

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

May 31, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES H.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:18-CV-05074-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 12, 15.¹ Attorney Nicholas David Jordan represents James H. (Plaintiff); Special Assistant United States Attorney Summer Stinson 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 the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary

¹The Court reviewed Plaintiff's Reply brief. ECF No. 16. While the heading of the brief matches this case's number and the names of the parties, the body of the brief concerns an individual and impairments other than those dealt with in this case. Therefore, it was not considered in rendering this decision.

1 Judgment; and **REMANDS** the matter to the Commissioner for additional
2 proceedings pursuant to 42 U.S.C. §§ 405(g), 1383(c).

3 **JURISDICTION**

4 Plaintiff filed applications for Supplemental Security Income (SSI) and
5 Disability Insurance Benefits (DIB) on March 24, 2014, Tr. 75-76, alleging
6 disability since June 29, 2012, Tr. 200, 207, due to posttraumatic arthritis, left
7 carpal tunnel syndrome, and proximal row carpectomy, Tr. 242. The applications
8 were denied initially and upon reconsideration. Tr. 147-67. Administrative Law
9 Judge (ALJ) Eric S. Basse held a hearing on January 4, 2017 and heard testimony
10 from Plaintiff and vocational expert Kimberly S. Mullinax. Tr. 34-74. The ALJ
11 issued an unfavorable decision on March 1, 2017. Tr. 15-26. The Appeals
12 Council denied review on March 7, 2018. Tr. 1-5. The ALJ's March 1, 2017
13 decision became the final decision of the Commissioner, which is appealable to the
14 district court pursuant to 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action
15 for judicial review on April 26, 2018. ECF Nos. 1, 4.

16 **STATEMENT OF FACTS**

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

20 Plaintiff was 43 years old at the alleged onset date. Tr. 200. He completed
21 his GED in 1989. Tr. 243. His reported work history includes the jobs of
22 mechanic, welder, sawyer/builder, maintenance, housekeeping, janitor and
23 assistant manager. *Id.* When applying for benefits Plaintiff reported that he
24 stopped working on June 29, 2012 because of his conditions. Tr. 242.

25 **STANDARD OF REVIEW**

26 The ALJ is responsible for determining credibility, resolving conflicts in
27 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
28 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,

1 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
2 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
3 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
4 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
5 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
6 another way, substantial evidence is such relevant evidence as a reasonable mind
7 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
8 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
9 interpretation, the court may not substitute its judgment for that of the ALJ.
10 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
11 findings, or if conflicting evidence supports a finding of either disability or non-
12 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
13 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
14 evidence will be set aside if the proper legal standards were not applied in
15 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
16 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

17 **SEQUENTIAL EVALUATION PROCESS**

18 The Commissioner has established a five-step sequential evaluation process
19 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
20 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
21 through four, the burden of proof rests upon the claimant to establish a prima facie
22 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
23 burden is met once the claimant establishes that physical or mental impairments
24 prevent him from engaging in his previous occupations. 20 C.F.R. §§ 404.1520(a),
25 416.920(a)(4). If the claimant cannot do his past relevant work, the ALJ proceeds
26 to step five, and the burden shifts to the Commissioner to show that (1) the
27 claimant can make an adjustment to other work, and (2) the claimant can perform
28 specific jobs which exist in the national economy. *Batson v. Comm'r of Soc. Sec.*

1 Admin., 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make an
2 adjustment to other work in the national economy, he is found “disabled”. 20
3 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

4 **ADMINISTRATIVE DECISION**

5 On March 1, 2017, the ALJ issued a decision finding Plaintiff was not
6 disabled as defined in the Social Security Act from June 29, 2012 through the date
7 of the decision.

8 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
9 activity since June 29, 2012, the alleged date of onset. Tr. 17.

10 At step two, the ALJ determined that Plaintiff had the following severe
11 impairments: status-post left upper extremity fracture with degenerative joint
12 disease; asthma; obesity; left carpal tunnel syndrome; and more recent right carpal
13 tunnel syndrome status-post release. Tr. 18.

14 At step three, the ALJ found that Plaintiff did not have an impairment or
15 combination of impairments that met or medically equaled the severity of one of
16 the listed impairments. Tr. 18.

17 At step four, the ALJ assessed Plaintiff’s residual function capacity and
18 determined he had no limitations in sitting, standing, or walking, but did have the
19 following limitations:

20 He is ambidextrous and has no limitations with his right upper
21 extremity; but with his left upper extremity, the claimant can lift and
22 carry up to 10 pounds. The claimant can occasionally climb ramps and
23 stairs, stoop, and crawl. He can frequently crouch. The claimant has
24 no difficulty with balancing or kneeling. The claimant cannot climb
25 ladders, ropes, or scaffolds. The claimant is limited to frequently
26 handling and fingering with his bilateral upper extremities. The
27 claimant can occasionally feel with his left upper extremity. He should
28 avoid concentrated exposure to extreme cold and extreme heat. The
claimant should avoid even moderate exposure to vibrations or
vibrating tools. The claimant cannot have concentrated exposure to
pulmonary irritants or hazards, such as dangerous machinery and

1 unprotected heights.

2 Tr. 19. The ALJ identified Plaintiff's past relevant work as diesel mechanic and
3 found that he could not perform this past relevant work. Tr. 24-25.

4 At step five, the ALJ determined that, considering Plaintiff's age, education,
5 work experience and residual functional capacity, and based on the testimony of
6 the vocational expert, there were other jobs that exist in significant numbers in the
7 national economy Plaintiff could perform, including the jobs of parking lot
8 attendant, escort vehicle driver, telephone information clerk, storage facility rental
9 clerk, and furniture rental clerk. Tr. 26-27. The ALJ concluded Plaintiff was not
10 under a disability within the meaning of the Social Security Act from June 29,
11 2012, through the date of the ALJ's decision. Tr. 26.

12 ISSUES

13 The question presented is whether substantial evidence supports the ALJ's
14 decision denying benefits and, if so, whether that decision is based on proper legal
15 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
16 medical opinions in the record, (2) failing to properly weigh Plaintiff's symptom
17 statements, and (3) failing to make a proper step five determination.

18 DISCUSSION²

19 1. Medical Opinions

20 Plaintiff argues that the ALJ failed to properly consider and weigh the
21

22 ²In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held
23 that ALJs of the Securities and Exchange Commission are "Officers of the United
24 States" and thus subject to the Appointments Clause. To the extent *Lucia* applies
25 to Social Security ALJs, the parties have forfeited the issue by failing to raise it in
26 their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161
27 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not
28 specifically addressed in an appellant's opening brief).

1 medical opinions expressed by James R. Kopp, M.D., Jean You, M.D., Daniel
2 Brzusek, D.O., and Eric Person, PA-C. ECF No. 12 at 11-13. Additionally,
3 Plaintiff argues that the ALJ erred by failing to identify any medical opinion which
4 he gave significant weight. *Id.* at 13.

5 In weighing medical source opinions, the ALJ should distinguish between
6 three different types of physicians: (1) treating physicians, who actually treat the
7 claimant; (2) examining physicians, who examine but do not treat the claimant;
8 and, (3) nonexamining physicians who neither treat nor examine the claimant.
9 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
10 weight to the opinion of a treating physician than to the opinion of an examining
11 physician and more weight to the opinion of an examining physician than to the
12 opinion of a nonexamining physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir.
13 2007). When a treating or examining physician's opinion is not contradicted by
14 another physician, the ALJ may reject the opinion only for "clear and convincing"
15 reasons, and when a treating or examining physician's opinion is contradicted by
16 another physician, the ALJ is only required to provide "specific and legitimate
17 reasons" to reject the opinion. *Lester*, 81 F.3d at 830-31.

18 The opinions of the four providers range from 2001 through 2016. On
19 August 31, 2011, Mr. Pearson placed Plaintiff on off work status until he was
20 cleared by a specialist. Tr. 466.

21 On December 13, 2013, Dr. Kopp evaluated Plaintiff. Tr. 427-38. He
22 answered questions from the Department of Labor and Industries on April 25, 2014
23 and opined that Plaintiff had a 15% impairment in the right upper extremity and a
24 16% impairment of the left upper extremity. Tr. 439-40.

25 On April 22, 2015, Dr. You stated Plaintiff was not released to work from
26 April 22, 2015 to May 22, 2015, stating that Plaintiff's progress was slower than
27 expected. Tr. 569.

28 On June 17, 2015, Dr. You was presented with the detailed functional

1 requirements of Plaintiff's job as a diesel mechanic and agreed that Plaintiff could
2 return to this past work. Tr. 591-96. She also reviewed the detailed functional
3 requirements of the occupations of janitor, rental clerk, lube tech, and
4 welder/fabricator, and she opined that Plaintiff could perform these jobs. Tr. 597-
5 620.

6 On February 24, 2016, Dr. You signed a declaration that at the time of her
7 June 17, 2015 opinion that Plaintiff could meet the functional requirements of a
8 janitor, a rental clerk, a lube tech, and a welder/fabricator, she had not been
9 provided a copy of Plaintiff's preexisting medical records including evidence from
10 the prior left wrist injury. Tr. 738. She concurred with the May 22, 2014 physical
11 capacity evaluation from Kirk Holle, P.T. and opined that Plaintiff was
12 permanently incapable of reasonably continuous, gainful employment as a
13 welder/fabricator, janitor, cashier, rental clerk, or lube tech. Id. The May 22, 2014
14 physical capacity evaluation from Therapist Holle limited Plaintiff to sitting,
15 standing, and walking each for two hours at one time and a total of eight hours
16 throughout a day, occasionally lifting 24 pounds from floor to waist and 16 pounds
17 from weight to overhead, frequently lifting 15 pounds from floor to waist and ten
18 pounds from waist to overhead, occasionally carrying 20 pounds and frequently
19 carrying 12 pounds, occasionally pushing/pulling with 32 pounds of force,
20 frequently pushing/pulling with 20 pounds of force, frequently squatting, kneeling,
21 bending/stooping, crouching, climbing stairs, static reaching overhead without
22 weight, and operating foot controls, occasionally to frequently climbing ladders
23 and performing final manipulation, and occasionally operating hand controls. Tr.
24 470.

25 On June 16, 2016, Dr. You stated that Plaintiff may perform modified duty
26 if available on a permanent basis. Tr. 1068. She also completed a form addressing
27 Plaintiff's ability to perform work as a cashier, but the form is cutoff, and Dr.
28 You's opinion is unclear. Tr. 1069.

1 On July 11, 2016, Dr. Brzusek completed an independent medical
2 examination. Tr. 1021-40. Following a review of the medical evidence and an
3 examination, Dr. Brzusek stated that “[d]ue to limitations of use of his left upper
4 extremity, [Plaintiff] cannot perform many jobs that require bilateral hand and
5 wrist movement during a typical eight-hour work day.” Tr. 1036. He then
6 answered a series of questions specific to Plaintiff’s worker’s compensation claim,
7 including that he had an impairment rating of 30% for the left upper extremity, he
8 was unable to perform the job of diesel mechanic/welder, lube tech, and welder
9 fabricator, it was unlikely Plaintiff could perform the job of janitor, and he could
10 only perform the job of rental clerk with significant accommodations. Tr. 1037-39.

11 On October 4, 2016, Dr. Brzusek reviewed a September 20, 2016 physical
12 capacity evaluation from Therapist Holle and stated that he concurred with his
13 findings. Tr. 1063. Therapist Holle opined that Plaintiff could sit, stand, and walk
14 each for two hours at a time for a total of eight hours in a day. Tr. 1058. He
15 precluded Plaintiff for any left wrist flexion/extensions, limited Plaintiff to seldom
16 climbing ladders, crawling, and left handling/grasping, limited Plaintiff to
17 occasional left work above the shoulder, left keyboarding, and left fine
18 manipulation, and limited Plaintiff to frequent bilateral reaching forward, bilateral
19 reaching waist to shoulder, right work above the shoulders, right keyboarding,
20 right flexion/extension of the wrist, right handling/grasping, and right fine
21 manipulation. Id. He further limited Plaintiff’s lifting, carrying, pushing, and
22 pulling from between seven and fifty pounds depending on the location of the
23 object and the specified activity. Id.

24 The ALJ found that the opinions of Dr. Kopp, Dr. You, Dr. Brzusek, and
25 Mr. Pearson were rendered as part of Plaintiff’s worker’s compensation case and
26 gave them “little probative value,” and found that their conclusions were “not
27 entirely relevant with regard to the claimant’s application under the Social Security
28 Act.” Tr. 23. Plaintiff argues that rejecting an opinion because it was rendered as

1 part of a worker's compensation claim is flawed reasoning. ECF No. 12 at 12-13.
2 Defendant argues that Ninth Circuit case law supports the ALJ's rejection of the
3 opinions because they addressed matters reserved for the Commissioner. ECF No.
4 15 at 9.

5 The final determination of whether an individual is disabled is reserved to
6 the Commissioner. 20 C.F.R. §§ 404.1527(d)(1)-(2), 416.927(d)(1)-(2); see also
7 20 C.F.R. §§ 404.1527(d)(3), 416.927(d)(3) ("We will not give any special
8 significance to the source of an opinion on issues reserved to the Commissioner
9 described in paragraphs (d)(1) and (d)(2)."). The Commissioner is not bound by
10 other agencies' evaluations of disability. See 20 C.F.R. §§ 404.1504, 416.904 (a
11 determination made by another agency that a claimant is disabled is not binding on
12 Social Security). However, agency "rules provide that adjudicators must always
13 carefully consider medical source opinions about any issue, including opinions
14 about issues that are reserved to the Commissioner." S.S.R. 96-5p. This S.S.R.
15 was rescinded by Federal Register Notice Vol. 82, No. 57, page 15263 effective
16 March 27, 2017. However, on March 27, 2017, 20 C.F.R. §§ 404.1504, 416.904
17 was amended to include "we will consider all the supporting evidence underlying
18 the other governmental agency or nongovernmental entity's decision that we
19 receive as evidence in your claim in accordance with" 20 C.F.R. §§ 404.1513(a)(1)
20 through (4), 416.913(a)(1) through (4).

21 While the S.S.R. was rescinded and the Regulations were changed after the
22 ALJ's March 1, 2017 decision, the intent of the agency has not changed. The ALJ
23 is not required to adopt the determination of another agency regarding disability,
24 but he cannot overlook the medical opinions or medical evidence that underlies
25 these disability determinations. 20 C.F.R. §§ 404.1527(c), 416.927(c) (the
26 regulations require every medical opinion to be evaluated, regardless of its source).
27 Furthermore, the purpose for which medical reports are prepared does not provide
28 a legitimate basis for rejecting them. Lester, 81 F.3d at 832. Therefore, the ALJ

1 erred to the extent that he rejected medical evidence or medical opinions simply
2 because they were made as part of a worker's compensation determination.
3 However, the ALJ did not err in rejecting the ultimate determinations of disability.

4 Here, the ALJ failed to provide a legally sufficient reason for rejecting the
5 underlying opinions regarding functional capacity. This was an error. Therefore,
6 the case is remanded for the ALJ to make a new determination addressing the
7 underlying opinions of the medical providers, not just their worker's compensation
8 ratings.

9 **2. Plaintiff's Symptom Statements**

10 Plaintiff contests the ALJ's determination that Plaintiff's symptom
11 statements were unreliable. ECF No. 12 at 7-11.

12 The evaluation of a claimant's symptom statements and their resulting
13 limitations relies, in part, on the assessment of the medical evidence. See 20
14 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, in light of the case
15 being remanded for the ALJ to readdress the medical source opinions from four
16 providers over the course of five years, a new assessment of Plaintiff's subjective
17 symptom statements will be necessary.

18 **3. Step 5**

19 Plaintiff argues that the ALJ presented an incomplete hypothetical to the
20 vocational expert as a result of failing to properly weigh the medical opinions and
21 Plaintiff's symptom statements. ECF No. 12 at 13-15. Because the Court is
22 remanding the case for the ALJ to properly address the medical opinions in the file
23 and to readdress Plaintiff's symptom statements, the ALJ will also make a new
24 residual functional capacity determination, which will require a new step four and
25 a new step five determination.

26 **CONCLUSION**

27 Accordingly, **IT IS ORDERED:**

28 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is

1 **DENIED.**

2 2. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is
3 **GRANTED, in part**, and the matter is **REMANDED** for additional proceedings
4 consistent with this Order.

5 3. Application for attorney fees may be filed by separate motion.

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

9 DATED May 31, 2019.

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

12 JOHN T. RODGERS
13 UNITED STATES MAGISTRATE JUDGE
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