

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

Mar 29, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RYAN L.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 4:20-CV-05163-JAG

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. 21, 22. Attorney Chad Hatfield represents Ryan L. (Plaintiff); Special Assistant United States Attorney Justin Martin represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

I. JURISDICTION

Plaintiff filed an application for Supplemental Security Income on January 29, 2018, alleging disability since January 1, 2012, due to bipolar disorder, ADHD,

1 and anxiety. Tr. 79-80. The application was denied initially and upon
2 reconsideration. Tr. 104-07, 111-17. Administrative Law Judge (ALJ) Lori
3 Freund held a hearing on October 22, 2019, Tr. 33-78, and issued an unfavorable
4 decision on November 26, 2019. Tr. 17-28. Plaintiff requested review of the
5 ALJ's decision by the Appeals Council and the Appeals Council denied the request
6 for review on July 21, 2020. Tr. 1-5. Accordingly, the ALJ's November 2019
7 decision is the final decision of the Commissioner, which is appealable to the
8 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
9 review on September 17, 2020. ECF No. 1.

10 **II. STATEMENT OF FACTS**

11 Plaintiff was born in 1998 and was 19 years old when he filed his
12 application. Tr. 26. He has a high school diploma and has taken courses on and
13 off at the local community college. Tr. 61, 301. He has no significant work
14 history, and his longest job was through a community-based assessment with
15 vocational rehabilitation. Tr. 53-55. He testified that his primary barriers to
16 working are his difficulties with attention and his various fears about what could
17 possibly happen in a work environment, particularly if he were not good at his job.
18 Tr. 56-58.

19 **III. STANDARD OF REVIEW**

20 The ALJ is responsible for determining credibility, resolving conflicts in
21 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
22 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
23 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
24 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
25 only if it is not supported by substantial evidence or if it is based on legal error.
26 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
27 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
28

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

13 **IV. SEQUENTIAL EVALUATION PROCESS**

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
16 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the claimant
17 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d
18 at 1098-1099. This burden is met once a claimant establishes that a physical or
19 mental impairment prevents the claimant from engaging in past relevant work. 20
20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ
21 proceeds to step five, and the burden shifts to the Commissioner to show: (1) the
22 claimant can make an adjustment to other work; and (2) the claimant can perform
23 specific jobs that exist in the national economy. *Batson v. Commissioner of Social*
24 *Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If a claimant cannot make
25 an adjustment to other work in the national economy, the claimant will be found
26 disabled. 20 C.F.R. § 416.920(a)(4)(v).
27
28

VI. ISSUES

1
2 The question presented is whether substantial evidence supports the ALJ's
3 decision denying benefits and, if so, whether that decision is based on proper legal
4 standards.

5 Plaintiff contends the Commissioner erred by: (1) failing to reopen
6 Plaintiff's prior application for SSI benefits; (2) improperly evaluating the medical
7 opinion evidence; (3) conducting an inadequate step three evaluation; (4)
8 improperly rejecting Plaintiff's subjective complaints; and (5) failing to conduct
9 and adequate step five analysis.

VII. DISCUSSION

A. Plaintiff's Subjective Statements.

11
12 Plaintiff contends the ALJ erred by improperly rejecting his subjective
13 complaints. ECF No. 21 at 20-21.

14 It is the province of the ALJ to make determinations regarding a claimant's
15 subjective statements. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
16 The ALJ's findings, however, must be supported by specific, cogent reasons.
17 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
18 produces medical evidence of an underlying medical impairment, the ALJ may not
19 discredit testimony as to the severity of an impairment merely because it is
20 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
21 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting
22 the claimant's testimony must be "specific, clear and convincing." *Smolen v.*
23 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834
24 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must identify
25 what testimony is not credible and what evidence undermines the claimant's
26 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
27 1993).
28

1 The ALJ concluded Plaintiff's medically determinable impairments could
2 reasonably be expected to cause the alleged symptoms; however, Plaintiff's
3 statements concerning the intensity, persistence and limiting effects of those
4 symptoms were not entirely consistent with the medical evidence and other
5 evidence in the record. Tr. 22. The ALJ found Plaintiff's complaints were
6 unsupported by the objective evidence of record and undermined by evidence of
7 Plaintiff's activities and improvement with treatment. Tr. 22-23.

8 Plaintiff argues the ALJ's rationale is insufficient, as the ALJ primarily
9 rejected his assertions based on the waxing and waning of symptoms and falsely
10 concluded that medication controlled his symptoms after January 2018. ECF
11 No. 21 at 20-21. Defendant argues the ALJ legitimately considered evidence of
12 improvement, Plaintiff's activities, and the lack of support from the treatment
13 records. ECF No. 22 at 17-20.

14 The Court finds the ALJ failed to offer clear and convincing reasons for
15 discounting Plaintiff's reports. Evidence of medical treatment successfully
16 relieving symptoms can undermine a claim of disability. *Wellington v. Berryhill*,
17 878 F.3d 867, 876 (9th Cir. 2017). Improvement in symptoms, however, does not
18 mean elimination of symptoms. As the Ninth Circuit has held that:

19
20 it is error to reject a claimant's testimony merely because
21 symptoms wax and wane in the course of treatment. Cycles of
22 improvement and debilitating symptoms are a common
23 occurrence, and in such circumstances it is error for an ALJ to
24 pick out a few isolated instances of improvement over a period
of months or years and to treat them as a basis for concluding a
claimant is capable of working.

25 *Garrison v. Colvin*, 759 F.3d 995, 1017 (9th Cir. 2014).

26 The ALJ found Plaintiff's conditions were largely controlled with
27 medication, noting his reports of stability, feeling less anxious, improved mood,
28 and other incidents of feeling better. Tr. 22. While the ALJ is correct that Plaintiff

1 occasionally reported improvement in his symptoms, these reports were
2 interspersed with or contemporaneous to reports of increased feelings of dread,
3 more paranoia and suspiciousness, concern about catastrophes, anxiousness about
4 change, and ongoing struggles with mood and anxiety. Tr. 489-93. The ALJ's
5 selective citations to notes of improvement and better functioning is not
6 representative of the record as a whole, particularly considering Plaintiff's bipolar
7 condition, which can result in substantially different presentation at different points
8 in his cycling. Tr. 476-77, 488. The Court finds the ALJ's conclusion is not
9 supported by substantial evidence.

10 A claimant's daily activities may support an adverse credibility finding if the
11 claimant's activities contradict their other testimony. *Orn v. Astrue*, 495 F.3d 625,
12 639 (9th Cir. 2007). The Ninth Circuit, however, has repeatedly noted that many
13 everyday activities are not inconsistent with a claim of disability:

14 We have repeatedly warned that ALJs must be especially
15 cautious in concluding that daily activities are inconsistent with
16 testimony about pain, because impairments that would
17 unquestionably preclude work and all the pressures of a
18 workplace environment will often be consistent with doing more
19 than merely resting in bed all day.

20 *Garrison v. Colvin*, 759 F.3d 995, 1016 (9th Cir. 2014) *citing* *Smolen v. Chater*, 80
21 F.3d 1273, 1287 n.7 (9th Cir. 1996) ("The Social Security Act does not require that
22 claimants be utterly incapacitated to be eligible for benefits, and many home
23 activities may not be easily transferable to a work environment where it might be
24 impossible to rest periodically or take medication." (citation omitted)); *Fair*, 885
25 F.2d at 603 ("[M]any home activities are not easily transferable to what may be the
26 more grueling environment of the workplace, where it might be impossible to
27 periodically rest or take medication."). The ALJ found Plaintiff's allegations
28 regarding his barriers to work were inconsistent with his demonstrated activities,
such as attending college courses, doing household chores, having friends, running

1 errands, reading, writing, playing video games, and being able to search for jobs
2 and attend job interviews. Tr. 23. The ALJ, however, did not explain how any of
3 these activities are inconsistent with Plaintiff's allegations. Plaintiff has alleged
4 issues with being distracted, trouble interacting with the public, lack of stress
5 tolerance, and a general fear of failure and worst-case-scenarios occurring in the
6 workplace. Tr. 56-58, 63-64, 67-68. None of these areas of difficulty are
7 incompatible with tending to household chores, spending time with close friends,
8 or engaging in hobbies at his own pace and without the pressures of a competitive
9 work environment. While Plaintiff did attend community college courses, he
10 frequently reported distress from the pressure of school, and he was placed on
11 academic dismissal for his poor grades and stopped taking classes when he became
12 overwhelmed, despite having multiple doctors recommend accommodations for his
13 conditions. Tr. 61, 68, 335, 422-23, 462, 484, 485, 730. The ALJ also found
14 Plaintiff completed a degree, but this event does not appear to be reflected
15 anywhere in the record. Therefore, the ALJ's finding that Plaintiff's allegations
16 were inconsistent with his activities is not supported by substantial evidence.
17

18 The only other rationale offered by the ALJ was the lack of support from the
19 objective testing. An ALJ may cite inconsistencies between a claimant's testimony
20 and the objective medical evidence in discounting the claimant's symptom
21 statements. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir.
22 2009). But this cannot be the only reason provided by the ALJ. *See Lester*, 81
23 F.3d at 834 (the ALJ may not discredit the claimant's testimony as to subjective
24 symptoms merely because they are unsupported by objective evidence).
25 Furthermore, as already discussed, the ALJ's summary of the evidence was not
26 entirely consistent with the longitudinal record and omitted several instances of
27 exacerbation of symptoms.
28

1 On remand, the ALJ shall reconsider Plaintiff's subjective testimony,
2 considering the record as a whole and the context of various notations.

3 **B. Medical Opinion Evidence.**

4 Plaintiff argues the ALJ erred in evaluating the medical opinions from
5 consultative examiner Dr. Karen Mansfield-Blair, treating psychologist Dr. Jessica
6 Long, and the medical expert who testified at the hearing, Dr. Jay Toews. ECF
7 No. 21 at 10-19.

8 For claims filed on or after March 27, 2017, new regulations apply that
9 change the framework for how an ALJ must weigh medical opinion evidence.
10 Revisions to Rules Regarding the Evaluation of Medical Evidence, 2017 WL
11 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new
12 regulations provide the ALJ will no longer give any specific evidentiary weight to
13 medical opinions or prior administrative medical findings, including those from
14 treating medical sources. 20 C.F.R. § 416.920c(a). Instead, the ALJ will consider
15 the persuasiveness of each medical opinion and prior administrative medical
16 finding, regardless of whether the medical source is an Acceptable Medical Source.
17 20 C.F.R. § 416.920c(c). The ALJ is required to consider multiple factors,
18 including supportability, consistency, the source's relationship with the claimant,
19 any specialization of the source, and other factors (such as the source's familiarity
20 with other evidence in the file or an understanding of Social Security's disability
21 program). *Id.* The regulations make clear that the supportability and consistency
22 of the opinion are the most important factors, and the ALJ must articulate how they
23 considered those factors in determining the persuasiveness of each medical opinion
24 or prior administrative medical finding. 20 C.F.R. § 416.920c(b). The ALJ may
25 explain how they considered the other factors, but is not required to do so, except
26 in cases where two or more opinions are equally well-supported and consistent
27 with the record. *Id.*
28

1 Supportability and consistency are further explained in the regulations:

2 (1) Supportability. The more relevant the objective medical
3 evidence and supporting explanations presented by a medical
4 source are to support his or her medical opinion(s) or prior
5 administrative medical finding(s), the more persuasive the
6 medical opinions or prior administrative medical finding(s) will
7 be.

8 (2) Consistency. The more consistent a medical opinion(s) or
9 prior administrative medical finding(s) is with the evidence from
10 other medical sources and nonmedical sources in the claim, the
11 more persuasive the medical opinion(s) or prior administrative
12 medical finding(s) will be.

13 20 C.F.R. § 416.920c(c). The Ninth Circuit has additionally held that the new
14 regulatory framework displaces the longstanding case law requiring an ALJ to
15 provide “specific and legitimate” or “clear and convincing” reasons for rejecting a
16 treating or examining doctor’s opinion. *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir.
17 2022).

18 **1. Dr. Long.**

19 In July 2018, Plaintiff’s treating psychologist, Dr. Jessica Long, completed a
20 letter summarizing Plaintiff’s diagnoses and treatment, and noting his difficulties
21 in academic and occupational functioning. Tr. 485-86. She concluded that with
22 appropriate supports and job placement he may be able to manage very part time
23 work, perhaps 10 hours per week, with a long-term goal of working his way up to
24 more full-time employment. Tr. 486.

25 The ALJ found this letter to be unpersuasive, noting most of it was a
26 summary of Plaintiff’s reports and did not qualify as a medical opinion under the
27 revised rules. Tr. 24. The ALJ further found that Dr. Long’s opinion limiting
28 Plaintiff to part-time work was not well-supported by her own findings, or the
record as a whole, including her summary of Plaintiff’s vocational rehabilitation
services, and that the opinion was inconsistent with the overall record showing

1 improvement in his symptoms, his varied activities, and the detailed assessment
2 from the state agency doctor. Tr. 24-25.

3 Plaintiff argues the ALJ failed to identify any specific inconsistencies in Dr.
4 Long's records, or the record as a whole, which Plaintiff argues show consistently
5 debilitating symptoms and marked deficits in day-to-day functioning. ECF No. 21
6 at 13-14. Plaintiff argues the opinion is clearly supported by the various findings
7 and symptoms noted in Dr. Long's treatment records and that the ALJ
8 mischaracterized the record. *Id.* at 14-16. Defendant argues the ALJ reasonably
9 considered supportability and consistency and that the ALJ's interpretation was
10 supported by substantial evidence. ECF No. 22 at 11-12.

11 The Court finds the ALJ's discussion is not supported by substantial
12 evidence. As discussed above, the ALJ's discussion of improvement in Plaintiff's
13 symptoms was not reflective of the longitudinal record, and there is no support for
14 the ALJ's finding that Plaintiff completed a college degree. The ALJ found Dr.
15 Long's summary of Plaintiff's interactions with vocational rehabilitation services a
16 year earlier to be inconsistent with the record, but the record is not as clear as the
17 ALJ implies; rather, the ALJ found Plaintiff turned down a full-time job offer in
18 order to attend school full-time, but there is no evidence that the job offer was for
19 full-time work or that Plaintiff was taking a full load of classes. Tr. 209, 430, 462.
20 The report from vocational rehabilitation following Plaintiff's community-based
21 assessment concluded that Plaintiff was not suited for full-time work until he
22 increased his stamina, and noted multiple other recommendations for work-place
23 accommodations. Tr. 280-82. The ALJ's conclusion that Dr. Long's
24 recommendation for part-time work is inconsistent with her treatment records and
25 the vocational rehabilitation records is not supported by substantial evidence.

26 On remand, the ALJ shall reconsider the persuasiveness of Dr. Long's
27 opinion.
28

1 **2. Dr. Toews.**

2 The medical expert who appeared at the hearing, Dr. Jay Toews, testified
3 that he believed Plaintiff's conditions met the mental listings prior to March 2018,
4 but that Plaintiff eventually grew out of it and his conditions were not as severe
5 beginning in March 2018. Tr. 46-52.¹

6 The ALJ found this testimony unpersuasive. Tr. 25-26. With respect to the
7 first period of listing-level impairment, the ALJ found the opinion to be
8 unsupported by the objective evidence, which the ALJ summarized as including
9 some difficulties, but showing improvement with medication and generally mild to
10 moderate findings on mental status exams, along with evidence of attending school
11 and working with vocational rehabilitation, all of which the ALJ found to be
12 inconsistent with the marked limitations identified by the medical expert. *Id.* The
13 ALJ additionally found that the beginning of the relevant period for the application
14 was January 2018, the protected filing date, thus concluding that Dr. Toews
15 testimony failed to establish disability for any 12-month period in the relevant
16 period. Tr. 26. With respect to Dr. Toews' opinion that Plaintiff's conditions were
17 non-severe as of March 2018, the ALJ found this unpersuasive, noting Plaintiff
18 improved, but not to the point of non-severity. *Id.*

19 Plaintiff argues the ALJ failed to identify any objective findings that did not
20 support Dr. Toews' testimony, and improperly rejected the testimony based on
21 waxing and waning symptoms and various other improper readings of the record.
22 ECF No. 21 at 11-12. Plaintiff further asserts the ALJ offered no rationale for

23 _____
24 ¹ Doctor Toews initially stated that Plaintiff's conditions were no longer severe as
25 of March 2018, but then went on to assess moderate limitations in some of the B
26 criteria and testified to work restrictions Plaintiff would have, therefore indicating
27 some limitation on Plaintiff's ability to conduct basic work activities, making his
28 impairments "severe" under Social Security's definition. 20 C.F.R. 416.922(a).

1 relying on the state agency reviewing doctor over Dr. Toews. *Id.* at 12. Finally,
2 Plaintiff argues the ALJ misstated Dr. Toews' testimony with respect to the dates
3 of disability and misstated the durational requirement, arguing that the 12-month
4 durational requirement relates to the severity of the impairment, and that the filing
5 date of the application is not a consideration in that assessment. *Id.* at 12.

6 Defendant argues the ALJ reasonably found the medical expert's testimony to be
7 unsupported and inconsistent with the objective evidence, noting the evidence of
8 improvement and mild to moderate objective findings. ECF No. 22 at 8-11.

9 Given the above discussion regarding the ALJ's incomplete reading of the
10 record, the ALJ must also reassess the medical expert's testimony. The Court
11 additionally notes that the ALJ's rationale with respect to the relevant period is
12 flawed. The 12-month durational requirement pertains to the impairments lasting
13 at a disabling level for the full year. Social Security Ruling 82-52. The filing date
14 of the application dictates only which months a claimant may be paid benefits. 20
15 C.F.R. 416.335. Therefore, the fact that Plaintiff did not file his application until
16 the last few months of the period that Dr. Toews testified Plaintiff was disabled
17 during does not mean Dr. Toews did not identify a period of disability that met the
18 durational requirement.

19 On remand the ALJ will reconsider Dr. Toews' testimony.

20 **3. Dr. Mansfield-Blair.**

21 Plaintiff attended a consultative exam with Dr. Mansfield-Blair in December
22 2018. Tr. 494-98. She diagnosed Plaintiff with unspecified bipolar disorder,
23 unspecified generalized anxiety disorder, and ADHD, and opined he would have
24 difficulty with certain work-related functions, such as handling detailed and
25 complex tasks, accepting instructions from supervisors, interacting with coworkers
26 and the public, performing on a consistent basis, and dealing with usual stress.

27 Tr. 497-98.

1 The ALJ found this opinion to be somewhat persuasive, finding it supported
2 by the exam findings and consistent with the longitudinal record, but did not find it
3 to be fully persuasive because the assessed limits were vague and failed to identify
4 the specific degree of limitation. Tr. 24. The ALJ further found that the opinion
5 that Plaintiff would have difficulty managing stress was not well supported by the
6 exam findings showing Plaintiff was able to complete the intensive interview and
7 testing without difficulty. *Id.* The ALJ finally found that because Dr. Mansfield-
8 Blair said Plaintiff’s condition was likely to improve within twelve months with
9 treatment, it was questionable whether the opinion established a durational level of
10 impairment.² *Id.*

11 Because this claim is being remanded for further consideration of other
12 evidence, the ALJ shall also reconsider Dr. Mansfield-Blair’s opinion.

13 **C. Step Three.**

14 At step three of the sequential evaluation process, the ALJ considers whether
15 one or more of the claimant’s impairments meets or equals an impairment listed in
16 Appendix 1 to Subpart P of the regulations. 20 C.F.R. § 416.920(a)(4)(iii). Each
17 Listing sets forth the “symptoms, signs, and laboratory findings” which must be
18 established for a claimant’s impairment to meet the Listing. *Tackett v. Apfel*, 180
19 F.3d 1094, 1099 (9th Cir. 1999). If a claimant meets or equals a Listing, the
20 claimant is considered disabled without further inquiry. 20 C.F.R. § 416.920(d).

21 Plaintiff argues the ALJ erred in failing to credit the testimony of Dr. Toews
22 with respect to Plaintiff’s listing-level mental impairments, and argues that had the
23

24
25 ² The Court notes the record contains no treatment records following this
26 consultative exam, despite Plaintiff’s testimony at the hearing nearly a year later
27 that he was keeping in close contact with all of his doctors. Tr. 74. On remand,
28 the ALJ should ensure that the record is fully developed.

1 ALJ properly credited Dr. Long and Dr. Mansfield-Blair's opinions, she would
2 have found Plaintiff's conditions to meet or equal a listing. ECF No. 21 at 20.

3 Because this claim is being remanded for reconsideration of Plaintiff's
4 subjective complaints and the medical opinion evidence, the ALJ shall also
5 reconsider the five-step process, including whether any of Plaintiff's impairments
6 meet or equal a listed impairment.

7 **D. Prior Application.**

8 With respect to prior SSI applications, an ALJ may reopen a determination
9 that is otherwise final for good cause within two years from the date of notice of
10 the initial determination. HALLEX I-2-9-40. Good cause is defined as existing
11 when new and material evidence is furnished, a clerical error was made, or the
12 evidence that was considered in making the determination clearly shows on its face
13 that an error was made. *Id.*

14 Plaintiff filed a prior application in April 2016, which was denied initially in
15 July 2016. Tr. 80. Plaintiff filed his current application in January 2018, within
16 two years of the previous initial denial, alleging an onset date in 2012. Tr. 79.
17 This operated as an implied request to reopen the prior application. HALLEX
18 I-2-9-10. The ALJ found there was no basis for reopening the prior application,
19 and adjudicated the current claim only. Tr. 20.

20 Plaintiff argues that the ALJ erred in failing to reopen his prior application,
21 based on the new and material testimony of Dr. Toews that Plaintiff's mental
22 conditions met a listing during the relevant period. ECF No. 21 at 9-10.
23 Defendant argues that even though the prior application was denied within two
24 years of the current application, the ALJ's action regarding reopening was
25 discretionary and is therefore not a "final decision" of the Commissioner that is
26 subject to judicial review, meaning the Court lacks jurisdiction to review the issue
27 of reopening. ECF No. 22 at 4-6.

1 The Court finds it lacks jurisdiction to review the ALJ's decision to not
2 reopen the prior application. The Supreme Court has specifically held that a
3 decision by an ALJ to not reopen a prior application is not reviewable by the
4 federal courts, with the exception of cases that present an argument of a colorable
5 constitutional claim. *Califano v. Sanders*, 430 U.S. 99 (1977). Plaintiff has not
6 alleged any such colorable claim and has offered no response to Defendant's
7 arguments regarding the lack of jurisdiction. ECF No. 23. However, as this claim
8 is being remanded for further proceedings and reconsideration of Dr. Toews'
9 testimony, Plaintiff may reassert any arguments regarding reopening at the remand
10 hearing.

11 **E. Step Five.**

12 Plaintiff argues that the ALJ erred in her step five determination because the
13 testimony of the vocational expert was premised on an incomplete hypothetical
14 stemming from an inaccurate residual functional capacity determination. ECF
15 No. 21 at 21. Considering the case is being remanded for the ALJ to properly
16 address the medical opinion evidence and Plaintiff's subjective symptom
17 testimony, the ALJ will be required to make a new step five determination and call
18 upon a vocational expert to provide testimony.

19 **VIII. CONCLUSION**

20 Plaintiff argues the ALJ's decision should be reversed and remanded for the
21 payment of benefits. The Court has the discretion to remand the case for additional
22 evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292
23 (9th Cir. 1996). The Court may award benefits if the record is fully developed, and
24 further administrative proceedings would serve no useful purpose. *Id.* Remand is
25 appropriate when additional administrative proceedings could remedy defects.
26 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court
27 finds that further development is necessary for a proper determination to be made.
28 Additional administrative proceedings could remedy defects.

1 The ALJ's decision is not supported by substantial evidence. On remand,
2 the ALJ shall reevaluate Plaintiff's subjective statements and the medical evidence
3 of record, making findings on each of the five steps of the sequential evaluation
4 process, and take into consideration any other evidence submitted or arguments
5 relevant to Plaintiff's disability claim. The Court makes no judgment as to the
6 whether the record supports an award of benefits.

7 Accordingly, **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment, **ECF No. 21**, is
9 **GRANTED IN PART.**

10 2. Defendant's Motion for Summary Judgment, **ECF No. 22**, is
11 **DENIED.**

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

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

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

18 **IT IS SO ORDERED.**

19 DATED March 29, 2023.




JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE