

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

Jun 10, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONALD H.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No.4:18-CV-05107-JTR

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

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 12, 16. Attorney David L. Lybbert represents Donald H. (Plaintiff); Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 5. 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 Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Supplemental Security Income on January 13, 2014, alleging disability since January 1, 2010,¹ based on ADHD, head

¹ Plaintiff later amended his alleged onset date to the protected filing date. Tr. 58.

1 injuries, memory problems, seizures, and body pain. Tr. 87, 222. The application
2 was denied initially and upon reconsideration. Tr. 122-29, 133-38. Administrative
3 Law Judge (ALJ) Caroline Siderius held a hearing on April 20, 2017, Tr. 55-85,
4 and issued an unfavorable decision on September 8, 2017, Tr. 21-34. Plaintiff
5 requested review from the Appeals Council. Tr. 198, 327-31. The Appeals
6 Council denied Plaintiff's request for review on May 14, 2018. Tr. 1-5. The
7 ALJ's September 2017 decision thus became the final decision of the
8 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
9 405(g). Plaintiff filed this action for judicial review on June 27, 2018. ECF No. 1.

10 **STATEMENT OF FACTS**

11 Plaintiff was born in 1967 and was 46 years old as of the filing date of his
12 application. Tr. 32. He dropped out of high school in the 11th grade to join the
13 military, and later obtained his GED and college certificates in information
14 technology and job psychology, and was working on his Bachelor's degree in
15 graphic design. Tr. 395, 432, 445, 733-34, 747. He had a limited work history,
16 primarily working in construction. Tr. 431-32, 445, 733, 747.

17 Plaintiff has suffered numerous head injuries and has complained of memory
18 problems for years. Tr. 343, 431, 444, 746. Following a head injury in December
19 2013, which resulted in a two week hospitalization for a brain bleed, Tr. 623-24,
20 he alleged worsening of his memory issues, and developed seizures, Tr. 693, 705,
21 733-35, 746.

22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
25 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, with
26 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
28 only if it is not supported by substantial evidence or if it is based on legal error.

1 Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
2 defined as being more than a mere scintilla, but less than a preponderance. Id. at
3 1098. Put another way, substantial evidence is such relevant evidence as a
4 reasonable mind might accept as adequate to support a conclusion. Richardson v.
5 Perales, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
6 rational interpretation, the Court may not substitute its judgment for that of the
7 ALJ. Tackett, 180 F.3d at 1097; Morgan v. Commissioner of Social Sec. Admin.,
8 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
9 administrative findings, or if conflicting evidence supports a finding of either
10 disability or non-disability, the ALJ's determination is conclusive. Sprague v.
11 Bowen, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
12 supported by substantial evidence will be set aside if the proper legal standards
13 were not applied in weighing the evidence and making the decision. Brawner v.
14 Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1988).

15 **SEQUENTIAL EVALUATION PROCESS**

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
18 416.920(a); Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987). In steps one through
19 four, the burden of proof rests upon the claimant to establish a prima facie case of
20 entitlement to disability benefits. Tackett, 180 F.3d at 1098-1099. This burden is
21 met once a claimant establishes that a physical or mental impairment prevents the
22 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
23 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
24 to step five, and the burden shifts to the Commissioner to show that (1) the
25 claimant can make an adjustment to other work; and (2) the claimant can perform
26 specific jobs which exist in the national economy. Batson v. Commissioner of
27 Social Sec. Admin., 359 F.3d 1190, 1193-1194 (2004). If a claimant cannot make
28

1 an adjustment to other work in the national economy, the claimant will be found
2 disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

3 **ADMINISTRATIVE DECISION**

4 On September 8, 2017, the ALJ issued a decision finding Plaintiff was not
5 disabled as defined in the Social Security Act.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
7 activity since January 13, 2014, the protected filing date. Tr. 23.

8 At step two, the ALJ determined Plaintiff had the following severe
9 impairments: seizures, degenerative disc disease, mild cognitive impairment with
10 memory loss, personality disorder, ADHD by history, and history of IV
11 meth/cocaine and cannabis dependence. Id.

12 At step three, the ALJ found Plaintiff did not have an impairment or
13 combination of impairments that met or medically equaled the severity of one of
14 the listed impairments. Tr. 26-27.

15 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
16 Plaintiff could perform work at the light exertional level with the following
17 additional limitations:

18 The claimant has the residual functional capacity to perform light
19 work as defined in 20 CFR 416.967(b) that involves lifting no more
20 than 30 pounds occasionally and 15 pounds frequently. He could not
21 climb ladders, ropes, or scaffolds and never work at unprotected
22 heights or operate heavy machinery or equipment. He is capable of
23 sitting up to 6 hours a day. He could stand and walk up to 4 hours a
24 day. He is capable of occasional overhead reaching, with occasional
25 kneeling, crouching, and crawling. He is limited to simple, routine
26 and predictable tasks. He could have superficial contact with the
27 general public and occasional contact with coworkers, but would work
28 best independently and working with things rather than people.

Tr. 27.

At step four, the ALJ found Plaintiff had no past relevant work. Tr. 32.

1 At step five, the ALJ determined that, based on the testimony of the
2 vocational expert, and considering Plaintiff's age, education, work experience, and
3 RFC, Plaintiff was capable of performing other work that existed in significant
4 numbers in the national economy, including the jobs of production assembler,
5 inspector/hand packager, and cleaner/polisher. Tr. 32-33.

6 The ALJ thus concluded Plaintiff was not under a disability within the
7 meaning of the Social Security Act at any time from January 13, 2014, the
8 protected filing date, through the date of the ALJ's decision, September 8, 2017.
9 Tr. 34.

10 ISSUES

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

14 Plaintiff contends the ALJ erred by (1) improperly rejecting medical opinion
15 evidence; (2) improperly rejecting Plaintiff's symptom testimony; and (3) making
16 step five findings that are not supported by substantial evidence.²

17 DISCUSSION

18 1. Medical opinion evidence

19 _____
20 ² Plaintiff also asserts within his other arguments that the ALJ erred by not
21 obtaining a post-hearing consultative examination once Plaintiff was released from
22 prison. ECF No. 12 at 2, 4, 8. Plaintiff has failed to offer any legal arguments in
23 support of this position and did not brief the issue with any specificity. The Ninth
24 Circuit has repeatedly admonished that the court will not "manufacture arguments
25 for an appellant" and therefore will not consider claims that were not actually
26 argued in appellant's opening brief. *Greenwood v. Fed. Aviation Admin.*, 28 F.3d
27 971, 977 (9th Cir. 1994). Because Plaintiff failed to provide adequate briefing, the
28 court declines to consider this issue.

1 Plaintiff asserts the ALJ erred by improperly evaluating the opinion
2 evidence from Drs. Clayton, Hipolito, Moon, Barnard, and Orr. ECF No. 12 at 11-
3 16.

4 In a disability proceeding, the courts distinguish among the opinions of three
5 types of acceptable medical sources: treating physicians, physicians who examine
6 but do not treat the claimant, and those who neither examine nor treat the claimant.
7 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion
8 generally carries more weight than an examining physician's opinion, and an
9 examining physician's opinion is given more weight than that of a nonexamining
10 physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d
11 at 830.

12 In weighing the medical opinion evidence, an ALJ must make findings
13 setting forth specific, legitimate reasons for the assessment that are based on
14 substantial evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
15 Cir. 1989). The ALJ must also set forth the reasoning behind his or her decisions
16 in a way that allows for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d
17 487, 492 (9th Cir. 2015) (finding a clear statement of the agency's reasoning is
18 necessary because the Court can affirm the ALJ's decision to deny benefits only on
19 the grounds invoked by the ALJ).

20 A. Dr. Clayton

21 Plaintiff argues the ALJ erred in rejecting some of the limitations
22 recommended by Dr. Sally Clayton, the medical expert who testified at the
23 hearing. ECF No. 12 at 14-16.

24 At the hearing, Dr. Clayton testified Plaintiff's predominant issues were his
25 neurocognitive disorder, his personality disorder, and his history of substance use.
26 Tr. 60-61. She found him to be moderately limited in understanding,
27 remembering, or applying information; moderate to markedly limited in interacting
28 with others; moderately limited in maintaining concentration, persistence, and

1 pace; and moderately limited in his ability to adapt and manage himself. Tr. 63-64.
2 In terms of work functioning, she agreed that Plaintiff would need written
3 instructions and reminders, and she suggested understanding supervision because
4 of his difficulties in social functioning, noting this to mean “not too authoritarian in
5 terms of supervision, but somebody who can be kind of negotiating low key with
6 him.” Tr. 64-65. She further agreed that there was some potential for Plaintiff to
7 not respond well to criticism, to be distracted, and to have some difficulty with
8 impulse control, though she did not quantify these problems. Tr. 65.

9 The ALJ gave this testimony significant weight, based on Dr. Clayton’s
10 specialized expertise and knowledge of Social Security, along with her opportunity
11 to review the longitudinal record and the consistency of her testimony with other
12 opinions contained in the file. Tr. 30-31.

13 Though an ALJ need not discuss all evidence presented, she must explain
14 why “significant probative evidence has been rejected.” *Vincent v. Heckler*, 739
15 F.3d 1393, 1394-95 (9th Cir. 1984); see also 20 C.F.R. 416.945(a)(3) (“We will
16 assess your residual functional capacity based on all of the relevant medical and
17 other evidence.”). The ALJ failed to include in the RFC any limitations to account
18 for Dr. Clayton’s recommended limitations regarding supervisors. Tr. 27. Though
19 the RFC includes limitations on interactions with coworkers and the public, and
20 notes Plaintiff would work best independently, there is no element of the RFC
21 addressing the nature of supervision, as Dr. Clayton recommended. *Id.* The ALJ’s
22 summary of Dr. Clayton’s testimony omits any reference to her recommendation
23 that Plaintiff have an understanding supervisor who would not be authoritarian in
24 terms of supervision. The ALJ offered no explanation for omitting this limitation
25 from the RFC. Tr. 31.

26 This was not a harmless omission. The Vocational Expert testified that there
27 was no way to assess what a supervisor’s temperament would be, as it is
28 subjective, and that a need for a tolerant supervisor would be an accommodation in

1 the workplace. Tr. 83. Therefore, Dr. Clayton's testimony regarding the nature of
2 supervision Plaintiff required was relevant testimony that the ALJ must address on
3 remand.

4 Plaintiff also asserts the ALJ erred in the discussion of Dr. Clayton's opinion
5 by omitting additional limitations from the RFC, and improperly attributing them
6 to Plaintiff's substance use. ECF No. 12 at 14-15. It is unclear to which
7 limitations Plaintiff was referring. Presumably Plaintiff was referencing the ALJ's
8 discussion at step five as to why she declined to include limitations regarding
9 inability to persist and interact appropriately with others for significant portions of
10 the day. Tr. 33. However, Dr. Clayton never endorsed or quantified any specific
11 limitations or percentages of time that she believed Plaintiff would experience such
12 difficulties. Tr. 65-66. Therefore, there was no rejection of any particular
13 probative evidence in this regard.

14 B. Drs. Hipolito, Barnard, and Moon

15 Plaintiff argues the ALJ erred in her discussion of opinions from Dr.
16 Hipolito (a treating source) and Drs. Barnard and Moon (examining sources). ECF
17 No. 12-13. Plaintiff asserts the ALJ improperly resorted to consideration of non-
18 examining medical sources to find contradiction and reject these opinions. *Id.*
19 Plaintiff fails to address any of the ALJ's stated rationale for assigning minimal
20 weight to Dr. Hipolito and Dr. Barnard's opinions.

21 Dr. Hipolito completed a Department of Social and Health Services form,
22 asserting Plaintiff was unable to meet the demands of even sedentary work. Tr.
23 754. The ALJ assigned this opinion little weight, finding it inconsistent with the
24 largely normal findings on exam and Plaintiff's extensive activities of daily living,
25 and unsupported by contradictory reports of his seizure activity. Tr. 30. These are
26 all specific and legitimate bases upon which the ALJ was entitled to rely in
27 evaluating the reliability of Dr. Hipolito's opinion. See *Valentine v. Comm'r of*
28 *Soc. Sec. Admin.*, 574 F.3d 685, 692-93 (9th Cir.2009) (holding that a conflict with

1 treatment notes is a specific and legitimate reason to reject treating a physician’s
2 opinion); *Trevizo v. Berryhill*, 871 F.3d 664, 676 (9th Cir. 2017) (indicating details
3 of daily activities inconsistent with opinion evidence is a relevant factor for ALJs
4 to consider). Plaintiff has offered no argument for why any of these reasons were
5 inaccurate. The Court finds the ALJ gave specific and legitimate reasons for
6 discounting Dr. Hipolito’s opinion.

7 Similarly, in discussing the disabling mental limitations opined by Dr.
8 Barnard, the ALJ gave the opinion no significant weight for several reasons,
9 including lack of confirmation of the ADHD diagnosis, the contradictory evidence
10 regarding seizure activity (a subject outside of Dr. Barnard’s specialty), and
11 Plaintiff’s ongoing substance use, including smoking marijuana the day of Dr.
12 Barnard’s exam, which two other doctors indicated could have impacted the testing
13 results. Tr. 31-32. These are all specific and legitimate bases for assigning less
14 weight to the opinion, none of which Plaintiff challenged. The Court finds no error
15 in the ALJ’s discussion.

16 With respect to Dr. Moon’s opinion, Plaintiff’s argument that the ALJ
17 resorted to non-examining sources in rejecting this opinion is incorrect, as the ALJ
18 offered no discussion or analysis of Dr. Moon’s opinion at all. Defendant asserts
19 this was harmless error, as the findings were largely unremarkable and Plaintiff
20 had used methamphetamine earlier in the day of the evaluation, and thus Dr.
21 Moon’s opined limitations were not supported by his own evaluation or by
22 substantial evidence of record. ECF No. 16 at 15. Defendant’s argument is post
23 hoc rationale that the ALJ did not offer, and thus will not be considered by the
24 Court. See *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The Court will
25 “review only the reasons provided by the ALJ in the disability determination and
26 may not affirm the ALJ on a ground upon which he did not rely.”). As this claim
27 is being remanded for reconsideration of Dr. Clayton’s testimony, the ALJ shall
28

1 also evaluate the probative value of Dr. Moon’s opinion in context with the rest of
2 the medical evidence.³

3 C. Dr. Orr

4 Plaintiff argues the ALJ failed to explicitly reject Dr. Orr’s assessed mental
5 restrictions, stating the ALJ only discussed the findings. ECF No. 13-14. Dr. Orr
6 administered a clinical interview and objective testing and offered a medical source
7 statement. Tr. 731-37. The ALJ summarized the report in her decision and
8 assigned it significant weight. Tr. 31. Plaintiff identifies no specific limitations
9 that the ALJ omitted. The Court finds no error in the ALJ’s discussion of Dr. Orr’s
10 opinion.

11 **2. Plaintiff’s subjective complaints**

12 Plaintiff contends the ALJ erred by improperly rejecting his subjective
13 complaints. ECF No. 12 at 16-19.

14 It is the province of the ALJ to make credibility determinations. *Andrews v.*
15 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ’s findings must be
16 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
17 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ’s reasons for
18 rejecting the claimant’s testimony must be “specific, clear and convincing.”
19 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d
20 821, 834 (9th Cir. 1996). “General findings are insufficient: rather the ALJ must
21 identify what testimony is not credible and what evidence undermines the
22 claimant’s complaints.” *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,
23 918 (9th Cir. 1993).

24
25 ³ The Court notes that Dr. Moon’s opinion was completed prior to Plaintiff’s
26 December 2013 head injury and the relevant period in this claim. These are
27 additional factors the ALJ may consider in assessing the probative value of the
28 opinion.

1 The ALJ concluded Plaintiff's medically determinable impairments could
2 reasonably be expected to cause his alleged symptoms; however, the ALJ found
3 Plaintiff's assertion of total disability was not supported by the weight of the
4 evidence. Tr. 28. Specifically, the ALJ noted the following factors in support of
5 her findings: (1) mental status examinations were largely normal; (2) Plaintiff
6 sought no specific mental health treatment; (3) the record contained conflicting
7 statements regarding Plaintiff's seizures; (4) physical exams were largely benign;
8 (5) Plaintiff's activities of daily living were not supportive of his allegation of
9 disability; (6) Plaintiff had not worked in the last 15 years; and (7) Plaintiff had a
10 significant history of substance abuse. Tr. 28-29.

11 Plaintiff asserts the ALJ cherry picked facts that are inconsistent with the
12 record as a whole, and improperly relied on daily activities that do not consume a
13 substantial part of Plaintiff's day. ECF No. 12 at 16-19.

14 Plaintiff failed to identify with any specificity what portions of the ALJ's
15 evaluation of the medical evidence was "cherry picked" or what evidence was
16 omitted from the ALJ's discussion. The Court finds the ALJ did not err in finding
17 the objective physical and mental status exams to be unresponsive of Plaintiff's
18 allegations of disabling limits. With respect to physical problems, the ALJ is
19 correct that, other than evidence of a hernia and some mildly reduced range of
20 motion and pain in the spine, physical exams have been largely benign. Tr. 440-
21 41, 695-96, 707, 719-20, 803, 825, 832-33. The ALJ is also correct that most
22 mental status exams have been within normal limits, other than some evidence of
23 memory impairment. Tr. 456, 707-08, 712, 720, 832-33. An ALJ may cite
24 inconsistencies between a claimant's testimony and the objective medical evidence
25 in discounting the claimant's symptom statements. *Bray v. Comm'r of Soc. Sec.*
26 *Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009); see also *Rollins v. Massanari*, 261
27 F.3d 853, 857 (9th Cir. 2001) (Although it cannot serve as the sole ground for
28

1 rejecting a claimant’s testimony, objective medical evidence is a “relevant factor in
2 determining the severity of the claimant’s pain and its disabling effects.”).

3 Plaintiff also challenges the ALJ’s use of his activities in finding his
4 allegations to be unreliable. ECF No. 12 at 17-19. Plaintiff asserts none of the
5 activities identified by the ALJ take up a substantial portion of his day or are
6 transferrable to a work environment. *Id.* at 18. A claimant’s daily activities may
7 support an adverse credibility finding if the claimant’s activities contradict his
8 other testimony. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). The ALJ’s
9 interpretation of Plaintiff’s reported activities as inconsistent with his allegations of
10 disabling physical and mental limitations is rational and supported by substantial
11 evidence.

12 Plaintiff offers no further challenge to any of the ALJ’s other stated reasons
13 for her findings regarding Plaintiff’s allegations. The Court acknowledges that
14 unexplained or inadequately explained reasons for failing to seek medical
15 treatment can cast doubt on a claimant’s subjective complaints. *Fair v. Bowen*,
16 885 F.2d 597, 603 (9th Cir. 1989). Furthermore, inconsistent statements by a
17 claimant is a relevant factor for an ALJ to consider in assessing the reliability of a
18 claimant’s allegations. *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).
19 Finally, the Ninth Circuit has found that a poor work history can support a
20 rejection of a claimant’s symptom statements. See *Thomas v. Barnhart*, 278 F.3d
21 947, 959 (9th Cir. 2002) (An ALJ’s finding that the claimant had limited work
22 history and “ha[d] shown little propensity to work in her lifetime” was a specific,
23 clear, and convincing reason for discounting the claimant’s testimony.). The Court
24 finds the ALJ offered clear and convincing reasons for finding Plaintiff’s
25 subjective statements to be inconsistent with the record.

26 **3. Step 5 findings**

27 Plaintiff asserts that an ALJ errs in the step five determination when the
28 testimony of a vocational expert is premised on an incomplete hypothetical

1 2. Defendant’s Motion for Summary Judgment, **ECF No. 16**, is
2 **DENIED.**

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

5 4. An 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 and
8 the file shall be **CLOSED.**

9 **IT IS SO ORDERED.**

10 DATED June 10, 2019.

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

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE