

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

Sep 25, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MATTHEW S.,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

No. 4:18-CV-05115-RHW

**ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

Before the Court are the parties’ cross-motions for summary judgment, ECF Nos. 11 & 14. Plaintiff brings this action seeking judicial review, pursuant to 42 U.S.C. § 405(g), of the Commissioner’s final decision, which denied his

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<sup>1</sup>Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 applications for Disability Insurance Benefits under Title II of the Social Security  
2 Act, 42 U.S.C § 401-434, and for Supplemental Security Income under Title XVI  
3 of the Act, 42 U.S.C § 1381-1383F. After reviewing the administrative record and  
4 briefs filed by the parties, the Court is now fully informed. For the reasons set forth  
5 below, the Court **GRANTS** Defendant’s Motion for Summary Judgment and  
6 **DENIES** Plaintiff’s Motion for Summary Judgment.

### 7 **I. Jurisdiction**

8 Plaintiff filed his applications for Disability Insurance Benefits and  
9 Supplemental Security Income on July 16, 2014. AR 105-06. His alleged onset  
10 date of disability is April 1, 2014. AR 212. Plaintiff’s applications were initially  
11 denied on October 13, 2014, AR 149-54, and on reconsideration on February 12,  
12 2015, AR 157-61.

13 A hearing with Administrative Law Judge (“ALJ”) Marie Palachuk occurred  
14 on April 13, 2017. AR 62-104. On May 26, 2017, the ALJ issued a decision  
15 finding Plaintiff ineligible for disability benefits. AR 19-35. The Appeals Council  
16 denied Plaintiff’s request for review on May 14, 2018, AR 1-5, making the ALJ’s  
17 ruling the “final decision” of the Commissioner.

18 Plaintiff timely filed the present action challenging the denial of benefits on  
19 July 10, 2018. ECF No. 1. Accordingly, Plaintiff’s claims are properly before this  
20 Court pursuant to 42 U.S.C. § 405(g).



1 Step two asks whether the claimant has a severe impairment, or combination  
2 of impairments, that significantly limits the claimant’s physical or mental ability to  
3 do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). A severe  
4 impairment is one that has lasted or is expected to last for at least twelve months,  
5 and must be proven by objective medical evidence. 20 C.F.R. §§ 404.1509,  
6 416.909. If the claimant does not have a severe impairment, or combination of  
7 impairments, the disability claim is denied, and no further evaluative steps are  
8 required. Otherwise, the evaluation proceeds to the third step.

9 Step three involves a determination of whether any of the claimant’s severe  
10 impairments “meets or equals” one of the listed impairments acknowledged by the  
11 Commissioner to be sufficiently severe as to preclude substantial gainful activity.  
12 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926; 20  
13 C.F.R. § 404 Subpt. P. App. 1 (“the Listings”). If the impairment meets or equals  
14 one of the listed impairments, the claimant is *per se* disabled and qualifies for  
15 benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to the  
16 fourth step.

17 Step four examines whether the claimant’s residual functional capacity  
18 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f),  
19 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant is  
20 not entitled to disability benefits and the inquiry ends. *Id.*

1 Step five shifts the burden to the Commissioner to prove that the claimant is  
2 able to perform other work in the national economy, taking into account the  
3 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1520(g),  
4 404.1560(c), 416.920(g), 416.960(c). To meet this burden, the Commissioner must  
5 establish that (1) the claimant is capable of performing other work; and (2) such  
6 work exists in "significant numbers in the national economy." 20 C.F.R. §  
7 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 388-89 (9th Cir. 2012).

### 8 III. Standard of Review

9 A district court's review of a final decision of the Commissioner is governed  
10 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the  
11 Commissioner's decision will be disturbed "only if it is not supported by  
12 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
13 1158-59 (9th Cir. 2012) (citing § 405(g)). Substantial evidence means "more than a  
14 mere scintilla but less than a preponderance; it is such relevant evidence as a  
15 reasonable mind might accept as adequate to support a conclusion." *Sandgathe v.*  
16 *Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (quoting *Andrews v. Shalala*, 53 F.3d  
17 1035, 1039 (9th Cir. 1995)) (internal quotation marks omitted). In determining  
18 whether the Commissioner's findings are supported by substantial evidence, "a  
19 reviewing court must consider the entire record as a whole and may not affirm  
20 simply by isolating a specific quantum of supporting evidence." *Robbins v. Soc.*

1 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (quoting *Hammock v. Bowen*, 879  
2 F.2d 498, 501 (9th Cir. 1989)).

3 In reviewing a denial of benefits, a district court may not substitute its  
4 judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.  
5 1992). If the evidence in the record “is susceptible to more than one rational  
6 interpretation, [the court] must uphold the ALJ’s findings if they are supported by  
7 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,  
8 1111 (9th Cir. 2012); *see also Thomas v. Barnhart*, 278 F.3d 947, 954 (9<sup>th</sup> Cir.  
9 2002) (if the “evidence is susceptible to more than one rational interpretation, one  
10 of which supports the ALJ’s decision, the conclusion must be upheld”). Moreover,  
11 a district court “may not reverse an ALJ’s decision on account of an error that is  
12 harmless.” *Molina*, 674 F.3d at 1111. An error is harmless “where it is  
13 inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115.  
14 The burden of showing that an error is harmful generally falls upon the party  
15 appealing the ALJ’s decision. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

#### 16 **IV. Statement of Facts**

17 The facts of the case are set forth in detail in the transcript of proceedings  
18 and only briefly summarized here. Plaintiff was 30 years old at the alleged date of  
19 onset. AR 212. He completed the twelfth grade in 2003. AR 250. Plaintiff can  
20 communicate in English. AR 248. Plaintiff has past work as a laborer at an

1 employment placement agency, as a pizza deliverer, as a pizza cook, as a car  
2 washer, as a prep cook, stocking shelves, as a granite polisher, taking fees at a  
3 parking lot, and installing heaters and dehumidifiers. AR 250, 257-68.

#### 4 **V. The ALJ's Findings**

5 The ALJ determined that Plaintiff was not under a disability within the  
6 meaning of the Act from April 1, 2014, through the date of the ALJ's decision. AR  
7 35.

8 **At step one**, the ALJ found that Plaintiff had not engaged in substantial  
9 gainful activity since April 1, 2014 (citing 20 C.F.R. §§ 404.1571 *et seq.*, and  
10 416.971 *et seq.*). AR 21.

11 **At step two**, the ALJ found Plaintiff had the following severe impairments:  
12 peripheral vascular disease; obesity; major depressive disorder; generalized anxiety  
13 disorder; personality disorder; post-traumatic stress disorder; and a history of  
14 heroin abuse/dependency in sustained remission (citing 20 C.F.R. §§ 404.1520(c)  
15 and 416.920(c)). AR 21.

16 **At step three**, the ALJ found that Plaintiff did not have an impairment or  
17 combination of impairments that meets or medically equals the severity of one of  
18 the listed impairments in 20 C.F.R. § 404, Subpt. P, App. 1. AR 21.

19 **At step four**, the ALJ found Plaintiff had the residual functional capacity to  
20 perform a range of light work with the following limitations:

1 He could frequently balance, stoop, kneel, crouch, and crawl; he could  
2 occasionally climb ramps or stairs but never ladders, ropes, or  
3 scaffolds; he should avoid concentrated exposure to extreme  
4 temperatures, wetness, humidity, and vibration; he could have no more  
5 than moderate exposure to hazards; he could understand, remember,  
6 and carry out simple, routine, and repetitive tasks or instructions; he  
7 could maintain attention and concentration at a productive pace for two-  
8 hour intervals between regularly scheduled breaks; he could tolerate  
9 only simple changes in routine and only simple judgment or decision-  
10 making; he could not work at a fast-paced production rate (i.e.,  
11 assembly line-type work); he should have no interaction with the public  
12 and only superficial interaction with co-workers (i.e., non-  
13 collaborative/no tandem tasks/no teamwork); and he should deal with  
14 things rather than people.

15 AR 26.

16 The ALJ identified Plaintiff's past relevant work as car wash attendant, prep  
17 cook, fast food worker, food deliverer, parking lot attendant, and laborer, and  
18 found that he was unable to perform his past relevant work. AR 33.

19 **At step five**, the ALJ found, in light of his age, education, work experience,  
20 and residual functional capacity, there were jobs that existed in significant numbers  
in the national economy that Plaintiff could perform. AR 34. These included a  
small parts assembler and an office cleaner. AR 35.

## 21 **VI. Issues for Review**

22 Plaintiff argues that the Commissioner's decision is not free of legal error  
23 and not supported by substantial evidence. Specifically, he argues the ALJ erred  
24 by: (1) failing to properly weigh the medical opinion evidence; (2) failing to  
25 properly consider Plaintiff's mental impairments; (3) failing to properly consider



1 Plaintiff's symptom statements; and (4) failing to make a proper step five  
2 determination.

## 3 **VII. Discussion**

### 4 **A. The ALJ properly weighed the medical opinion evidence.**

5 Plaintiff challenges the weight the ALJ gave to the opinions of John Hornell,  
6 M.D., Tae-Im Moon, Ph.D., N.K. Marks, Ph.D., and Thomas Genthe, Ph.D. ECF  
7 No. 11 at 14-18.

8 The Ninth Circuit has distinguished between three classes of medical  
9 providers in defining the weight to be given to their opinions: (1) treating providers  
10 (those who actually treat the claimant); (2) examining providers (those who  
11 examine but do not treat the claimant); and (3) non-examining providers (those  
12 who neither treat nor examine the claimant). *Lester v. Chater*, 81 F.3d 821, 830  
13 (9th Cir. 1996) (as amended).

14 A treating provider's opinion is given the most weight, followed by an  
15 examining provider, and finally a non-examining provider. *Id.* at 830-31. In the  
16 absence of a contrary opinion, a treating or examining provider's opinion may not  
17 be rejected unless "clear and convincing" reasons are provided. *Id.* at 830. If a  
18 treating or examining provider's opinion is contradicted, it may be discounted for  
19 "specific and legitimate reasons that are supported by substantial evidence in the  
20 record." *Id.* at 830-31.

1 The ALJ may meet the specific and legitimate standard by “setting out a  
2 detailed and thorough summary of the facts and conflicting clinical evidence,  
3 stating his interpretation thereof, and making findings.” *Magallanes v. Bowen*, 881  
4 F.2d 747, 751 (9th Cir. 1989) (internal citation omitted). When rejecting a treating  
5 provider’s opinion on a psychological impairment, the ALJ must offer more than  
6 his or his own conclusions and explain why he or she, as opposed to the provider,  
7 is correct. *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

8 **1. John Hornell, M.D.**

9 Dr. Hornell completed three separate opinions regarding Plaintiff’s  
10 functional abilities. The first is in a December 1, 2014 letter:

11 It is my medical opinion that [Plaintiff] [c]ontinues to be unable to  
12 work. [H]e continues to have issues with chronic pain in his leg which  
13 prevent him from standing for any prolonged period. He also suffers  
from chronic anxiety and currently appears to be unable to work until  
conditions improve.

14 AR 408. The ALJ gave the portion of the opinion addressing Plaintiff’s inability to  
15 work due to chronic leg pain “little weight” because (1) the opinion offered an  
16 analysis on an issue reserved to the Commissioner, (2) it made a conclusion that  
17 required vocational expertise, (3) Dr. Hornell only visited with Plaintiff twice at  
18 the time of the opinion, and (4) Dr. Hornell’s records did not reflect any objective  
19 evidence to support his conclusion. AR 29. The ALJ gave the portion of the  
20 opinion addressing Plaintiff’s chronic anxiety “little weight” because (1) it

1 addressed an issue reserved to the Commissioner, (2) Dr. Hornell did not provide  
2 specific reasoning for his opinion, and (3) he offered the opinion after only seeing  
3 Plaintiff once. AR 31-32.

4 Dr. Hornell's second opinion is on a Physical Functional Evaluation form  
5 dated April 22, 2016. AR 946-48. He opined that Plaintiff was limited to sedentary  
6 work. AR 948. The ALJ assigned this opinion "little weight" because (1) it was  
7 inconsistent with his reported activities and (2) Dr. Hornell failed to provide  
8 objective support for his limitations. AR 30.

9 Dr. Hornell's third opinion is on a Physical Medical Source Statement form  
10 dated April 12, 2017. AR 1102-05. He limited Plaintiff to sitting for half an hour at  
11 a time for a total of four hours, standing for fifteen minutes at a time for a total of  
12 one hour, and walking for half an hour at a time for a total of one hour. AR 1002.  
13 He limited Plaintiff's lifting and carrying and provided additional postural and  
14 environmental limitations. AR 1102-04. He stated Plaintiff would need additional  
15 breaks, would likely miss work or leave early at least two to three days per month,  
16 and was precluded from production level sorting, assembly, or inspection. AR  
17 1104. He stated that the objective medical findings that supported the opinion  
18 included recurrent deep vein thrombosis bilateral lower extremities, chronic  
19 venous insufficiency, complex regional pain syndrome, and a history of carpal  
20 tunnel syndrome. *Id.* The ALJ gave this opinion "little weight" because (1) it was

1 inconsistent with Plaintiff's reported activities and (2) Dr. Hornell did not provide  
2 objective support for the opinion. AR 30.

3 In challenging the ALJ's treatment of Dr. Hornell's opinions, Plaintiff only  
4 addressed the ALJ's determination that the opinions were not supported by  
5 objective evidence. ECF No. 11 at 15-16. In doing so, the ALJ failed to address all  
6 the reasons the ALJ provided for rejecting the opinion.

7 Plaintiff's failure to argue this with more specificity essentially results in a  
8 waiver of the issue. *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155,  
9 1161 n.2 (9th Cir. 2008). The Ninth Circuit explained the necessity for providing  
10 specific arguments:

11 The art of advocacy is not one of mystery. Our adversarial system  
12 relies on the advocates to inform the discussion and raise the issues  
13 to the court. Particularly on appeal, we have held firm against  
14 considering arguments that are not briefed. But the term "brief" in  
15 the appellate context does not mean opaque nor is it an exercise in  
16 issue spotting. However much we may importune lawyers to be brief  
17 and to get to the point, we have never suggested that they skip the  
18 substance of their argument in order to do so. It is no accident that  
19 the Federal Rules of Appellate Procedure require the opening brief  
20 to contain the "appellant's contentions and the reasons for them,  
with citations to the authorities and parts of the record on which the  
appellant relies." Fed. R. App. P. 28(a)(9)(A). We require  
contentions to be accompanied by reasons.

1 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).<sup>2</sup>

2 Moreover, the Ninth Circuit has repeatedly admonished that the court will not  
3 “manufacture arguments for an appellant” and therefore will not consider claims  
4 that were not actually argued in appellant’s opening brief. *Greenwood v. Fed.*  
5 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because Plaintiff failed to  
6 provide adequate briefing, the court declines to consider this issue.

7 In his Reply, Plaintiff did address the ALJ’s finding that the opinion was  
8 inconsistent with his reported activities. ECF No. 14 at 3-4. However, as the Court  
9 in *Greenwood* stated, the Court will not consider claims not actually argued in the  
10 opening brief.

11 **2. Tae-Im Moon, Ph.D.**

12 On May 13, 2013, Dr. Moon examined Plaintiff and provided an opinion  
13 that he had a moderate limitation in eleven basic functional abilities. AR 803. The  
14 ALJ gave this opinion “little weight” because Dr. Moon evaluated Plaintiff almost  
15 a year prior to the alleged onset date. AR 31.

16 “Medical opinions that predate the alleged onset of disability are of limited  
17 relevance.” *See Carmickle*, 533 F.3d at 1165. Plaintiff alleged disability starting  
18

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19 <sup>2</sup>Under the current version of the Federal Rules of Appellate Procedure, the  
20 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

1 April 1, 2014, AR 212, almost a year after Dr. Moon's opinion. Therefore, the  
2 Court will not disturb the ALJ's treatment of Dr. Moon's opinion.

3 **3. N.K. Marks, Ph.D.**

4 On May 2, 2014, Dr. Marks completed a Psychological/Psychiatric  
5 Evaluation opining that Plaintiff had a severe limitation in two basic functional  
6 abilities, a marked limitation in four basic functional abilities, and a moderate  
7 limitation in two functional abilities. AR 390-91. The ALJ gave this opinion "little  
8 weight" because Plaintiff demonstrated a capacity to participate in the types of  
9 activities Dr. Marks believed would be markedly or severely difficult for him. AR  
10 31.

11 Plaintiff failed to address the ALJ's reason for rejecting Dr. Marks' opinion  
12 in his opening brief. ECF No. 11 at 16-19. Therefore, the Court will not consider  
13 this issue. *See Carmickle*, 533 F.3d at 1165.

14 **4. Thomas Genthe, Ph.D.**

15 Dr. Genthe completed a Psychological/Psychiatric Evaluation form opining  
16 that Plaintiff had severe limitations in two basic functional areas and marked  
17 limitations in eight basic functional areas. AR 949-53. The form is undated. AR  
18 953. The ALJ gave the opinion "little weight" because it was based on Plaintiff's  
19 uncorroborated symptoms reports. AR 32.

20 Plaintiff failed to challenge this reason in his opening brief. ECF No. 11 at

1 16-18. Therefore, the Court declines to consider the issue. *See Carmickle*, 533 F.3d  
2 at 1161 n.2.

3 **B. The ALJ did not err in the treatment of Plaintiff's mental impairments.**

4 Plaintiff argues that the ALJ failed to properly evaluate Plaintiff's mental  
5 impairments and resulting functional limitations as required by 20 C.F.R. §§  
6 404.1520a, 416.920a. ECF No. 11 at 8.

7 At steps two and three of the five-step sequential evaluation process, mental  
8 impairments are evaluated using the special psychiatric review technique. 20  
9 C.F.R. §§ 404.1520a(b)-(d), 416.920a(b)-(d). Functional limitations are determined  
10 by assessing the functional areas of how one can: (1) understand, remember, or  
11 apply information; (2) interact with others; (3) concentrate, persist, or maintain  
12 pace; and (4) adapt or manage oneself. 20 C.F.R. §§ 404.1520a(c)(3),  
13 416.920a(c)(3). After the functional limitations are determined, the ALJ  
14 determines if the severity of the impairment meets or equals a listed impairment.  
15 20 C.F.R. §§ 404.1520a(d), 416.920a(d). If the impairment does not meet or equal  
16 a listing, the ALJ must then assess the claimant's mental residual functional  
17 capacity. 20 C.F.R. §§ 404.1520a(d)(3), 416.920a(d)(3).

18 Here, the ALJ found Plaintiff had a mild limitation in understanding,  
19 remembering, or applying information, a moderate limitation in interacting with  
20 others, a moderate limitation in concentrating, persisting, or maintain pace, and a

1 mild limitation in adapting or managing oneself. AR. 23-25. While Plaintiff  
2 challenged the ALJ's determination, the challenge failed to specifically address  
3 any of the evidence the ALJ relied upon in her decision. ECF No. 11 at 8.

4 Plaintiff's argument is only a few sentences generally addressing the issue:

5 The [ALJ] has failed to properly evaluate the claimant's mental  
6 impairments. The ALJ erred in failing to evaluate the claimant's mental  
7 impairments and resulting functional limitations as required by 20  
8 C.F.R., Section 404.1520a. Instead the ALJ has made a concentrated  
9 effort to cite only the positive form the claimant's medical records,  
10 particularly with regards to mental conditions and mental impairments.

11 ECF No. 11 at 8. Additionally, Plaintiff stated that "[t]he ALJ has absolutely no  
12 support in her conclusions that the mental status exams or repeat psychological  
13 exams, failed to show the limitations described." ECF No. 11 at 8-9.

14 Plaintiff's failure to argue this with more specificity essentially results in a  
15 waiver of the issue. *See Carmickle*, 533 F.3d at 1161 n.2. Because Plaintiff failed  
16 to provide adequate briefing, the court declines to consider this issue.

17 **C. The ALJ did not err in finding Plaintiff's subjective complaints not**  
18 **entirely credible.**

19 Plaintiff argues that the ALJ erred in evaluating his credibility. ECF No. 11  
20 at 18.

An ALJ engages in a two-step analysis to determine whether a claimant's  
testimony regarding subjective symptoms is reliable. *Tommasetti v. Astrue*, 533  
F.3d 1035, 1039 (9th Cir. 2008). First, the claimant must produce objective



1 medical evidence of an underlying impairment or impairments that could  
2 reasonably be expected to produce some degree of the symptoms alleged. *Id.*  
3 Second, if the claimant meets this threshold, and there is no affirmative evidence  
4 suggesting malingering, “the ALJ can reject the claimant’s testimony about the  
5 severity of his symptoms only by offering specific, clear and convincing reasons  
6 for doing so.” *Id.*

7 In weighing a claimant’s credibility, the ALJ may consider many factors,  
8 including, “(1) ordinary techniques of credibility evaluation, such as the claimant’s  
9 reputation for lying, prior inconsistent statements concerning the symptoms, and  
10 other testimony by the claimant that appears less than candid; (2) unexplained or  
11 inadequately explained failure to seek treatment or to follow a prescribed course of  
12 treatment; and (3) the claimant’s daily activities.” *Smolen v. Chater*, 80 F.3d 1273,  
13 1284 (9th Cir. 1996). When evidence reasonably supports either confirming or  
14 reversing the ALJ’s decision, the Court may not substitute its judgment for that of  
15 the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). Here, the ALJ  
16 found that the medically determinable impairments could reasonably be expected  
17 to produce the symptoms Plaintiff alleges; however, the ALJ determined that  
18 Plaintiff’s statements of intensity, persistence, and limiting effects of the symptoms  
19 were not entirely consistent with the medical evidence and other evidence in the  
20 record. AR 27. Specifically, the ALJ provided three reasons for rejecting Plaintiff’s

1 symptom statements: (1) “the objective medical evidence does not fully support  
2 the level of limitation claimed,” AR 27; (2) the claimant’s activities are  
3 inconsistent with his alleged symptoms and limitations, AR 29, 32, 33; and (3)  
4 “The claimant’s pattern of non- or limited compliance detracts from his allegations  
5 of ongoing pain and limitation,” AR 29.

6 **1. Objective Medical Evidence**

7 The ALJ’s first reason for rejecting Plaintiff’s symptom statements, that they  
8 were not supported by the objective medical evidence, is not specific, clear and  
9 convincing.

10 An ALJ may cite inconsistencies between a claimant’s testimony and the  
11 objective medical evidence in discounting the claimant’s testimony. *Bray v.*  
12 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009). While it is a  
13 “relevant factor in determining the severity of the claimant’s pain and its disabling  
14 effects,” it cannot serve as the sole reason for rejecting a claimant’s symptom  
15 statements. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *see also*  
16 *Lester*, 81 F.3d at 834 (an ALJ may not discredit the claimant’s testimony as to  
17 subjective symptoms merely because they are unsupported by objective evidence).

18 The ALJ summarized Plaintiff’s alleged symptoms, stated that “in terms of  
19 the claimant’s alleged physical impairments and their corresponding symptoms,  
20 the objective medical evidence does not fully support the level of limitation

1 claimed,” went through a detailed review of the medical records including provider  
2 opinions, and then stated “[t]he medical records reflect improvement in the  
3 claimant’s symptoms, increased activity, and a capacity that contradicts his  
4 allegations of disability.” AR 27-33. In doing so, the ALJ failed to specifically  
5 identify which of Plaintiff’s symptom statements were undermined by specific  
6 medical evidence in the record. The Ninth Circuit has held that “general findings  
7 are insufficient; rather, the ALJ must identify what testimony is not credible and  
8 what evidence undermines the claimant’s complaints.” *Reddick v. Chater*, 157  
9 F.3d 715, 722 (9th Cir. 1998). Therefore, this reason fails to rise to the specific,  
10 clear and convincing standard.

## 11 **2. Reported Activities**

12 The ALJ’s second reason for rejecting Plaintiff’s symptom statements, that  
13 they were not supported by Plaintiff’s reported activities, is specific, clear and  
14 convincing. A claimant’s daily activities may support an adverse credibility finding  
15 if (1) the claimant’s activities contradict his other testimony, or (2) “the claimant is  
16 able to spend a substantial part of his day engaged in pursuits involving  
17 performance of physical functions that are transferable to a work setting.” *Orn v.*  
18 *Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603  
19 (9th Cir. 1989)). A claimant need not be “utterly incapacitated” to be eligible for  
20 benefits. *Fair*, 885 F.2d at 603.

1 Here, the ALJ found that Plaintiff's reported activities contradicted his  
2 allegations. First, the ALJ found that Plaintiff's reported walking, going camping,  
3 and repairing a duplex was inconsistent with his alleged inability to stand or walk  
4 for five to ten minutes. AR 29. At the hearing, Plaintiff reported that he could stand  
5 or walk for five or ten minutes before needing to get down and elevate the leg or  
6 knee. AR 88. The ALJ found this inconsistent with a June 8, 2015 treatment record  
7 in which Plaintiff appeared 30 minutes late, reporting that his friend ran out of gas  
8 and he had to walk as fast as he could to the appointment. AR 29 (*citing* AR 754).  
9 The ALJ also cited to Plaintiff's reports that in May of 2015 he was working with  
10 his cousin at a duplex doing repairs and that he had gone camping in June 2015.  
11 AR 29 (*citing* AR 752, 760). Here, the ALJ's reason is supported by substantial  
12 evidence and meets the specific, clear and convincing standard.

13 Second, the ALJ found that Plaintiff's reports that he could not leave his  
14 house in 2015 were inconsistent with his abilities to go camping, go fishing, look  
15 for jobs and volunteer opportunities, and apply to college. AR 32. Plaintiff had his  
16 medications increased in June and August of 2015. AR 760, 769. By September 2,  
17 2015, Plaintiff reported that he was avoiding leaving his place due to anxiety. AR  
18 771. However, Plaintiff reported going camping in June 2015 and in October 2015,  
19 he reported that going fishing helped him cope with his anxiety. AR 760, 780. He  
20 also reported that he was going to look for jobs or volunteer opportunities that

1 involved fishing. AR 780. By April 2016 he reported he was applying to college  
2 for computer programming. AR 976. Here, the inconsistencies are supported by  
3 substantial evidence and meets the specific, clear and convincing standard.

4 Third, the ALJ found that the “records reflect improvement in the claimant’s  
5 symptoms, increased activity, and a capacity that contradicts his allegations of  
6 disability.” AR 33. To support her finding, the ALJ pointed to Plaintiff’s  
7 involvement in a fishing club, walking to lose weight, living with his girlfriend,  
8 and working to broaden his horizons. *Id.* In doing so, the ALJ failed to state how  
9 these activities contradicted Plaintiff’s symptom statements. The Ninth Circuit has  
10 held that “general findings are insufficient; rather, the ALJ must identify what  
11 testimony is not credible and what evidence undermines the claimant’s  
12 complaints.” *Reddick*, 157 F.3d at 722. By failing to specifically identify the  
13 statements undermined by Plaintiff’s activities, the ALJ failed to meet the specific,  
14 clear and convincing standard. However, the other two examples provided by the  
15 ALJ are sufficient to uphold her determination.

### 16 **3. Lack of Treatment**

17 The ALJ’s third reason for rejecting Plaintiff’s symptom statements, that his  
18 lack of treatment detracts from his alleged pain and limitations, is specific, clear  
19 and convincing.

20 Noncompliance with medical care or unexplained or inadequately explained

1 reasons for failing to seek medical treatment cast doubt on a claimant's subjective  
2 complaints. 20 C.F.R. §§ 404.1530, 416.930; *Fair*, 885 F.2d at 603; *Macri v.*  
3 *Chater*, 93 F.3d 540, 544 (9th Cir. 1996) (finding the ALJ's decision to reject the  
4 claimant's subjective pain testimony was supported by the fact that claimant was  
5 not taking pain medication).

6 Plaintiff failed to address this reason in his briefing. ECF No. 11. Therefore,  
7 the court declines to consider this issue in detail and will not disturb the ALJ's  
8 decision. *See Carmickle*, 533 F.3d at 1161 n.2.

#### 9 **4. Malingering**

10 Defendant argues that the ALJ found Plaintiff to be malingering; therefore,  
11 Defendant argues, the ALJ was not required to meet the specific, clear and  
12 convincing standard. ECF No. 14 at 2-3. Absent affirmative evidence of  
13 malingering, the ALJ is required to provide specific, clear and convincing reasons  
14 to reject Plaintiff's symptom statements. *Tommasettie*, 533 F.3d at 1039.

15 Defendant cites to an October 2013 hospital admission in which Dr.  
16 Fontanilla characterized Plaintiff's suicidal statements as "more of an attempt to  
17 manipulate either us or the providers at the chemical dependency unit into  
18 providing him with benzodiazepines." ECF No. 14 at 3 (*citing* AR 334). However,  
19 the ALJ did not find affirmative evidence of malingering or identify this encounter  
20 with hospital staff as evidence of malingering. Therefore, this amounts to a post

1 hoc rationalization which the Court will not consider. *See Orn*, 495 F.3d at 630  
2 (the court will “review only the reasons provided by the ALJ in the disability  
3 determination and may not affirm the ALJ on a ground upon which he [or she] did  
4 not rely.”).

5 In conclusion, the ALJ provided specific, clear and convincing reasons to  
6 support her determination that Plaintiff’s symptom statements were unreliable. *See*  
7 *Carmickle*, 533 F.3d at 1163 (upholding an adverse credibility finding where the  
8 ALJ provided four reasons to discredit the claimant, two of which were invalid);  
9 *Batson v. Comm’r, Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004)  
10 (affirming a credibility finding where one of several reasons was unsupported by  
11 the record); *Tommasetti*, 533 F.3d at 1038 (an error is harmless when “it is clear  
12 from the record that the . . . error was inconsequential to the ultimate nondisability  
13 determination”).

14 **D. The ALJ did not err at step five.**

15 Plaintiff challenged the ALJ’s step five determination by asserting that the  
16 hypothetical presented to the vocational expert was incomplete because it did not  
17 account for the limitations opined by Dr. Hornell, Dr. Moon, Dr. Marks, and Dr.  
18 Genthe. ECF No. 11 at 21-23. As addressed above, the ALJ provided legally  
19 sufficient reasons for rejecting these opinions. Therefore, the ALJ did not err in her  
20 step five determination.

1 Plaintiff's heading to this argument asserts that the evidence submitted to the  
2 Appeals Council shows that the ALJ failed to meet her burden at step five. ECF  
3 No. 11 at 21. However, nothing in the body of the argument discusses evidence  
4 submitted to the Appeals Council that was not already before the ALJ. *Id.* at 21-23.  
5 Therefore, this Court will not consider the issue. *See Carmickle*, 533 F.3d at 1165.

### 6 **VIII. Conclusion**

7 Having reviewed the record and the ALJ's findings, the Court finds the  
8 ALJ's decision is supported by substantial evidence and is free from harmful legal  
9 error. Accordingly, **IT IS ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.

11 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is  
12 **GRANTED**.

13 3. Judgment shall be entered in favor of Defendant and the file shall be  
14 **CLOSED**.

15 **IT IS SO ORDERED**. The District Court Executive is directed to enter this  
16 Order, forward copies to counsel and **close the file**.

17 **DATED** this 25th day of September, 2019.

18 *s/Robert H. Whaley*  
19 ROBERT H. WHALEY  
Senior United States District Judge