

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

Jun 25, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM S.,¹

Plaintiff,

v.

ANDREW M. SAUL, THE
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 4:19-CV-5164-EFS

**ORDER DENYING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION
AND GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.²

Plaintiff William S. appeals the denial of benefits by the Administrative Law Judge (ALJ). He alleges the ALJ erred by 1) improperly weighing the medical opinions; 2) improperly determining that Plaintiff did not have a severe physical impairment; 3) discounting Plaintiff's symptom reports; 4) failing to properly consider lay

¹ To protect the privacy of the social-security Plaintiff, the Court refers to him by first name and last initial or by "Plaintiff." See LCivR 5.2(c).

² ECF Nos. 13 & 17.

1 statements; and 5) improperly assessing Plaintiff's residual functional capacity and
2 therefore relying on an incomplete hypothetical at step five. In contrast, Defendant
3 Commissioner of Social Security asks the Court to affirm the ALJ's decision finding
4 Plaintiff not disabled. After reviewing the record and relevant authority, the Court
5 denies Plaintiff's Motion for Summary Judgment, ECF No. 13, and grants the
6 Commissioner's Motion for Summary Judgment, ECF No. 17.

7 I. Five-Step Disability Determination

8 A five-step sequential evaluation process is used to determine whether an
9 adult claimant is disabled.³ Step one assesses whether the claimant is currently
10 engaged in substantial gainful activity.⁴ If the claimant is engaged in substantial
11 gainful activity, benefits are denied.⁵ If not, the disability-evaluation proceeds to
12 step two.⁶

13 Step two assesses whether the claimant has a medically severe impairment,
14 or combination of impairments, which significantly limits the claimant's physical
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19 ³ 20 C.F.R. § 416.920(a).

20 ⁴ *Id.* § 416.920(a)(4)(i).

21 ⁵ *Id.* § 416.920(b).

22 ⁶ *Id.*

1 or mental ability to do basic work activities.⁷ If the claimant does not, benefits are
2 denied.⁸ If the claimant does, the disability-evaluation proceeds to step three.⁹

3 Step three compares the claimant's impairment(s) to several recognized by
4 the Commissioner to be so severe as to preclude substantial gainful activity.¹⁰ If an
5 impairment meets or equals one of the listed impairments, the claimant is
6 conclusively presumed to be disabled.¹¹ If an impairment does not, the disability-
7 evaluation proceeds to step four.

8 Step four assesses whether an impairment prevents the claimant from
9 performing work he performed in the past by determining the claimant's residual
10 functional capacity (RFC).¹² If the claimant is able to perform prior work, benefits
11 are denied.¹³ If the claimant cannot perform prior work, the disability-evaluation
12 proceeds to step five.

13 Step five, the final step, assesses whether the claimant can perform other
14 substantial gainful work—work that exists in significant numbers in the national
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16 ⁷ 20 C.F.R. § 416.920(a)(4)(ii).

17 ⁸ *Id.* § 416.920(c).

18 ⁹ *Id.*

19 ¹⁰ *Id.* § 416.920(a)(4)(iii).

20 ¹¹ *Id.* § 416.920(d).

21 ¹² *Id.* § 416.920(a)(4)(iv).

22 ¹³ *Id.*

1 economy—considering the claimant’s RFC, age, education, and work experience.¹⁴
2 If so, benefits are denied. If not, benefits are granted.¹⁵

3 The claimant has the initial burden of establishing entitlement to disability
4 benefits under steps one through four.¹⁶ At step five, the burden shifts to the
5 Commissioner to show that the claimant is not entitled to benefits.¹⁷

6 II. Factual and Procedural Summary

7 Plaintiff filed a Title XVI application, alleging a disability onset date of July
8 1, 1997.¹⁸ His claim was denied initially and upon reconsideration.¹⁹ A video
9 administrative hearing was held before Administrative Law Judge Steward
10 Stallings.²⁰

11 In denying Plaintiff’s disability claim, the ALJ made the following findings:

- 12 • Step one: Plaintiff had not engaged in substantial gainful activity
13 since May 20, 2015, the application date;

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15 ¹⁴ 20 C.F.R. § 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir.
16 1984).

17 ¹⁵ 20 C.F.R. § 416.920(g).

18 ¹⁶ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

19 ¹⁷ *Id.*

20 ¹⁸ AR 99.

21 ¹⁹ AR 108 & 122.

22 ²⁰ AR 39.

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- Step two: Plaintiff had the following medically determinable severe
2 impairments: depressive disorder and an anxiety disorder;
 - Step three: Plaintiff did not have an impairment or combination of
3 impairments that met or medically equaled the severity of one of the
4 listed impairments;
 - RFC: Plaintiff had the RFC to perform medium work except:
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6 [H]e can never climb ladders, ropes or scaffolds and must
7 avoid exposure to the use of moving or dangerous machinery
8 and unprotected heights. He required work with no
9 interaction with the public, only occasional interaction with
10 supervisors, only brief superficial interaction with coworkers
11 (and this would preclude any team or tandem tasks), and in
12 an environment where there would be very few people around
13 during the performance of the work. He also requires a low
14 stress job, defined as not requiring the worker to cope with
15 work-related circumstances that could be dangerous to the
16 workers or others, and no work requiring sales or production
17 quotas, security, or customer service.
 - Step four: Plaintiff was not capable of performing past relevant work;
18 and
 - Step five: considering Plaintiff's RFC, age, education, and work
19 history, Plaintiff could perform work that existed in significant
20 numbers in the national economy, such as industrial cleaner and
21 lumbar sorter.²¹

22 When assessing the medical-opinion evidence, the ALJ gave:

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²¹ AR 19-28.

- 1 • significant weight to the opinions of Jay Toews, Ed.D., T.L. Browne,
2 Psy.D., and state agency psychological consultants Diane Fligstein,
3 Ph.D. and Jan Lewis, Ph.D.;
- 4 • some weight to the opinion of Wayne Hurley, M.D.; and
- 5 • little weight to the opinion of Jason England, ARNP, N.K. Marks,
6 Ph.D., Janis Lewis, Ph.D., Steven Johansen, Ph.D., and Deborah
7 Davis, RNC.

8 The ALJ also found that Plaintiff's medically determinable impairments
9 could reasonably be expected to cause some of the alleged symptoms, but that his
10 statements concerning the intensity, persistence, and limiting effects of those
11 symptoms were not entirely consistent with the medical evidence and other
12 evidence in the record.²² Likewise, the ALJ discounted the lay statements from
13 Plaintiff's former supervisor.²³

14 Plaintiff requested review of the ALJ's decision by the Appeals Council,
15 which denied review.²⁴ Plaintiff timely appealed to this Court.

20 ²² AR 22.

21 ²³ AR 24-25.

22 ²⁴ AR 1.

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III. Standard of Review

A district court’s review of the Commissioner’s final decision is limited.²⁵ The Commissioner’s decision is set aside “only if it is not supported by substantial evidence or is based on legal error.”²⁶ Substantial evidence is “more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁷ Moreover, because it is the role of the ALJ and not the Court to weigh conflicting evidence, the Court upholds the ALJ’s findings “if they are supported by inferences reasonably drawn from the record.”²⁸ The Court considers the entire record as a whole.²⁹

²⁵ 42 U.S.C. § 405(g).

²⁶ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

²⁷ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

²⁸ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

²⁹ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court “must consider the entire record as whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion,” not simply the evidence cited by the ALJ or the parties.); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (“An ALJ's failure to cite specific evidence does not indicate that such evidence was not considered[.]”).

1 Further, the Court may not reverse an ALJ decision due to a harmless
2 error.³⁰ An error is harmless “where it is inconsequential to the [ALJ’s] ultimate
3 nondisability determination.”³¹ The party appealing the ALJ’s decision generally
4 bears the burden of establishing harm.³²

5 IV. Analysis

6 A. Medical Opinions: Plaintiff fails to establish error.

7 Plaintiff challenges the ALJ’s assignment of little weight to the examining
8 opinions of Dr. N.K. Marks, Nurse Practitioner Jason England, and Registered
9 Nurse Deborah Davis, and the reviewing opinions of Dr. Janis Lewis and Dr.
10 Steven Johansen.

11 The weighing of medical-source opinions is dependent upon the nature of the
12 medical relationship, i.e., 1) a treating physician; 2) an examining physician who
13 examines but did not treat the claimant; and 3) a reviewing physician who neither
14 treated nor examined the claimant.³³ Generally, more weight is given to the
15 opinion of a treating physician than to an examining physician’s opinion, and both
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19 ³⁰ *Molina*, 674 F.3d at 1111.

20 ³¹ *Id.* at 1115 (quotation and citation omitted).

21 ³² *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

22 ³³ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

1 treating and examining opinions are to be given more weight than the opinion of a
2 reviewing physician.³⁴

3 When a treating physician’s or evaluating physician’s opinion is not
4 contradicted by another physician, it may be rejected only for “clear and
5 convincing” reasons, and when it is contradicted, it may be rejected only for
6 “specific and legitimate reasons” supported by substantial evidence.³⁵ A reviewing
7 physician’s opinion may be rejected for specific and legitimate reasons supported by
8 substantial evidence, and the opinion of an “other” medical source³⁶ may be
9 rejected for specific and germane reasons supported by substantial evidence.³⁷ The
10 opinion of a reviewing physician serves as substantial evidence if it is supported by
11 other independent evidence in the record.³⁸

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13 ³⁴ *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

14 ³⁵ *Lester*, 81 F.3d at 830.

15 ³⁶ *See* 20 C.F.R. § 404.1502 (For claims filed before March 27, 2017, acceptable
16 medical sources are licensed physicians, licensed or certified psychologists, licensed
17 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed
18 audiologists, licensed advanced practice registered nurses, and licensed physician
19 assistants within their scope of practice—all other medical providers are “other”
20 medical sources.).

21 ³⁷ *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

22 ³⁸ *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

1 As discussed below, the Court finds Plaintiff fails to establish that the ALJ's
2 weighing of the medical-opinion evidence was erroneous.

3 1. Dr. Marks, Dr. Lewis, and Dr. Johansen

4 Dr. Marks evaluated Plaintiff in August 2015 and June 2017.³⁹ In 2015, Dr.
5 Marks diagnosed Plaintiff with unspecified anxiety disorder, moderate; social
6 anxiety disorder; unspecified depressive disorder, moderate, unspecified
7 personality disorder with paranoid and antisocial features, self-report of bipolar
8 disorder, and self-report of PTSD.⁴⁰ Based on these mental limitations, Dr. Marks
9 opined that Plaintiff was:

- 10 • Moderately limited in understanding, remembering, and persisting in
11 tasks by following detailed instructions; performing activities within a
12 schedule, maintaining regular attendance, and being punctual within
13 customary tolerances without special supervision; learning new tasks;
14 performing routine tasks without special supervision; and making
15 simple work-related decisions; and
- 16 • Markedly limited in adapting to changes in a routine work setting,
17 asking simple questions or requesting assistance, communicating and
18 performing effectively in a work setting, maintaining appropriate
19 behavior in a work setting, completing a normal work day and work

21 ³⁹ AR 422-25, 415-19, & 437-43.

22 ⁴⁰ AR 424.

1 week without interruptions from psychologically based symptoms, and
2 setting realistic goals and planning independently.⁴¹

3 Dr. Johansen reviewed Dr. Marks' 2015 evaluation and concurred with her
4 findings.⁴² In 2017, Dr. Marks diagnosed Plaintiff with the same impairments as in
5 2015, except for excluding the diagnosis of social anxiety disorder.⁴³ Based on these
6 mental limitations, Dr. Marks opined that Plaintiff was:

- 7 • Moderately limited in performing activities within a schedule,
8 maintaining regular attendance, and being punctual within
9 customary tolerances without special supervision; adapting to changes
10 in a routine work setting; making simple work-related decisions; and
11 maintaining appropriate behavior in a work setting; and
- 12 • Markedly limited in being aware of normal hazards and taking
13 appropriate precautions, asking simple questions or requesting
14 assistance, communicating and performing effectively in a work
15 setting, completing a normal work day and work week without
16 interruptions from psychologically based symptoms, and setting
17 realistic goals and planning interpedently.⁴⁴

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19 ⁴¹ *Id.*

20 ⁴² AR 445-46.

21 ⁴³ AR 418 & 440.

22 ⁴⁴ *Id.*

1 Dr. Lewis reviewed Dr. Marks' 2017 evaluation and concurred with her findings.⁴⁵

2 The ALJ discounted Dr. Marks', Dr. Lewis', and Dr. Johansen's opinions
3 because they were unsupported by the record.⁴⁶

4 The ALJ's finding that Dr. Marks', Dr. Lewis', and Dr. Johansen's opinions
5 were inconsistent with the longitudinal medical record is rational and supported by
6 substantial evidence. Whether a medical opinion is consistent with the longitudinal
7 record is a factor for the ALJ to consider.⁴⁷ Here, the medical record reflects that
8 Plaintiff's mental status examinations and observations had mostly been
9 unremarkable with his behaviors, attitude, appearance, speech, affect, thought,
10 and content all within normal limits.⁴⁸ In addition, the records shows that Plaintiff
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15 ⁴⁵ AR 428-30 & 444-47.

16 ⁴⁶ AR 26.

17 ⁴⁷ See *Lingenfelter v. Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007) (recognizing that
18 the ALJ is to consider the consistency of the medical opinion with the record as a
19 whole).

20 ⁴⁸ AR 473, 491, 509, 565 (speech, cognition, thought, and memory normal); AR 553-
21 57 & 560 (Plaintiff appeared calm, cooperative, and had a clear oriented stream of
22 thought);
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1 appeared to improve with treatment and stable on medication.⁴⁹ That the
2 longitudinal medical record was inconsistent with Dr. Marks', Dr. Lewis', and Dr.
3 Johansen's opinions was a clear and convincing reason to discount the opinions.

4 In addition, the ALJ gave significant weight to state agency psychological
5 consultants Dr. Diane Fligstein and Dr. Jan Lewis,⁵⁰ who opined Plaintiff had
6 moderate limitations in maintaining social functioning, concentration, persistence,
7 or pace, and his ability to work with coworkers and the general public was limited
8 to very superficial.⁵¹ The ALJ also crafted an RFC that incorporated limitations in
9 social functions by limiting Plaintiff interactions with the public, supervisors, and
10 coworkers.⁵²

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12 ⁴⁹ AR 394 (Patient outcome improved); AR 750 (Plaintiff's depression/anxiety
13 appears "very stable on current meds"); AR 573, 691 & 694 (reported improvement
14 with depression and anxiety).

15 ⁵⁰ Plaintiff does not challenge the weight the ALJ gave to the opinions Dr. Fligstein
16 and Dr. Lewis.

17 ⁵¹ AR 103, 106, & 120.

18 ⁵² See AR 22 (Plaintiff is "required [to] work with no interaction with the public,
19 only occasional interaction with supervisors, only brief superficial interaction with
20 coworkers (and this would preclude any team or tandem tasks), and in an
21 environment where there would be very few people around during the performance
22 of the work.).

1 2. Nurse Practitioner England

2 Nurse Practitioner England began treating Plaintiff in July 2017.⁵³ In
3 November 2017, Mr. England diagnosed Plaintiff with hearing loss in his left ear,
4 balance problems, and chronic back pain.⁵⁴ Mr. England opined Plaintiff had a
5 light level functional work capacity and would miss an average of three days of
6 work per month.⁵⁵

7 The ALJ gave little weight to Mr. England’s opinion because the evidence
8 showed Plaintiff does not have any significant physical impairments, Plaintiff only
9 began seeing Mr. England in July 2017, and Plaintiff had appointments for further
10 evaluations.

14 ⁵³ A nurse practitioner is an “other” medical source.⁵³ *See* 20 C.F.R. § 404.1513(d).
15 The ALJ is to use “other” medical source opinions in determining the “severity of
16 [the individual's] impairment(s) and how it affects [the individual's] ability to
17 work.” SSR 06-03p, 2006 WL 2329939, at *2; 20 C.F.R. § 416.913(a)(3). In order to
18 reject the competent testimony of “other” medical sources, the ALJ must give
19 specific “reasons germane to each witness for doing so.” *Molina*, 674 F.3d at 1111
20 (quoting *Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010)).

21 ⁵⁴ AR 518-19.

22 ⁵⁵ AR 519.

1 First, inconsistency with the medical record is a germane reason to discount
2 an “other source” medical opinion.⁵⁶ The ALJ highlighted the hearing testing
3 Plaintiff underwent in December 2017, which indicated Plaintiff had moderate
4 high frequency sensorineural hearing loss bilaterally, and that Plaintiff was
5 scheduled to return for a comprehensive vestibular evaluation. The vestibular
6 evaluation revealed no evidence of peripheral vestibular impairment; abnormal
7 tracking (leftward) and saccades (reduced gain) with imbalance is suggestive of
8 central nervous system involvement, suggesting a neurology consult may be
9 beneficial; and recommended Plaintiff return to his primary care physician (Mr.
10 England) for further recommendations.⁵⁷ Plaintiff followed up with Mr. England
11 who assessed that Plaintiff’s imbalance had improved from the onset and planned
12 on referring him to neurology as recommended by the audiologist.⁵⁸ That the
13 longitudinal medical record was inconsistent with Mr. England’s opinion was a
14 germane reason to discount the opinion.

17 ⁵⁶ See *Lingenfelter*, 504 F.3d at 1042 (recognizing that a medical opinion is
18 evaluated as to the amount of relevant evidence that supports the opinion, the
19 quality of the explanation provided in the opinion, and the consistency of the
20 medical opinion with the record as a whole).

21 ⁵⁷ AR 764.

22 ⁵⁸ AR 766.

1 Second, the number of visits a claimant had with a particular provider is a
2 relevant factor in assigning weight to an opinion.⁵⁹ By Mr. England's November 20,
3 2017 opinion, he had been seeing Plaintiff for a few months concerning hearing loss
4 and balance problems, with the first being on July 17, 2017.⁶⁰ Since treatment, at
5 time of opinion was limited to a short period of time, the reason meets the germane
6 standard.⁶¹

7 Lastly, the ALJ discounted Mr. England's opinion because Plaintiff had an
8 appointment with an audiologist for further evaluation in December 2017.⁶² An
9 assessment being premature is a germane reason to discount Mr. England's
10 opinion.

11 The ALJ's decision to discount Mr. England's opinion is supported by
12 germane reasons and substantial evidence.

17 ⁵⁹ 20 C.F.R. § 416.927(c).

18 ⁶⁰ AR 518.

19 ⁶¹ *See* 20 C.F.R. 404.1527(f)(1) (the length of the treatment relationship and the
20 frequency of examination are factors to consider when weighing the opinion of a non-
21 acceptable medical source.)

22 ⁶² AR 518.

1 3. Registered Nurse Deborah Davis

2 On February 9, 2005, Ms. Davis performed a psychological evaluation of
3 Plaintiff.⁶³ Ms. Davis diagnosed Plaintiff with depressive disorder, polysubstance
4 abuse, anxiety disorder, and social phobia.⁶⁴ Based on these mental limitations,
5 Ms. Davis opined that Plaintiff was:

- 6 • Moderately limited in understanding, remembering, and following
7 simple instructions; learning new tasks; exercising judgment and
8 making decisions; and controlling physical or motor movements and
9 maintaining appropriate behavior; and
- 10 • Markedly limited in understanding, remembering, and following
11 complex instructions; exercising judgment and making decision;
12 relating appropriately to co-workers and supervisors; interacting
13 appropriately in public contacts; and responding appropriately to and
14 tolerating the pressure and expectations of a normal work setting.

15 The ALJ discounted Ms. Davis’ opinion because Plaintiff’s records from the
16 Department of Corrections (DOC) show Plaintiff was able to interact with other
17 inmates and hold two jobs while incarcerated.⁶⁵ Inconsistency with the medical
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19 ⁶³ AR 396-99; *see* 20 C.F.R. § 416.927 (2016) (a registered nurse is an “other”
20 medical source).

21 ⁶⁴ AR 397.

22 ⁶⁵ AR 27.

1 evidence of record is a germane reason to discount an “other source” medical
2 opinion.⁶⁶ The DOC behavioral health records show Plaintiff experienced
3 depression and anxiety, but showed improvement with nice weather and when he
4 had frequent contact with mental health providers.⁶⁷ The records also show that
5 Plaintiff worked in the inmate kitchen and the therapeutic community, and if
6 taking his medications as prescribed, his mood and anxiety were manageable
7 enough to work in these settings.⁶⁸ In light of this medial record, that Ms. Davis’
8 more-limiting opinion was inconsistent with the other medical evidence was a
9 germane reason to discount Ms. Davis’ opinion.

10 Plaintiff fails to establish that the ALJ erred when weighing Ms. Davis’
11 opinion.

12 **B. Step Two (Severe Impairment): Plaintiff fails to establish error.**

13 Plaintiff contends the ALJ erred at step two by failing to identify his
14 physical impairments as a severe impairment, specifically hepatitis C, imbalance
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17 ⁶⁶ See *Lingenfelter*, 504 F.3d at 1042 (recognizing that a medical opinion is evaluated
18 as to the amount of relevant evidence that supports the opinion, the quality of the
19 explanation provided in the opinion, and the consistency of the medical opinion with
20 the record as a whole).

21 ⁶⁷ AR 297-98.

22 ⁶⁸ AR 299.

1 problems, falls, bilateral hearing loss, and abnormal tracking and “saccades
2 suggestive of central nervous system involvement.”⁶⁹

3 At step two of the sequential process, the ALJ must determine whether the
4 claimant suffers from a “severe” impairment, i.e., one that significantly limits his
5 physical or mental ability to do basic work activities.⁷⁰ To show a severe
6 impairment, the claimant must first prove the existence of a physical or mental
7 impairment by providing medical evidence consisting of signs, symptoms, and
8 laboratory findings.⁷¹ The claimant’s own statement of symptoms alone will not
9 suffice.⁷²

10 A medically determinable impairment is not severe if the “medical evidence
11 establishes only a slight abnormality or a combination of slight abnormalities
12 which would have no more than a minimal effect on an individual’s ability to
13 work.”⁷³ Similarly, an impairment is not severe if it does not significantly limit a
14 claimant’s physical or mental ability to do basic work activities, such as walking,
15 standing, sitting, lifting, reaching, carrying, handling, responding appropriately to
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17 ⁶⁹ ECF No. 13 at 15.

18 ⁷⁰ 20 C.F.R. § 416.920(c).

19 ⁷¹ *Id.* § 416.921 (recognizing the claimant’s statement of symptoms alone will not
20 suffice).

21 ⁷² *Id.*

22 ⁷³ SSR 85-28 at *3.
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1 supervision and usual work situations, and dealing with changes in a routine work
2 setting.⁷⁴

3 Step two is “a de minimus screening device [used] to dispose of groundless
4 claims.”⁷⁵ “Thus, applying our normal standard of review to the requirements of
5 step two, [the Court] must determine whether the ALJ had substantial evidence to
6 find that the medical evidence clearly establishes that [Plaintiff] did not have a
7 medically severe impairment or combination of impairments.”⁷⁶

8 At step two, the ALJ concluded that Plaintiff had the severe impairments of
9 depressive disorder and anxiety disorder.⁷⁷ After detailing the medical evidence
10 pertaining to Plaintiff’s treatment for a knee injury, back pain, hepatitis C (which
11 has been in remission), and hearing with loss of balance issues, the ALJ found
12 Plaintiff’s complaints and treatments had been limited and that none of these
13 conditions, individually or collectively, caused Plaintiff more than minimal or
14 temporary limitations in his functioning.⁷⁸ Plaintiff argues the “medical records
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18 ⁷⁴ *Id.* § 416.922.

19 ⁷⁵ *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

20 ⁷⁶ *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

21 ⁷⁷ AR 19.

22 ⁷⁸ AR 19-20.

1 and opinions are more than enough to meet the *de minimus* step two screening,”
2 but provides no explanation as to how the cited evidence is severe.⁷⁹

3 Here, the ALJ’s finding that Plaintiff’s knee injury, back pain, hepatitis C,
4 and hearing with loss of balance issues were not a severe impairment is a rational
5 interpretation of the record.⁸⁰ The ALJ considered that, while Plaintiff reported
6 knee pain and intermittent swelling if he walked or rode his bike too much, Dr.
7 Richard Jacobs indicated that Plaintiff’s knee pain was “due to dysfunction of the
8 normal knee mechanism stemming from his injury and would benefit from physical
9 therapy.”⁸¹ The ALJ also considered that Plaintiff had a history of knee pain and
10 hepatitis C, for which he required no treatment.⁸² Finally, the ALJ considered the
11 hearing testing Plaintiff underwent in December 2017, which indicated moderate
12 high frequency sensorineural hearing loss bilaterally, and that while there was
13 indication of imbalance, there was no evidence of peripheral vestibular
14 impairment.⁸³ The ALJ noted that Plaintiff’s complaints of hearing loss and
15 imbalance issues had yet to be associated with any specific diagnosis and,
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18 ⁷⁹ ECF No. 13 at 15.

19 ⁸⁰ See *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

20 ⁸¹ AR 20 (citing AR 351-52).

21 ⁸² *Id.* (citing AR 323-42).

22 ⁸³ *Id.* (citing AR 763).
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1 therefore, Plaintiff's complaints and treatment had been limited. Moreover, as
2 previously explained, the ALJ properly discounted Mr. England's opinion.

3 Furthermore, any error at step two is harmless because the ALJ resolved
4 step two in Plaintiff's favor by finding severe impairments and continued the
5 sequential analysis through step five. Also, the ALJ considered Plaintiff's non-
6 severe issues when formulating the RFC.⁸⁴

7 **C. Plaintiff's Symptom Reports: Plaintiff fails to establish**
8 **consequential error.**

9 Plaintiff argues the ALJ failed to provide valid reasons for rejecting his
10 symptom reports. When examining a claimant's symptom reports, the ALJ must
11 make a two-step inquiry. "First, the ALJ must determine whether there is objective
12 medical evidence of an underlying impairment which could reasonably be expected
13 to produce the pain or other symptoms alleged."⁸⁵ Second, "[i]f the claimant meets
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15 ⁸⁴ *Id.* ("While the undersigned does not find these conditions to be 'severe' as this
16 term is used for Social Security disability evaluation purposes (i.e., resulting in
17 more than minimal or temporary limitations), a medium level residual functional
18 capacity would be considered reasonable. The undersigned has also included
19 limitations for climbing ladders, ropes, or scaffolds and exposure to the use of
20 moving or dangerous machinery and unprotected heights."); see *Burch*, 400 F.3d at
21 679.

22 ⁸⁵ *Molina*, 674 F.3d at 1112.

1 the first test and there is no evidence of malingering, the ALJ can only reject the
2 claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific,
3 clear and convincing reasons' for the rejection."⁸⁶ Here, the ALJ found Plaintiff's
4 statements concerning the intensity, persistence, and limiting effects of his
5 symptoms were inconsistent with the objective medical evidence and other evidence
6 in the record.⁸⁷

7 As to the ALJ's finding that Plaintiff's symptom reports were inconsistent
8 with the objective medical evidence, symptom reports cannot be solely discounted
9 on the grounds that they were not fully corroborated by the objective medical
10 evidence, which entails signs, laboratory findings, or both.⁸⁸ However, objective
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14 ⁸⁶ *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504
15 F.3d at 1036).

16 ⁸⁷ AR 22.

17 ⁸⁸ See *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); 20 C.F.R. §
18 404.1502(f). "Signs" is defined as:

19 one or more anatomical, physiological, or psychological abnormalities
20 that can be observed, apart from [the claimant's] statements
21 (symptoms). Signs must be shown by medically clinical diagnostic
22 techniques. Psychiatric signs are medically demonstrable phenomena
23 that indicate specific psychological abnormalities, e.g., abnormalities
of behavior, mood, thought, memory, orientation, development, or
perception, and must also be shown by observable facts that can be
medically described and evaluated.

1 medical evidence is a relevant factor in considering the severity of the reported
2 symptoms. ⁸⁹ The ALJ cited several specific reasons why Plaintiff's reported
3 disabling symptoms conflicted with the objective medical evidence, including
4 records from the Department of Corrections reporting depression and anxiety with
5 components of generalized anxiety, social anxiety, and bipolar disorder (well
6 managed with medications), which indicated Plaintiff functioned well, could
7 advocate for himself, attend all programming, manage his mental health without
8 much interference from others, and was infraction free for a year and half;⁹⁰
9 unremarkable mental status examinations and observations;⁹¹ and Plaintiff
10 actively participated in his medication management and treatment.⁹² Based on the
11 medical record, the ALJ's finding that Plaintiff's reported severe symptoms were
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14 *Id.* § 404.1502(g). Evidence obtained from the “application of a medically acceptable
15 clinical diagnostic technique, such as evidence of reduced joint motion, muscle
16 spasm, sensory deficits, or motor disruption” is considered objective medical
17 evidence. 3 Soc. Sec. Law & Prac. § 36:26, Consideration of objective medical
18 evidence (2019).

19 ⁸⁹ *Id.*

20 ⁹⁰ AR 297-99.

21 ⁹¹ AR 305, 307, 347, 578, 552 & 565.

22 ⁹² AR 23-24 & 560.

1 inconsistent with the medical evidence is rational and supported by substantial
2 evidence.

3 In addition, the ALJ's finding that Plaintiff's conditions improved with
4 treatment is a relevant consideration for the ALJ when assessing Plaintiff's
5 reported symptoms and, on this record, supported by substantial evidence.⁹³

6 The ALJ also discounted Plaintiff's symptom reports because they were
7 inconsistent with his daily activities.⁹⁴ If a claimant can spend a substantial part of
8 the day engaged in pursuits involving the performance of exertional or non-
9 exertional functions, the ALJ may find these activities inconsistent with the
10 reported disabling symptoms.⁹⁵ The ALJ highlighted that Plaintiff found a job to
11 "keep busy," worked daily around his apartment complex, and reported enjoying
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14 ⁹³ *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 599–600 (9th Cir. 1999)
15 (considering evidence of improvement); *See, e.g.*, AR 750 (Plaintiff's
16 depression/anxiety appears "very stable on current meds"); AR 553-57 & 560
17 (Plaintiff appeared calm, cooperative, and had a clear oriented stream of thought
18 after a week of in-house treatment where he was able to meet with practitioners,
19 assess his medication, and attend groups, and participate in treatment.); AR 573,
20 691 & 694 (reported improvement with depression and anxiety).

21 ⁹⁴ AR 22-24.

22 ⁹⁵ *Molina*, 674 F.3d at 1113.
23

1 walking and riding his bike.⁹⁶ In order for Plaintiff's cited activities to be deemed
2 "high-functioning activities of daily living" constituting a clear and convincing
3 reason to discount Plaintiff's symptoms, the ALJ needed to have more
4 meaningfully articulated this finding. These cited activities, which may be
5 achieved in relatively short periods of time and with multiple breaks and limited
6 verbal instructions, do not "contradict claims of a totally debilitating
7 impairment."⁹⁷

8 Because the ALJ articulated two other supported grounds for discounting
9 Plaintiff's reported symptoms — inconsistent with the objective medical evidence
10 and improvement with treatment — the ALJ's decision to discount Plaintiff's
11 reported symptoms is upheld on this record.

12 **D. Lay Witness: Plaintiff fails to establish error.**

13 The ALJ gave some weight to Plaintiff's former supervisor's statements
14 because her reports of Plaintiff's limitations when interacting with others were
15 consistent with Plaintiff's reported symptomology, but her statements related to
16 Plaintiff's other symptoms (specifically fatigue) were not significant or relevant as
17 they were temporary.⁹⁸ "Testimony by a lay witness provides an important source
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20 ⁹⁶ AR 24 (citing AR 630, 677, 680, & 682).

21 ⁹⁷ *Molina*, 674 F.3d at 1112-13.

22 ⁹⁸ AR 24-25.
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1 of information about a claimant's impairments, and an ALJ can reject it only by
2 giving specific reasons germane to each witness."⁹⁹

3 Plaintiff's former supervisor testified that Plaintiff would get angry quickly,
4 push his way of doing things onto others, had a bit of OCD about the way things
5 work, and would get angry and frighten his coworkers.¹⁰⁰ The former supervisor
6 also testified that she tried to work with Plaintiff on these issues by sending him
7 home early and supervising him working, but ultimately had to let him go because
8 minimum wage increased and the place of employment had to hire people that did
9 not need as much supervision.¹⁰¹ The former supervisor confirmed that Plaintiff
10 was able to perform the physical aspects of his job, but had difficulty interacting
11 with others.¹⁰²

12 The ALJ's decision to discount part of Plaintiff's former supervisor's
13 statement because it was inconsistent with the objective medical evidence is a
14 germane reason for rejecting lay witness testimony.¹⁰³ The ALJ included the
15 former supervisor's reported limitations of Plaintiff interacting with others in the
16 RFC and, as to her statements regarding Plaintiff's fatigue, the record shows

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18 ⁹⁹ *Regennitter v. Comm'r*, 166 F.3d 1294, 1298 (9th Cir. 1999).

19 ¹⁰⁰ AR 59-60.

20 ¹⁰¹ AR 61 & 63.

21 ¹⁰² AR 61-63.

22 ¹⁰³ *See Molina*, 674 F.3d at 1111-12.

1 Plaintiff continually showed no symptoms of fatigue.¹⁰⁴ This was a germane reason
2 to discount the former supervisor’s statements regarding Plaintiff’s difficulties,
3 other than interacting with others.

4 Plaintiff fails to establish error by the ALJ in this regard.

5 **E. Step Five: Plaintiff fails to establish error.**

6 Plaintiff argues the ALJ erred at step five because the vocational expert’s
7 testimony was based on an incomplete hypothetical that failed to include the follow
8 limitations: “off-task and unproductive more than 10 percent of the time; the need
9 for close supervision on a persistent, ongoing basis; confrontations with or difficulty
10 receiving instruction from supervisors on an ongoing basis; and causing coworkers
11 to be off-task more than 10 percent of the time.”¹⁰⁵ Plaintiff’s argument is based
12 entirely on his initial argument that the ALJ erred in considering the medical-
13 opinion evidence, Plaintiff’s symptom reports, and lay witness testimony. However,
14 this argument merely restates Plaintiff’s earlier allegations of error, which are not
15 supported by the record. Accordingly, the ALJ’s hypothetical properly accounted for
16 the limitations supported by the record.¹⁰⁶

19 ¹⁰⁴ See *e.g.*, AR 488-89, 92, 495, 765 (symptoms negative for fatigue).

20 ¹⁰⁵ ECF No. 13 at 20.

21 ¹⁰⁶ See *Magallanes*, 881 F.2d at 756–57 (holding it is proper for the ALJ to limit a
22 hypothetical to those restrictions supported by substantial evidence in the record).

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V. Conclusion

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.
2. The Commissioner's Motion for Summary Judgment, **ECF No. 17**, is **GRANTED**.
3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.
4. The case shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to file this Order and provide copies to all counsel.

DATED this 25th day of June 2020.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge