not reviewed any imaging, including the September MRI. Tr. 437. He  
15 noted Plaintiff's symptoms were exacerbated by walking and standing and  
16 indicated Plaintiff had moderate limitations in his ability to stand and walk. *Id.*

17 The ALJ noted Plaintiff underwent left tendon surgical foot repair in  
18 February 2019. Tr. 22 (citing Tr. 440-41). The ALJ again noted findings from the  
19 February 2019 CE, explaining that Plaintiff's "consultative examination a month  
20 after surgery was nearly unremarkable except for some decreased ankle range of  
21 motion and antalgic gait." Tr. 22-23 (citing Tr. 448-54). As discussed *supra*, in  
22 relation to the medical opinion evidence, however, the ALJ misstated and/or  
23 minimized the findings from this exam.

24 The ALJ also noted findings including antalgic gait but improving balance  
25 from an appointment in June 2020 and noted his physical therapist's finding at that  
26

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27 <sup>3</sup> The ALJ provides an incorrect cite here, citing 2F/1-2; the records referenced  
28 appear at 2F/34-35, which is Tr. 335-336.

1 time that Plaintiff continued to have “balance/stability limitations as well as  
2 limitations with prolonged standing.” Tr. 23 (citing Tr. 633-34). Records from  
3 that 2020 visit show Plaintiff was approaching maximal medical improvement  
4 following surgery, and his provider noted that despite surgical repair on the left  
5 and physical therapy, Plaintiff had persistent pain and stiffness in the ankles, with  
6 objective findings including antalgic gait and reduced range of motion. Tr. 633-34.  
7 His physical therapist explained while he was improving, he still was still working  
8 on the ability to ambulate without compensation and he continued to have  
9 decreased tolerance in ability to stand on uneven surfaces. Tr. 634.

10 The ALJ provided only a brief summary of medical evidence and found that  
11 the record did not support limitations beyond those contained in the RFC. Tr. 23.  
12 However, much of the medical evidence cited supports Plaintiff’s symptom claims,  
13 and as discussed in relation to the medical evidence, *supra*, the ALJ misstated  
14 evidence and failed to discuss relevant objective evidence. The ALJ’s finding that  
15 Plaintiff’s symptom claims are inconsistent with objective medical evidence is not  
16 supported by substantial evidence.

## 17 2. Activities

18 The ALJ also concluded that Plaintiff’s activities were inconsistent with his  
19 allegations. Tr. 23. An ALJ may consider a claimant’s activities that undermine  
20 reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a substantial  
21 part of the day engaged in pursuits involving the performance of exertional or non-  
22 exertional functions, the ALJ may find these activities inconsistent with the  
23 reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina v. Astrue*, 674 F.3d  
24 1104, 1113 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§  
25 404.1502(a), 416.902(a). “While a claimant need not vegetate in a dark room in  
26 order to be eligible for benefits, the ALJ may discount a claimant’s symptom  
27 claims when the claimant reports participation in everyday activities indicating  
28

1 capacities that are transferable to a work setting” or when activities “contradict  
2 claims of a totally debilitating impairment.” *Molina*, 674 F.3d at 1112-13.

3 Here, the ALJ noted “by 2020 Plaintiff reported recent cortisone injections  
4 last week resulted in ‘good improvement,’ and he had ‘been doing things around  
5 the house about two hours a day or so.” Tr. 23 (citing Tr. 633). It is well-  
6 established that a claimant need not be “utterly incapacitated” to be eligible for  
7 benefits. *Fair*, 885 F.2d at 603. The Court also cannot affirm the ALJ’s credibility  
8 decision based on evidence that the ALJ did not discuss. *Connett v. Barnhart*, 340  
9 F.3d 871, 874 (9th Cir. 2003). Here, while the ALJ mentions Plaintiff had been  
10 doing some things around the house, the ALJ failed to provide any examples of  
11 household or other activities Plaintiff performed and this fact is briefly noted  
12 without any discussion of how it was considered in the disability analysis. *See* Tr.  
13 19-25. Reviewing the decision as a whole, there is also no discussion or analysis  
14 of how Plaintiff’s activities factored into the ALJ’s rejection of Plaintiff’s  
15 symptom reports, and such general findings are insufficient to undermine  
16 Plaintiff’s symptom claims. *See* Tr. 19-25.

17 At the hearing Plaintiff testified that he could make breakfast, that he played  
18 games on a computer, and that he tried to do some housework and household  
19 projects. Tr. 50-52. He also testified, however, that he napped daily, had side  
20 effects from medication that were severe enough that he gave up driving, and that  
21 he could only stand for about 15 minutes at a time. Tr. 43, 50, 52. Without further  
22 explanation of the ALJ’s reasoning, a finding that Plaintiff’s activities were  
23 inconsistent with his symptoms claims is not supported by substantial evidence.

24 The ALJ failed to provide legally sufficient findings concerning the  
25 objective evidence, and the ALJ’s only other reason for rejective Plaintiff’s  
26 symptom complaints, that they are inconsistent with his activities, is legally  
27 insufficient. Even if the ALJ had provided adequate findings concerning the  
28 objective medical evidence, an ALJ may not discredit a claimant’s symptom



1 testimony and deny benefits solely because the degree of the symptoms alleged is  
2 not supported by objective medical evidence. *Rollins*, 261 F.3d at 856. Further, in  
3 the absence of a clear and convincing reason to discount symptom reports, the  
4 limitations in a claimant’s symptom reports must be made part of the RFC. *See*  
5 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (“[T]he ALJ failed to  
6 provide clear and convincing reasons for finding Lingenfelter’s alleged pain and  
7 symptoms not credible, and therefore was required to include these limitations in  
8 his assessment of Lingenfelter’s RFC.”).

9         The ALJ failed to provide clear and convincing reasons supported by  
10 substantial evidence to discount Plaintiff’s symptom claims. Upon remand the  
11 ALJ shall reevaluate Plaintiff’s symptom claims and their impact on each step of  
12 the sequential analysis and either incorporate them into the RFC or provide clear  
13 and convincing reasons to discount them.

14 **C. Step-three and Step-five.**

15         Plaintiff argues the ALJ also erred in failing to conduct an adequate analysis  
16 and failing to find Plaintiff disabled at step-three, and in determining Plaintiff’s  
17 RFC and relying on the vocational expert’s response to an incomplete hypothetical  
18 at step-five. ECF No. 16 at 14-16, 19-20. Having determined a remand is  
19 necessary to readdress the medical source opinions and Plaintiff’s subjective  
20 complaints, the Court declines to reach the other issues. *See Hiler v. Astrue*, 687  
21 F.3d 1208, 1212 (9th Cir. 2012) (“Because we remand the case to the ALJ for the  
22 reasons stated, we decline to reach [plaintiff’s] alternative ground for remand.”).

23         Upon remand, the ALJ is instructed to perform the sequential analysis anew,  
24 including reconsidering the step-three and step-five analysis.

25 **CONCLUSION**

26         Plaintiff argues the decision should be reversed and remanded for the  
27 payment of benefits. ECF No. 19 at 20. The Court has the discretion to remand  
28 the case for additional evidence and findings or to award benefits. *Smolen*, 80 F.3d

1 at 1292. The Court may award benefits if the record is fully developed and further  
2 administrative proceedings would serve no useful purpose. *Id.* Remand is  
3 appropriate when additional administrative proceedings could remedy defects.  
4 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). The Court will also not  
5 remand for immediate payment of benefits if “the record as a whole creates serious  
6 doubt that a claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

7 Here, it is not clear that the ALJ would be required to find Plaintiff disabled,  
8 or disabled through the entire period at issue, if all the evidence were properly  
9 evaluated. The Court finds that further proceedings are necessary for the ALJ to  
10 reconsider the medical evidence, including conflicting medical opinion evidence,  
11 reevaluate Plaintiff’s symptom claims, as well as to further develop the record and  
12 perform the five-step sequential evaluation anew. For these reasons, the Court  
13 remands this case for further administrative proceedings.

14 The ALJ’s decision is not supported by substantial evidence and not free of  
15 harmful legal error. On remand, the ALJ shall order a physical consultative  
16 examination and obtain all updated medical evidence. The ALJ shall reevaluate the  
17 medical evidence of record with the assistance of medical expert testimony,  
18 making new findings on each of the five steps of the sequential evaluation process,  
19 take the testimony of a vocational expert, and issue a new decision. The ALJ shall  
20 reassess all medical opinion evidence using the factors required by the regulations,  
21 and shall also reassess plaintiff’s subjective complaints, taking into consideration  
22 any other evidence or testimony relevant to Plaintiff’s disability claim.

23 Accordingly, **IT IS ORDERED:**

24 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 19**, is  
25 **GRANTED.**

26 2. Defendant’s Motion for Summary Judgment, **ECF No. 21**, is  
27 **DENIED.**

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

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

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

7  
8           DATED January 31, 2023.



*Alexander C. Ekstrom*

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE

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